

## 2018 SURVEY OF NEW YORK INSURANCE LAW

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### CONTENTS

INTRODUCTION .....	852
I. PRIVILEGE .....	852
II. UNTIMELY DISCLAIMERS OF COVERAGE .....	854
III. OUT-OF-STATE INSURERS.....	858
IV. RISK RETENTION GROUPS.....	864
V. REDEYE AND UNTIMELY MOTIONS TO RENEW .....	866
VI. BAD FAITH .....	868
VII. BURLINGTON: THE AFTERMATH.....	870
VIII. ALTER EGO AND WORKERS' COMPENSATION EXCLUSIVITY .....	874
IX. LONG-TAIL CLAIMS .....	877
X. "WEAR AND TEAR" EXCLUSION .....	885
XI. "ACCIDENTAL" VS "INTENTIONAL" .....	887
XII. APPRAISAL AMIDST A COVERAGE DISPUTE .....	894
XIII. THE YEAR IN REVIEW.....	895

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## INTRODUCTION

This year the courts in New York have resolved some questions of policy interpretation while creating new ones. The most significant New York appellate insurance decisions this past year have focused on the scope of Insurance Law § 3420(d) and apportioning losses in long tail claims. New York's highest court, the Court of Appeals, meaningfully increased the number of policies potentially subject to the strict requirements of § 3420(d) by determining that the statute applies not only to policies issued to insureds that have offices in New York or insureds who received their policies in New York, but also encompasses situations where both insureds and risks are located in New York State. Secondly, we have seen the Court clarify that under the pro-rata, time-on-the-risk method of allocation, an insurer is not liable for years outside of its policy period where there was no applicable insurance coverage on the market. Other interesting questions relating to the aftermath of *Burlington Insurance Co. v. New York City Transit Authority*,<sup>1</sup> the application of the wear and tear exclusion, the continued attacks on privilege and long tail claims add to this year's reported cases. We once again offer you a *Survey* of the most noteworthy cases over the last year.

## I. PRIVILEGE

Attorneys and carriers must constantly be mindful of, and act accordingly, in order to protect the ever-shrinking privilege that continues to exist between them amid a sustained and steadfast assault on such.<sup>2</sup> One specific area where attorneys should be mindful is in regard to their role in investigation of a claim prior to disclaimer or rescission. An important Appellate Division, Fourth Department decision in *Celani v. Allstate Indemnity Co.* held that pre-disclaimer claim notes were discoverable.<sup>3</sup> Importantly, however, the Fourth Department maintained that coverage counsel's legal opinion and associated pre-disclaimer notes were "absolutely privileged."<sup>4</sup>

In July 2010, Louis Territo's minor daughter, Maria Territo, was accidentally shot by a firearm that Mr. Territo owned.<sup>5</sup> Maria's mother, Mary Ann Celani, filed suit individually, and on behalf of her daughter

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1. 29 N.Y.3d 313, 79 N.E.3d 477, 57 N.Y.S.3d 85 (2017).

2. See Dan. D. Kohane & Jennifer A. Ehman, *Insurance Law*, 68 SYRACUSE L. REV. 914, 914-17 (2018).

3. (*Celani II*), 155 A.D.3d 1524, 1525, 64 N.Y.S.3d 793, 795 (4th Dep't 2017).

4. *Id.* at 1526, 64 N.Y.S.3d at 795.

5. *Id.* at 1525, 64 N.Y.S.3d at 794.

against Mr. Territo.<sup>6</sup> Allstate Indemnity Company (“Allstate”) had issued a homeowner’s insurance policy to Mr. Territo (the “Allstate Policy”).<sup>7</sup> Ms. Celani filed a claim with Allstate on her daughter’s behalf.<sup>8</sup> Allstate disclaimed coverage under an insured versus insured exclusion.<sup>9</sup> In an amended complaint, the plaintiff alleged that her daughter’s injuries were caused by Mr. Territo’s negligence, and that Allstate had agreed to indemnify Mr. Territo for such bodily injury under the terms of the policy.<sup>10</sup>

Sometime thereafter, Ms. Celani filed a motion to compel disclosure of Allstate’s entire claim file, “including a legal opinion prepared by [the] defendant’s outside counsel and a claim investigation manual prepared by [the] defendant’s employees.”<sup>11</sup> Unsurprisingly, Allstate cross-moved for a protective order.<sup>12</sup> The supreme court granted Ms. Celani’s motion in its entirety and denied Allstate’s cross motion.<sup>13</sup>

The Fourth Department affirmed the decision of the supreme court as to its order to disclose pre-disclaimer claim notes that contained statements made by Mr. Territo to Allstate’s investigators prior to Allstate’s decision to disclaim coverage, and upon which Allstate ultimately based its decision to disclaim.<sup>14</sup> “Accident reports prepared in the ordinary course of business that were motivated at least in part by a business concern other than preparation for litigation” require full disclosure.<sup>15</sup>

Importantly, the Fourth Department reversed the decision of the lower court regarding compelled disclosure of an outside counsel’s pre-disclaimer legal opinion and associated claim notes by Allstate.<sup>16</sup>

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6. *Celani v. Allstate Indem. Co. (Celani I)*, No. 804070/2013, 2016 WL 10828177, at \*1 (Sup. Ct. Erie Cty. Dec. 7, 2016), *aff’d*, *Cellani II*, 155 A.D.3d 1524, 64 N.Y.S.3d 793 (4th Dep’t 2017).

7. *Celani II*, 155 A.D.3d at 1525, 64 N.Y.S.3d at 794.

8. *Id.*

9. *Id.*

10. *Id.* at 1525, 64 N.Y.S.3d at 794–95.

11. *Id.* at 1525, 64 N.Y.S.3d at 795; *Celani I*, 2016 WL 10828177, at \*1.

12. *Celani I*, 2016 WL 10828177, at \*1.

13. *Celani II*, 155 A.D.3d at 1525, 64 N.Y.S.3d at 795.

14. *Id.* at 1525–26, 64 N.Y.S.3d at 795.

15. *Id.* at 1525, 64 N.Y.S.3d at 795 (quoting *Calkins v. Perry*, 168 A.D.2d 999, 999, 564 N.Y.S.2d 943, 943 (4th Dep’t 2017)) (citing *Beaumont v. Smyth*, 306 A.D.2d 921, 921, 762 N.Y.S.2d 317, 317 (4th Dep’t 2003)).

16. *Id.* at 1526, 64 N.Y.S.3d at 795. Not to be lost, the Fourth Department also reversed the lower court’s decision to compel disclosure of Allstate’s reserve information, and, without first conducting in camera review, Allstate’s claim investigation manual. *Id.* (first citing N.Y. C.P.L.R. 3101 (a) (McKinney 2018); and then citing *40 Rector Holdings, LLC v. Travelers Indem. Co.*, 40 A.D.3d 482, 482–83, 836 N.Y.S.2d 173, 174 (1st Dep’t 2007)).

Documents prepared by an attorney that are “primarily and predominantly of a legal character,” are not reports prepared in the regular course of business if made to furnish legal services, “regardless of whether there was pending litigation at the time they were prepared.”<sup>17</sup>

## II. UNTIMELY DISCLAIMERS OF COVERAGE

The Appellate Division, Second Department in *Mazl Building, LLC v. Greenwich Insurance Co.* held that a carrier who had undertaken a defense for four years after discovering grounds for denial of coverage had waived the right to do so under the doctrine of equitable estoppel.<sup>18</sup>

In January 2006, Mazl Building, LLC (“Mazl”) retained Rovatele Elevator, Inc. (“Rovatele”) to renovate the elevators in a building it owned.<sup>19</sup> In compliance with certain contractual requirements, Rovatele procured a policy of insurance issued by Greenwich Insurance Company (“Greenwich”).<sup>20</sup> Mazl was listed as an additional insured under that policy.<sup>21</sup> In October 2006, Joseph Samaroo sustained injuries while working on this elevator renovation project, and sued Mazl and others (the “underlying action”).<sup>22</sup> Greenwich undertook the defense of Mazl as an additional insured in February 2008 and continued defending Mazl until 2013 where it suddenly issued a disclaimer of coverage following jury selection.<sup>23</sup> In disclaiming, Greenwich cited information it had obtained in 2009 indicating that Mazl had, in fact, assigned its right to additional insured status under the Rovatele contract to another entity as early as March 2006.<sup>24</sup> The underlying action ultimately settled, with Mazl agreeing to pay \$250,000.<sup>25</sup>

Mazl subsequently commenced this action seeking recoupment of the settlement funds, as well as defense costs incurred in the underlying

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17. *Id.* (quoting *Spectrum Sys. Int’l. Corp. v. Chemical Bank*, 78 N.Y.2d 371, 378, 581 N.E.2d 1055, 1060, 575 N.Y.S.2d 809, 814 (1991)) (citing *VGFC Realty II, LLC v. D’Angelo*, 114 A.D.3d 765, 765–66, 980 N.Y.S.2d 505, 506 (2d Dep’t 2014)).

18. (*Mazl II*), 162 A.D.3d 655, 657, 78 N.Y.S.3d 390, 392–93 (2d Dep’t 2018).

19. *Id.* at 656, 78 N.Y.S.3d at 392.

20. *Id.*

21. *Id.*

22. *Samaroo v. Patmos Fifth Real Estate, Inc.*, No. 37170/06, N.Y. Slip Op. 51217(U), at 1–2, 5 (Sup. Ct. Kings Cty. June 30, 2011), *aff’d*, 102 A.D.3d 944, 959 N.Y.S.2d 229 (2d Dep’t 2013).

23. *Mazl Bldg. LLC v. Greenwich Ins. Co. (Mazl I)*, No. 11434/2013, 2016 WL 11508185, at \*2 (Sup. Ct. Nassau Cty. Jan. 6, 2016), *aff’d, Mazl II*, 162 A.D.3d 655, 78 N.Y.S.3d 390 (2d Dep’t 2018).

24. *Id.*

25. *Id.*

action.<sup>26</sup> Mazl was granted summary judgment by the supreme court with respect to its claims involving estoppel due to the untimely nature of Greenwich's disclaimer of coverage.<sup>27</sup> The Second Department agreed.<sup>28</sup> Because Greenwich had learned by 2009 that Mazl had assigned its rights under the Rovatele contract to additional insured status, and, despite that knowledge, continued to control Mazl's defense in the underlying action for almost four years before issuing a coverage disclaimer, "estoppel [barred] them from denying coverage under the circumstances of this case."<sup>29</sup>

Unlike the case above, most untimely disclaimer cases involve a reading of Insurance Law § 3420(d)(2), which requires that disclaimers based upon exclusions and breaches of policy conditions for policies issued or delivered in New York be issued as soon as is reasonably possible.<sup>30</sup> The U.S. Court of Appeals for the Second Circuit in *Citizens Insurance Co. v. Risen Foods, LLC* analyzed an interesting wrinkle involving the disclaimer of excess coverage where the primary carrier timely disclaimed for lack of "inclusion."<sup>31</sup>

In April 2013, a van owned by Risen Foods, LLC ("Risen") and driven by a Risen employee collided with a truck driven by Jason Tanner.<sup>32</sup> Later that year, Tanner and his wife sued Risen and its employee-driver for Tanner's injuries and loss of services (the "underlying action").<sup>33</sup>

The Risen vehicle was insured under a State Farm Insurance Company ("State Farm") issued commercial auto policy.<sup>34</sup> State Farm provided defense and indemnity coverage to both Risen and its driver.<sup>35</sup> Additionally, Citizens Insurance Company ("Citizens") issued a

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26. *Id.* at \*1.

27. *Id.* at \*4–5.

28. *Mazl II*, 162 A.D.3d at 657, 78 N.Y.S.3d at 393.

29. *Id.* at 658, 78 N.Y.S.3d at 393 (first citing *Daimler Chrysler Ins. Co. v. Zurich Ins. Co.*, 72 A.D.3d 730, 732, 899 N.Y.S.3d 310, 311 (2d Dep't 2010); then citing *Brooklyn Hosp. Ctr. v. Centennial Ins. Co.*, 258 A.D.2d 491, 491–92, 685 N.Y.S.2d 267, 268–69 (2d Dep't 1998); then citing *Indemnity Ins. Co. v. Charter Oak Ins. Co.*, 235 A.D.2d 521, 522, 653 N.Y.S.2d 135, 136–37 (2d Dep't 1997); and then citing *Touchette Corp. v. Merchants Mut. Ins. Co.*, 76 A.D.2d 7, 12, 429 N.Y.S.2d 952, 955 (4d Dep't 1980)).

30. N.Y. INS. LAW § 3420 (d)(2) (McKinney 2015).

31. *See generally* (*Citizens II*), 880 F.3d 73 (2d Cir. 2018) (finding that because no coverage existed by reason of lack of inclusion, no notice of disclaimer was required).

32. *Id.* at 74.

