INSURANCE LAW

Dan D. Kohane, Esq. & Jennifer A. Ehman, Esq. †

CONTENTS

INTRODUCTION

The most significant New York appellate insurance decisions over

---

† Dan D. Kohane, a Senior Member of the New York law firm of Hurwitz & Fine, P.C., chairs the firm's Insurance Coverage practice group. An adjunct professor of Insurance Law at the University at Buffalo Law School, he 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 a founding member of the American College of Coverage and Extracontractual Counsel, a member of the American Law Institute, past president of the Federation of Defense & Corporate Counsel and serves on the Board of Directors of the National Foundation for Judicial Excellence. He is known in the industry for his comprehensive newsletter, *Coverage Pointers*, a bi-weekly publication summarizing important insurance coverage decisions.

Jennifer A. Ehman, Esq. is a Member of Hurwitz & Fine, P.C., in its Buffalo, NY office, where she focuses on insurance coverage analysis and coverage litigation. Ms. Ehman also has experience in construction and labor law defense matters, handling additional insured issues affecting construction site and premises liability claims. She regularly analyzes construction contracts to determine respective rights and obligations. She has provided legal training on the handling of insurance claims, investigations and adjuster negotiations. Ms. Ehman was a named a Rising Star in Insurance Coverage by *New York Super Lawyers Magazine* and a Rising Star in a special "Legal Elite of WNY" section of *Business First* newspaper.

The authors wish to specially thank Mr. Ryan P. Maxwell, University at Buffalo Law School JD Candidate 2019 for his dedication and assistance on this survey. Mr. Maxwell is a Law Clerk at Hurwitz & Fine, P.C., and an Articles Editor for the *Buffalo Law Review*.

the last year have focused in two areas. First, the courts continue to clarify the breadth of additional insured endorsements in liability policies. Secondly, the courts continue to try to find a balance between the desire for broad disclosure in declaratory judgment and related insurance actions and the rights of insurers to protect work product, material prepared for litigation, and the sacrosanct attorney-client privilege. Other vexing questions relating to policy exclusions, coverage denials, property insurance and no fault then add to this year's coverage offerings. Below represents a survey of the most noteworthy cases over the last year.

I. ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT PROTECTION

In March 2017, the First Department in *570 Smith Street Corp. v. Seneca Insurance Co.* reversed a decision of the New York supreme court that had directed Seneca Insurance Company, Inc. ("Seneca") to produce documents involving correspondence between it and its counsel.[1]

Superstorm Sandy caused damage to the building of 570 Smith Street Realty Corp., Gold Star Fish Corp., a/k/a Gold Star Smoked Fish Corp., and International Gold Star, Inc.[2] The plaintiffs sued their insurer, Seneca, for what they claimed was an outstanding balance after partial indemnity was provided.[3]

During discovery, Seneca received a Notice for Discovery and Inspection requesting, in relevant part, "all correspondence between Seneca and its investigators and consultants concerning the [l]oss and all documents in Seneca's possession that relate to any decisions in connection with [the] [p]laintiff's claim."[4] In response, Seneca provided redacted copies of attorney-client exchanges, including a letter dated May 2, 2013, and an e-mail dated April 25, 2013.[5] Seneca contended in its privilege log, and again in its affirmation in support of a motion to vacate a court order to produce, that these exchanges were "attorney-client communication in anticipation of litigation."[6]

The lower court conducted an in camera review and found that "Seneca's attorney was investigating the issue of whether coverage should be provided" and counsel and the insurer had created documents according to the ordinary course of business in making coverage

1. 570 Smith St. Corp. v. Seneca Ins. Co. (*570 Smith St. II*), 148 A.D.3d 561, 561, 50 N.Y.S.3d 57, 57 (1st Dep't 2017).

2. Affirmation in Opposition at 2, *570 Smith St. II*, 148 A.D.3d 561, 50 N.Y.S.3d 57 (No. 653296/2014).

3. *Id.*

4. *Id.*

5. *Id.* at 3.

6. *Id.*

determinations.[7] The lower court held that this conduct was not "primarily of a legal character,"[8] reasoning that while the communication between Seneca and counsel was ongoing, no coverage decisions had been made, and thus Seneca was unable to "rely on the assertion that such documents [were] privileged as prepared in 'anticipation of litigation.'"[9]

On appeal, the First Department conducted its own *in camera* review of the correspondence, concluding that the documents "protected by attorney-client privilege, as the correspondence is predominantly of a legal character."[10]

The importance of precision when withholding documents and the need to support any claim of privilege with an affidavit of someone with knowledge of the nature of the documents was stressed in the Third Department decision, *Hewitt v. Palmer Veterinary Clinic PC*, where the court considered whether documents prepared by an insurance adjuster prior to service of the complaint were subject to disclosure, or should be afforded "a conditional immunity . . . as material prepared for litigation."[11]

On April 16, 2014, Hewitt brought her cat to the Palmer Veterinary Clinic, PC (the "clinic"), for an examination.[12] While in the waiting room,

---

7. 570 Smith St. Realty Corp. v. Seneca Ins. Co. (*570 Smith St. I*), No. 653296/2014, 2016 WL 8993933, at *2 (Sup. Ct. N.Y. Cty. Sept. 23, 2016), *rev'd*, 148 A.D.3d 561, 50 N.Y.S.3d 57 (1st Dep't 2017) (citing Nat'l Union Fire Ins. Co. of Pittsburgh v. TransCanada Energy USA, Inc. 119 A.D.3d 492, 493, 990 N.Y.S.2d 510, 511–12 (1st Dep't 2014)).

8. *Id.* at *2 (citing *Nat'l Union Fire Ins. Co. of Pittsburgh*, 119 A.D.3d at 493, 990 N.Y.S.2d at 511–12). When discussing *National Union Fire Insurance*, the court found that

> documents prepared in ordinary course of an investigation conducted by counsel retained by insurers to provide a coverage opinion, i.e.[,] an opinion as to whether the insurance companies should pay or deny the claims, were not protected by attorney-client privilege, work product doctrine, or as materials prepared in anticipation of litigation.

Id.

9. *Id.* (citing Brooklyn Union Gas Co. v. Am. Home Assurance Co., 23 A.D.3d 190, 190–91, 803 N.Y.S.2d 532, 534 (1st Dep't 2005)). The appellate division found that "where appellants had not yet made a coverage decision they could not rely on their anticipation of litigation to shield documents from discovery." *Id.* (citing *Brooklyn Union Gas Co*., 23 A.D.3d at 190–91, 803 N.Y.S.2d at 534).

10. *570 Smith St. II*, 148 A.D.3d 561, 561, 50 N.Y.S.3d 57, 57 (1st Dep't 2017) (citing Rossi v. Blue Cross & Blue Shield of Greater N.Y., 73 N.Y.2d 588, 593, 540 N.E.2d 703, 706, 542 N.Y.S.2d 508, 510–11 (1989)).

11. Hewitt v. Palmer Veterinary Clinic, PC, 145 A.D.3d 1415, 1415, 45 N.Y.S.3d 605, 606 (3d Dep't 2016) (quoting Ainsworth v. Union Free Sch. Dist., 38 A.D.2d 770, 771, 327 N.Y.S.2d 873, 875 (3d Dep't 1972)) (first citing N.Y. C.P.L.R 3101(d)(2) (McKinney 2005 & Supp. 2018); and then citing Litvinov v. Hodson, 74 A.D.3d 1884, 1886, 905 N.Y.S.2d 400, 402 (4th Dep't 2010)).

12. *Id.* at 1415, 45 N.Y.S.3d at 605–06.

she was allegedly attacked and injured by a dog.[13] On April 25, 2014, Hewitt's counsel notified the clinic that he had been retained, and urged it to notify its liability insurance carrier.[14] A negligence and premises liability action was commenced in August 2014, and the clinic was served with the summons and complaint in September 2014.[15]

As part of discovery, Hewitt demanded the clinic produce documents in its possession, custody, or control that the insurance adjuster had generated prior to service of the complaint.[16] The clinic refused the demand, claiming such documents were "prepared directly in anticipation of litigation."[17] Upon the clinic's refusal, Hewitt filed a motion to compel, which was denied and ultimately led to this appeal.[18]

On appeal, the Third Department noted that the clinic "neither disclosed what documents were encompassed by the discovery demand nor identified the specific documents that it claimed were prepared solely for litigation purposes."[19] Moreover, the clinic "made inadequate efforts to show that these unidentified documents were conditionally immune from disclosure, submitting the conclusory affidavits of two individuals who baldly asserted that the undisclosed portions of the carrier's file . . . had been created for litigation purposes."[20] The clinic had failed to meet its initial burden to demonstrate that the documents should be afforded conditional immunity.[21]

Despite the clinic's failure to meet its initial burden, the court believed that compelling the disclosure of all demanded documents was inappropriate at that juncture, and remitted it to Supreme Court for in camera review.[22] The Third Department indicated that it was unclear

13. *Id.* at 1415, 45 N.Y.S.3d at 606.

14. *Id.*

15. *Id.*

16. *Hewitt*, 145 A.D.3d at 1415, 45 N.Y.S.3d at 606.

17. *Id.*

18. *Id.*

19. *Id.* at 1416, 45 N.Y.S.3d at 606.

20. *Id.* (first citing Claverack Coop. Ins. Co. v. Nielsen, 296 A.D.2d 789, 789, 745 N.Y.S.2d 604, 605 (3d Dep't 2002); and then citing Agovino v. Taco Bell 5083, 225 A.D.2d 569, 571, 639 N.Y.S.2d 111, 112 (2d Dep't 1996)).

21. *Hewitt*, 145 A.D.3d at 1416, 45 N.Y.S.3d at 606 (first citing Wheeler v. Frank, 101 A.D.3d 1449, 1449, 955 N.Y.S.2d 538, 539 (3d Dep't 2012); then citing Pinkans v. Hulett, 156 A.D.2d 877, 878, 549 N.Y.S.2d 863, 864–65 (3d Dep't 1989); then citing McKie v. Taylor, 146 A.D.2d 921, 922, 536 N.Y.S.2d 893, 894 (3d Dep't 1989); and then citing Sack v. N. Am. Sys., 115 A.D.2d 721, 721, 496 N.Y.S.2d 536, 537 (2d Dep't 1985)).

22. *Id.* at 1416, 45 N.Y.S.3d at 607 (citing N.Y. C.P.L.R. 3101(d) (McKinney 2005 & Supp. 2018)); *cf. Sack*, 115 A.D.2d at 721, 496 N.Y.S.2d at 537 (reversing the lower court decision that denied disclosure of adjuster documents, because the defendant had failed to meet this same initial burden). The defense was fortunate that there was an agreement with the plaintiff's counsel for an in camera review. *See Hewitt*, 145 A.D.3d at 1416, 45 N.Y.S.3d

which documents were encompassed in the discovery demand, and may well include documents "solely prepared for litigation purposes" after notice was given to the carrier.[23] Also, the parties were in agreement that the documents should be reviewed in camera should there be any questions regarding the applicability of conditional immunity.[24]

These decisions illustrate the continuing struggle between the insurance industry, which seeks to stop the erosion of well-established and historically compelling privileges, and policyholders who believe that insurers should not be able to hide claims activity behind the curtain of attorney activity that would otherwise have been performed by insurance claim professionals.[25]

II. TRIGGERING THE DUTY TO DEFEND

In *Guzy v. New York Central Mutual Fire Insurance Co.*, the Third Department applied New York's broad interpretation of an insurance company's duty to defend.[26] The Third Department looked outside of the allegations in the complaint in determining the insurance company's duty to defend absent an allegation of negligence.[27]

In February 2015, Derek Prindle sued John Guzy in a personal injury action, alleging that Guzy assaulted him by shooting him in the abdomen.[28] Guzy tendered his defense to New York Central Mutual Fire Insurance Company ("Central Mutual").[29] Guzy had acquired both homeowners and umbrella insurance policies from Central Mutual.[30]

Central Mutual disclaimed any defense obligation, claiming that the shooting was not an accident, and thus outside of the terms of the homeowner's policy, and also that it was excluded from the umbrella

---

at 607. Insurers and defense counsel are reminded of the importance of establishing privilege with an affidavit of someone other than defense counsel with knowledge of the nature of the documents and reason for its privileged status.

23. *Hewitt*, 145 A.D.3d at 1416, 45 N.Y.S.3d at 607.

24. *Id.*

25. *See* Dan D. Kohane & Audrey A. Seeley, *2014–15 Survey of New York Law: Insurance Law*, 66 Syracuse L. Rev. 999, 1000 (2016).

26. 146 A.D.3d 1143, 1144, 44 N.Y.S.3d 792, 792–93 (3d Dep't 2017) (quoting Auto. Ins. Co. of Hartford v. Cook, 7 N.Y.3d 131, 137, 850 N.E.2d 1152, 1155, 818 N.Y.S.2d 176, 179 (2006)).

27. *Id.* at 1144–45, 44 N.Y.S.3d at 793 (first citing Fitzpatrick v. Am. Honda Motor Co., 78 N.Y.2d 61, 68, 575 N.E.2d 90, 93, 571 N.Y.S.2d 672, 675 (1991); then citing *Auto. Ins. Co. of Hartford*, 7 N.Y.3d at 137–38, 850 N.E.2d at 1156, 818 N.Y.S.2d at 180; then citing Deetjen v. Nationwide Mut. Fire Ins. Co., 302 A.D.2d 350, 352, 754 N.Y.S.2d 366, 368 (2d Dep't 2003); and then citing Merrimack Mut. Fire Ins. Co. v. Carpenter, 224 A.D.2d 894, 895, 638 N.Y.S.2d 234, 235–36 (3d Dep't 1996)).

28. *Id.* at 1143–44, 44 N.Y.S.3d at 792–93.

29. *Id.* at 1143, 44 N.Y.S.3d at 792.

30. *Id.*

policy by way of an "expected or intended" conduct exclusion.[31]

The Third Department noted that, specifically, the "complaint alleged that Guzy assault[ed] [Prindle] . . . by shooting [Prindle] in the abdomen" and that "as a result of the assault, Prindle sustained personal injuries."[32] The complaint also alleged Guzy was charged with criminal assault, although no further specification as to the criminal charge was included.[33] "Inasmuch as an assault may derive from an individual's recklessness or criminal negligence . . . , a reasonable possibility exists that [the] plaintiff's actions were not intentional, as [the] defendant argues."[34] Moreover, "while the allegation in Prindle's complaint describing [the] plaintiff's actions as 'intentional and criminal' is relevant in determining whether defendant's duty to defend exists, such conclusory allegation drafted by a third party is not the focal point."[35]

Thus, the Third Department held that, because a reasonable interpretation involving Guzy's unintentional conduct existed, Central Mutual's duty to defend was triggered.[36] In addition, Central Mutual "failed to establish that the allegations . . . were subject to no other interpretation than that [Guzy] expected or intended the resulting harm."[37]

Of importance, the underlying complaint in this case did not allege negligence, it only alleged intentional assault.[38] It is recognized that the

---

31. *Guzy*, 146 A.D.3d at 1144, 44 N.Y.S.3d at 793.