33. *Id.*

34. *Id.*

35. *Id.*

businessowners policy to Risen along with an umbrella policy.<sup>36</sup>

In May 2013, Risen placed Citizens on notice of the accident, stating that its auto insurance carrier had been notified.<sup>37</sup> During the ensuing phone conversation, the individual that reported the accident provided only the Citizens umbrella policy number.<sup>38</sup> After being placed on notice, and assuming that Risen only sought coverage under the umbrella policy, Citizens disclaimed coverage under that policy because the State Farm policy was not listed on the umbrella policy's schedule of underlying policies.<sup>39</sup>

In April 2014, Citizen filed a declaratory judgment action against Risen and its employee-driver, as well as the Tanners, seeking a judicial declaration that it had no duty to defend or indemnify Risen or its employee under either its businessowners policy or the umbrella policy.<sup>40</sup>

The Second Circuit agreed with the district court in holding that Risen had provided timely notice of the accident to Citizens under both the businessowners and umbrella policies.<sup>41</sup> Since both policies issued by Citizens used the same policy number, Risen provided notice for claims under both when he gave that policy number in reference to the underlying claim.<sup>42</sup>

However, the Second Circuit disagreed with the district court's assessment of the defense and indemnity obligations of Citizen's under either the businessowners or umbrella policies.<sup>43</sup> Relying on the Second Circuit holding in *NGM Insurance Co. v. Blakely Pumping, Inc.*,<sup>44</sup> the court made note that "[d]etermin[ing] whether there is no coverage by reason of exclusion as opposed to lack of inclusion can be problematic."<sup>45</sup> The holding in *NGM*, ruling on operative language identical to that at issue in the *Citizens*, stated:

The Endorsement did not generally cover auto accidents; it covered only accidents arising from the use of a "Hired Auto" or "Non-Owned

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36. *Citizens II*, 880 F.3d at 74.

37. *Id.* at 76.

38. *Id.*

39. *Id.* Citizens disclaimed for this reason first upon receiving Risen's initial claim and again upon receipt of the underlying complaint forwarded by Risen. *Id.* at 76–77.

40. *Citizens Ins. Co. of Am. v. Risen Foods, LLC (Citizens I)*, No. 14-0493 (BKS/ATB), 2016 U.S. Dist. LEXIS 192538, at \*1 (N.D.N.Y. Nov. 23, 2016), *aff'd*, *Citizens II*, 880 F.3d 73 (2d Cir. 2018).

41. *Citizens II*, 880 F.3d at 77; *Citizens I*, 2016 U.S. Dist. LEXIS 192538, at \*41–42.

42. *Id.* at 77–78.

43. *Id.* at 78.

44. *See* 593 F.3d 150, 155 (2d Cir. 2010).

45. *Citizens II*, 880 F.3d at 78 (alterations in original) (internal quotations omitted) (quoting *NGM*, 593 F.3d at 153).

Auto.” Those terms were defined in such a way that an employee’s or officer’s vehicle, like [the insured’s] pick-up truck, could *never* be covered. . . . In short, there was no coverage “by reason of lack of inclusion,” and thus no notice of disclaimer was required.<sup>46</sup>

Continuing, the NGM decision noted that “notice is not required where there is no coverage by reason of lack of inclusion.”<sup>47</sup>

The district court, in essence, misunderstood Citizen’s argument that the auto exclusion was redundant given the lack of coverage for owned autos to begin with, construing it as if Citizens’ had argued the exclusion was meaningless.<sup>48</sup> Because no coverage existed, there was no need for the exclusion to operate, and thus no required timely disclaimer of coverage.<sup>49</sup>

For an interesting and quick read on the necessity of timely disclaimer based upon a policy exclusion, the Second Department’s brief decision in *Kemper Independence Insurance Co. v. Brennan* shows the importance of meeting the requirements of Insurance Law § 3420(d)(2).<sup>50</sup>

In April 2012, William Brennan was involved in a two car accident when his vehicle was struck by another vehicle owned by Hertz Vehicles (“Hertz”) and operated by Steven Lax.<sup>51</sup> Brennan sued Lax and Hertz to recover damages for his injuries resulting from the accident.<sup>52</sup> Brennan made a claim to Kemper Independence Insurance Company (“Kemper”), his personal auto insurer, for supplemental underinsured motorists coverage (SUM).<sup>53</sup> In the instant proceeding, Kemper sought to permanently stay arbitration of the SUM matter due to Lax being listed as an insured on an auto policy issued by American Commerce Insurance Company (ACIC).<sup>54</sup>

Following a framed-issue hearing on the matter, the supreme court properly concluded that ACIC had failed to timely disclaim coverage for

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46. *NGM*, 593 F.3d at 154 (quoting *Zappone v. Home Ins. Co.*, 55 N.Y.2d 131, 137, 432 N.E.2d 783, 786, 447 N.Y.S.2d 911, 914 (1982)); *see also Citizens II*, 880 F.3d at 78 (quoting *NGM*, 593 F.3d at 154).

47. *NGM*, 593 F.3d at 153 (citing *Zappone*, 55 N.Y.2d at 137, 432 N.E.2d at 786, 447 N.Y.S.2d at 914).

48. *Citizens II*, 880 F.3d at 79 (quoting Memorandum-Decision and Order at 21, *Citizens I*, No. 14-0493 (BKS/ATB), 2016 U.S. Dist. LEXIS 192538 (N.D.N.Y. Nov. 23, 2016)).

49. *Id.* (citing *Zappone*, 55 N.Y.2d at 134, 432 N.E.2d at 785, 447 N.Y.S.2d at 913).

50. 155 A.D.3d 953, 953, 64 N.Y.S.3d 125, 126 (2d Dep’t 2017); *see also* N.Y. INS. LAW § 3420(d)(2) (McKinney 2015).

51. *Kemper*, 155 A.D.3d at 953–54, 64 N.Y.S.3d at 126.

52. *Id.* at 954, 64 N.Y.S.3d at 126.

53. *Id.*

54. *Id.*

Lax pursuant to a policy exclusion.<sup>55</sup> As such, Lax was eligible for coverage as an insured under that policy.<sup>56</sup> Because coverage was available on an auto policy insuring Lax, Kemper was eligible for its requested stay of arbitration regarding SUM coverage until ACIC had exhausted its limits of insurance in indemnifying Lax for any liability owed to Brennan.<sup>57</sup> Where ACIC may have owed no coverage whatsoever, its failure to timely disclaim coverage based upon an exclusion potentially reduced Kemper's exposure for SUM coverage owed to Brennan.<sup>58</sup>

### III. OUT-OF-STATE INSURERS

During this *Survey* period, the Court of Appeals imposed significant requirements on out-of-state insurers issuing policies anywhere in the country, covering New York risks if an insured has a substantial business presence in New York. Following the holding by the Court of Appeals in *Carlson v. American International Group, Inc.*, out-of-state insurers must learn how to avoid statutory penalties for failure to follow New York rules requiring prompt disclaimers, notice and copying requirements, and avoidance of reservation of rights language.<sup>59</sup>

William Porter, an employee of MVP Delivery and Logistics, Inc. ("MVP"), was driving a truck owned by his employer when he crossed a double-yellow divider and struck Claudia Carlson's vehicle head on, killing her.<sup>60</sup> Although the truck was owned by MVP, it was painted with a DHL Worldwide Express, Inc. ("DHL") logo as part of a cartage agreement between the two entities, whereby MVP agreed to furnish trucks and employees to perform DHL's package delivery services in Western New York.<sup>61</sup> Although the *Carlson* decision involved the construction of numerous policies in light of five separate causes of action and several carrier-defendants,<sup>62</sup> the relevant policy for our purposes was a two million dollar excess policy issued by American Alternative Insurance Co. (AAIC) to DHL (the "AAIC Policy").<sup>63</sup> The

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55. *Id.* at 954, 64 N.Y.S.3d at 127.

56. *Kemper*, 155 A.D.3d at 954, 64 N.Y.S.3d at 127 (citing *Handelsman v. Sea Ins. Co.*, 85 N.Y.2d 96, 100, 647 N.E.2d 1258, 1259–60, 632 N.Y.S.2d 750, 751–52 (1994)).

57. *Id.*

58. *See id.* at 954, 64 N.Y.S.3d at 126.

59. *See (Carlson II)*, 30 N.Y.3d 288, 309, 89 N.E.3d 490, 503, 67 N.Y.S.3d 100, 113 (2017) (citing N.Y. INS. LAW § 3420 (McKinney 2015)).

60. *Id.* at 296, 89 N.E.3d at 493, 67 N.Y.S.3d at 103.

61. *Id.* at 296, 89 N.E.3d at 493–94, 67 N.Y.S.3d at 103–04.

62. *Id.* at 296, 89 N.E.3d at 494, 67 N.Y.S.3d at 104.

63. *Id.*



AAIC Policy was issued in New Jersey and delivered to DHL's predecessor, Airborne Inc., headquartered in Washington, and then to DHL, headquartered in Florida.<sup>64</sup>

In the Fourth Department, the cause of action against AAIC concerning the payment of a judgment was dismissed pursuant to Insurance Law § 3420 (a)(2) and (b).<sup>65</sup> The Fourth Department held that the "plaintiff may not recover against AAIC pursuant to [§] 3420 (a)(2) because the policy was not 'issued or delivered in this state.'"<sup>66</sup>

However, the Court of Appeals disagreed. The Court of Appeals held that the term "issued or delivered" in New York applies not only to policies issued to insureds that have offices in New York or insureds who received their policies in New York, but also encompasses situations where both insureds and risks are located in New York State.<sup>67</sup> The Court found support in a prior decision, *Preserver Insurance Co. v. Ryba*, which had interpreted the former Insurance Law § 3420(d) language "'issued for delivery' in New York," construing it to mean "where the risk to be insured was located—not where the policy document itself was actually handed over or mailed to the insured."<sup>68</sup> Following *Preserver*, the Court believed "that DHL is 'located in' New York because it has a substantial business presence and creates risks in New York. It is even clearer that DHL purchased liability insurance covering vehicle-related risks arising from vehicles delivering its packages in New York, because [the AAIC Policy] say[s] so."<sup>69</sup>

In downplaying the plain language differences between "issued or delivered" and "issued for delivery," the majority partially justified its liberal construction of the language in New York Insurance Law [§] 3420(a) by stating that "'issued or delivered' is facially broader than 'issued for delivery.'"<sup>70</sup> The dissent was quick to point out that "the *Preserver* Court was not only aware of the distinction between the two phrases—'issued for delivery' and 'issued or delivered'—but relied on that distinction in defining 'issued for delivery.'"<sup>71</sup> In holding that "issued

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64. *Carlson II*, 30 N.Y.3d at 297, 305, 89 N.E.3d at 494, 500, 67 N.Y.S.3d at 104, 110.

65. *Carlson v. American Int'l Group, Inc. (Carlson I)*, 130 A.D.3d 1477, 1477, 16 N.Y.S.3d 637, 638 (4th Dep't 2015), *aff'd as modified*, *Carlson II*, 30 N.Y.3d 288, 89 N.E.3d 490, 67 N.Y.S.3d 100 (2017).

66. *Id.* (quoting *Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350, 352, 820 N.E.2d 855, 856, 787 N.Y.S.2d 211, 212 (2004)).

67. *Carlson II*, 30 N.Y.3d at 305, 89 N.E.3d at 500, 67 N.Y.S.3d at 110.

68. *Id.* at 306, 89 N.E.3d at 501, 67 N.Y.S.3d at 111 (emphasis added) (citing 10 N.Y.3d 635, 642, 893 N.E.2d 97, 100–01, 862 N.Y.S.2d 820, 823–24 (2008)).

69. *Id.*

70. *Id.* at 307, 89 N.E.3d at 502, 67 N.Y.S.3d at 112.

71. *Id.* at 321, 89 N.E.3d at 512, 67 N.Y.S.3d at 122 (Garcia, J., dissenting).

for delivery” covered both insureds and risks in New York, the *Preserver* Court cited *American Ref-Fuel Co. of Hempstead v. Employers Insurance Co. of Wausau*,<sup>72</sup> which clearly notes that “the language . . . ‘delivered or issued for delivery in this [S]tate’ differs from the language in . . . Insurance Law [§] 3420(a), applicable to policies ‘issued or delivered in this [S]tate.’”<sup>73</sup>

In framing the majority opinion, the dissent argued that the majority’s purported limitation on its holding to policies that cover both insureds and risks located in New York raises more questions than answers.<sup>74</sup>

[W]hat will occur when an out-of-state resident owns property in New York, or works in New York, or simply vacations regularly in New York, and drives a vehicle into the state? Will the out-of-state insurers of an insurance policy delivered out of state be subject to direct suit in New York under such circumstances? It would appear so under the majority’s interpretation.<sup>75</sup>

The dissent offered cautionary language that is instructive and suggests frightening consequences:

[I]t is hardly plausible that the legislature intended to require every automobile insurer throughout the country—regardless of where the policy was issued or delivered—to comply with New York insurance statutes on the chance that the insured vehicle may be driven into New York. Given that many of the provisions of [Insurance Law §] 3420 governing policies issued or delivered in the state govern the relationship between the insured and the insurer, it is also hardly plausible that the New York Legislature intended to dictate the relationship between out-of-state insureds and out-of-state insurers.<sup>76</sup>

In the first New York appellate division case to apply the *Carlson* holding, few questions have been answered. In *Vista Engineering Corp. v. Everest Indemnity Insurance Co.*, New York’s First Department left us

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72. See *Preserver*, 10 N.Y.3d at 642, 893 N.E.2d at 100, 862 N.Y.S.2d at 823 (first citing *Columbia Cas. Co. v. Nat’l Emergency Servs.*, 282 A.D.2d 346, 347, 723 N.Y.S.2d 473, 474 (1st Dep’t 2001); and then citing 265 A.D.2d 49, 53, 705 N.Y.S.2d 67, 71 (2d Dep’t 2000)).