32. *Id.* at 1144, 44 N.Y.S.3d at 793 (alterations in original) (internal quotations omitted).

33. *Id.* (citing United Servs. Auto. Assn. v. Iannuzzi, 138 A.D.3d 638, 639, 28 N.Y.S.3d 878, 878 (1st Dep't 2016)). In *United Services Automobile Association v. Ianuzzi*, the appellate division found that the defendant was collaterally estopped from litigating the issue of intent to cause bodily injury because "[d]efendant pleaded guilty to third-degree assault" which includes the "intent to cause physical injury to another person." 138 A.D.3d at 639, 28 N.Y.S.3d at 878. Prindle's complaint, while mentioning the criminal charges, was void of any mention of specifics, including intent. *Guzy*, 146 A.D.3d at 1144, 44 N.Y.S.3d at 793.

34. *Guzy*, 146 A.D.3d at 1144, 44 N.Y.S.3d at 793 (first citing N.Y. PENAL LAW § 120.00(2), (3) (McKinney 2009); and then citing Trafalski v. Allstate Ins. Co., 258 A.D.2d 888, 888, 685 N.Y.S.2d 351, 352 (4th Dep't 1991)).

35. *Id.* (citing Fitzpatrick v. Am. Honda Motor Co., 78 N.Y.2d 61, 68, 575 N.E.2d 90, 93–94, 571 N.Y.S.2d 672, 675–76 (1991)).

36. *Id.* at 1144–45, 44 N.Y.S.3d at 793 (first citing Auto. Ins. Co. of Hartford v. Cook, 7 N.Y.3d 131, 137–38, 850 N.E.2d 1152, 1156, 818 N.Y.S.2d 176, 180 (2006); then citing Deetjen v. Nationwide Mut. Fire Ins. Co., 302 A.D.2d 350, 352, 754 N.Y.S.2d 366, 368 (2d Dep't 2003); and then citing Merrimack Mut. Fire Ins. Co. v. Carpenter, 224 A.D.2d 894, 895, 638 N.Y.S.2d 234, 235–36 (3d Dep't 1996)).

37. *Id.* at 1145, 44 N.Y.S.3d at 793 (internal quotations omitted) (first citing *Auto. Ins. Co. of Hartford*, 7 N.Y.3d at 137, 850 N.E.2d at 1155–56, 818 N.Y.S.2d at 180; then citing Clayburn v. Nationwide Mut. Fire Ins. Co., 58 A.D.3d 990, 991, 871 N.Y.S.2d 487, 488–89 (3d Dep't 2009); then citing Merchs. Ins. of N.H., Inc. v. Weaver, 31 A.D.3d 945, 946, 819 N.Y.S.2d 594, 595–96, (3d Dep't 2006); and then Mich. Millers Mut. Ins. Co. v. Christopher, 66 A.D.2d 148, 152, 413 N.Y.S.2d 264, 266 (4th Dep't 1979)); *see* PENAL § 120.00(2), (3).

38. *See Guzy*, 146 A.D.3d at 1144, 44 N.Y.S.3d at 793.

Court of Appeals in *Automobile Insurance Co. of Hartford v. Cook* previously required a carrier to defend if the allegations—however groundless, false, or fraudulent—allege something that can be covered.[39] In that decision, which involved another shooting, a defense was required because of the allegations of unintentional results.[40] It is further recognized that in *Fitzpatrick v. American Honda Motor Co*., the Court of Appeals suggests that a carrier can look at the "true facts," even if not alleged, to broaden the duty to defend.[41] But, those cases are not this case. If this becomes the norm, it has the possibility of rendering the complaint a meaningless document, because a court could use its imagination in every case to imagine facts that may give rise to a duty to defend.

In comparison, the Second Department in *East Ramapo Central School District v. New York Schools Insurance Reciprocal* seemed to practice more restraint. It held that a school district was not afforded insurance coverage where the allegations in a complaint were for intentional, wrongful acts.[42]

The underlying action involved a putative class action, where the complaint alleged that past and present members, employees, or attorneys of Ramapo's Board of Education "engaged in numerous schemes to siphon off public money to support private religious institutions in various yeshivas, forcing a large cut in instructional programming in the public schools to a degree that the right of public school children to an education [was] impugned."[43] The complaint raised violations of the Establishment Clause, the Equal Protection Clause, Article VIII of the New York Constitution, as well as breaches of fiduciary duties and fraud.[44]

New York Schools Insurance Reciprocal ("NYSIR") issued an insurance policy to East Ramapo Central School District ("Ramapo") providing coverage for claims "made against the Insured and reported to [NYSIR] during the Policy Period and any Extended Reporting Period,

39. 7 N.Y.3d at 137, 850 N.E.2d at 1155, 818 N.Y.S.2d at 179–80 (2006) (quoting Ruder & Finn v. Seaboard Sur. Co., 52 N.Y.2d 663, 670, 422 N.E.2d 518, 521, 439 N.Y.S.2d 858, 861 (1981)).

40. *Id.* at 138, 850 N.E.2d at 1156, 818 N.Y.S.2d at 180 (*cf.* Allstate Ins. Co. v. Mugavero, 79 N.Y.2d 153, 159, 589 N.E.2d 365, 369, 581 N.Y.S.2d 142, 146 (1992) (finding the injury inherent to the nature of the act committed and thereby falling within a policy's exclusion)).

41. 78 N.Y.2d 61, 69–70, 575 N.E.2d 90, 94–95, 571 N.Y.S.2d 672, 676–77 (1991) (citing N.Y. C.P.L.R. 3025(c) (McKinney 2010 & Supp. 2018)).

42. 150 A.D.3d 683, 687, 54 N.Y.S.3d 413, 419 (2d Dep't 2017) (first citing Amato v. Nat'l Specialty Ins. Co., 134 A.D.3d 966, 968–69, 21 N.Y.S.3d 696, 698–99 (2d Dep't 2015); and then citing Erie Ins. Co. v. Nick Radtke, Inc., 126 A.D.3d 757, 758, 5 N.Y.S.3d 300, 302 (2d Dep't 2015)).

43. *Id.* at 684, 54 N.Y.S.3d at 416–17.

44. *Id.* at 684–85, 54 N.Y.S.3d at 417.

for Wrongful Act(s) by the Insured in the performance of duties for the School [District]."[45] The policy defined the term "Insured" as Ramapo and "the Board of Education of [Ramapo], all present and former members of the Board of Education, officers, trustees, [and] employees," but only with respect to conduct within the scope of their duties or employment for Ramapo.[46] The policy defined "wrongful act" as "any actual or alleged breach of duty, negligent error, misstatement, misleading statement, or omission by an Insured solely in the course and scope of the Insured's duties or employment for [Ramapo]."[47] It also included express policy exclusions for claims relating to "any fraudulent, dishonest, malicious, criminal[,] or intentional wrongful act or omission by an Insured."[48]

NYSIR disclaimed coverage on a couple different grounds, most notably, that the alleged acts fell outside of the scope of the Insured's duties and employment with Ramapo and also fell wholly within the policy's intentional, wrongful acts exclusion.[49] Ramapo sued NYSIR, "seeking a declaration that NYSIR had a duty to defend and indemnify it in the underlying action."[50] The supreme court granted Ramapo's motion for summary judgment, concluding that the allegations, construed liberally, presented a "reasonable possibility of coverage," and that a "cause of action alleging breach of fiduciary duty was premised on both intentional and negligent conduct and, therefore, . . . did not fall entirely within a policy exclusion."[51]

The Second Department shared in the supreme court's opinion that breach of fiduciary duty allegations alleging that NYSIR's insureds

> [failed] to take reasonable steps to ascertain the value of certain properties that were sold by [Ramapo] and [did not utilize] a method of sale . . . apt to bring in the best price . . . [if] liberally construed, suggest a reasonable possibility of coverage, and therefore, triggered NYSIR's duty to defend in the underlying action.[52]

---

45. *Id.* at 684, 54 N.Y.S.3d at 416 (first alteration in original) (internal quotations omitted).

46. *Id.*

47. *East Ramapo Cent. Sch. Dist.*, 150 A.D.3d at 684, 54 N.Y.S.3d at 416 (internal quotations omitted).

48. *Id.* (internal quotations omitted).

49. *Id.* at 685, 54 N.Y.S.3d at 417.

50. *Id.*

51. *Id.*

52. *East Ramapo Cent. Sch. Dist.*, 150 A.D.3d at 686, 54 N.Y.S.3d at 418 (internal quotations omitted) (citing Frontier Insulation Contractors, Inc., v. Merchs. Mut. Ins. Co., 91 N.Y.2d 169, 175, 690 N.E.2d 866, 868, 667 N.Y.S.2d 982, 984 (1997); then citing GMM Realty, LLC v. St. Paul Fire & Marine Ins. Co., 129 A.D.3d 909, 910, 11 N.Y.S.3d 661, 662 (2d Dep't 2015); and then citing Barkan v. N.Y. Schs. Ins. Reciprocal, 65 A.D.3d 1061, 1063,

Moreover, the Second Department agreed with the supreme court that these allegations "occurred within the course and scope of their employment with [Ramapo]."[53]

However, after the lower court dismissed eight of the ten claims against Ramapo, including the breach of fiduciary duty claim that had initially triggered NYSIR's duty to defend, NYSIR filed and was granted a motion for leave to reargue and renew.[54] On reargument, the supreme court correctly held that "the remaining causes of action in the underlying action were based solely upon allegations that [Ramapo's administrators] intentionally participated in a scheme to, inter alia, illegally fund religious activities and institutions, and therefore, [fell] entirely within the policy's exclusion for claims related to intentional, wrongful acts."[55]

A. Content of Late Notice Disclaimer

Appeals relating to "disclaimers" filled the Second Department's appellate docket this past year. In *Pollack v. Scottsdale Insurance Co.*, decided October 12, 2016, the court affirmed a lower court determination that an insurer was precluded from disclaiming coverage where an injured party provided notice of a lawsuit to the insurer, and the insurer's disclaimer of coverage failed to address the timeliness of the *injured party's* notice with adequate specificity.[56]

On January 11, 2009, Pollack was injured when she slipped and fell on snow and ice outside her Staten Island residence.[57] Florite Maintenance Corp. ("Florite") provided snow removal services for the multiunit condominium in which Pollack resided.[58] Scottsdale Insurance Company ("Scottsdale") issued a general liability policy to Florite.[59]As a condition of coverage, Florite was required to provide Scottsdale with notice of any occurrence that could possibly lead to a claim, as well as

886 N.Y.S.2d 414, 418 (2d Dep't 2009)).

53. *Id.* at 687, 54 N.Y.S.3d at 418 (citing Drayer v. City of Saratoga Springs, 43 A.D.3d 586, 587–88, 840 N.Y.S.2d 680, 682 (3d Dep't 2007)).

54. *Id.*

55. *Id.* at 687, 54 N.Y.S.3d at 419 (first citing Amato v. Nat'l Specialty Ins. Co., 134 A.D.3d 966, 968–99, 21 N.Y.S.3d 696, 699 (2d Dep't 2015); and then citing Erie Ins. Co. v. Radtke, Inc., 126 A.D.3d 757, 758, 5 N.Y.S.3d 300, 302 (2d Dep't 2015)).

56. 143 A.D.3d 794, 795–97, 39 N.Y.S.3d 211, 212–13 (2d Dep't 2016), *lv. denied*, 29 N.Y.3d 908, 80 N.E.3d 405, 57 N.Y.S.3d 712 (2017) (first citing Gen. Accident Ins. Grp. v. Cirucci, 46 N.Y.2d 862, 864, 387 N.E.2d 223, 225, 414 N.Y.S.2d 512, 514 (1979); then citing AutoOne Ins. Co. v. Sarvis, 111 A.D.3d 824, 825, 975 N.Y.S.2d 457, 458 (2d Dep't 2013); and then citing Loeffler v. Sirius Am. Ins. Co., 82 A.D.3d 1172, 1173, 923 N.Y.S.2d 550, 551 (2d Dep't 2011)).

57. *Id.* at 795, 39 N.Y.S.3d at 212.

58. *Id.*

59. *Id.*

notice of any lawsuit thereof "as soon as practicable."[60] On March 31, 2009, Pollack's counsel notified Florite of her fall via letter, and Florite, not having known of the accident previously, promptly and timely notified Scottsdale in accordance with the policy provisions.[61]

In March 2010, Pollack commenced an action against Florite, who, this time, failed to forward the suit papers to Scottsdale.[62] Moreover, Florite failed to submit an answer or otherwise appear in the personal injury action.[63] Prior to seeking leave to enter a default judgment against Florite in September 2010, Pollack's counsel sent a copy of the summons, verified complaint, medical complaint, and authorizations to the claim representative, thereby notifying Scottsdale of the underlying action.[64] Soon after, Scottsdale sent a letter to both Pollack's counsel and Florite, dated September 20, 2010, in which it disclaimed coverage due to *Florite's* "failure to comply with the policy requirement to provide the insurer with notice of a lawsuit 'as soon as practicable.'"[65]

While the policy provides that notice of accident, claim, and lawsuit must be given timely by policyholders and insureds, the New York Insurance Law deems that notice given by the injured person or other claimants will also satisfy liability insurance policy notice requirements. Insurance Law § 3420(a)(3) provides that "notice given by or on behalf of the insured, or written notice by or on behalf of the *injured person* or any other claimant, to any licensed agent of the insurer in this state, with particulars sufficient to identify the insured, shall be deemed notice to the insurer."[66]

Following a jury verdict that awarded a judgment in the underlying action above the $1,000,000.00 Scottsdale policy limit,[67] Pollack commenced a *direct action* against Scottsdale pursuant to Insurance Law § 3420(a)(2),[68] seeking to recover Florite's unsatisfied judgment.[69] In response to Pollack's summary judgment motion, Scottsdale cross-moved for summary judgment, arguing that Pollack was not entitled to

60. *Id.* (internal quotations omitted).

61. *Pollack*, 143 A.D.3d at 795, 39 N.Y.S.3d at 212.

62. *Id.*

63. *Id.*

64. *Id.* at 795–96, 39 N.Y.S.3d at 212.