73. *Am. Ref-Fuel*, 265 A.D.2d at 52, 705 N.Y.S.2d at 70 (first and third alterations in original) (first citing *Aperm of Florida, Inc. v. Trans-Coastal Maint. Co.*, 505 So.2d 459, 462 (Fla. Dist. Ct. App. 1987); and then citing *Am. Cont’l Props. v. Nat’l Union Fire Ins. Co.*, 200 A.D.2d 443, 446–47, 608 N.Y.S.2d 807, 809 (1st Dep’t 1994)). “[I]f it is found that the policy was written to cover risks that would occur in Florida, then it will be assumed the policy was issued for delivery in Florida.” *Aperm*, 505 So.2d at 462.

74. *Carlson II*, 30 N.Y.3d at 324 n.8, 89 N.E.3d at 514 n.8, 67 N.Y.S.3d at 124 n.8 (Garcia, J., dissenting).

75. *Id.*

76. *Id.* at 323–24, 89 N.E.3d at 514, 67 N.Y.S.3d at 124 (Garcia, J., dissenting).

wondering what exactly the Court of Appeals meant by “substantial business presence” when determining if a company is “located in” New York.<sup>77</sup>

Vista Engineering Corporation (“Vista”), the general contractor performing work on the Queensboro Plaza subway station, subcontracted with East Coast Painting (“East Coast”), headquartered in New Jersey.<sup>78</sup> Pursuant to the contract, East Coast was required to procure insurance naming Vista and the New York City Transit Authority (NYCTA) as additional insureds, which was ultimately obtained through Everest Indemnity Insurance Company (“Everest”).<sup>79</sup> Everest is headquartered in New Jersey.<sup>80</sup>

In June 2011, an employee of East Coast, Louis Soto, was injured while working on the Queensboro Plaza subway station when he fell from a ladder.<sup>81</sup> Soto filed a lawsuit against Vista, who in turn tendered its defense and indemnification to Everest through East Coast’s broker.<sup>82</sup> Everest acknowledged receipt of tender on September 20, 2011, and subsequently disclaimed coverage on November 17, 2011 pursuant to the policy’s “Third Party Action Over” exclusion.<sup>83</sup>

Challenging the Everest disclaimer of coverage as untimely under Insurance Law § 3420(d)(2), and thus invalid, Vista filed this declaratory judgment action seeking a declaration that Everest’s duty to defend it in the underlying lawsuit had been triggered, and moved for summary judgment.<sup>84</sup> Cross-moving for summary judgment, Everest contended that “[§] 3420(d)(2) applies only to insurance policies ‘issued or delivered’ in New York. Everest argued that it is a New Jersey insurer and that it issued the policy to East Coast, a New Jersey company, and that therefore the policy was not ‘issued or delivered’ in New York.”<sup>85</sup>

Following the completion of briefing by both parties in early November 2017, the New York Court of Appeals rendered its decision in

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77. *See generally* 161 A.D.3d 596, 78 N.Y.S.3d 43 (1st Dep’t 2018) (remanding for further development of the record as to the “substantial business presence” of the company).

78. *Id.* at 596–97, 78 N.Y.S.3d at 44.

79. *Id.* at 597, 78 N.Y.S.3d at 44.

80. *Id.*

81. *Id.* at 601, 78 N.Y.S.3d at 47 (Andrias, J.P., dissenting).

82. *Vista*, 161 A.D.3d at 601–02, 78 N.Y.S.3d at 47–48.

83. *Id.* at 602, 78 N.Y.S.3d at 48.

84. *Id.*; *see also* N.Y. INS. LAW § 3420(d)(2) (McKinney 2015) (“If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a[n] . . . accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.”).

85. *Vista*, 161 A.D.3d at 597, 78 N.Y.S.3d at 44.

*Carlson*, holding that the applicability of § 3420(d)(2) depends on “(1) a policy covering risks located in New York, and (2) the insured being located in New York,” and finding that a company was “‘located in’ New York if it had a ‘substantial business presence’ there.”<sup>86</sup>

The First Department determined that the first prong of the *Carlson* test, concerning whether the policy covered risks in New York, was clearly satisfied because the Queensboro Plaza project located in New York State was among risks covered by the Everest Policy.<sup>87</sup>

However, the First Department remanded for clarification regarding the second prong of the *Carlson* test, concerning whether the insured was located in New York, and more specifically, if it had a “substantial business presence” there.<sup>88</sup> On appeal, the record contained only “some indicia that East Coast had a substantial business presence in New York,” and was thus insufficient for the First Department to decide on appeal.<sup>89</sup> Although the record showed that “[t]he payment under the subcontract was for \$982,500, and there is email correspondence that the Queensboro Plaza project was East Coast’s ‘main job,’” the original sources of these emails never submitted affidavits to describe their roles, nor were the emails themselves authenticated as a business record.<sup>90</sup> The lack of a concrete definition of “substantial business presence” by the *Carlson* Court, paired with the limited information available on the record, led to the First Department’s decision to remand.<sup>91</sup>

For now, we can only offer suggestions as to how out-of-state insurers should respond post-*Carlson*, such as the scenario presented in *Vista* above. When an insurer is placed on notice about a New York bodily injury or wrongful death accident, it must act quickly and respond properly.

The insurer must determine whether its insured is “located in New York.” The Court of Appeals in *Carlson* found that DHL was “located

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86. *Id.* at 598, 78 N.Y.S.3d at 44 (quoting *Carlson II*, 30 N.Y.3d 288, 306, 89 N.E.3d 490, 501, 67 N.Y.S.3d 100, 111 (2017)). Interestingly, the First Department characterized as dicta the part of the *Carlson* Court’s reasoning that “the legislature did not intend that a company ‘doing business in New York’ be able to evade the Insurance Law.” *Id.* at 598, 78 N.Y.S.3d at 45 (quoting *Carlson II*, 30 N.Y.3d at 309, 89 N.E.3d at 503, 67 N.Y.S.3d at 113).

87. *Id.*

88. *Id.*

89. *Vista*, 161 A.D.3d at 599, 78 N.Y.S.3d at 45.

90. *Id.* Although the individual that forwarded the email containing this information, Jennifer Connell-Weibelt, submitted an affidavit, she was “an insurance representative for nonparty Environmental Underwriting Solutions (EUS),” and admitted in her affidavit that “EUS was neither an employee nor an agent of Everest, nor did EUS have binding authority from Everest.” *Id.*

91. *Id.* at 599, 78 N.Y.S.3d at 46.

in” New York “because it has a substantial business presence.”<sup>92</sup> How much business must an insured be doing to create a “substantial business presence” remains unclear.<sup>93</sup> Then, the insurer must examine its policy to see if New York risks are covered by policy terms. If the answer to both questions is “yes” or, most importantly, if the answer to both questions is “possibly,” the insurer should err on the side of compliance with Insurance Law § 3420(d)(2).

Under § 3420(d)(2), the insurer should send out a coverage position letter within thirty days, avoiding reservation of rights language in favor of, when necessary, complete or “partial” disclaimer language.<sup>94</sup> Additionally, § 3420(d)(2) requires that, in addition to the insured, the injured party (or their counsel) and any other person, entity or party who might interpose a cross-claim against the insured be copied on this correspondence.<sup>95</sup> Failure to do so, when required, may well result in the loss of the insurer’s ability to rely upon otherwise valid and applicable policy exclusions or the insured’s breach of policy conditions.

Remaining to be decided is the all-important “choice of law” questions that will undoubtedly confront the costs. If a policy was “issued” in New Jersey to a New Jersey company with New York risks, and there was an accident on the New York side of the Holland Tunnel, which law will apply to the “reservation of rights/disclaimer” protocols? Can a New York statute override New Jersey law that may (and does) have different requirements?

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92. *Carlson II*, 30 N.Y.3d 288, 306, 89 N.E.3d 490, 501, 67 N.Y.S.3d 100, 111 (2017).

93. *See Vista*, 161 A.D.3d at 599, 78 N.Y.S.3d at 46 (“Because the *Carlson* Court did not set forth a specific definition of substantial business presence, and because the record is insufficiently developed concerning East Coast’s business presence in New York, we remand to allow the parties to develop the record and give [the] [s]upreme [c]ourt an opportunity to meaningfully review the case in light of *Carlson*.”).

94. *See* N.Y. INS. LAW § 3420(d)(2) (McKinney 2015). While the statute merely provides that the written notice be given “as soon as is reasonably possible,” courts have commonly interpreted the statute’s reasonable time frame requirement to mean thirty days. *See, e.g.*, *Nabutovsky v. Burlington Ins. Co.*, 81 A.D.3d 615, 617, 916 N.Y.S.2d 132, 134 (2d Dep’t 2011) (first citing *Interboro Mut. Indem. Ins. Co. v. Fatsis*, 279 A.D.2d 450, 450, 718 N.Y.S.2d 95, 96 (2d Dep’t 2001); and then citing *Sphere Drake Ins. Co. v. Block 7206 Corp.*, 265 A.D.2d 78, 80–81, 705 N.Y.S.2d 623, 625 (2d Dep’t 2000)); *Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co.*, 27 A.D.3d 84, 90, 806 N.Y.S.2d 53, 58 (1st Dep’t 2005). *But see* *Colony Ins. Co. v. Tudor Ins. Co.*, No. 652031/2016, 2018 N.Y. Misc. LEXIS 4842, at \*22–23 (Sup. Ct. N.Y. Cty. 2018) (citing *Hess v. Nationwide Mut. Ins. Co.*, 273 A.D.2d 689, 690, 709 N.Y.S.2d 701, 703 (3d Dep’t 2000)) (holding that there is no bright-line rule that any delay of thirty days or less is reasonable as a matter of law, and that a delay of more than thirty days is not automatically deemed unreasonable).

95. *See* INS. § 3420(d)(2).

## IV. RISK RETENTION GROUPS

A risk retention group is essentially “any corporation or other limited liability association whose primary activity consists of assuming, and spreading all, or any portion, of the liability exposure of its group members,” which is organized primarily for that purpose, and “whose members are engaged in businesses or activities similar or related with respect to the liability to which such members are exposed by virtue of any related, similar, or common business, trade, product, services, premises, or operations.”<sup>96</sup> An interesting case in the First Department, *Nadkos, Inc. v. Preferred Contractors Insurance Company Risk Retention Group LLC*, provided insight into the limitations imposed by the Liability Risk Retention Act of 1986 (LRRRA) on the applicability of certain New York Insurance Law provisions to foreign risk retention groups (RRGs).<sup>97</sup>

In May 2015, Mirkamel Vafaev, a steelworking subcontractor employed by Chesakl Enterprises, Inc. (“Chesakl”), fell and sustained injuries during a construction project in Brooklyn.<sup>98</sup> The property owner, 596 E19 Partners, LLC (“596”), had hired Nadkos, Inc. (“Nadkos”) as general contractor for the project.<sup>99</sup> Nadkos subcontracted with Chesakl for the project’s structural steel work.<sup>100</sup> Pursuant to the subcontract, Chesakl had procured general liability insurance from Preferred Contractors Insurance Company Risk Retention Group LLC (“PCIC”), which named Nadkos and 596 as additional insureds.<sup>101</sup>

Vafaev filed suit against 596, Nadkos, and Chesakl, among others, alleging negligence and violations of New York Labor Law.<sup>102</sup> In August 2015, Colony Insurance Company (“Colony”), the general liability carrier for Nadkos, tendered the company’s defense and indemnity to Chesakl and PCIC.<sup>103</sup> In response, PCIC disclaimed coverage under the policy for both Chesakl and Nadkos pursuant to exclusions within the

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96. Liability Risk Retention Act of 1986, 15 U.S.C. § 3901(4)(A)–(B), (F) (2012). There are additional requirements provided within § 3901(4) that are beyond the scope of the following case analysis and understanding its impact. *See id.* § 3901(4).