65. *Id.* at 796, 39 N.Y.S.3d at 212–13.

66. N.Y. INS. LAW § 3420(a)(3) (McKinney 2015) (emphasis added).

67. Pollak v. Scottsdale Ins. Co., No. 1015112013, 2014 WL 12665064, at *1 (Sup. Ct. Richmond Cty. 2014).

68. INS. § 3420(a)(2). That section permits a plaintiff who has secured a judgment against a defendant to commence a direct enforcement action against that defendant's insurer, up to the limits of the insurer's policy. *See id.*

69. *Pollack*, 143 A.D. at 796, 39 N.Y.S.3d at 213.

coverage for failure to provide timely notice of the underlying action.[70] The supreme court sided with Pollack, and granted the plaintiff's motion to the extent it comported with the Scottsdale policy limits, plus interest, costs, and disbursements.[71]

In affirming, the Second Department reasoned that,

> [w]here the required notice of suit is not provided by the insured, but rather by the injured party, the insurer's notice of disclaimer must address with specificity the grounds for disclaiming coverage applicable to the injured party as well as the insured, "because notice of an occurrence by the injured party constitutes prima facie compliance with the notice requirements of the policy and, if unchallenged, relieves the insured of its contractual duty to provide proper notice."[72]

While Scottsdale's notice of disclaimer mentioned, in passing, the notice provided by Pollack, it failed to specifically state whether Pollack's notice was considered untimely, and did not disclaim coverage to Pollack based on any untimeliness of her notice.[73] Without raising this ground in its notice of disclaimer, Scottsdale was barred from raising it at all.[74]

In *Glanz v. New York Marine & General Insurance Co.*, the Second Department handled a pre-prejudice disclaimer, holding that if an insurer already disclaimed coverage based on an insured's late notice, any failure of the insurer to issue a separate letter based upon late notice of the injured party received subsequent to its notice of disclaimer does not void the coverage denial.[75]

Just as an insured is obligated to give an insurer prompt notice under Insurance Law § 3420(d)(2), an insurer is obligated to deny coverage "as soon as is reasonably possible."[76] A failure to do so precludes an insurer from relying upon policy exclusions or breaches of policy conditions as

---

70. *Id.*

71. *Id.*

72. *Id.* (quoting Mass. Bay Ins. Co. v. Flood, 128 A.D.2d 683, 684, 513 N.Y.S.2d 182, 183 (2d Dep't 1987)).

73. *Id.* at 797, 39 N.Y.S.3d at 213.

74. *Pollack*, 143 A.D.3d at 797, 39 N.Y.S.3d at 213 (citing Gen. Accident Ins. Grp. v. Cirucci, 46 N.Y.2d 862, 864, 387 N.E.2d 223, 225, 414 N.Y.S.2d 512, 514 (1979)).

75. 150 A.D.3d 704, 706, 54 N.Y.S.3d 50, 52 (2d Dep't 2017) (quoting Ringel v. Blue Ridge Ins. Co., 293 A.D.2d 460, 462, 740 N.Y.S.2d 109, 111 (2d Dep't 2018)) (first citing Rochester v. Quincy Mut. Fire Ins. Co., 10 A.D.3d 417, 418, 781 N.Y.S.2d 139, 140 (2d Dep't 2004); and then citing *Mass. Bay Ins. Co.*, 128 A.D.2d at 684, 513 N.Y.S.2d at 183–84). By virtue of legislation passed in 2008, for policies issued or renewed after January 17, 2009, an insurer cannot deny coverage for late notice of accident, claim, or suit, unless there is proof of material prejudice in the carrier's ability to investigate or defend the claim. Prejudice was not considered in the "pre-prejudice" cases—those involving policies issued or renewed prior to January 17, 2009. Act of Jan. 17, 2009, 2008 McKinney's Sess. Laws of N.Y., ch. 388, at 1088 (codified at N.Y. INS. LAW § 3420(a) (McKinney 2015)).

76. INS. § 3420(d)(2).

a reason to deny coverage.[77] In *Ramlochan v. Scottsdale Insurance Co.*, the Second Department affirmed the supreme court's granting of an insurer's summary judgment motion, where the insurer's delay in issuing the notice of disclaimer "was reasonably related to the completion of a necessary, thorough, and diligent investigation into issues affecting its decision to disclaim."[78]

In a direct action under Insurance Law § 3420(a)(2), seeking to recover an unsatisfied judgment held by Ramlochan against Sweet P Home Care, Inc. ("Sweet"), Ramlochan sought a declaratory judgment indicating that Scottsdale Insurance Company ("Scottsdale") was obligated to satisfy the judgment against its insured, Sweet.[79] The judgment held by Ramlochan was the result of a tort action following the death of her child after she went into respiratory distress and received improper CPR while under the care of Sweet.[80]

Scottsdale denied coverage based upon Sweet's late notice of an occurrence covered under the liability policy, and established a prima facie entitlement to judgment as a matter of law regarding its proper disclaimer of coverage.[81] Sweet, despite knowledge of the occurrence in June 2008, waited until September 2009 to notify Scottsdale.[82] Because the policy was issued prior to the amendment of § 3420, Scottsdale was not required to establish that it had been prejudiced by Sweet's failure to provide timely notice.[83]

Scottsdale took six weeks to deny coverage which, without a reasonable excuse, would be considered late.[84] However, "Scottsdale

77. *See* Albert J. Schiff Assocs. Inc. v. Flack, 51 N.Y.2d 692, 700, 417 N.E.2d 84, 88, 435 N.Y.S.2d 972, 976 (1980).

78. (*Ramlochan II*), 150 A.D.3d 1166, 1167, 55 N.Y.S.3d 369, 371–72 (2d Dep't 2017) (first citing Magistro v. Buttered Bagel, Inc., 79 A.D.3d 822, 824–25, 914 N.Y.S.2d 192, 195 (2d Dep't 2010); then citing Hermitage Ins. Co. v. Arm-ing, Inc., 46 A.D.3d 620, 621, 847 N.Y.S.2d 628, 629 (2d Dep't 2007); and then citing Tully Constr. Co., Inc. v. TIG Ins. Co., 43 A.D.3d 1150, 1152–53, 842 N.Y.S.2d 528, 530 (2d Dep't 2007)).

79. *Id.* at 1166, 55 N.Y.S.3d at 370 (citing INS. § 3420(a)(2)).

80. Ramlochan v. Scottsdale Ins. Co. (*Ramlochan I*), No. 702183/13, 2015 N.Y. Slip Op. 30830(U), at 2 (Sup. Ct. Queens Cty. Apr. 7, 2015).

81. *Ramlochan II*, 150 A.D.3d at 1167, 55 N.Y.S.3d at 371.

82. *Id.* (first citing Great Canal Realty Corp. v. Seneca Ins. Co., 5 N.Y.3d 742, 743–44, 833 N.E.2d 1196, 1197, 800 N.Y.S.2d 521, 522 (2015); and then citing Guideone Ins. Co. v. Darkei Noam Rabbinical Coll., 120 A.D.3d 625, 627, 992 N.Y.S.2d 66, 68 (2d Dep't 2014)).

83. *Id.* (first citing Briggs Ave. v. Ins. Corp. of Hannover, 11 N.Y.3d 377, 381–82, 899 N.E.2d 947, 948, 870 N.Y.S.2d 841, 842 (2008); then citing Kraemer Bldg. Corp., LLC v. Scottsdale Ins. Co., 136 A.D.3d 1205, 1207, 25 N.Y.S.3d 718, 719 (3d Dep't 2016); and then citing A.H. Prop., LLC v. N.H. Ins. Co., 95 A.D.3d 1243, 1244, 945 N.Y.S.2d 391, 392–93 (2d Dep't 2012)).

84. *Ramlochan I*, 2015 N.Y. Slip Op. 30830(U), at 6; *see* N.Y. INS. LAW § 3420(d) (McKinney 2015); First Fin. Ins. Co. v. Jetco Contracting Corp., 1 N.Y.3d 64, 66, 801 N.E.2d 835, 837, 769 N.Y.S.2d 459, 461 (2003);.

demonstrated, prima facie, that its delay in disclaiming coverage was reasonable under the circumstances."[85] Such a delay may be excused if the disclaimer follows "an investigation into issues affecting the decision whether to disclaim[,]" as long as the written notice of disclaimer is given "as soon as is reasonably possible[.]"[86] Scottsdale, in this case, demonstrated that the delay in disclaiming coverage was "reasonably related to the completion of a necessary, thorough, and diligent investigation into issues affecting its decision to disclaim."[87]

The Second Department also handled an interesting case involving the sufficiency of evidence to confirm that disclaimer of coverage had actually been mailed. There is no requirement under New York law that denial or disclaimer letters be sent by certified or registered mail.[88] First class mail is permitted, but proof of mailing can, and in this case did, become an issue. In *Matsil v. Utica First Insurance Co.*, the Second Department held that an insurer who fails to provide sufficient evidence of the proper mailing of a disclaimer to an injured party's counsel cannot establish, prima facie, that disclaimer was timely and proper.[89]

Steven Matsil fell from a ladder while working for Brian Doris Home Improvements, Inc. ("Brian Doris"), and sustained injuries.[90] Matsil, after filing suit, was awarded a judgment against Brian Doris and subsequently sought to recover from Brian Doris' insurer, Utica First Insurance Company ("Utica"), by filing a direct action.[91] Following the partial denial of Utica's motion for a declaratory judgment, Utica appealed.[92]

Utica contended that in July 2014, it had promptly mailed a

85. *Ramlochan II*, 150 A.D.3d at 1167, 55 N.Y.S.3d at 371.

86. *Id.* (first citing INS. § 3420(d)(2); then citing Magistro v. Buttered Bagel, Inc., 79 A.D.3d 822, 824–25, 914 N.Y.S.2d 192, 195 (2d Dep't 2010); then citing Hermitage Ins. Co. v. Arm-ing, Inc., 46 A.D.3d 620, 621, 847 N.Y.S.2d 628, 629 (2d Dep't 2007); then citing Tully Constr. Co., Inc. v. TIG Ins. Co., 43 A.D.3d 1150, 1152–53, 842 N.Y.S.2d 528, 530 (2d Dep't 2007); and then citing *Guideone Ins. Co.*, 120 A.D.3d at 627, 992 N.Y.S.2d at 68).

87. *Id.* (first citing *Magistro*, 79 A.D.3d at 824–25, 914 N.Y.S.2d at 195; then citing *Hermitage Ins. Co.*, 46 A.D.3d at 621, 847 N.Y.S.2d at 629; and then citing *Tully Constr. Co., Inc.*, 43 A.D.3d at 1152–53, 842 N.Y.S.2d at 530).

88. *See* INS. § 3420(a)(6).

89. (*Matsil II*), 150 A.D.3d 982, 983, 55 N.Y.S.3d 304, 305 (2d Dep't 2017) (first citing Progressive Cas. Ins. Co. v. Metro Psychological Servs. P.C., 139 A.D.3d 693, 693–94, 32 N.Y.S.3d 182, 184 (2d Dep't 2016); then citing Progressive Cas. Ins. Co. v. Infinite Ortho Prods., Inc., 127 A.D.3d 1050, 1051–52, 7 N.Y.S.3d 429, 431–32 (2d Dep't 2015); and then citing Mid City Constr. Co. v. Sirius Am. Ins. Co., 70 A.D.3d 789, 790, 894 N.Y.S.2d 113, 115 (2d Dep't 2010)).

90. *Id.* at 982, 55 N.Y.S.3d at 304.

91. *Id.* at 983, 55 N.Y.S.3d at 305; *see* INS. § 3420(a)(2).

92. *Id.* at 983, 55 N.Y.S.3d at 305.

disclaimer of coverage letter to both Brian Doris and Matsil's counsel.[93] Utica argued that its standard office practice in July 2014 for the mailing of coverage disclaimers was evidence that it had promptly disclaimed coverage.[94]

The Second Department noted that "[g]enerally, proof that an item was properly mailed gives rise to a rebuttable presumption that the item was received by the addressee."[95] Although this presumption may be created by "proof of a standard office practice . . . designed to ensure that items are properly addressed and mailed,"[96] the practice "must be geared so as to ensure the likelihood that a notice . . . is always properly addressed and mailed."[97]

In holding that Utica's standard office practice for mailing disclaimers was insufficient to create a rebuttable presumption of receipt by the addressee, the court affirmed the supreme court's ruling on the motion.[98] The supreme court, in reaching its decision, concluded that the standard office practice alone, without more, was not supported by any case law warranting dismissal at that point in litigation.[99]

Interestingly, despite Utica's standard office practice customarily sending such disclaimers both by regular and certified mail with return receipt requested, Utica does not appear to have submitted any such receipt into evidence.[100] Both the Second Department and supreme court were silent on whether submission of such a receipt would have made a difference in the outcome.[101]

---

93. *Id.*; *see* N.Y. C.P.L.R. 3001 (McKinney 2010); N.Y. C.P.L.R. 3211(c) (McKinney 2016).

94. *Matsil II*, 150 A.D.3d at 983, 55 N.Y.S.3d at 305.

95. *Id.* (internal quotations omitted) (quoting N.Y. & Presbyterian Hosp. v. Allstate Ins. Co., 29 A.D.3d 547, 547, 814 N.Y.S.2d 687, 688 (2d Dep't 2006)) (first citing Rodriguez v. Wing, 251 A.D.2d 335, 336, 673 N.Y.S.2d 734, 735 (2d Dep't 1998); then citing Progressive Cas. Ins. Co. v. Metro Psychological Servs, P.C., 139 A.D.3d 693, 694, 32 N.Y.S.3d 182, 184 (2d Dep't 2016); and then citing Mid City Constr. Co. v. Sirius Am. Ins. Co., 70 A.D.3d 789, 790, 894 N.Y.S.2d 113, 115 (2d Dep't 2010)).

96. *Id.* (quoting Residential Holding Corp. v. Scottsdale Ins. Co., 286 A.D.2d 679, 680, 729 N.Y.S.2d 776, 778 (2d Dep't 2001)) (citing *Mid City Constr. Co.*, 70 A.D.3d at 790, 894 N.Y.S.2d at 115).

97. *Id.* (omission in original) (quoting Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 830, 386 N.E.2d 1085, 1086, 414 N.Y.S.2d 117, 118 (1978)).

98. *Id.*

99. Matsil v. Utica First Ins. Co. (*Matsil I*), No. 604676/15, 2016 N.Y. Slip Op. 32743(U), at 4 (Sup. Ct. Nassau Cty. Jan. 7, 2016), *aff'd*, 150 A.D.3d 982, 55 N.Y.S.3d 304 (2d Dep't 2017).