97. 162 A.D.3d 7, 8–9, 76 N.Y.S.3d 528, 530 (1st Dep’t 2018) (first citing INS. § 3420(d)(2); and then citing 15 U.S.C. § 3901), *lv. granted*, 32 N.Y.3d 905, 109 N.E.3d 1159, 94 N.Y.S.3d 859 (2018).

98. *Id.* at 9, 76 N.Y.S.3d at 530.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Nadkos*, 162 A.D.3d at 9, 76 N.Y.S.3d at 530 (first citing N.Y. LAB. LAW § 200 (McKinney 2015); and then citing N.Y. LAB. LAW § 241(6) (McKinney 2015)).

103. *Id.* (citing N.Y. INS. LAW § 3420(d)(2) (McKinney 2015)).

policy.<sup>104</sup> However, and primarily at issue in this case, Colony asserted that under Insurance Law § 3420(d)(2), PCIC had waived its right to rely on policy exclusions as its disclaimer was untimely.<sup>105</sup> In retort, PCIC contended that as an RRG organized under the laws of Montana, § 3420(d)(2) was inapplicable.<sup>106</sup>

The First Department characterized the LRRRA as a “reticulated structure under which risk retention groups are subject to a tripartite scheme of concurrent federal and state regulation,” rather than a comprehensive federal regulation of RRGs.<sup>107</sup> Under LRRRA, the chartering state is permitted “to regulate the formation and operation of RRGs and preempts most ordinary forms of regulation by the nondomiciliary states”<sup>108</sup> and “sharply limits the secondary regulatory authority of nondomiciliary states over [RRGs] to specified, if significant, spheres.”<sup>109</sup>

One such specified sphere allowing secondary regulatory authority by nondomiciliary states is the area of unfair claims settlement practices of that state.<sup>110</sup> To provide for this area, “Insurance Law § 5904(d) . . . expressly requires foreign RRGs to ‘comply with the unfair claims settlement practices provisions as set forth in [Insurance Law § 2601].’”<sup>111</sup> Section 2601 includes within the umbrella of unfair claims settlement practices a provision for “failing to promptly disclose coverage pursuant to [Insurance Law § 3420(d)].”<sup>112</sup>

Importantly, § 3420(d) contains subdivision (1) setting forth time requirements for the *disclosure* of liability limits and identifying information by an insurance carrier, and separately subdivision (2) which sets forth time requirements for the *disclaimer* of coverage.<sup>113</sup> Thus, disclose and disclaim carry two separate and distinct meanings under § 3420(d), of which only disclosure requirements are included under § 2601 as triggering potential unfair claims settlement practices.<sup>114</sup> Since disclaimer requirements are not included under the unfair claims

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104. *Id.* (citing INS. § 3420(d)(2)).

105. *Id.*

106. *Id.*

107. *Nadkos*, 162 A.D.3d at 10, 76 N.Y.S.3d at 531 (quoting *Wadsworth v. Allied Prof'ls. Ins. Co.*, 748 F.3d 100, 103 (2d Cir. 2014)).

108. *Id.* (citing 15 U.S.C. § 3902(a)(1), (4) (2012)).

109. *Id.* (quoting *Wadsworth*, 748 F.3d at 104).

110. *Id.* (citing 15 U.S.C. § 3902(a)(1)(A)).

111. *Id.* (alteration in original) (quoting N.Y. INS. LAW § 5904(d) (McKinney 2016)).

112. *Nadkos*, 162 A.D.3d at 10, 76 N.Y.S.3d at 531 (alteration in original) (quoting N.Y. INS. LAW § 2601(a)(6) (McKinney 2015)).

113. *Id.* at 11, 76 N.Y.S.3d at 532 (citing INS. § 3420(d)(1)–(2)).

114. *Id.* (first citing INS. § 2601; and then citing INS. § 3420(d)).

settlement practice provisions of New York, the limited allowance for nondomiciliary secondary regulation of foreign RRGs under the LRRRA makes it impermissible for New York laws governing such disclaimer requirements to regulate foreign RRGs in that manner.

Therefore, the First Department concluded that the lower court had correctly found that the timely disclaimer of coverage requirements in § 3420(d)(2) were preempted by the LRRRA as an impermissible direct or indirect regulation of RRGs by a non-domiciliary state.<sup>115</sup> Such a “heightened standard requirement in New York impairs an RRG’s ability to operate on a nationwide basis ‘without being compelled to tailor their policies to the specific requirements of every state in which they do business.’”<sup>116</sup>

#### V. REDEYE AND UNTIMELY MOTIONS TO RENEW

In *Redeye v. Progressive Insurance Co.*, the Fourth Department held that an insured’s motion to renew and/or vacate a prior order that had granted summary judgment to the insured’s carrier was untimely.<sup>117</sup>

Daniel Redeye was injured after a drunk driver struck a parked car and propelled it into him and two other pedestrians.<sup>118</sup> Following the incident, Redeye filed suit against the driver and fire company that allegedly served the driver alcoholic beverages.<sup>119</sup> Progressive Insurance Company (“Progressive”), Redeye’s motor vehicle liability insurer, denied coverage for Redeye’s claim for SUM benefits because Redeye’s recovery from both the driver and fire company exceeded his SUM coverage.<sup>120</sup> Redeye commenced this action seeking SUM coverage under the Progressive policy.<sup>121</sup>

Initially, relying upon the Second Department holding in *Weiss v. Tri-State Consumer Insurance Co.*,<sup>122</sup> the supreme court granted

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115. *Id.* at 12, 76 N.Y.S.3d at 532 (first citing INS. § 3420(d); then citing INS. § 2601; then citing INS. § 5904; and then citing 15 U.S.C. § 3902(a)(1)).

116. *Id.* (quoting *Wadsworth v. Allied Prof’ls. Ins. Co.*, 748 F.3d 100, 108 (2d Cir. 2014)).

117. (*Redeye II*), 158 A.D.3d 1208, 1209, 71 N.Y.S.3d 233, 234 (4th Dep’t 2018) (first citing *Daniels v. Millar Elevator Indus. Inc.*, 44 A.D.3d 895, 895–96, 845 N.Y.S.2d 785, 787 (2d Dep’t 2007); and then citing *Glicksman v. Bd. of Educ./Central Sch. Bd.*, 278 A.D.2d 364, 366, 717 N.Y.S.2d 373, 375 (2d Dep’t 2000)).

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

119. *Id.* at 1261–62, 19 N.Y.S.3d at 646. All parties settled in the underlying action. *Id.*

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

121. *Id.* at 1261, 19 N.Y.S.3d at 645.

122. *Redeye I*, 133 A.D.3d at 1261–62, 19 N.Y.S.3d at 645–46 (citing 98 A.D.3d 1107, 1110–11, 951 N.Y.S.2d 191, 194 (2d Dep’t 2012)).



summary judgment dismissing the complaint, and the Fourth Department affirmed on the same precedent.<sup>123</sup> However, in June 2016, the Second Department disavowed certain aspects of *Weiss* in a case called *Government Employees Insurance Co. v. Sherlock*.<sup>124</sup> Redeye moved for leave to renew under Civil Practice Law and Rules (CPLR) 2221(e)(2), and/or vacate the prior order under CPLR 5015(a) because it was based on *Weiss* which was no longer good law.<sup>125</sup>

It is true that “CPLR 2221(e) does not impose a time limit on motions for leave to renew, unlike motions for leave to reargue, which must be made before the expiration of the time in which to take an appeal.”<sup>126</sup> However, motions based upon change in the law are treated as a motion for leave to reargue, and the rule that has developed is these motions can only be made “where the case was still pending, either in the trial court or on appeal.”<sup>127</sup> Although such a rule regarding temporal limitations on a motion to renew based upon a change in law “might at times seem harsh,” the New York Court of Appeals has expressed that “there must be an end to lawsuits.”<sup>128</sup> Despite amendments to the statutory language indicating that a motion based on a change in the law is a motion for leave to renew, the rule and policy stated above has, in fact, persisted.<sup>129</sup>

Because Redeye’s suit was no longer pending at the time of motion under CPLR 2221(e) for leave to renew, the Fourth Department held that it was untimely.<sup>130</sup> Whether you call it a motion to reargue or one to

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123. *Id.* at 1261, 19 N.Y.S.3d at 645.

124. 140 A.D.3d 872, 875, 32 N.Y.S.3d 635, 638 (2d Dep’t 2016)) (“To the extent that *Weiss* can be interpreted to require that the amount of SUM coverage be reduced without regard to the actual amount of bodily injury damages suffered, it should no longer be followed.”).

125. *Redeye II*, 158 A.D.3d at 1208, 71 N.Y.S.3d at 234 (first citing N.Y. C.P.L.R. 2221(e)(2) (McKinney 2010); and then citing N.Y. C.P.L.R. 5015(a) (McKinney 2007)).

126. *Id.* (first citing N.Y. C.P.L.R. 2221(d)(3); and then citing N.Y. C.P.L.R. 5512(a) (McKinney 2014)).

127. *Id.* (internal quotations omitted) (quoting *Glicksman v. Bd. of Educ./Central Sch. Bd.*, 278 A.D.2d 364, 365–66, 717 N.Y.S.2d 373, 374 (2d Dep’t 2000)).

128. *Id.* at 1208–09, 71 N.Y.S.3d at 234 (internal quotations omitted) (quoting *In re Huie*, 20 N.Y.2d 568, 572, 232 N.E.2d 642, 644, 285 N.Y.S.2d 610, 612 (1967)).

129. *Id.* at 1209, 71 N.Y.S.3d at 234 (first citing *Daniels v. Millar Elevator Indus., Inc.*, 44 A.D.3d 895, 895, 845 N.Y.S.2d 785, 786 (2d Dep’t 2007); then citing *Eagle Ins. Co. v. Persaud*, 1 A.D.3d 356, 357, 766 N.Y.S.2d 571, 571 (2d Dep’t 2003); and then citing *Glicksman*, 278 A.D.2d at 366, 717 N.Y.S.2d at 374). As the Second Department in the *Glicksman* case explained, “[T]here is no indication in the legislative history of an intention to change the rule regarding the finality of judgments.” 278 A.D.2d at 366, 717 N.Y.S.2d at 374.

130. *Redeye II*, 158 A.D.3d at 1209, 71 N.Y.S.3d at 234 (first citing *Daniels*, 44 A.D.3d at 895–96, 845 N.Y.S.2d at 787; and then citing *Glicksman*, 278 A.D.2d at 366, 717 N.Y.S.2d

renew, every case must come to an end, and the Redeye decision could not be reconsidered after the judicial process had been exhausted.

#### VI. BAD FAITH

Since 1998, not one single claim for bad faith filed against an insurance company in the State of New York has succeeded on the merits in any of New York's judicial departments. However, that is not to say that these types of claims have not been raised; far from it. And recently an intriguing department split has developed concerning whether certain parties have standing to sue under a theory of bad faith. This split was highlighted in *Corle v. Allstate Insurance Co.*, where the Fourth Department expressly declined to follow First Department precedent on the issue of whether an injured person turned judgment creditor had standing to assert a claim for bad faith absent assignment of the interests of the insured.<sup>131</sup>

Colin Corle, the infant son of James Corle, was accidentally shot by Jeffrey Lee Bauter Teeter.<sup>132</sup> After James Corle filed suit against Teeter and his father, Teeter sought coverage under an insurance policy issued by Allstate Insurance Company ("Allstate").<sup>133</sup> Allstate disclaimed coverage for the accidental shooting and James Corle ultimately obtained a judgment against the Teeters in excess of \$350,000.<sup>134</sup>

Following judgment in the underlying action, James Corle filed a direct action against Allstate under Insurance Law § 3420(a)(2) and (b)(1).<sup>135</sup> The supreme court granted summary judgment in that action, deeming the accidental shooting a covered loss and awarding James Corle the \$50,000 limit on the Allstate issued insurance policy.<sup>136</sup> It was only after this direct action that the Teeters assigned their rights and claims against Allstate to the Corles, at which time James Corle, individually and as assignee of the Teeters, commenced this action alleging a bad faith disclaimer of coverage on the part of Allstate.<sup>137</sup>

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at 374). With regard to Redeye's CPLR 5015(a) motion to vacate the prior order, the court was unpersuaded by the argument that there were "sufficient reasons to vacate the prior order in the interests of substantial justice." *Id.* at 1209, 71 N.Y.S.3d at 234–35 (citing *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 68, 790 N.E.2d 1156, 1160, 760 N.Y.S.2d 727, 731 (2003)).

131. 162 A.D.3d 1489, 1492, 79 N.Y.S.3d 414, 417 (4th Dep't 2018).

132. *Id.* at 1490, 79 N.Y.S.3d at 415.

133. *Id.*

134. *Id.* at 1490, 79 N.Y.S.3d at 415–16.

135. *Id.* at 1490, 79 N.Y.S.3d at 416 (citing N.Y. INS. LAW § 3420(a)(2), (b)(1) (McKinney 2015)).

136. *Corle*, 162 A.D.3d at 1490, 79 N.Y.S.3d at 415.

137. *Id.*

Contrary to Allstate's contention that this bad faith action was barred by the doctrine of res judicata, the Fourth Department held that the plain language of § 3420(a)(2) and (b)(2) establishes that "an injured party's standing to bring an action against an insurer is limited to recovering only the policy limits of the insured's insurance policy."<sup>138</sup> Under the Fourth Department's reading, until such time as the insured has assigned its rights under the insurance contract to the judgment creditor, such judgment creditor is without standing to bring suit for bad faith against the insurance company.<sup>139</sup> Since the Teeters had not yet assigned the Corles their rights under the Allstate policy, James Corle was without standing to bring a bad faith claim at the time of his § 3420(a)(2) action, and thus the doctrine of res judicata is inapplicable to prematurely bar such a claim.<sup>140</sup>

Continuing the discussion, and expressly declining to follow the reading of the same language by the First Department confronting similar facts in *Cirone v. Tower Insurance Co. of New York*,<sup>141</sup> the Fourth Department declared that

to the extent that the First Department in *Cirone* concluded that an injured person/judgment creditor who commenced an action against the insurer pursuant to Insurance Law § 3420(a)(2) had standing to assert a bad faith settlement practices claim in that action in the absence of an assignment from the insured, we disagree with that conclusion and decline to follow *Cirone*.<sup>142</sup>

Exactly how this issue of pre-assignment standing to sue on the basis of

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138. *Id.* at 1491, 79 N.Y.S.3d at 417. In the preceding paragraph, the Fourth Department details the operative language as follows:

Insurance Law § 3420(b)(1) provides that, "[s]ubject to the limitations and conditions of paragraph two of subsection (a) of this section, any person who . . . has obtained a judgment against the insured or the insured's personal representative[] for damages for injury sustained . . . during the life of the policy or contract" may maintain an action against the insurer "to recover the amount of a judgment against the insured or his personal representative." Such an action may be "maintained against the insurer under the terms of the policy or contract for the amount of such judgment not exceeding the amount of the applicable limit of coverage under such policy or contract."

*Id.* at 1491, 79 N.Y.S.3d at 416 (alterations in original) (quoting INS. § 3420(a)(2)).

139. *Id.*

140. *Corle*, 162 A.D.3d at 1491–92, 79 N.Y.S.3d at 417 (first citing *Bennion v. Allstate Ins. Co.*, 284 A.D.2d 924, 926, 727 N.Y.S.2d 222, 225 (4th Dep't 2001); and then citing *Summer v. Marine Midland Bank, N.A.*, 227 A.D.2d 932, 934, 643 N.Y.S.2d 256, 258 (4th Dep't 1996)).

141. *See* 76 A.D.3d 883, 883–84, 908 N.Y.S.2d 178, 179 (1st Dep't 2010).

142. *Corle*, 162 A.D.3d at 1492, 79 N.Y.S.3d at 417 (citing INS. § 3420(a)(2)).

bad faith settlement practices will be resolved remains to be seen, but the Fourth Department in *Corle* has clearly drawn its proverbial line in the sand on the matter.

#### VII. BURLINGTON: THE AFTERMATH

Shortly after the New York Court of Appeals handed down its decision in *Burlington Insurance Co. v. New York City Transit Authority*,<sup>143</sup> we have seen a trickle of decisions come out applying the “proximate cause” analysis to various factual scenarios during our *Survey* period. In the first such decision, *Indian Harbor Insurance Co. v. Alma Tower, LLC*, the trial court held that despite the recent decision in *Burlington*, an insurance company is still obligated to defend where there is a “reasonable possibility” of coverage for the named insured’s acts or omissions.<sup>144</sup>

Indian Harbor Insurance Company (“Indian”) commenced this declaratory judgment action against Alma Tower, LLC (“Alma”) and Vordonia Contracting and Supplies Corp. (“Vordonia”).<sup>145</sup> The action arose out of an underlying lawsuit commenced against Alma and Vordonia by an injured plaintiff who alleged that he sustained injuries while working in the course of employment with S&S HVAC (“S&S”) on a construction project (the “Project”).<sup>146</sup>

Alma owned the premises where the Project had been ongoing.<sup>147</sup> Vordonia was the Project’s general contractor and S&S was a subcontractor.<sup>148</sup> Indian sought a declaration that Alma and Vordonia were not entitled to a defense and indemnification costs as additional insureds under the relevant insurance policy it had issued to S&S (the “Policy”).<sup>149</sup>

Alma and Vordonia sought summary judgment on the action, arguing that Indian’s Complaint should be dismissed because it was obligated to defend and reimburse them for the costs of the underlying actions.<sup>150</sup> Just prior to this motion,<sup>151</sup> the Court of Appeals handed down

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143. 29 N.Y.3d 313, 317, 79 N.E.3d 477, 478, 57 N.Y.S.3d 85, 86 (2017).

144. No. 159286/2014, 2017 WL 3438141, at \*2 (Sup. Ct. N.Y. Cty. 2017) (citing *Regal Const. Corp. v. Nat’l Union Fire Ins. Co.*, 15 N.Y.3d 34, 37, 930 N.E.2d 259, 261, 904 N.Y.S.2d 338, 340 (2010)), *aff’d*, 165 A.D.3d 549, 87 N.Y.S.3d 9 (1st Dep’t 2018).

145. *Id.* at \*1.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Indian Harbor*, 2017 WL 3438141, at \*1.

150. *Id.*

151. *See id.* (motion dated of July 12, 2017).

its decision in *Burlington*.<sup>152</sup> According to the Court in *Burlington*, which considered the same additional insured endorsement, for the duty to indemnify to be triggered, the named insured's acts or omissions must have been a proximate cause of the alleged accident.<sup>153</sup>

For a reason not stated in the decision, Alma and Vordonia withdrew a separate motion for summary judgment regarding Indian's duty to indemnify.<sup>154</sup> Thus, the only issue was Indian's obligation to pay for their defense costs.<sup>155</sup>

In considering the Policy's additional insured endorsement, the court found the language unambiguous, and afforded it its plain and ordinary meaning.<sup>156</sup> The Policy granted "additional insured coverage to the Moving Defendants pursuant to: (i) the contract between the Moving Defendants and S&S, and (ii) when Claimant's alleged injuries were 'caused, in whole or in part, by' S&S's acts or omissions in the performance of S&S's ongoing operations for the Project."<sup>157</sup>

The court framed its analysis through the "exceedingly" broad lens customarily associated with duty to defend cases.<sup>158</sup> Such a duty is determined not by resolving the truth of the allegations, but by comparing the policy language against any underlying allegations.<sup>159</sup> An insurer is required to provide a defense where the underlying allegations suggest that there is a "reasonable possibility" of coverage.<sup>160</sup> An insurer with knowledge of facts that potentially bring a claim within a policy's indemnity coverage has a duty to defend an insured.<sup>161</sup>

Citing *Burlington*, the court acknowledged that "[w]here an insurance policy 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."<sup>162</sup>

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152. *Burlington Ins. Co. v. N.Y.C. Transit Auth.*, 29 N.Y.3d 313, 313, 79 N.E.3d 477, 477, 57 N.Y.S.3d 85, 85 (2017) (decided June 6, 2017).

153. *Id.* at 323, 79 N.E.3d at 482, 57 N.Y.S.3d at 90.

154. *Indian Harbor*, 2017 WL 3438141, at \*1.

155. *Id.*

156. *Id.* at \*2.

157. *Id.*

158. *Id.* (citing *BP Air Conditioning Corp. v. One Beacon Ins. Grp.*, 8 N.Y.3d 708, 714, 871 N.E.2d 1128, 1131, 840 N.Y.S.2d 302, 305 (1st Dep't 2007)).

159. *Indian Harbor*, 2017 WL 3438141, at \*2 (citing *BP Air Conditioning*, 8 N.Y.3d at 714, 871 N.E.2d at 1131, 840 N.Y.S.2d at 305).

160. *Id.* (citing *BP Air Conditioning*, 8 N.Y.3d at 714, 871 N.E.2d at 1131, 840 N.Y.S.2d at 305).

161. *Id.* (citing *Fitzpatrick v. Am. Honda Motor Co.*, 78 N.Y.2d 61, 66, 575 N.E.2d 90, 92, 571 N.Y.S.2d 672, 674 (2d Dep't 1991)).

162. *Id.* (quoting *Burlington Ins. Co. v. N.Y.C. Transit Auth.*, 29 N.Y.3d 313, 317, 79

However, the court, citing the Court of Appeals' earlier decision in *Regal Construction Corp. v. National Union Fire Insurance Co.*, continued by adding that “[w]hen an employee of the named insured is injured while in the employ of the named insured, the additional insured is entitled to defense because there is a reasonable possibility that the bodily injury is proximately caused by the named insured’s acts or omissions.”<sup>163</sup>

The court was satisfied that Alma and Vordonia had met their prima facie burden, establishing Indian’s duty to defend and reimburse them as additional insureds, where the court determined that it was “reasonably possible” that the injured plaintiff’s alleged accident occurred while working on the Project it in turn was proximately caused by welding directions given to him by his supervisor.<sup>164</sup>

Subsequently, the First Department handed down a couple decisions implementing the *Burlington* decision. In February 2018, the First Department in *Vargas v. City of New York* held that where the allegations within a complaint raised the possibility of negligent causation by the named insured, a duty to defend was owed until proximate causation was officially deemed eliminated from contention.<sup>165</sup>

E.E. Cruz & Tully Construction Co., a Joint Venture, LLC (“E.E. Cruz”) was the general contractor that had contracted with the City of New York (“NYC”) for a construction project.<sup>166</sup> L&L Painting Co., Inc., (“L&L”) a painting subcontractor on the project, was enlisted.<sup>167</sup> L&L subsequently subcontracted some of its work to Camabo Industries, Inc. (“Camabo”).<sup>168</sup> L&L obtained a commercial general liability policy from Liberty Insurance Underwriters (“Liberty”), declaring as additional insureds anyone “required by written contract signed by both parties prior to any ‘occurrence’ in which coverage is sought,” including E.E. Cruz and NYC.<sup>169</sup>

This action arose following an injury to an L&L employee, Robert

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N.E.3d 477, 478, 57 N.Y.S.3d 85, 86 (2017)).

163. *Id.* (citing 15 N.Y.3d 34, 39, 930 N.E.2d 259, 263, 904 N.Y.S.2d 338, 342 (2010)).

164. *Indian Harbor*, 2017 WL 3438141, at \*2.

165. (*Vargas III*), 158 A.D.3d 523, 525, 71 N.Y.S.3d 415, 417 (1st Dep’t 2018) (first citing *BP Air Conditioning*, 8 N.Y.3d at 714, 871 N.E.2d at 1131, 840 N.Y.S.2d at 305; and then citing *Burlington*, 29 N.Y.3d at 317, 79 N.E.3d at 478, 57 N.Y.S.3d at 86).

166. *Vargas v. City of New York (Vargas I)*, No. 154323/13, 2016 N.Y. Slip Op. 30070(U), at 2 (Sup. Ct. N.Y. Cty. Jan. 15, 2016), *aff’d in part*, (*Vargas II*), No. 154323/13, 2016 N.Y. Slip Op. 30070(U) (Sup. Ct. N.Y. Cty. May 25, 2016), *aff’d in part and modified in part*, *Vargas III*, 158 A.D.3d 523, 71 N.Y.S.3d 415 (1st Dep’t 2018).

167. *Id.*

168. *Id.* at 3.

169. *Vargas III*, 158 A.D.3d at 524, 71 N.Y.S.3d at 417; *Vargas I*, 2016 N.Y. Slip Op. 30070(U), at 3.

Vargas, during construction.<sup>170</sup> Liberty contended that NYC did not qualify as an additional insured under the policy it had issued to L&L because there was no allegation of causation on the part of L&L, or those acting on its behalf.<sup>171</sup>

The First Department was quick to note that it was unconvinced as to Liberty's argument "because the second amended complaint brings the insurance claim at least 'potentially within the protection purchased.'"<sup>172</sup> Specifically, that second amended complaint alleged that "all defendants—which includes L&L—operated, maintained, managed, and controlled the job site. It also alleges that all defendants were negligent and failed to provide a safe job site."<sup>173</sup> Thus, it was possible that the plaintiff's injury was caused by L&L.<sup>174</sup> Since it was premature to determine whether L&L was a proximate cause of Vargas' injury, it was also premature for the lower court to determine that Liberty was obligated to indemnify NYC.<sup>175</sup> Until such time, the court held that Liberty's broad defense obligation, relying upon the allegations in the complaint, remained.<sup>176</sup>

In a subsequent decision, *Hanover Insurance Co. v. Philadelphia Indemnity Insurance Co.*, the First Department held that where an accident is not caused by the negligence or fault of the named insured, an insurer is under no obligation to provide coverage to an additional insured under its policy where such accident was not "caused, in whole or in part, by" the named insured.<sup>177</sup>

The underlying personal injury action arose when a security guard employed by Protection Plus Security Corporation ("Protection Plus") slipped on a recently mopped floor while working at the Manhattan School of Music ("Manhattan School").<sup>178</sup> Manhattan School was an

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170. *Vargas I*, 2016 N.Y. Slip Op. 30070(U), at 2.