100. *See id.*

101. *See generally Matsil II*, 150 A.D.3d 982, 55 N.Y.S.3d 304 (holding that Utica's submissions were insufficient to establish a prima facie case without mentioning the mailing receipts); *Matsil I*, 2016 N.Y. Slip Op. 32743(U) (holding that the evidence provided by Utica did not warrant dismissal without mentioning the lack of mailing receipts). While there is no

III. COURTESY DEFENSE

In a matter predominately concerning a disclaimer for untimely notice, the Fourth Department had occasion to embrace the term "courtesy defense." The term has been used by some insurers who disclaim coverage but nonetheless provide a defense while the coverage issues are being resolved in a declaratory judgment action.[102] The underlying action in *BN Partners Association, LLC v. Selective Way Insurance Co.* arose from the injuries an employee of JAG I, LLC ("JAG") sustained while working on a site owned by BN Partners Associates, LLC ("BN Partners") that had been leased to The Golub Corporation ("Golub").[103] JAG had been retained by the general contractor, LeChase Construction Services, LLC ("LeChase").[104]

The underlying action filed against BN Partners and LeChase commenced in June 2011, and a related action filed against Golub commenced in October 2011.[105] This declaratory judgment action was commenced against JAG's insurer, Selective Way Ins. Co. ("Selective"), in November 2012.[106] Selective asserted that it had no defense or indemnity obligations, as BN Partners, Golub, and LeChase failed to provide timely notice of the underlying lawsuit, in addition to their failure to immediately relay legal papers received pertaining to that lawsuit.[107]

Summary judgment motions were filed by all parties.[108] BN

---

requirement that disclaimer letters be sent by certified mail, had that been done here, and had a receipt been presented, the proof would probably have been established. *See Matsil* I, 2016 N.Y. Slip Op. 32743(U), at 4. We are not suggesting that certified letters are necessary but if a receipt is received and maintained, it is easier to establish proof of mailing. *See id.*

102. Lang v. Hanover Ins. Co., 3 N.Y.3d 350, 356, 820 N.E.2d 855, 858–59, 787 N.Y.S.2d 211, 214–15 (2004). The Court of Appeals suggested in that situation the insurance company may only litigate the validity of its disclaimer:

> Finally, we note that an insurance company that disclaims in a situation where coverage may be arguable is well advised to seek a declaratory judgment concerning the duty to defend or indemnify the purported insured. If it disclaims and declines to defend in the underlying lawsuit without doing so, it takes the risk that the injured party will obtain a judgment against the purported insured and then seek payment pursuant to Insurance Law § 3420. Under those circumstances, having chosen not to participate in the underlying lawsuit, the insurance carrier may litigate only the validity of its disclaimer and cannot challenge the liability or damages determination underlying the judgment.

Id. (citing N.Y. INS. LAW § 3420 (McKinney 2015)).

103. BN Partners Assoc., LLC v. Selective Way Ins. Co., 148 A.D.3d 1592, 1592, 50 N.Y.S.3d 701, 702 (4th Dep't 2017).

104. *Id.*

105. *Id.* at 1593, 50 N.Y.S.3d at 702.

106. *Id.* at 1592–93, 50 N.Y.S.3d at 702.

107. *Id.* at 1593, 50 N.Y.S.3d at 702.

108. *BN Partners Assoc., LLC*, 148 A.D.3d at 1593, 50 N.Y.S.3d at 702.

Partners, Golub, and LeChase alleged that timely notice was given to Selective either through "a letter that LeChase's insurance carrier sent to JAG, dated September 27, 2011, informing it of the lawsuit and advising JAG to turn the matter over to its general liability carrier, and . . . a voicemail message with JAG's insurance agent following up on that letter."[109] Selective argued that it had not received notice until December 2012, a seventeen-month delay which was untimely as a matter of law, and also that notice to JAG's insurance agent through a voicemail was neither written as required by the policy, nor notice to a Selective insurance agent.[110]

The Fourth Department reversed the supreme court's determination that there was a question of fact regarding whether LeChase had provided Selective with timely notice and affirmed the trial court's finding relative to the untimely notice by BN Partners and Golub.[111] "[T]he policy unambiguously require[d] an insured to provide Selective with written notice of a claim or lawsuit brought against an insured and to send Selective copies of any legal papers received in connection with the claim or lawsuit."[112] Selective had established its initial burden, showing that even if notice had been received, the parties seeking coverage had waited seventeen months after they had learned of the underlying lawsuit, and no excuse for the delay was offered.[113] Moreover, the Fourth Department concluded that they could not rely solely on inadmissible double hearsay that the letter sent to JAG was turned over to Selective.[114] Furthermore, the Fourth Department rejected that the voicemail left for the JAG insurance agent was adequate, as it was not in writing as required by the policy.[115]

Notably, the Fourth Department also ejected an additional contention raised; namely, that because Selective had afforded JAG a "courtesy defense," an issue of fact remained regarding "the timeliness

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 1594, 50 N.Y.S.3d at 703.

113. *BN Partners Assoc., LLC*, 148 A.D.3d at 1594, 50 N.Y.S.3d at 703 (first citing Anglero v. George Units, LLC, 61 A.D.3d 564, 565, 877 N.Y.S.2d 296, 297 (1st Dep't 2009); then citing Gershow Recycling Corp. v. Transcon. Ins. Co., 22 A.D.3d 460, 461, 801 N.Y.S.2d 832, 833 (2d Dep't 2005); and then citing Zugnoni v. Travelers Ins. Cos., 179 A.D.2d 1033, 1033, 579 N.Y.S.2d 296, 297 (4th Dep't 1992)).

114. *Id.* (citing Raux v. City of Utica, 59 A.D.3d 984, 985, 873 N.Y.S.2d 812, 813 (4th Dep't 2009)).

115. *Id.* (first citing Bretton v. Mut. of Omaha Ins. Co., 110 A.D.2d 46, 49–50, 492 N.Y.S.2d 760, 763 (1st Dep't 1985); then citing First City Acceptance Corp. v. Gulf Ins. Cos., 245 A.D.2d 649, 651, 665 N.Y.S.2d 114, 116 (3d Dep't 1997)).

of [the] plaintiffs' notice to Selective."[116] The court concluded that the questions of reasonableness regarding JAG's failure to provide Selective with timely notice were more deserving of a "courtesy defense" rather than any similar questions, or lack thereof, regarding the reasonableness of BN Partners, LeChase, and Golub's failures to provide timely notice.[117]

IV. ADDITIONAL INSURED COVERAGE

In the landmark New York Court of Appeals decision, *Burlington Insurance Co. v. New York City Transit Authority*, it was established that where coverage under an additional insured endorsement "is restricted to liability for any bodily injury 'caused, in whole or in part,' by the 'acts or omissions' of the named insured, the coverage applies to injury *proximately caused* by the named insured."[118] The finding was a conscious decision by the court to distance itself from a series of cases that granted an additional insured coverage from an insurer even where the underlying injury was entirely the result of the purported additional insured's own negligence, and not caused by the acts of the named insured.[119]

In the construction industry, where *Burlington* is set, risk transfer is critical. Typically, owners will compel general contractors to provide trade contract indemnity via hold harmless agreements and, perhaps more importantly, insurance protection through the requirement that the owners be added as additional insureds under identified policies of insurance issued to the general contractors.[120] General contractors then continue to pass risk down by compelling their subcontractors to do the same, naming the general contractor as an additional insured in policies where the subcontractor is the named insured.[121]

---

116. *Id.* at 1595, 50 N.Y.S.3d at 703.

117. *Id.* at 1595, 50 N.Y.S.3d at 704 (citing Lang v. Hanover Ins. Co., 3 N.Y.3d 350, 356, 820 N.E.2d 855, 858–59, 787 N.Y.S.2d 211, 214–15 (2004)). This was the first case where we saw a court expressly endorsing the use of the "courtesy defense," which we have always believed was sanctioned by the Court of Appeals in *Lang v. Hanover Insurance Company*, 3 N.Y.3d at 356, N.E.2d at 858–59, 787 N.Y.S.2d at 214–15.

118. (*Burlington II*), 29 N.Y.3d 313, 317, 79 N.E.3d 477, 478, 57 N.Y.S.3d 85, 86 (2017) (emphasis added).

119. *Id.* at 324, 79 N.E.3d at 483, 57 N.Y.S.3d at 91 (first citing Burlington Ins. Co. v. NYC Transit Auth. (*Burlington I*), 132 A.D.3d 127, 135, 14 N.Y.S.3d 377, 382–83 (1st Dep't 2015); then citing W&W Glass Sys., Inc. v. Admiral Ins. Co., 91 A.D.3d 530, 530–31, 937 N.Y.S.2d 28, 29 (1st Dep't 2012); and then citing Nat'l Union Fire Ins. Co. of Pittsburgh v. Greenwich Ins. Co., 103 A.D.3d 473, 474, 962 N.Y.S.2d 9, 10 (1st Dep't 2013)).

120. *See id.* at 326, 79 N.E.3d at 485, 57 N.Y.S.3d at 93 (citing Dale Corp. v. Cumberland Mut. Fire Ins. Co., No. 09-1115, 2010 U.S. Dist. LEXIS 127126, at *4 (E.D. Pa. Nov. 30, 2010)).

121. *See id.*

Much of New York's construction activity is in Manhattan and the Bronx, therefore lawsuits arising out of job-related accidents frequently resolve in the First Department, where appeals from those counties are heard.[122] In a series of First Department decisions, including the lower court decision in *Burlington*, the court concluded that an insurer who agreed to provide additional insured protection was obligated to afford such coverage, irrespective of the named insured's negligence, so long as there was some tangential relationship between the work performed by the named insured and the accident that led to the lawsuit.[123] That was the case even though the additional insured endorsements provided that coverage would only be provided if the accident was "caused in whole or in part" by the acts or omissions of the named insured.[124] This broad interpretation of additional insured coverage was even recognized, and endorsed, by other departments—including the Fourth Department—as recently as March 2017.[125]

---

122. *See* Thomas F. Segalla and Richard J. Cohen, *1999–2000 Survey of New York Law: Insurance Law*, 51 SYRACUSE L. REV. 563, 645 (2001). Between 2011 and 2015, Manhattan and the Bronx accounted for sixty-four percent of the construction projected in New York City, whereas Brooklyn and Queens accounted for the remaining thirty-six percent. *Construction Outlook Update: Manhattan Continues to Account for Nearly 60 Percent of the Value of All New York City Construction Projects*, N.Y. BUILDING CONGRESS (Nov. 2016), https://www.buildingcongress.com/advocacy-and-reports/reports-and-analysis/construction-outlook-update/Manhattan-continues-to-account-for-nearly-60-percent-of-the-value-of-all-new-york-city-construction-projects.html.

123. *Burlington I*, 132 A.D.3d at 1335, 14 N.Y.S.3d at 382–83; *W&W Glass Sys., Inc.*, 91 A.D.3d at 530–31, 937 N.Y.S.2d at 29; *National Union Fire Ins. Co. of Pittsburgh*, 103 A.D.3d at 474, 962 N.Y.S.2d at 10.

124. *See, e.g.*, Nova Cas. v. Harleysville Worchester Ins. Co., 146 A.D.3d 428, 429, 50 N.Y.S.3d 1, 2 (1st Dep't 2017) (first citing *Nat'l Union Fire Ins. Co. of Pittsburgh*, 103 A.D.3d at 474, 962 N.Y.S.2d at 10; and then citing Strauss Painting, Inc. v. Mt. Hawley Ins. Co., 105 A.D.3d 512, 513, 963 N.Y.S.2d 197, 198 (1st Dep't 2013)) ("Harleysville is obligated to provide a defense and indemnity for [the additional insured], even if Coastal is ultimately found to have no liability in the underlying action."); Aspen Specialty Ins. Co. v. Ironshore Indem. Inc., 144 A.D.3d 606, 607, 42 N.Y.S.3d 121, 123 (1st Dep't 2016).

> While the policy issued by Ironshore to [the named insured] refers, with respect to coverage for additional insureds, to losses caused by [the named insured's] acts or omissions or operations, the existence of coverage does not depend upon a showing that [the named insured's] causal conduct was negligent or otherwise at fault.

Aspen Specialty Ins. Co., 144 A.D.3d at 607, 42 N.Y.S.3d at 123 (internal quotations omitted) (quoting *Burlington I*, 132 A.D.3d at 135, 14 N.Y.S.3d at 382–83); *Burlington I*, 132 A.D.3d 127, 14 N.Y.S.3d 377 (1st Dep't 2015) ("[T]he loss 'resulted, at least in part, from the acts or omissions of [the named insured] . . . , regardless of whether [the named insured] was negligent or otherwise at fault for [the] mishap.'") (third alteration in original) (omission in original) (citing Kel-Mar Designs, Inc. v. Harleysville Ins. Co. of N.Y., 127 A.D.3d 662, 663, 8 N.Y.S.3d 304, 305 (1st Dep't 2015)).

125. Time Cap Dev. Corp. v. Colony Ins. Co., 148 A.D.3d 1749, 1752, 51 N.Y.S.3d 757, 759–60 (4th Dep't 2017).

The high court in *Burlington* added clarity and explained that the term "caused by" means "proximately caused by."[126] In *Burlington*, the New York City Transit Authority (NYCTA) had entered into a contract with Breaking Solutions, Inc. (BSI), for the excavation of a New York City subway tunnel.[127] BSI obtained a commercial general liability policy from the Burlington Insurance Company ("Burlington").[128] Contractually, BSI was required to name NYCTA, MTA New York City Transit (MTA), and New York City as "additional insureds" within the newest Insurance Services Office (ISO) issued policy endorsement.[129] The associated endorsement in the Burlington policy, in relevant part, listed NYCTA, MTA, and New York City as additional insureds "only with respect to liability for 'bodily injury,' 'property damage' or 'personal and advertising injury' caused, in whole or in part, by . . . [y]our acts or omissions; or . . . [t]he acts or omissions of those acting on your behalf."[130]

While the Burlington policy was in effect, after a BSI machine contacted a live electrical cable that was buried at the excavation site, a NYCTA employee fell from an elevated platform attempting to avoid the ensuing explosion.[131] The injured employee sued the City and BSI in federal court, for various Labor Law claims, negligence, and loss of consortium.[132]

The City tendered its defense in the underlying action to Burlington, under BSI's policy.[133] Burlington initially accepted the City's tender, although reserved its rights based upon the scope of the additional insured endorsement.[134] Burlington ultimately withdrew its reservation of rights after receiving a letter from NYCTA indicating that without its agreement to defend and indemnify the City without reservation, the named insured,

---

> Although Colony contends that [the additional insured] was required to establish negligence . . . the deposition testimony established that the bodily injuries at issue were caused at least in part by the 'acts or omissions' of one acting on the [named insured's] behalf, i.e., the injured laborer himself, regardless whether the [named insured] was negligent.

Id. (citing *Kel-Mar Designs, Inc.*, 127 A.D.3d at 663, 8 N.Y.S.3d at 305).

126. *Burlington II*, 29 N.Y.3d 313, 322, 79 N.E.3d 477, 482, 57 N.Y.S.3d 85, 90 (2017).

127. *Id.* at 317, 79 N.E.3d at 479, 57 N.Y.S.3d at 87.

128. *Id.* at 317–18, 79 N.E.3d at 479, 57 N.Y.S.3d at 87.

129. *Id.*

130. *Id.* at 318, 79 N.E.3d at 479, 57 N.Y.S.3d at 87.

131. *Burlington II*, 29 N.Y.3d at 318, 79 N.E.3d at 479, 57 N.Y.S.3d at 87.

132. *Id.* (citing Kenny v. City of New York, No. 09-CV-1422, 2011 U.S. Dist. LEXIS 109057, at *2 (E.D.N.Y. Sept. 26, 2011)).

133. *Id.*

134. *Id.*

BSI, would not be paid in accordance with their contract.[135]

Eventually, Burlington discovered that NYCTA had "failed to identify, mark, or protect the electric cable, and that it also failed to turn off the cable power."[136] In addition, documents established that BSI's machine operator had no knowledge of the location or active nature of these electric cables.[137] In fact, these documents included two internal memoranda indicating NYCTA was solely responsible for the accident.[138] Accordingly, Burlington disclaimed coverage to NYCTA and MTA, asserting the named insured, BSI, was without fault, and contending that NYCTA and MTA, being solely at fault, were not additional insureds under the policy.[139]

Burlington's contention was that additional insured coverage does not exist where the sole proximate cause of an injury is the acts or omissions of a potential additional insured.[140] NYCTA and MTA relied strictly on policy language, claiming that regardless of the negligence of an additional insured, should *any* act or omission of the named insured result in injury, the proper causal nexus is satisfied.[141]

The Court of Appeals agreed with Burlington, rejecting the nexus argued for by NYCTA and MTA.[142] Specifically, the court rejected the notion that "caused, in whole or in part means but for causation."[143] Since "but for" causation cannot be partial, the plain meaning of the policy terms indicate that "in whole or in part" are meant to modify proximate, or legal, causation.[144] The court found unpersuasive NYCTA and MTA's

---

135. *Id.*

136. *Burlington II*, 29 N.Y.3d at 319, 79 N.E.3d at 480, 57 N.Y.S.3d at 88.

137. *Id.*

138. *Id.*

> In the first, the NYCTA superintendent explained that "the excavation equipment operators were operating the equipment properly and had no way of knowing that the cables were submerged in the invert." The second memorandum concluded that "this accident was primarily due to an inadequate/ineffective inspection process for identifying job-site hazards involving buried energized cables."

Id.

139. *Id.*

140. *Burlington II*, 29 N.Y.3d at 320, 79 N.E.3d at 481, 57 N.Y.S.3d at 89.

141. *Id.*

142. *Id.* at 320–21, 79 N.E.3d at 481, 57 N.Y.S.3d at 89.

143. *Id.* at 321, 79 N.E.3d at 481, 57 N.Y.S.3d at 89 (internal quotations omitted) ("This is an incorrect interpretation of the policy language, which by its terms, describes proximate causation and legal liability based on the insured's negligence or other actionable deed.").

144. *Id.* at 322, 79 N.E.3d at 482, 57 N.Y.S.3d at 90 (first citing DAN B. DOBBS ET AL., 1 THE LAW OF TORTS § 189 (2d ed. 2011); then citing *Proximate* Cause, BLACK'S LAW DICTIONARY (10th ed. 2014); then citing Hain v. Jamison, 28 N.Y.3d 524, 529, 68 N.E.3d 1233, 1237, 46 N.Y.S.3d 502, 506 (2016); and then citing Cragg v. Allstate Indem. Corp., 17

argument that "in whole or in part" was required to ensure that "caused by" did not mean "solely caused by."[145] The court was likewise unpersuaded by NYCTA and MTA's stance that if "proximate causation" was meant, it could have been written in the endorsement, because such a requirement would render what *was* written ("in whole or in part") meaningless.[146]

In summary, the court gave vitality to the term "caused by" and held that the activities of the named insured must be a proximate cause of the accident and injuries for there to be additional insured status. The Court of Appeals did not go so far as to require a demonstration of negligence on the part of the named insured, but did require proximate causation.

In dissent, Justice Eugene Fahey argued that the majority undercut the court's commitment to "certainty . . . in crafting its rules of policy interpretation."[147] First, Justice Fahey rejected the notion that courts should give the policy term "cause" a legal definition, as opposed to the "plain and ordinary meaning" customary in the New York insurance law context.[148] Second, because a reasonable mind could define "cause" to mean either "proximate cause" or something "legally sufficient to result in liability," an ambiguity existed that should have been interpreted in favor of the insured.[149] Finally, the dissent proffered that if the insurer wanted to provide coverage only for instances where the named insured was negligent, as the holding effectively mandates, the insurer should have been required to revise the policy so as to clarify such ambiguities

---

N.Y.3d 118, 122, 950 N.E.2d 500, 502, 926 N.Y.S.2d 867, 869 (2011)) ("Defendants' interpretation would render this modification superfluous, in contravention of the rule that requires us to interpret the language 'in a manner that gives full force and effect to the policy language and does not render a portion of the provision meaningless.'").

145. *Burlington II*, 29 N.Y.3d at 322, 79 N.E.3d at 482, 57 N.Y.S.3d at 90 (citing Argentina v. Emery World Wide Delivery Corp., 93 N.Y.2d 554, 560 n.2, 715 N.E.2d 495, 498 n.2, 693 N.Y.S.2d 493, 496 n.2 (1999)).

146. *Id.* at 323, 79 N.E.3d at 482–83, 57 N.Y.S.3d at 90–91 (citing *Cragg*, 17 N.Y.3d at 122, 950 N.E.2d at 502, 926 N.Y.S.2d at 869) ("[I]t is enough that the parties used words that convey the legal doctrine of proximate causation.").

147. *Id.* at 338–39, 79 N.E.3d at 494–95, 57 N.Y.S.3d at 102–03 (Fahey, J., dissenting) ("At best, the decision reflects a departure from, but not a disavowal of, long-held precepts of policy construction.").

148. *Id.* at 334–35, 79 N.E.3d at 491, 57 N.Y.S.3d at 99 (first citing Lend Lease (U.S.) Constr. LMB Inc. v. Zurich Am. Ins. Co., 28 N.Y.3d 675, 681–82, 71 N.E.3d 556, 560, 49 N.Y.S.3d 65, 69 (2017); and then citing Universal Am. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 25 N.Y.3d 675, 680, 37 N.E.3d 78, 81, 16 N.Y.S.3d 21, 23 (2015)) ("The application of the plain and ordinary meaning of cause' to the subject endorsement compels the conclusion that BSI caused the bodily injuries that Kenny sustained as a result of the accident and that defendants therefore are additional insureds under that amendment.").

149. *Id.* at 335, 79 N.E.3d at 492, 57 N.Y.S.3d at 100 (citing *Proximate Cause*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

as to the meaning of "liability" in the policy.[150]

Beyond this landmark decision, there were other instructive decisions concerning the scope of additional insured endorsements particularly related to premises liability losses. In *Chappaqua Central School District v. Philadelphia Indemnity Insurance Co.*, an interesting case that was denied leave to appeal to the Court of Appeals, despite establishing what appears to be a New York Department split, the Second Department held that a "Managers, Landlords, or Lessors of Premises" endorsement did not provide a landlord with additional insured coverage when an accident occurred outside of the leased space.[151]

The Chappaqua Central School District (CCSD) leased its middle school cafeteria to Chappaqua Children's Workshop, Inc. (CCW), an after-school program.[152] In January 2011, a CCW employee, Patricia Brunsting, was allegedly injured when she fell down an exterior staircase leading to the middle school parking lot.[153] At the time of the fall, a Philadelphia Indemnity Insurance Company (PIIC) liability insurance policy was in effect covering CCW.[154] Additionally, CCSD was covered under a liability insurance policy in effect that they had obtained from New York Schools Insurance Reciprocal (NYSIR).[155]

After Brunsting sued CCSD to recover personal injury damages, PIIC disclaimed additional insured coverage to CCSD, because Brunsting was injured outside of the leased cafeteria, and CCW was not responsible for staircase maintenance.[156] Following PIIC's disclaimer of coverage, CCSD commenced a declaratory judgment action, arguing that PIIC was obligated to defend and indemnify it pursuant to the policy's additional insured endorsement covering "liability arising out of the ownership, maintenance or use of that part of the premises leased or rented to [CCW] . . . "[157] CCSD contended that "'arising out of the use' was a broad, comprehensive term" that should be read to cover a staircase "necessarily used for access to the leased premises."[158] PIIC refuted that the staircase was "necessarily incidental" to the cafeteria's use.[159]

The Second Department agreed with PIIC, stating that "[t]he

150. *Burlington II*, 29 N.Y.3d at 337, 79 N.E.3d at 493, 57 N.Y.S.3d at 101.

151. 148 A.D.3d 980, 981–82, 48 N.Y.S.3d 784, 786, *lv. denied*, 29 N.Y.3d 913, 85 N.E.3d 98, 63 N.Y.S.3d 3 (2017).

152. *Id.* at 981, 48 N.Y.S.3d at 785–86.

153. *Id.*

154. *Id.* at 981, 48 N.Y.S.3d at 786.

155. *Id.*

156. *Chappaqua*, 148 A.D.3d at 981, 48 N.Y.S.3d at 786.

157. *Id.*

158. *Id.* at 981–82, 48 N.Y.S.3d at 786.

159. *Id.* at 982, 48 N.Y.S.3d at 786.

additional insured provision unambiguously provided that CCSD was an additional insured, as a 'Lessor,' for liability arising out of the ownership, maintenance or use of the premises leased to CCW, namely, the cafeteria."[160] Thus, Brunsting's injury on the staircase was never intended to be covered by the policy issued by PIIC.[161]

Following the decision in *Chappaqua*, the Second Department then decided *Atlantic Avenue Sixteen AD, Inc. v. Valley Forge Insurance Co.*, a slip-and-fall case, on similar grounds.[162] Eric Raven, an employee of Linea 3, a wedding and party-favor supply business, was injured when he slipped and fell on black ice that had accumulated in his workplace parking lot.[163] Linea 3 conducted business within part of a building owned by Atlantic Ave. Sixteen AD, Inc. ("Atlantic").[164] Linea 3 and Atlantic had a written lease which provided, in part, that Atlantic was responsible for maintaining all common areas, including snow removal in the parking lot.[165] Universal Strapping Corp. ("Universal") was owned by the same principals as Atlantic, and also operated its business within the building.[166] Raven sued Atlantic and Universal to recover damages for his personal injuries.[167]

Citizens Insurance Company of America ("Citizens") insured both Atlantic and Universal under a commercial liability insurance policy at the time of the accident.[168] Linea 3 was insured under a commercial liability policy issued by Valley Forge Insurance Company ("Valley Forge").[169] The Valley Forge policy contained an additional insured endorsement providing coverage for Atlantic for "liability arising out of the ownership, maintenance or use of that part of the premises leased to [Linea] and shown in the Schedule."[170] The Schedule stated that Linea 3

160. *Id.* at 982, 48 N.Y.S.3d at 787 (internal quotations omitted); *see* Maroney v. N.Y. Cent. Mut. Fire Ins. Co., 5 N.Y.3d 467, 472, 839 N.E.2d 886, 889, 805 N.Y.S.2d 533, 536 (2005) ("An insurer does not wish to be liable for losses arising from risks associated with a premises for which the insurer has not evaluated the risk and received a premium . . . .").

161. *Chappaqua*, 148 A.D.3d at 982–83, 48 N.Y.S.3d at 787 (first citing Regal Constr. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 15 N.Y.3d 34, 38, 930 N.E.2d 259, 262, 904 N.Y.S.2d 338, 341 (2010); then citing Christ the King Reg'l High Sch. v. Zurich Ins. Co. of N. Am., 91 A.D.3d 806, 809, 937 N.Y.S.2d 290, 293 (2d Dep't 2012); and then citing *Maroney*, 5 N.Y.3d at 473, 839 N.E.2d at 889, 805 N.Y.S.2d at 536). There appears to be a New York State Department split on this issue.

162. 150 A.D.3d 1182, 1183, 56 N.Y.S.3d 207, 209 (2d Dep't 2017).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Atlantic Ave.*, 150 A.D.3d at 1183, 56 N.Y.S.3d at 209.

168. *Id.*

169. *Id.*

170. *Id.* (alteration in original).

had leased "Unit 2," but failed to mention the parking lot.[171]

Upon Atlantic's tender to Valley Forge for defense and indemnity in the underlying action pursuant to the additional insured endorsement, Valley Forge disclaimed coverage, contending that "potential liability did not arise out of the ownership, maintenance, or use of the part of the premises leased to Linea."[172] This action was commenced by Atlantic, Universal, and Citizens seeking a declaratory judgment that Valley Forge was obligated to provide a defense and indemnity.[173]

The Second Department, in affirming the supreme court's ruling, agreed with Valley Forge, as "there was no causal relationship between the injury and the risk for which coverage was provided, and Raven's injury was not a bargained-for risk."[174] The additional insured endorsement unambiguously required that, for Atlantic to receive coverage as an additional insured, liability must arise out of the "ownership, maintenance or use of the premises leased to Linea."[175] Since Linea only leased "Unit 2," and not the parking lot, it had no duty for parking lot maintenance.[176]

These decisions seem to pull back from the Court of Appeals' decision in *ZKZ Associates LP v. CNA Insurance Co.*, where the Court had found that even where the alleged accident occurred outside of leased premises, if the location was necessarily used for access in and out of that area, by implication it was part of the premises that the named insured was licensed to use under the parties' agreement and, consequently, the claim arose out of "the ownership, maintenance [or] use of" the leased premises for purposes of triggering additional insured coverage.[177]

A. Privity Requirement

In *Harco Construction, LLC v. First Mercury Insurance Co.*, the Second Department confirmed that without a contractual obligation to the owners of a property, the owner could not be an additional insured under an endorsement requiring contractual privity with the subcontractor

171. *Id.*

172. *Atlantic Ave.*, 150 A.D.3d at 1183, 56 N.Y.S.3d at 209 ("[A]ccording to the lease, the parking lot was a common area outside of the leased premises, and Atlantic was responsible for snow and ice removal from the parking lot.").