171. *Id.* at 3–4.

172. *Vargas III*, 158 A.D.3d at 525, 71 N.Y.S.3d at 417 (quoting *BP Air Conditioning Corp. v. One Beacon Ins. Group*, 8 N.Y.3d 708, 714, 871 N.E.2d 1128, 1131, 840 N.Y.S.2d 302, 305 (1st Dep't 2007)).

173. *Id.*

174. *Id.*

175. *Id.* (citing *Burlington Ins. Co. v. N.Y.C. Transit Auth.*, 29 N.Y.3d 313, 324, 79 N.E.3d 477, 483, 57 N.Y.S.3d 85, 91 (2017)).

176. *Id.* at 525, 71 N.Y.S.3d at 417 (citing *BP Air Conditioning*, 8 N.Y.3d at 714, 871 N.E.2d at 1131, 840 N.Y.S.2d at 305).

177. (*Hanover II*), 159 A.D.3d 587, 588, 73 N.Y.S.3d 549, 550 (1st Dep't 2018) (quoting *Burlington*, 29 N.Y.3d at 323, 79 N.E.3d at 482, 57 N.Y.S.3d at 90).

178. *Hanover Ins. Co. v. Phila. Indem. Ins. Co. (Hanover I)*, No. 154006/2014, 2015 WL 6920605, at \*1 (Sup. Ct. N.Y. Cty. Oct. 30, 2015), *rev'd*, *Hanover II*, 159 A.D.3d 587, 73 N.Y.S.3d 549 (1st Dep't 2018).

additional insured under a policy issued by Philadelphia Indemnity Insurance Company (PIIC) to Protection Plus, “but ‘only with respect to liability for bodily injury . . . caused, in whole or in part, by: (1) [Protection Plus’s] acts or omissions; or (2) [t]he acts or omissions of those acting on [Protection Plus’s] behalf; in the performance of [Protection Plus’s] ongoing operations for [Manhattan School].”<sup>179</sup>

Citing *Burlington*, the First Department noted that “[w]hen ‘an insurance policy 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.’”<sup>180</sup> Where, as here, “the acts or omissions of Protection Plus were not a proximate cause of the security guard’s injury” and “the sole proximate cause of the injury was the additional insured,” coverage was held to be unavailable to Manhattan School under the PIIC issued policy.<sup>181</sup>

#### VIII. ALTER EGO AND WORKERS’ COMPENSATION EXCLUSIVITY

Two recent appellate division cases shed light on the potential viability of an affirmative defense for workers’ compensation exclusivity for closely related businesses. New York’s Second Department had occasion to discuss the topic in *Clarke v. First Student, Inc.*<sup>182</sup>

In *Clarke*, Ibia M. Clarke, a bus driver employed by First Student Management, LLC (the “LLC”) was injured when she slipped and fell in the school bus parking lot allegedly owned by Laidlaw Transit, Inc.<sup>183</sup> Importantly, and contrary to the allegations in the complaint, the parking lot was actually owned by First Student, Inc. f/k/a Laidlaw Transit, Inc. (“First Student”), who had previously merged.<sup>184</sup> The LLC, Clarke’s employer, was a wholly owned subsidiary of First Student.<sup>185</sup> Because of this relationship, First Student moved to dismiss the action under CPLR

179. *Id.* at \*1–2 (alterations in original).

180. *Hanover II*, 159 A.D.3d at 587, 73 N.Y.S.3d at 550 (quoting *Burlington*, 29 N.Y.3d at 317, 79 N.E.3d at 478, 57 N.Y.S.3d at 86).

181. *Id.* at 588, 73 N.Y.S.3d at 550 (citing *Burlington*, 29 N.Y.3d at 320–21, 79 N.E.3d at 481, 57 N.Y.S.3d at 89).

182. (*Clarke III*), 160 A.D.3d 921, 921, 72 N.Y.S.3d 489, 491 (2d Dep’t 2018) (citing N.Y. WORKERS’ COMP. LAW § 11 (McKinney 2013); and then citing N.Y. WORKERS’ COMP. LAW § 29(6) (McKinney 2015)).

183. *Clarke v. Laidlaw Transit, Inc. (Clarke I)*, No. 015770/12, 2014 WL 8775284, at \*2 (Sup. Ct. Nassau Cty. Jan. 7, 2014), *rev’d*, (*Clarke II*), 125 A.D.3d 920, 5 N.Y.S.3d 138 (2d Dep’t 2015), *decision reached on appeal by Clarke III*, 160 A.D.3d 921, 72 N.Y.S.3d 489 (2d Dep’t 2018).

184. *Id.* (citing Affirmation in Support of Motion to Dismiss at ¶¶ 14–15, 18, *Clarke I*, No. 01-5770/12, 2014 WL 8775284).

185. *Id.* (citing Affirmation in Support of Motion to Dismiss, *supra* note 184, at ¶¶ 16, 19).



3211(a)(1) and (7) on the grounds that the two entities were “alter egos” of one another and functional equivalents for the purposes of Workers’ Compensation Law.<sup>186</sup>

In establishing its status as an alter ego of the LLC, First Student submitted evidence establishing, inter alia, that “in addition to owning the premises, it was the sole owner and manager of the [LLC] that was the plaintiff’s employer, that the [LLC] was formed to provide bus drivers for the defendant’s pupil transportation business, and that the two entities shared the same Workers’ Compensation insurance policy.”<sup>187</sup> Additionally, it was submitted that the entities filed a single tax return for both federal and New York State taxes, and that the assets of the entities were commingled.<sup>188</sup>

In light of the evidence presented, the Second Department granted First Student’s motion for summary judgment, holding that where “one of the entities in question controls the other or when the two entities operate as a single integrated entity,” workers’ compensation exclusivity under Workers’ Compensation Law § 29(6) applies.<sup>189</sup>

Although New York’s Second Department found that one entity was an alter ego of another, it was New York’s Fourth Department days later that provided factors to consider in such an equation. In *Buchwald v. 1307 Porterville Rd., LLC*, an employee of Fox Run Horse Farms, LLC (“Fox Run”), David Buchwald, was injured when he fell from the hayloft of a barn owned by 1307 Porterville Road, LLC (“Porterville Road”).<sup>190</sup> At the time of the incident, Fox Run was leasing the property from Porterville Road, where it operated its horse farm business.<sup>191</sup>

Porterville Road moved for summary judgment, arguing, inter alia, that as an alter ego of Buchwald’s employer, Fox Run, the exclusive remedy provisions of the Workers’ Compensation Law applied to bar recovery against Porterville Road.<sup>192</sup>

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186. *Id.* at \*1.

187. *See* Affirmation in Support of Motion to Dismiss, *supra* note 184, at Ex. C, E–F.

188. *Id.* at ¶ 27 (citing *Rosenburg v. Angiuli Buick, Inc.*, 220 A.D.2d 654, 655, 632 N.Y.S.2d 658, 659 (1995)).

189. *Clarke III*, 160 A.D.3d 921, 921, 72 N.Y.S.3d 489, 491 (2d Dep’t 2018) (citing *Samuel v. Fourth Ave. Assocs.*, 75 A.D.3d 594, 595, 906 N.Y.S.2d 67, 69 (2d Dep’t 2010)). Workers’ Compensation Law § 29(6) states that “[t]he right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee.” WORKERS’ COMP. § 29(6).

190. (*Buchwald II*), 160 A.D.3d 1464, 1465, 75 N.Y.S.3d 729, 730–31 (4th Dep’t 2018).

191. *Id.* at 1465, 75 N.Y.S.3d at 731.

192. *Id.* (first citing N.Y. WORKERS’ COMP. LAW § 11 (McKinney 2013); and then citing WORKERS’ COMP. § 29(6)); *see* *Buchwald v. 1307 Porterville Rd., LLC* (*Buchwald I*), No. 812101/2014, 2017 WL 10311488, at \*1 (Sup. Ct. Erie Cty. Apr. 27, 2017), *aff’d*, *Buchwald II*, 160 A.D.3d 1464, 75 N.Y.S.3d 729 (4th Dep’t 2018).

“As a general rule, when employees are injured in the course of their employment, their sole remedy against their employer lies in their entitlement to a recovery under the Workers’ Compensation Law.”<sup>193</sup> These limitations extend to entities that form an alter ego of a plaintiff’s employer.<sup>194</sup>

In evaluating whether Porterville Road was an alter ego of Fox Run, the Fourth Department sought to determine whether “one of the entities controls the other or that the two operate as a single integrated entity.”<sup>195</sup> Primarily, this determination involves weighing relevant factors including “whether the two entities share a common purpose, have integrated or commingled assets, share a tax return, are treated by the owners as a single entity, share the same insurance policy, and share managers or are owned by the same person.”<sup>196</sup> Additionally, the Fourth Department factored in “whether the alter ego has any employees, whether the alter ego leases property pursuant to a written lease or pays rent to the plaintiff’s employer, and whether one entity pays the bills for the other even if those bills are for the benefit of the nonpaying entity.”<sup>197</sup>

The Fourth Department ultimately upheld the lower court’s determination that Porterville Road and Fox Run were one in the same for the purposes of New York’s Workers’ Compensation Law.<sup>198</sup> In reaching its decision, the court noted that “[Porterville Road] and Fox Run were single-member-owned LLCs that were created on the same day

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193. *Buchwald II*, 160 A.D.3d at 1465, 75 N.Y.S.3d at 731 (quoting *Billy v. Consol. Mach. Tool Corp.*, 51 N.Y.2d 152, 156, 412 N.E.2d 934, 936, 432 N.Y.S.2d 879, 881 (1980)).

194. *Id.* (quoting *Ciapa v. Misso*, 103 A.D.3d 1157, 1159, 959 N.Y.S.2d 774, 775 (4th Dep’t 2013)) (citing *Cleary v. Walden Galleria LLC*, 145 A.D.3d 1524, 1525, 44 N.Y.S.3d 305, 307 (4th Dep’t 2016)).

195. *Id.* (first citing *Cleary*, 145 A.D.3d at 1525, 44 N.Y.S.3d at 307; and then citing *Quizhpe v. Luvin Constr. Corp.*, 103 A.D.3d 618, 619, 960 N.Y.S.2d 130, 131 (2d Dep’t 2013)).

196. *Id.*

197. *Id.* at 1465–66, 75 N.Y.S.2d at 731 (first citing *Quizhpe*, 103 A.D.3d at 619, 960 N.Y.S.2d at 131; then citing *Thomas v. Dunkirk Resort Props., LLC*, 101 A.D.3d 1721, 1722, 957 N.Y.S.2d 542, 543 (4th Dep’t 2012); then citing *Amill v. Lawrence Ruben Co.*, 100 A.D.3d 458, 459, 954 N.Y.S.2d 27, 28–29 (1st Dep’t 2012); then citing *Carty v. E. 175th St. Hous. Dev. Fund Corp.*, 83 A.D.3d 529, 529, 921 N.Y.S.2d 237, 237 (1st Dep’t 2011); then citing *Lee v. Arnan Dev. Corp.*, 77 A.D.3d 1261, 1262–63, 909 N.Y.S.2d 826, 828 (3d Dep’t 2010); then citing *Samuel v. Fourth Ave. Assocs.*, 75 A.D.3d 594, 595, 906 N.Y.S.2d 67, 69 (2d Dep’t 2010); then citing *Mertz v. Seibel Realty*, 265 A.D.2d 925, 925–26, 696 N.Y.S.2d 598, 599 (4th Dep’t 1999); and then citing *Richardson v. Benoit’s Elec., Inc.*, 254 A.D.2d 798, 799, 677 N.Y.S.2d 855, 856 (4th Dep’t 1998)).

198. *Buchwald II*, 160 A.D.3d at 1465, 75 N.Y.S.2d at 731 (first citing N.Y. WORKERS’ COMP. LAW § 11 (McKinney 2013); and then citing N.Y. WORKERS’ COMP. LAW § 29(6) (McKinney 2015)).