173. *Id.* at 1183–84, 56 N.Y.S.3d at 209.

174. *Id.* at 1184–85, 56 N.Y.S.3d at 210 (first citing Maroney v. N.Y. Cen. Mut. Fire Ins. Co., 5 N.Y.3d 467, 472, 839 N.E.2d 886, 889, 805 N.Y.S.2d 533, 536 (2005); and then citing Chappaqua Cent. Sch. Dist. v. Phila. Indem. Ins. Co., 148 A.D.3d 980, 982, 48 N.Y.S.3d 784, 786 (2d Dep't 2017)).

175. *Id.* at 1184, 56 N.Y.S.3d at 210 (internal quotation omitted).

176. *Id.*

177. 89 N.Y.2d 990, 991, 679 N.E.2d 629, 630, 657 N.Y.S.2d 390, 391 (1997).

acting as the named insured.[178]

Harco Construction, LLC ("Harco"), entered into a construction contract as the general contractor with the property owner, 301–303 West 125th, LLC ("301–303").[179] Harco subcontracted with Disano Demolition Co. ("Disano"), where Disano agreed to demolish several structures on the property.[180] Harco, pursuant to the subcontract, required Disano to obtain a commercial general liability insurance policy naming the general contractor as an additional insured.[181] First Mercury Insurance Company (FMIC) issued a policy to Disano, including an additional insured endorsement specifying that an additional insured is "any person or organization for whom [the named insureds] is performing operations . . . and such person or organization ha[s] agreed in writing in a contract or agreement that such person or organization be added as an additional insured on [the] policy."[182]

On September 20, 2011, following the collapse of a partially demolished five-story building on 301–303's property, debris fell onto a New York City street and bus.[183] Harco's primary insurer, Mt. Hawley Insurance Company ("Hawley"), notified FMIC of the occurrence, and requested FMIC defend and indemnify their named insured, Harco.[184] On October 21, 2011, FMIC sent a letter to Mt. Hawley disclaiming any duty to defend or indemnify Harco, indicating that the occurrence triggered a policy exclusion for "all work over [one] story in height."[185] The immediate action, commenced by Harco and 301–303, sought a judgment that FMIC was obligated to defend and indemnify them, to which FMIC moved for and was granted summary judgment declaring no such obligation.[186]

On appeal, the court found that FMIC established, prima facie, that 301–303 lacked the necessary contractual privity with Disano for

178. 148 A.D.3d 870, 872, 49 N.Y.S.3d 495, 497–98 (2d Dep't 2017) (first citing Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Marine Ins. Co., 143 A.D.3d 146, 152, 38 N.Y.S.3d 1, 5 (1st Dep't 2016); then citing Structure Tone, Inc. v. Nat'l Cas. Co., 130 A.D.3d 405, 406, 13 N.Y.S.3d 52, 53 (1st Dep't 2015); then citing AB Green Gansevoort, LLC v. Peter Scalamandre & Sons, Inc., 102 A.D.3d 425, 426, 961 N.Y.S.2d 3, 5 (1st Dep't 2013); then citing Linarello v. City Univ. of N.Y., 6 A.D.3d 192, 195, 774 N.Y.S.2d 517, 520 (1st Dep't 2004); then citing Maxwell Plumb Mech. Corp. v. Nationwide Prop. & Cas. Ins. Co., 116 A.D.3d 740, 741, 983 N.Y.S.2d 600, 602 (2d Dep't 2014); and then citing Utica Mut. Ins. Co. v. Gov't Emps. Ins. Co., 98 A.D.3d 502, 503, 949 N.Y.S.2d 182, 184 (2d Dep't 2012)).

179. *Id.* at 871, 49 N.Y.S.3d at 496.

180. *Id.* at 871, 49 N.Y.S.3d at 496–97.

181. *Id.* at 871, 49 N.Y.S.3d at 497.

182. *Id.*

183. *Harco Constr., LLC*, 148 A.D.3d at 871, 49 N.Y.S.3d at 497.

184. *Id.*

185. *Id.*

186. *Id.* at 871–72, 49 N.Y.S.3d at 497.

additional insured status under the policy, and thus FMIC was not required to disclaim additional insured coverage to 301–303 because "it's denial of coverage was based on the lack of coverage, rather than on a policy exclusion."[187] 301–303 was unable to raise an issue of fact as to its additional insured status where it insufficiently relied upon the certificate of insurance Disano's insurance broker had issued requiring contractual privity.[188] However, with regard to Harco, it was determined that the supreme court erred in finding that FMIC was not required to provide timely, written notice of disclaimer.[189]

B. Motor Vehicle Liability Exclusion for Vehicles "Furnished or Available" for Regular Use

Common in motor vehicle liability policies is a provision which removes coverage for a driver if he or she is operating someone else's vehicle that is "furnished or available for regular use."[190] Why such a

187. *Id.* at 872, 49 N.Y.S.3d at 497–98 (quoting Maxwell Plumb Mech. Corp. v. Nationwide Prop. & Cas. Ins. Co., 116 A.D.3d 740, 741, 983 N.Y.S.2d 600, 602 (2d Dep't 2014)) (first citing Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Marine Ins. Co., 143 A.D.3d 146, 151, 38 N.Y.S.3d 1, 5 (1st Dep't 2016); then citing Structure Tone, Inc. v. Nat'l Cas. Co., 130 A.D.3d 405, 406, 13 N.Y.S.3d 52, 53 (1st Dep't 2015); then citing AB Green Gansevoort, LLC v. Peter Scalamandre & Sons, Inc., 102 A.D.3d 425, 426, 961 N.Y.S.2d 3, 5 (1st Dep't 2013); then citing Linarello v. City Univ. of N.Y., 6 A.D.3d 192, 195, 774 N.Y.S.2d 517, 520 (1st Dep't 2004); and then citing Utica Mut. Ins. Co. v. Gov't Emps. Ins. Co., 98 A.D.3d 502, 503, 949 N.Y.S.2d 182, 184 (2d Dep't 2012)).

188. *Harco Constr., LLC*, 148 A.D.3d at 872, 49 N.Y.S.3d at 498 (first citing Three Boroughs, LLC v. Endurance Am. Specialty Ins. Co., 143 A.D.3d 480, 481, 38 N.Y.S.3d 421, 421 (1st Dep't 2016); then citing *Structure Tone, Inc.*, 130 A.D.3d at 406, 13 N.Y.S.3d at 53; then citing Sevenson Envtl. Servs., Inc. v. Sirius Am. Ins. Co., 74 A.D.3d 1751, 1753, 902 N.Y.S.2d 279, 280 (4th Dep't 2010); then citing Hargob Realty Assoc., Inc. v. Fireman's Fund Ins. Co., 73 A.D.3d 856, 857–58, 901 N.Y.S.2d 657, 659 (2d Dep't 2010); and then citing Tribeca Broadway Assocs., LLC v. Mount Vernon Fire Ins. Co., 5 A.D.3d 198, 200, 774 N.Y.S.2d 11, 13 (1st Dep't 2004)); *see Three Boroughs, LLC*, 143 A.D.3d at 481, 38 N.Y.S.3d at 421–22 (quoting Nat'l Abatement Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 33 A.D.3d 570, 571, 824 N.Y.S.3d 230, 232 (1st Dep't 2006)) (first citing *Tribeca Broadway Assocs., LLC*, 5 A.D.3d at 199–200, 774 N.Y.S.2d at 13; then citing Consol. Edison Co. of N.Y. v. Hartford Ins. Co., 203 A.D.2d 83, 84, 610 N.Y.S.2d 219, 221 (1st Dep't 1994); then citing B.R. Fries & Assoc. v. Ill. Union Ins. Co., 89 A.D.3d 619, 621, 934 N.Y.S.2d 10, 11 (1st Dep't 2011); and then citing Hunter Roberts Constr. Group, LLC v. Arch Ins. Co., 75 A.D.3d 404, 407, 904 N.Y.S.2d 52, 56 (1st Dep't 2010)) ("The record establishes that the contractor's broker lacked the authority to bind the carrier. Thus, the defendant insurer here cannot be estopped on the basis of an inadequate disclaimer, since '[a]n additional insured endorsement is an addition, rather than a limitation, of coverage.'"); *Structure Tone, Inc.*, 130 A.D.3d at 406, 13 N.Y.S.3d at 53 (citing *Tribeca Broadway Assocs., LLC*, 5 A.D.3d at 200, 774 N.Y.S.2d at 13) ("[A]ny reliance on the certificate of insurance produced by [the] plaintiffs' broker is unavailing, as it is undisputed that no agency agreement existed between National Casualty and the broker.").

189. *Harco Constr., LLC*, 148 A.D.3d at 872, 49 N.Y.S.3d at 498.

190. *See, e.g.*, GMAC INSURANCE, NEW YORK PERSONAL AUTOMOBILE POLICY 4, http://www.gmacinsurance.com/forms_catalog/NY400_01012009_OTHER_NY_V2.pdf

provision? The answer makes sense. If a driver is operating someone else's car, primary coverage is generally provided by the owner's insurance policy and the driver's policy becomes excess for the driver. So, if the owner's policy provides $25,000/$50,000 in liability limits and the driver's personal policy has $500,000/$1,000,000 in liability limits; where the driver has an accident injuring a pedestrian, he or she would have $525,000 in coverage for the use of that vehicle. But, if the driver regularly has access to the vehicle, the insurance industry wants to make certain that the vehicle being driven regularly has its own adequate insurance, and in turn, the excess coverage will not be available.

In *Tuttle v. State Farm Mutual Automotive Insurance Co.*, the Fourth Department held that even though an individual has keys to someone else's vehicle, that vehicle still might not be "furnished or available" for his or her regular use.[191]

In the underlying action, Michelle Swiatowy Tuttle sued and obtained a judgment against her former boyfriend after he fell asleep while driving her car, injuring her as a passenger in the vehicle.[192] State Farm Mutual Automotive Insurance Company ("State Farm") had issued Tuttle's former boyfriend an automotive policy for a separate vehicle that he owned.[193] After receiving the policy limit of $25,000 from her insurer, Tuttle commenced this action seeking a declaration that State Farm was obligated to provide excess coverage for the judgment.[194] Tuttle alleged that her former boyfriend was operating a "non-owned car" under the policy issued by State Farm.[195] State Farm had disclaimed coverage, contending that the vehicle did not qualify as a "non-owned car" under its policy.[196]

The Fourth Department reversed the lower court's granting of State Farm's motion for summary judgment because, inter alia, Tuttle's vehicle was not a "non-owned car" under the policy, insofar as State Farm had failed to meet its burden of proof of such.[197] State Farm's policy defined "non-owned car" as "a car not . . . furnished or available for the regular or frequent use of the insured."[198] To establish whether a vehicle is furnished or available, courts should weigh "the availability of the vehicle

(last visited Apr. 21, 2018).

191. 149 A.D.3d 1477, 1478–79, 53 N.Y.S.3d 426, 428 (4th Dep't 2017).

192. *Id.* at 1477, 53 N.Y.S.3d at 427.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Tuttle*, 149 A.D.3d at 1478, 53 N.Y.S.3d at 427.

197. *Id.* (citing Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853, 476 N.E.2d 642, 643, 487 N.Y.S.2d 316, 317 (1985)).

198. *Id.* (omission in original) (internal quotations omitted).

and frequency of its use by the insured."[199] Furthermore,

> The applicability of the policy exclusion to a particular case must be determined in light of the purpose of [the] provision [of coverage] for a nonowned vehicle not [furnished or available] for the regular use of the insured[, which] is to provide protection to the insured for the occasional or infrequent use of [a] vehicle not owned by him or her[,] and [which coverage] is not intended as a substitute for insurance on vehicles furnished for the insured's regular use.[200]

Tuttle and her former boyfriend testified that he had a set of keys to the vehicle, however, he only drove on rare occasions.[201] Also, they both testified that they had separate vehicles, with separate insurance policies, and did not use their vehicles interchangeably.[202] Because there are issues of fact remaining as to whether the vehicle was a "non-owned car" under the policy, the Fourth Department reversed the lower court's granting of State Farm's summary judgment motion and dismissal of the complaint.[203]

C. Proving Noncooperation of an Insured

In a rare insurance company win for establishing the lack of cooperation of an insured, the Second Department in *West Street Properties, LLC v. American States Insurance Co.* held that an insurance carrier established its heavy burden to prove *willful and avowed obstruction*, an essential element of proof in establishing lack of cooperation under the *Thrasher* rule and the statutory requirements under Insurance Law § 3420(c)(1).[204]

In the underlying action, West Street Properties, LLC ("West") sued and was awarded a judgment against A & A Industries, LLC ("A&A"), after an oil spill damaged real property owned by West.[205] American States Insurance Company ("American States") had issued commercial

---

199. *Id.* at 1478, 53 N.Y.S.3d at 427–28 (quoting Newman v. N.Y. Cent. Mut. Fire Ins. Co., 8 A.D.3d 1059, 1060, 778 N.Y.S.2d 827, 828 (4th Dep't 2004)) (citing Konstantinou v. Phoenix Ins. Co., 74 A.D.3d 1850, 1851, 904 N.Y.S.2d 599, 600 (4th Dep't 2010)).

200. *Id.* at 1478, 53 N.Y.S.3d at 428 (alterations in original) (quoting *Newman*, 8 A.D.3d at 1060, 778 N.Y.S.2d at 828).

201. *Tuttle*, 149 A.D.3d at 1478–79, 53 N.Y.S.3d at 428.

202. *Id.* at 1479, 53 N.Y.S.3d at 428.

203. *Id.*

204. (*West St. II*), 150 A.D.3d 792, 794, 53 N.Y.S.3d 674, 677 (2d Dep't), *lv. denied*, 29 N.Y.3d 917, 86 N.E. 559, 64 N.Y.S.3d 667 (2017) (first citing Thrasher v. U.S. Liab. Ins. Co., 19 N.Y.2d 159, 168, 225 N.E.2d 503, 508, 278 N.Y.S.2d 793, 801 (1967); and then citing N.Y INS. LAW § 3420(c)(1) (McKinney 2015)).