‘for a single purpose[,] to operate a horse stable business.’”<sup>199</sup> Each entity had the same individual owner, tax return, and insurance policy.<sup>200</sup> The financial books, accounting, and tax reporting for each entity were conducted jointly.<sup>201</sup> Porterville Road had no employees and “‘was formed solely for the purpose of owning the premises upon which [the] plaintiff’s employer . . . operate[d]’ its horse farm.”<sup>202</sup> Despite leasing the property from Porterville Road, Fox Run was never held to any written lease agreement, nor did it pay rent.<sup>203</sup> Additionally, Fox Run’s owner paid Porterville Road’s property taxes and operating expenses.<sup>204</sup> Weighing the factors above, it was clear to the court that the two entities did in fact function as one company.<sup>205</sup>

#### IX. LONG-TAIL CLAIMS

During the *Survey* period, New York state and federal courts encountered influential cases considering the administration and allocation of long-tail claims. In *Keyspan Gas East Corp. v. Munich Reinsurance America, Inc.*, the New York Court of Appeals held on an issue of first impression that under the pro-rata, time-on-the-risk method of allocation, an insurer is not liable for years outside of its policy period where there was no applicable insurance coverage on the market.<sup>206</sup>

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199. *Id.* at 1466, 75 N.Y.S.2d at 731 (first citing *Carty*, 83 A.D.3d at 529, 924 N.Y.S.2d at 237; then citing *Cappella v. Suresky at Hatfield Lane, LLC*, 897 N.Y.S.2d 668, 668 (Sup. Ct. Orange Cty. 2007); then citing *Wernig v. Parents & Bros. Two*, 195 A.D.2d 944, 945–46, 600 N.Y.S.2d 852, 853 (3d Dep’t 1993); and then citing *Richardson*, 254 A.D.2d at 799, 677 N.Y.S.2d at 856).

200. *Id.* at 1466, 75 N.Y.S.3d at 731–32 (first citing *Di Rie v. Auto. Realty Corp.*, 199 A.D.2d 98, 98, 605 N.Y.S.2d 60, 61 (1st Dep’t 1993); then citing *Salcedo v. Demon Trucking, Inc.*, 146 A.D.3d 839, 841, 44 N.Y.S.3d 543, 545 (2d Dep’t 2017); then citing *Thomas*, 101 A.D.3d at 1722, 957 N.Y.S.2d at 543; then citing *Shelley v. Flow Int’l Corp.*, 283 A.D.2d 958, 960, 724 N.Y.S.2d 244, 246 (4th Dep’t 2001); then citing *Carty*, 83 A.D.3d at 529, 921 N.Y.S.2d at 237; then citing *Capella*, 897 N.Y.S.2d at 668; and then citing *Wernig*, 195 A.D.2d at 945, 600 N.Y.S.2d at 853).

201. *Id.* at 1466, 75 N.Y.S.3d at 732 (first citing *Cappella*, 897 N.Y.S.2d at 668; then citing *Thomas*, 101 A.D.3d at 1722, 957 N.Y.S.2d at 543; then citing *Lee*, 77 A.D.3d at 1262–63, 909 N.Y.S.2d at 828; and then citing *Wernig*, 195 A.D.2d at 945–46, 600 N.Y.S.2d at 853).

202. *Id.* (quoting *Cappella*, 897 N.Y.S.2d at 668).

203. *Buchwald II*, 160 A.D.3d at 1466, 75 N.Y.S.3d at 732 (citing *Cappella*, 897 N.Y.S.2d at 668).

204. *Id.* (first citing *Capella*, 897 N.Y.S.2d at 668; and then citing *Carty*, 83 A.D.3d at 529, 921 N.Y.S.2d at 237).

205. *Id.* (first citing *Di Rie*, 199 A.D.2d at 98, 605 N.Y.S.2d at 61; then citing *Carty*, 83 A.D.3d at 529, 921 N.Y.S.2d at 237; then citing *Quizhpe*, 103 A.D.3d at 619, 960 N.Y.S.2d at 131; and then citing *Batts v. IBEX Constr., LLC*, 112 A.D.3d 765, 767, 977 N.Y.S.2d 282, 284 (2d Dep’t 2013)).

206. (*Keyspan III*), 31 N.Y.3d 51, 63, 96 N.E.3d 209, 216, 73 N.Y.S.3d 113, 120 (2018) (first citing *In re Viking Pump, Inc.*, 27 N.Y.3d 244, 261, 52 N.E.3d 1144, 1153, 33 N.Y.S.3d

KeySpan Gas East Corporation's ("KeySpan") predecessor in interest, Long Island Lighting Company (LILCO), owned and operated certain manufactured gas plants (MGPs) located in Rockaway Park and Hempstead, New York, in the late 1880s and early 1900s.<sup>207</sup> Decades later, following a New York State Department of Environmental Conservation (DEC) determination that the MGPs had caused long-term, gradual environmental damage due to contaminants seeping into the ground, KeySpan was required to undertake expensive remediation in 2002 and 2012.<sup>208</sup>

From 1953 until 1969, Century Indemnity Company ("Century") had issued eight excess liability insurance policies to LILCO.<sup>209</sup> It was undisputed that "environmental contamination at the sites occurred gradually and continuously before, during, and after the Century policy periods," and it was impossible to determine the extent to which the total resulting contamination and damages occurred in any given year over that span.<sup>210</sup>

KeySpan commenced this action<sup>211</sup> to obtain a judicial "declaration of coverage and determination of liability owed under a number of insurance policies, including the policies issued by Century."<sup>212</sup> The

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118, 128 (2016); and then citing *Consol. Edison Co. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 224, 774 N.E.2d 687, 695, 746 N.Y.S.2d 622, 630 (2002)). It does not take long for the New York Court of Appeals in this decision (i.e., all of one sentence) to admit that its analysis is a "venture into the complex realm of long-tail insurance claims." *Id.* at 56, 96 N.E.3d at 211, 73 N.Y.S.3d at 115.

As we posited in our most recent foray into an insurance allocation dispute, long-tail claims present unique difficulties. In such cases, the injury-producing harm is gradual and continuous and typically spans multiple insurance policy periods or, as here, implicates years during which insurance coverage was in place, as well as years for which no coverage was purchased. In these situations, courts across the country have been tasked with determining the appropriate distribution of liability among various insurers and between the insurers and the policyholder.

*Id.* at 57–58, 96 N.E.3d at 212–13, 73 N.Y.S.3d at 116–17 (citing *In re Viking Pump*, 27 N.Y.3d at 255, 52 N.E.3d at 1149, 33 N.Y.S.3d at 123).

207. *Id.* at 56, 96 N.E.3d at 211, 73 N.Y.S.3d at 115.

208. *Id.* at 56, 96 N.E.3d at 211–12, 73 N.Y.S.3d at 115–16.

209. *Keyspan III*, 31 N.Y.3d 51 at 56, 96 N.E.3d at 212, 73 N.Y.S.3d at 116.

210. *Id.*

211. *Keyspan Gas E. Corp. v. Munich Reins. Am., Inc. (Keyspan I)*, 46 Misc. 3d 395, 396, 998 N.Y.S.2d 781, 783 (Sup. Ct. N.Y. Cty. Oct. 17, 2014), *rev'd*, (*Keyspan II*), 143 A.D.3d 86, 37 N.Y.S.3d 85 (1st Dep't 2016), *aff'd*, *Keyspan III*, 31 N.Y.3d 51, 96 N.E.3d 209, 73 N.Y.S.3d 113 (2018). Interestingly, this action has spanned decades, plural. *See id.* at 397 n.2, 998 N.Y.S.2d at 784 n.2.

212. *Keyspan III*, 31 N.Y. 3d at 56–57, 96 N.E.3d at 212, 73 N.Y.S.3d at 116; *Keyspan I*, 46 Misc. 3d at 396, 998 N.Y.S.2d at 783.

Century policies were the only policies at issue on this appeal.<sup>213</sup>

In 2014, Century moved for partial summary judgment, seeking a declaration that it was responsible solely for its pro-rata share of damages over the entire duration of the loss, and that it was “not responsible for any portion of the property damage at the Hempstead and Rockaway Park sites that occurred outside the policy periods.”<sup>214</sup> Notably, and key to this decision, pollution coverage was not available to utilities until after 1925, and the insurance industry generally adopted “sudden and accidental pollution exclusions” sometime around October 1970.<sup>215</sup> KeySpan argued that these periods of time should not factor into any allocation of coverage pro-rata amongst insurers, where coverage was either not available or unavailable by way of industry-wide exclusions.<sup>216</sup>

Under New York law, “the method of allocation is governed foremost by the particular language of the relevant insurance policy.”<sup>217</sup> Two important Court of Appeals cases serve as models for the type of language an insurance policy must exhibit to call for either pro-rata or all sums allocation. Under *Consolidated Edison Co. v. Allstate Insurance Co.*, pro rata allocation of damages was applicable to policy language that provided “for liability incurred as a result of an accident or occurrence during the policy period, not outside that period,” since “[p]roration of liability acknowledges the fact that there is uncertainty as to what actually transpired during any particular policy period.”<sup>218</sup> However, as distinguished from *Consolidated Edison Co.*, the Court of Appeals in the case of *In re Viking Pump, Inc.* applied all sums allocation to a policy that included noncumulation and prior insurance provisions, which are “inconsistent with pro rata allocation because ‘the very essence of pro rata allocation is that the insurance policy language limits indemnification to losses and occurrences during the policy period,’ such that no two insurance policies indemnify the same loss or occurrence absent overlapping or concurrent policy periods.”<sup>219</sup>

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213. *Keyspan I*, 46 Misc. 3d at 396, 998 N.Y.S.2d at 783.

214. *Id.* at 396–97, 998 N.Y.S.2d at 783.

215. *Keyspan III*, 31 N.Y. 3d at 57, 96 N.E.3d at 212, 73 N.Y.S.3d at 116; *Keyspan I*, 46 Misc. 3d at 401, 998 N.Y.S.2d at 786.

216. *Keyspan I*, 46 Misc. 3d at 397–98, 998 N.Y.S.2d at 784; *see also Keyspan III*, 31 N.Y. 3d at 57, 96 N.E.3d at 212, 73 N.Y.S.3d at 116.

217. *Keyspan III*, 31 N.Y. 3d at 58, 96 N.E.3d at 213, 73 N.Y.S. 3d at 117 (citing *In re Viking Pump Inc.*, 27 N.Y.3d 244, 257, 52 N.E.3d 1144, 1150–51, 33 N.Y.S.3d 118, 124–25 (2016)).

218. *Id.* at 58–59, 96 N.E.3d at 213, 73 N.Y.S. 3d at 117 (quoting *Consol. Edison Co. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 224, 774 N.E.2d 687, 695, 746 N.Y.S.2d 622, 630 (2002)).

219. *Id.* at 59, 96 N.E.3d at 213, 73 N.Y.S. 3d at 117 (quoting *In re Viking Pump*, 27 N.Y.3d at 261, 52 N.E.3d at 1153, 33 N.Y.S. 3d at 127).

Here, it was apparent that the policy language called for a pro rata method of allocation.<sup>220</sup> However, the Court of Appeals confronted an issue of first impression with regard to whether the insurer or insured should be considered “on the risk” for pro rata allocation during periods where coverage was “unavailable.”<sup>221</sup> Looking to other courts that have confronted this issue, it was apparent that jurisdictions are divided.<sup>222</sup> Where some jurisdictions follow what is known as the “unavailability rule” pursuant to which the years where coverage was unavailable are not considered while calculating pro rata, time-on-the-risk allocations for insurers,<sup>223</sup> other jurisdictions explicitly reject this “unavailability rule,” deeming the policyholder on the risk for any period of non-coverage.<sup>224</sup>

Ultimately, the Court of Appeals agreed with Century that “the unavailability rule is inconsistent with the policy language that mandates pro rata allocation” in that “the imposition of liability on an insurer for damages resulting from occurrences outside the policy period would contravene the very premise underlying pro rata allocation.”<sup>225</sup> Consistent with the opinion of the lower court, the Court of Appeals noted that

“the spreading of industry risk through insurance is accomplished through the setting and payment of premiums for insurance, consistent with the parties’ forward[-]looking assessment of what that risk might entail,” and that, “[i]n the absence of a contract requiring such action, spreading risk should not by itself serve as a legal basis for providing free insurance to an insured.”<sup>226</sup>

Following the holding in *Consolidated Edison Co.*,

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220. *Id.* at 57, 96 N.E.3d at 212, 73 N.Y.S. 3d at 116.

221. *Id.* at 59, 96 N.E.3d at 214, 73 N.Y.S.3d at 118.

222. *Keyspan III*, 31 N.Y.3d at 59, 96 N.E.3d at 214, 73 N.Y.S.3d at 118.

223. *Id.* (first citing *R.T. Vanderbilt Co. v. Hartford Accident & Indem. Co.*, 156 A.3d 539, 577 (Conn. App. Ct. 2017); then citing *Wooddale Builders, Inc. v. Md. Cas. Co.*, 722 N.W.2d 283, 297 (Minn. 2006); then citing *Mayor & City Council of Baltimore v. Utica Mut. Ins. Co.*, 802 A.2d 1070, 1104 n.54 (Md. Ct. Spec. App. 2002); then citing *Chem. Leaman Tank Lines, Inc. v. Aetna Cas. and Sur. Co.*, 177 F.3d 210, 231 (3d Cir. 1999); and then citing *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1203 (2d Cir. 1995)). Notably, the Court distinguishes between voluntary non-coverage by choice and unavailability of coverage options in the market generally; the “unavailability rule” only excludes the latter from the prorated allocation equation. *Id.* at 59–60, 96 N.E.3d at 214, 73 N.Y.S. 3d at 118 (citing STEVEN PLITT ET AL., COUCH ON INSURANCE § 220.30 (West 3d ed. 2017)).