205. West St. Props., LLC v. Am. States Ins. Co., No. 54513-2012, 2012 N.Y. Slip Op. 33760(U), at 2 (Sup Ct. Westchester Cty. Oct. 5, 2012).

liability policies to A&A.[206] In April 2015, the supreme court held that American States was obligated to pay West's judgment against A&A up to the policy limits.[207]

To disclaim coverage based upon an insured's alleged lack of cooperation, the insurer must establish that "it acted diligently in seeking to bring about its insured's cooperation, that its efforts were reasonably calculated to obtain its insured's cooperation, and that the attitude of its insured, after the cooperation of its insured was sought, was one of 'willful and avowed obstruction.'"[208] "The insurer has a 'heavy' burden of proving lack of cooperation."[209]

The Second Department, in reversing the lower court, deemed that American States met its heavy burden to show "willful and avowed obstruction."[210] American States diligently made reasonably calculated attempts to persuade its insured to cooperate, through written correspondence, telephone, and visits to his home.[211] After being informed of the risk of losing coverage should he fail to cooperate, and acknowledging the risk of a default judgment should he fail to attend his deposition, the insured "made statements to the effect that he would cooperate only if he were paid for certain work he claimed to have performed, and that the plaintiff could 'just get in line' were it to obtain a judgment against him."[212]

IV. DIRECT ACTION CHALLENGED

In June 2017, the First Department issued a decision in *Mt. Hawley Insurance Co. v. Penn-Star Insurance Co.*, holding that a general contractor's insurer was collaterally estopped from challenging the effectiveness of a subcontractor's insurer's coverage disclaimer.[213] This is a decision which demonstrates how estoppel can occur in related actions.

Marlite Construction Corporation ("Marlite"), acting as the general contractor on a construction project, hired a subcontractor, W.R. Precision, Inc. ("W.R. Precision"), who, in turn, subcontracted its steel

206. *Id.*

207. *West St. II*, 150 A.D.3d at 794, 53 N.Y.S.3d at 676 ("[T]he [s]upreme [c]ourt issued a judgment dated February 1, 2016, in favor of the plaintiff and against American States in the total sum of $1,736,130.").

208. *Id.* at 794, 53 N.Y.S.3d at 677 (quoting State-Wide Ins. Co. v. Luna, 68 A.D.3d 882, 883, 889 N.Y.S.2d 488, 488 (2d Dep't 2009)).

209. *Id.* (citing *Thrasher*, 19 N.Y.2d at 168, 225 N.E.2d at 508, 278 N.Y.S.2d at 800).

210. *Id.*

211. *Id.*

212. *West St. II*, 150 A.D.3d at 795, 53 N.Y.S.3d at 677.

213. 151 A.D.3d 528, 528, 56 N.Y.S.3d 98, 99 (1st Dep't 2017).

work to Structure Builders, Inc., d/b/a J&B Ironworks ("Structure").[214] A Structure employee, injured while working, sued Marlite and others.[215] Mt. Hawley Ins. Co. ("Mt. Hawley"), insuring Marlite, tendered its defense to W.R. Precision's insurer, Penn-Star Ins. Co. ("Penn-Star"), based upon an additional insured endorsement within its insurance policy.[216] Penn-Star disclaimed coverage based upon an independent contractors' exclusion within the policy issued to W.R. Precision.[217] Before settlement of the underlying action, the court determined that Penn-Star had no defense or indemnity obligation to W.R. Precision or Marlite due to the exclusion.[218]

Nevertheless, this finding relative to coverage did not preclude Marlite from enforcing its contractual indemnification claim against W.R. Precision. The settlement of the underlying action included a judgment in favor of Marlite against W.R. Precision.[219] The judgment required W.R. Precision to indemnify Marlite according to the terms of their contract.[220] Mt. Hawley, acting as Marlite's subrogee, sued Penn-Star pursuant to Insurance Law § 3420(b), seeking to recover the settlement amount.[221]

Mt. Hawley argued, inter alia, that Penn-Star had failed to provide timely disclaimer of coverage.[222] Penn-Star moved to dismiss contending that Marlite, and its subrogee, were collaterally estopped from asserting such a claim as the supreme court had made a final determination, holding that Penn-Star had no duty either to defend (and thus indemnify) W.R. Precision as a named insured, or Marlite, who alleged additional insured status.[223]

The First Department, in affirming, acknowledged that,

> [w]hile Insurance Law § 3420(b) enables a judgment creditor of an insured to 'step[] into the shoes of the [insured] tortfeasor' and to sue the carrier directly to assert any rights the insured might have against it with respect to the judgment, the statute does not confer upon such a

214. *Id.*

215. *Id.*

216. *Id.* at 528–29, 56 N.Y.S.3d at 99.

217. *Id.* at 529, 56 N.Y.S.3d at 99.

218. *Mt. Hawley Ins. Co.*, 151 A.D.3d at 529, 56 N.Y.S.3d at 99 (citing Szymanksi v. 444 Realty Co., 938 N.Y.S.2d 230, 230 (Sup Ct. App. Term 1st Dep't 2011)). "The [Penn-Star] general liability policy here involved unambiguously excludes from coverage any personal injuries to independent contractors, subcontractors, and their employees at the construction site." *Szymanski*, 938 N.Y.S.2d at 230.

219. *Mt. Hawley Ins. Co.*, 151 A.D.3d at 529, 56 N.Y.S.3d at 99.

220. *Id.*

221. *Id.* (citing N.Y. INS. LAW § 3420(b)(2) (McKinney 2015)).

222. *Id.*

223. *Id.*

> judgment creditor new rights against the carrier not held by the insured.[224]

Therefore, Mt. Hawley, acting as Marlite's subrogee, was estopped from raising an issue as to the effectiveness of Penn-Star's disclaimer of coverage "merely because it now wears the hat of a judgment creditor against defendant's named insured rather than the hat of a purported additional insured under the named insured's policy."[225]

V. UIM/SUM COVERAGE

Two February 2017 cases in the Second Department provide guidance for challenging the arbitrability of supplementary uninsured or underinsured motorist (SUM) claims.

In *Fiduciary Insurance Company of America v. Greenidge*, Fiduciary Insurance ("Fiduciary") brought an action to stay arbitration of a claim for SUM benefits "that was made by its insured, Renny Greenidge."[226] "Greenidge's claim arose out of an automobile accident in which his vehicle was struck by another vehicle."[227] The other vehicle (the "hit-and-run" vehicle) fled the scene.[228] There was a framed issue hearing in which it was decided by the supreme court to permanently stay arbitration.[229]

> An insurance carrier seeking to stay the arbitration of an uninsured motorist claim has the burden of establishing that the offending vehicle was insured at the time of the accident. Once such a prima facie case of coverage is established, the burden shifts to the opposing party to come forward with evidence to the contrary.[230]

On appeal, it was found that Fiduciary failed to submit sufficient admissible evidence to establish, prima facie, that insurance coverage existed for the hit-and-run vehicle at the time it struck Greenidge's vehicle.[231] Thus, the supreme court should have denied Fiduciary's

---

224. *Mt. Hawley Ins. Co.*, 151 A.D.3d at 529, 56 N.Y.S.3d at 100 (second and third alteration in original) (quoting Lang v. Hanover Ins. Co., 3 N.Y.3d 350, 355, 820 N.E.2d 855, 858, 787 N.Y.S.2d 211, 214 (2004)) (citing INS. § 3420(b)).

225. *Id.* at 529, 56 N.Y.S.3d at 99–100.

226. 147 A.D.3d 1050, 1051, 48 N.Y.S.3d 219, 219 (2d Dep't 2017).

227. *Id.*

228. *Id.* at 1051, 48 N.Y.S.3d at 219–20.

229. *Id.* at 1051, 48 N.Y.S.3d at 220.

230. *Id.* (quoting Am. Home Assurance Co. v. Wai Ip Wong, 249 A.D.2d 301, 301, 671 N.Y.S.2d 288, 288 (2d Dep't 1998)) (citing Eagle Ins. Co. v. Pusey, 271 A.D.2d 445, 455, 706 N.Y.S.2d 123, 124 (2d Dep't 2000)).

231. *Fiduciary Ins. Co.*, 147 A.D.3d at 1051, 48 N.Y.S.3d at 220 (first citing *Eagle Ins. Co.*, 271 A.D.2d at 445–46, 706 N.Y.S.2d at 124; then citing *Am. Home Assurance Co.*, 249 A.D.2d at 301, 671 N.Y.S.2d at 288; then citing Liberty Mut. Ins. Co. v. McDonald, 6 A.D.3d 614, 615, 775 N.Y.S.2d 83, 84 (2d Dep't 2004); and then citing 11 N.Y.C.R.R. § 60-2.3

petition for a permanent stay of arbitration and dismissed the proceeding.[232]

In a contrasting case, *Government Employees Insurance Co. v. Fletcher*, the Second Department upheld a permanent stay of a SUM arbitration, where the disclaiming carrier failed to prove that its denial of coverage for lack of cooperation was sustainable.[233] In June 2013, a vehicle operated by Joy Fletcher collided with a vehicle owned by BMC Auto, Inc. (BMC) and operated by Otabek Abduahadov.[234] Global Liberty Insurance Company of New York ("Global") disclaimed coverage to its insured, BMC, due to lack of cooperation.[235]

Fletcher sought uninsured motorist benefits under an insurance policy issued by Government Employees Insurance Company (GEICO).[236] GEICO brought an application to permanently stay the arbitration, claiming that the Global disclaimer was invalid.[237] In a framed issue hearing, the lower court granted the petition, found the disclaimer invalid and permanently stayed the arbitration.[238] The question before the court was whether the cooperation disclaimer was supportable, which standard was discussed above.[239]

Despite Global establishing that it made diligent efforts reasonably calculated to obtain the cooperation of its insureds, it failed to provide sufficient evidence establishing "willful and avowed obstruction" on behalf of BMC and Abduahadov.[240] Thus, the Second Department upheld the lower court's grant of GEICO's petition to permanently stay arbitration of the uninsured motorist claim.[241] It is also important to note that an insurer that fails to seek a stay of arbitration within twenty days after being served with a demand to arbitrate a claim generally is precluded from thereafter objecting to the arbitration.[242]

(2017)).

232. *See id.*

233. 147 A.D.3d 940, 941, 48 N.Y.S.3d 173, 175 (2d Dep't 2017).

234. *Id.* at 940, 48 N.Y.S.3d at 174.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Fletcher*, 147 A.D.3d at 940, 48 N.Y.S.3d at 174.

239. *See id.*

240. *Id.* (quoting N.Y. Cent. Mut. Fire Ins. Co. v. Bresil, 7 A.D.3d 716, 716, 777 N.Y.S.2d 174, 175 (2d Dep't 2004)) (first citing Country-Wide Ins. Co. v. Henderson, 50 A.D.3d 789, 790, 856 N.Y.S.2d 184, 185–86 (2d Dep't 2008); then citing Utica First Ins. Co. v. Arken, Inc., 18 A.D.3d 644, 645, 795 N.Y.S.2d 640, 641 (2d Dep't 2005); and then citing Coleman v. Nat'l Grange Mut. Ins. Co., 28 A.D.2d 1073, 1074 (4th Dep't 1967)).

241. *Id.*

242. N.Y. C.P.L.R. 7503(c) (McKinney 2013).

VI. NO-FAULT

Several recent cases in New York highlight the important role the plaintiffs' experts serve when attempting to establish the serious injury necessary to receive noneconomic damages. For example, in *Marino v. Amoah*, the First Department granted the defendant's motion for summary judgment, where the plaintiff's expert testified that an accident exacerbated the plaintiff's existing condition, but failed to explain why such degeneration was necessarily related to the accident and not the plaintiff's chronic condition.[243]

Jose A. Marino allegedly sustained injuries after a motor vehicle accident with Richard Amoah on May 11, 2012, near the intersection of East 180th Street and 3rd Avenue in the Bronx.[244] Beyond a claim for first-party benefits, Marino sought noneconomic damages from Amoah, alleging that he had sustained a serious injury as the term is defined under

---

243. Marino v. Amoah (*Marino II*), 143 A.D.3d 541, 541, 38 N.Y.S.3d 893, 893 (1st Dep't 2016) (first citing Rivera v. Fernandez & Ulloa Auto Grp., 123 A.D.3d 509, 509, 999 N.Y.S.2d 37, 38 (1st Dep't 2014); and then citing Alvarez v. NYLL Mgt. Ltd., 120 A.D.3d 1043, 1044, 993 N.Y.S.2d 1, 3 (1st Dep't 2014)); *see* Franklin v. Gareyua, 136 A.D.3d 464, 465, 24 N.Y.S.3d 304, 305 (1st Dep't 2016), *aff'd*, 29 N.Y.3d 925, 71 N.E.3d 1218, 49 N.Y.S.3d 651 (2017) (first citing *Alvarez*, 120 A.D.3d at 1044, 993 N.Y.S.2d at 3; and then citing Paduani v. Rodriguez, 101 A.D.3d 470, 471, 955 N.Y.S.2d 48, 49–50 (1st Dep't 2012)).

> [The Plaintiff's] treating orthopedist . . . did not refute or address the findings of preexisting degeneration and lack of traumatic injury, set forth in the reports by [other physicians] contained in [the] plaintiff's own medical records . . . nor did [the plaintiff's expert] explain why degeneration was not the cause of the left shoulder injury.

Franklin, 136 A.D.3d at 465, 24 N.Y.S.3d at 305; *see* Khanfour v. Nayem, 148 A.D.3d 426, 427, 49 N.Y.S.3d 394, 396 (1st Dep't 2017) (first citing Acosta v. Traore, 136 A.D.3d 533, 534, 24 N.Y.S.3d 652, 652–53 (1st Dep't 2016); and then citing *Alvarez*, 120 A.D.3d at 1044, 993 N.Y.S.2d at 3).

> Since [the] plaintiff's own medical records provided evidence of preexisting degenerative changes, his pain management specialist's conclusory opinion, lacking any medical basis, was insufficient to raise an issue of fact since it failed to explain how the accident, rather than the preexisting disc disease and osteophytes, could have been the cause of [the] plaintiff's cervical spine condition.

Khanfour, 148 A.D.3d at 427, 49 N.Y.S.3d at 396; *see* Brown v. Miller, 148 A.D.3d 1555, 1556, 50 N.Y.S.3d 693, 694 (4th Dep't 2017) (first citing N.Y. INS. LAW § 5102(d) (McKinney 2016); and then citing Linnane v. Szabo, 111 A.D.3d 1304, 1305, 974 N.Y.S.2d 715, 717 (4th Dep't 2013)) ("Although [the] plaintiff submitted expert medical evidence establishing that he sustained injuries causally related to the collision, he failed to raise an issue of fact whether those injuries constituted 'serious injury' within the meaning of Insurance Law § 5102.").

244. Marino v. Amoah, No. 30180913, 2015 WL 9273305, at *1 (N.Y. Sup. Ct. Bronx Cty. 2015), *aff'd*, 143 A.D.3d 541, 38 N.Y.S.3d 893 (1st Dep't 2016).

Insurance Law § 5102(d).[245]

Amoah established that Marino had not, in fact, suffered a serious injury as a result of the accident by "submitting, inter alia, the affirmed reports of a radiologist and an orthopedist."[246] These reports indicated that the plaintiff had a history of degenerative disc disease as well as hypertrophy, and that he had not suffered any traumatic injury to his knee as a result of the accident.[247]

In response, the plaintiff failed to raise a triable issue. "[N]one of his medical experts addressed or explained the finding of preexisting degeneration present in his own medical records, including the operative report that [the] plaintiff submitted which diagnosed degenerative disc disease."[248] Moreover, his orthopedist failed to explain why the degeneration in Marino's own medical records had not caused his lumbar spine condition.[249] His expert had provided "no objective basis or reason, other than the history provided by [the] plaintiff, to opine that the accident aggravated the lumbar condition, or that any injuries were different from his preexisting degenerative conditions.[250]

VII. PROPERTY INSURANCE

In a first-party case, *Papa v. Associated Indemnity Corp.*, the Court of Appeals affirmed the Fourth Department's holding that a water exclusion barred coverage for damage caused by water flowing into a

245. *See id.* at *2; N.Y. INS. Law §§ 5102(d), 5104(b) (McKinney 2016).

> "Serious injury" means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

INS. § 5102(d).

246. *Marino II*, 143 A.D.3d at 541, 38 N.Y.S.3d at 893.

247. *Id.* (citing *Alvarez*, 120 A.D.3d at 1044, 993 N.Y.S.2d at 2).

248. *Id.*

249. *Id.* (first citing Rivera v. Fernandez & Ulloa Auto Grp., 123 A.D.3d 509, 509–10, 999 N.Y.S.2d 37, 38 (1st Dep't 2014); and then citing *Alvarez*, 120 A.D.3d at 1044, 993 N.Y.S.2d at 2).

250. *Id.* at 541, 38 N.Y.S.3d at 893–94 (quoting Shu Chi Lam v. Dong, 84 A.D.3d 515, 516, 922 N.Y.S.2d 381, 382–83 (1st Dep't 2011)) (citing Campbell v. Fischetti, 126 A.D.3d 472, 473, 5 N.Y.S.3d 79, 80 (1st Dep't 2015). "[P]laintiff failed to provide evidence of any injuries that were different from her preexisting arthritic condition." *Campbell*, 126 A.D.3d at 473, 5 N.Y.S.3d at 80.

basement of an insured premises.[251]

Ronald and Theresa Papa, doing business as Muir Lake Associates ("Muir Lake"), owned a commercial property.[252] The Muir Lake commercial property was damaged after a heavy rain caused a broken underground conduit to channel groundwater into the basement.[253]

Associated Indemnity Corporation (AIC) issued an all-risk insurance policy to Muir Lake that included an exclusion for water damage caused by "[w]ater under the ground surface pressing on, or flowing or seeping through . . . [f]oundations, walls, floors or paved surfaces . . . [or][d]oors, windows or other openings."[254] AIC also provided a limited coverage grant of $25,000 for losses caused by ground water.[255]

After the water damage occurred, AIC issued Muir Lake a check for $25,000 pursuant to the water damage endorsement, but declined to pay the full policy limit after disclaiming coverage in accordance with the policy exclusion for water damage.[256] Thereafter, Muir Lake sued, inter alia, AIC for breach of contract, arguing that ambiguous language entitled it to the full policy limit.[257] AIC contended that the plain terms of the policy entitled Muir Lake to no more than the $25,000 already paid.[258]

In agreeing with AIC, the Fourth Department concluded that "insurance contracts are construed 'in light of common speech and the reasonable expectations of a businessperson,'"[259] and "unambiguous provisions of an insurance contract must be given their plain and ordinary meaning."[260] Thus, the policy language was deemed to unambiguously limit coverage to $25,000 when damage is caused by ground water entering the basement "through a gap, hole, or opening in the wall, and the conduit clearly falls within the water damage exclusion and endorsement."[261]

---

251. 147 A.D.3d 1558, 1559–60, 47 N.Y.S.3d 825, 827 (4th Dep't), *aff'd*, 29 N.Y.3d 1095, 1097, 81 N.E.3d 379, 379, 58 N.Y.S.3d 896, 896 (2017).

252. *Id.* at 1559, 47 N.Y.S.3d at 827.

253. *Id.*

254. *Id.* (alterations in original) (omissions in original).

255. *Id.*

256. *See Papa*, 147 A.D.3d at 1559, 47 N.Y.S.3d at 827.

257. *Id.* at 1559, 47 N.Y.S.3d at 827–28.

258. *Id.* at 1559, 47 N.Y.S.3d at 827.

259. *Id.* at 1560, 47 N.Y.S.3d at 828 (internal quotations omitted) (quoting Belt Painting Corp. v. TIG Ins. Co., 100 N.Y.2d 377, 383, 795 N.E.2d 15, 17, 763 N.Y.S.2d 790, 792 (2003)).

260. *Id.* (quoting White v. Cont'l Cas. Co., 9 N.Y.3d 264, 267, 878 N.E.2d 1019, 1021, 848 N.Y.S.2d 603, 605 (2007)).

261. *Papa*, 147 A.D.3d at 1560, 47 N.Y.S.3d at 828 (citing Commerce Ctr. P'ship v. Cincinnati Ins. Co., No. 265147, 2006 Mich. App. LEXIS 1608, at *3 (Mich. Ct. App. 2006)).

In another property insurance decision, *Nicastro v. New York Central Mutual Fire Insurance Co.*, the Fourth Department held that the term "claim" was ambiguous within an insurance policy, and thus the carrier was unable to rely upon a replacement cost limitation.[262]

Ryan Nicastro brought a breach of contract action against his insurance company, New York Central Mutual Fire Insurance Company ("Central Mutual"), seeking a declaratory judgment that he was entitled to full replacement cost coverage after a fire destroyed his property.[263] Three days after the fire, Nicastro advised Central Mutual that he "elect[ed] to exercise any replacement cost options, which are or may become available."[264]

Central Mutual refuted any entitlement Nicastro claimed to full replacement cost coverage because he had failed to "make a claim for replacement costs within 180 days of the loss."[265] This failure, Central Mutual contended, made any claim untimely.[266]

The Central Mutual policy included a replacement cost provision providing in part that "[the insured] may make a claim for the actual cash value amount of the loss before repairs are made. A claim for any additional amount payable under this provision must be made within 180 days after the loss."[267] However, the term "claim" was left undefined in the policy.[268]

Nicastro argued that he made a "claim" required by the replacement cost provision three days after the fire by notifying Central Mutual.[269] In response, Central Mutual contended that the provision required a "bona-fide" claim by "actually replacing and actually spending money in excess of the actual cash value within 180 days of the loss."[270] The Fourth Department sided with Nicastro, holding that because the term "claim" was ambiguous, Central Mutual was required, and had failed, to establish that the "only fair construction" of the provision was to require a bona-fide claim for replacement costs as they had argued.[271]

---

262. 148 A.D.3d 1737, 1738–39, 50 N.Y.S.3d 736, 738 (4th Dep't 2017) (citing Harrington v. Amica Mut. Ins. Co., 223 A.D.2d 222, 228, 645 N.Y.S.2d 221, 224–25 (4th Dep't 1996)).

263. *Id.* at 1737–38, 50 N.Y.S.3d at 737.

264. *Id.* at 1738, 50 N.Y.S.3d at 737 (alteration in original).

265. *Id.*

266. *Id.*

267. *Nicastro*, 148 A.D.3d at 1738, 50 N.Y.S.3d at 738.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at 1738–39, 50 N.Y.S.3d at 738 (quoting Harrington v. Amica Mut. Ins. Co., 223 A.D.2d 222, 228, 645 N.Y.S.2d 221, 224–25 (4th Dep't 1996)).

VIII. Bar on Recovery of Affirmative Action Expenses

In *Zelasko Construction Inc. v. Merchants Mutual Insurance Co.*, the Fourth Department partially reversed a supreme court order that had, inter alia, granted attorneys' fees to the plaintiff as consequential damages following the insurer's breach of payment obligations in a commercial auto policy.[272]

Zelasko Construction, Inc. ("Zelasko") was the insured under a commercial auto insurance policy issued by Merchants Mutual Insurance Company ("Merchants").[273] When Merchants refused coverage under a "physical damage" provision in the policy, Zelasko sued Merchants for breach of its payment obligations, and requested, among other damages, the reimbursement of attorneys' fees accumulated during this affirmative action.[274] The supreme court agreed with Zelasko on Merchants' coverage obligations and awarded attorneys' fees for the affirmative action, which was ultimately appealed by Merchants.[275]

The Fourth Department, in reaching its decision to partially reverse, concluded that the case was "governed by the general rule that attorneys' fees and other litigation expenses are 'incidents of litigation' that the prevailing party may not collect 'from the loser unless an award is authorized by agreement between the parties or by statute or court rule.'"[276] Moreover, "it is well established that 'an insured may not recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy.'"[277]

The commercial auto policy issued by Merchants did not obligate the insurer to indemnify Zelasko for fees incurred in prosecuting an action to enforce the policy's coverage provisions.[278] Furthermore, Zelasko failed to establish that any court rule or statute authorized it to

---

272. (*Zelasko II*), 142 A.D.3d 1328, 1328–29, 38 N.Y.S.3d 643, 644 (4th Dep't 2016).

273. *Id.* at 1328, 38 N.Y.S.3d at 644.

274. *Id.* at 1328–29, 38 N.Y.S.3d at 644.

275. Zelasko Constr., Inc. v. Merchs. Mut. Ins. Co., No. 2007-011654, 2014 WL 12775225, at *1 (Sup. Ct. Erie Cty. Dec. 12, 2014), *rev'd in part*, 142 A.D.3d 1328, 1328, 38 N.Y.S.3d 643, 644 (4th Dep't 2016).

276. *Zelasko II*, 142 A.D.3d at 1329, 38 N.Y.S.3d at 644 (quoting A.G. Ship Maint. Corp. v. Lezak, 69 N.Y.2d 1, 5, 503 N.E.2d 681, 683, 511 N.Y.S.2d 216, 218 (1986)) (first citing Mt. Vernon City Sch. Dist. v. Nova Cas. Co., 19 N.Y.3d 28, 39, 968 N.E.2d 439, 447, 945 N.Y.S.2d 202, 210 (2012); and then citing Wharton Assoc. v. Cont'l Indus. Capital LLC, 137 A.D.3d 1753, 1755, 29 N.Y.S.3d 717, 719 (4th Dep't 2016)).

277. *Id.* (quoting N.Y. Univ. v. Cont'l Ins. Co., 87 N.Y.2d 308, 324, 662 N.E.2d 763, 772, 639 N.Y.S.2d 283, 292 (1995)) (first citing U.S. Underwriters Ins. Co. v. City Club Hotel, LLC, 3 N.Y.3d 592, 597, 822 N.E.2d 777, 780, 789 N.Y.S.2d 470, 473 (2004); and then citing Mighty Midgets, Inc. v. Centennial Ins. Co., 47 N.Y.2d 12, 21, 389 N.E.2d 1080, 1085, 416 N.Y.S.2d 559, 564 (1979)).

278. *Id.*

recover fees from Merchants.[279]

In addition, the Fourth Department established that the holdings in *Bi-Economy Market Inc. v. Harleysville Insurance Company of New York*[280] and *Panasia Estates Inc. v. Hudson Insurance Co.*,[281] (both decided on February 19, 2008) concerning the entitlement of an insured to consequential damages after a breach of an insurance policy, did not require a different outcome in this case.[282] The record did not indicate that Merchants breached the implied covenant of good faith and fair dealing, nor acted otherwise in bad faith toward Zelasko.[283] Moreover, there was no indication that, at the time of the contract formation, recovery of attorneys' fees by Zelasko was contemplated by either party as a foreseeable consequence of a breach.[284]

Because the request for attorneys' fees was meritless, the Fourth Department granted Merchants' motion for summary judgment, and dismissed that part of Zelasko's complaint outright.[285]

CONCLUSION

The cases this year reveal the courts' continued struggle to balance the interests of insurers and insureds while at the same time applying appropriate and logical interpretations to the agreements these parties entered into with each other. We anticipate that in the next year the courts will attempt to provide more definitive guidance on the scope of disclosure of claims file and insurer's investigation materials, and that the courts will wrestle with how to determine a loss's proximate cause and whether the result comes down closer to a "but for" connection or negligence trigger.

279. *Id.*

280. 10 N.Y.3d 187, 192, 886 N.E.2d 127, 129–30, 856 N.Y.S.2d 505, 507–08 (2008).

281. 10 N.Y.3d 200, 203, 886 N.E.2d 135, 137, 856 N.Y.S.2d 513, 515 (2008).

282. *Zelasko II*, 142 A.D.3d at 1329, 38 N.Y.S.3d at 644 (first citing Pandarakalam v. Liberty Mut. Ins. Co., 137 A.D.3d 1234, 1235–36, 29 N.Y.S.3d 413, 415 (2d Dep't 2016); and then citing O'Keefe v. Allstate Ins. Co., 90 A.D.3d 725, 726, 934 N.Y.S.2d 481, 483 (2d Dep't 2011)).

283. *Id.* at 1329, 38 N.Y.S.3d at 644–45 (first citing *Panasia Estates, Inc.*, 10 N.Y.3d at 203, 886 N.E.2d at 136–37, 856 N.Y.S.2d at 514–15; and then citing *Bi-Economy Mkt., Inc.*, 10 N.Y.3d at 194–96, 886 N.E.2d at 131–32, 856 N.Y.S.2d at 509–10).

284. *Id.* at 1329, 38 N.Y.S.3d at 645 (first citing *Bi-Economy Mkt., Inc.*, 10 N.Y.3d at 192–93, 886 N.E.2d at 130–31, 856 N.Y.S.2d at 508; and then citing *Panasia Estates, Inc.*, 10 N.Y.3d at 203, 886 N.E.2d at 136–37, 856 N.Y.S.2d 514–15).

285. *Id.* (citing Merritt Hill Vineyards v. Windy Heights Vineyard, Inc., 61 N.Y.2d 106, 110, 460 N.E.2d 1077, 1080, 472 N.Y.S.2d 592, 595 (1984)).