224. *Id.* at 60, 96 N.E.3d at 214, 73 N.Y.S. 3d at 118 (first citing *Boston Gas Co. v. Century Indem. Co.*, 910 N.E.2d 290, 315 (Mass. 2009); then citing *AAA Disposal Sys., Inc. v. Aetna Cas. & Sur. Co.*, 821 N.E.2d 1278, 1290 (Ill. App. Ct. 2005); and then citing *Sybron Transition Corp. v. Sec. Ins.*, 258 F.3d 595, 599 (7th Cir. 2001)).

225. *Id.*

226. *Keyspan III*, 31 N.Y.3d at 62, 96 N.E.3d at 216, 73 N.Y.S. 3d at 118 (alterations in original) (quoting *Keyspan II*, 143 A.D. 3d 86, 97, 37 N.Y.S. 3d 85, 93 (1st Dep’t 2016)).

the unavailability rule is inconsistent with the contract language that provides the foundation for the pro rata approach—namely, the “during the policy period” limitation—and that to allocate risk to the insurer for years outside the policy period would be to ignore the very premise underlying pro rata allocation. Indeed, such an approach could, once a policy is triggered, impose liability in perpetuity (or retroactively to periods prior to coverage) on an insurer who issued insurance coverage for only a limited number of years, thereby eviscerating much of the distinction between pro rata and all sums allocation. In the context of continuous harms, where the contamination attributable to each policy period cannot be proved and we draw from the contract language to distribute the harm pro rata across the policy periods, it would be incongruous to include harm attributable to years of non-coverage within the policy periods.<sup>227</sup>

Because the Court of Appeals could not reconcile the “unavailability rule” with pro rata allocation, New York has officially rejected the applicability of the “unavailability rule” where policy language calls for time-on-the-risk, pro rata allocation.<sup>228</sup>

In another long-tail claim action, the Second Circuit handed down a decision, *Olin Corp. v. OneBeacon America Insurance Co.*, which brought New York State’s federal courts in line with recent New York State court interpretations of policy language dictating all sums liability allocation where specific language is present.<sup>229</sup>

This appeal concerned the most recent coverage action in a voluminous series of such actions arising out of environmental damage at manufacturing sites owned by Olin Corporation (“Olin”).<sup>230</sup> Five Olin manufacturing sites were involved in this action, stemming from various chemical contaminations of surrounding land, sediments, and groundwater.<sup>231</sup> After receiving governmental orders requiring investigation and cleanup at three of these sites in 1984, Olin formally notified its insurers, including OneBeacon America Insurance Company (“OneBeacon”), of the claims asserted against it.<sup>232</sup> These claim notices were regularly supplemented with updated site-specific damages, costs,

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227. *Id.* at 61, 96 N.E.3d at 215, 73 N.Y.S. 3d at 119 (citing *Consol. Edison Co. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 224, 774 N.E.2d 687, 695, 746 N.Y.S.2d 622, 630 (2002)).

228. *Id.* at 63, 96 N.E.3d at 216, 73 N.Y.S. 3d at 120.

229. *See generally (Olin II)*, 864 F.3d 130 (2d Cir. 2017) (applying the holding from *In re Viking Pump*).

230. *Id.* at 135. “[T]he district court chose to address coverage on a site-by-site basis” due to the sheer volume of claims and sites involved. *Id.*

231. *Id.*

232. *Id.* at 136. Olin also received additional orders in 1986 and provided supplemental notice of claims to these insurers for two additional sites. *Olin II*, 864 F.3d at 136.

and remedial measures; of fifteen total notices, Olin contended that OneBeacon failed to respond to a single notice until after Olin filed coverage claims against OneBeacon in 1993.<sup>233</sup> During discovery in the matter, it was determined that OneBeacon, among other things, had failed to investigate the claims, delegated its claims handling to a third-party, and sought to litigate rather than pay claims as a cost-saving measure.<sup>234</sup>

OneBeacon had issued Olin three excess umbrella insurance policies effective from 1970 to 1972.<sup>235</sup> The policies issued in 1971 and 1972 contained pollution exclusion while the 1970 policy did not.<sup>236</sup> Thus, OneBeacon was only on the Olin risk from January 1, 1970 to December 31, 1970.<sup>237</sup> These policies provided “noncumulation” and “continuing coverage” language within Condition C, which specifically provided:

It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Insured prior to the inception date hereof, *the limit of liability hereon shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance.*

Subject to the foregoing paragraph and to all other terms and conditions of this Policy in the event that personal injury or property damage arising out of an occurrence covered hereunder is continuing at the time of termination of this Policy, OneBeacon will continue to protect the Insured for liability in respect of such personal injury or property damage without payment of additional premium.<sup>238</sup>

Importantly, the immediately preceding excess policies to the OneBeacon excess policies were issued by certain underwriters at Lloyd’s, London, covering the exact same layer of coverage that OneBeacon was responsible for in 1970.<sup>239</sup>

Revisiting several prior *Olin* decisions involving other site-specific coverage issues, the Second Circuit noted its prior determinations “that the appropriate method for ‘allocating’ responsibility for ‘on-going and

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233. *Id.* at 136–37.

234. *Id.* at 137.

235. *Id.*

236. *Id.*

237. *Olin II*, 864 F.3d at 137.

238. *Id.* at 137–38 (emphasis added). “Noncumulation” and “prior insurance” clauses are one in the same, and we have chosen to use the term “noncumulation” instead of “prior insurance” as it is more descriptive of what actually occurs pursuant to such provisions. Noncumulation clauses serve to prevent the accumulation of multiple limits of insurance for the same loss merely because it spans multiple policy periods. Thus, any amount paid under a “prior insurance” policy for such loss reduces or completely depletes the limit of insurance available under a subsequent policy.

239. *Id.* at 138.



progressive injury that spans many years' is to do so 'pro rata.'"<sup>240</sup> Notably, none of those decisions resolved the separate issue encountered in the immediate action: "how a [noncumulation] provision applies when the prior policy was underwritten by a different insurer," certain underwriters at Lloyd's, London.<sup>241</sup>

Following the initial judgment in this matter entered by the district court,<sup>242</sup> and oral argument in the Second Circuit, the New York Court of Appeals reached its decision in the case of *In re Viking Pump, Inc.*,<sup>243</sup> and the Second Circuit took time to dissect that decision's impact on this litigation.<sup>244</sup> Ultimately, the *In re Viking Pump* holding forced the Second Circuit to reevaluate its prior *Olin* decisions.<sup>245</sup> Where the Second Circuit concluded in a prior *Olin* case that "under the contracts at issue, property damage assigned to a period after the applicable policy year would be swept back into the 'earliest triggered policy,'"<sup>246</sup> an insured under the holding in the case of *In re Viking Pump, Inc.* "can pursue any insurer whose policy contains Condition C, and whose policy covers property damage during the relevant period, for all damage reaching the insurer's policy layer regardless of 'when' it took place."<sup>247</sup>

With regard to damages under *In re Viking Pump*, the Second Circuit noted that *Olin* was eligible to "collect its total liability under any policy in effect during the periods that the damage occurred, up to the policy

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240. *Id.* (quoting *Olin Corp. v. Ins. Co. of N. Am.*, 221 F.3d 307, 322–24 (2d Cir. 2000)).

241. *Id.* at 139–40 (citing *Olin v. Am. Home Assur. Co.*, 704 F.3d 89, 105 n.21 (2d Cir. 2012)).

242. *See* *Olin Corp. v. Ins. Co. of N. Am. (Olin I)*, No. 84-CV-1968 (TPG), 2015 U.S. Dist. LEXIS 49682, at \*17–18 (S.D.N.Y. Apr. 15, 2015), *aff'd in part, vacated in part*, *Olin II*, 864 F.3d 130 (2d Cir. 2017).

243. 27 N.Y.3d 244, 264, 52 N.E.3d 1144, 1155–56, 33 N.Y.S.3d 118, 129–30 (2016) (first citing *Liberty Mut. Ins. Co. v. Fairbanks, Co.*, 170 F. Supp. 3d 634, 645 (S.D.N.Y. 2016); and then citing *Liberty Mut. Fire Ins. Co. v. J.&S. Supply Corp.*, 2015 U.S. Dist. LEXIS 177124, at \*24–25 (S.D.N.Y. 2015)).

244. *Olin II*, 864 F.3d at 142 (citing *In re Viking Pump*, 27 N.Y.3d at 257, 52 N.E.3d at 1151, 33 N.Y.S.3d at 125).

245. *Id.* at 143.

246. *Id.* at 143–44 (citing *Am. Home Assur.*, 704 F.3d at 104).

247. *Id.* at 144.

In other words, *Viking Pump* departs from the "legal fiction" that property damage can be cleanly allocated between policy years, and instead adopts a joint and several liability theory that allows the insured to seek indemnification for the full amount of damage incurred over the continuing damage period from any insurer whose policy language dictates all sums liability with language similar to Condition C.

*Id.* (citing *In re Viking Pump*, 27 N.Y.3d at 261, 52 N.E.3d at 1153, 33 N.Y.3d at 127).

limits.”<sup>248</sup> Because the district court, in reliance upon a prior *Olin* decision had capped Olin’s recovery at the loss attributable to all years subsequent to 1970 under a prorated allocation,<sup>249</sup> the Second Circuit vacated and remanded on that issue to the lower court for application of *In re Viking Pump*.<sup>250</sup>

More importantly, the Second Circuit reassessed the lower court’s interpretation of the noncumulation clause included within Condition C, and agreeing with OneBeacon’s interpretation, it vacated the judgments that had been issued in light of *In re Viking Pump* holding:

Where an occurrence spans multiple policy years, the plain language of the [noncumulation] provision requires the reduction of the occurrence limit of a OneBeacon policy by amounts due under any prior excess insurance policy on account of a loss covered by a prior insurance policy in the same layer of coverage as the relevant OneBeacon policy, when that prior insurance policy is triggered by the same occurrence for which the insured presently seeks indemnification.<sup>251</sup>

The idea is to prevent the “stacking” or “cumulation” of coverage limits in an attempt to add successive policies together to cover a long-term or continuous loss.<sup>252</sup>

Noting that the noncumulation language in Condition C applies to “any other excess policy,” and is not limited to prior policies issued by OneBeacon, the Second Circuit viewed the language as “unambiguous and that the district court erred when it concluded that the prior insurance provision did not apply to reduce the limits of OneBeacon’s liability.”<sup>253</sup> Although Olin argued that an all sums method of allocation allowed it “to

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248. *Olin II*, 864 F.3d at 146 (internal quotations omitted) (quoting *In re Viking Pump*, 27 N.Y.3d at 255, 52 N.E.3d at 1149, 33 N.Y.S.3d at 123).

249. *Olin I*, No. 84-CV-1968 (TPG), 2015 U.S. Dist. LEXIS 49682, at \*17 (S.D.N.Y. Apr. 15, 2015).

250. *Olin II*, 864 F.3d at 147.

251. *Id.* (citing *Am. Home Assur.*, 704 F.3d at 104).

252. *Id.* (first citing *In re Viking Pump*, 27 N.Y.3d at 259, 52 N.E.3d at 1152, 33 N.Y.S.3d at 126; and then citing *PLITT ET AL.*, *supra* note 223, § 169.50).

253. *Id.* at 148.

Indeed, there is no language in Condition C that might imply that the prior insurance provision is limited in application to any other excess policy issued only by the same provider. Rather, the general language of the prior insurance provision suggests that the clause is designed to apply whenever both earlier and later policies cover the same loss, just as the focus of noncumulation clauses is whether more than one policy provides coverage for identical loss within the same layer, unaffected by the identity of the insurer.

collect its total liability under any policy in effect during the periods that the damage occurred, up to the policy limits,”<sup>254</sup> allowing Olin to recover beyond the reduced limits of liability on the OneBeacon policy “would be to strip the [noncumulation] provision of its bargained-for effect, . . . and permit Olin to recover multiple times for a single loss by pursuing multiple insurers within the same layer of coverage.”<sup>255</sup>

#### X. “WEAR AND TEAR” EXCLUSION

The Appellate Division, Third Department in *Superhost Hotels Inc. v. Selective Insurance Co. of America* determined that a “wear and tear” exclusion within an insurance policy precluded coverage for water damage from Hurricane Irene.<sup>256</sup>

In August 2011, Hurricane Irene wreaked havoc along the east coast of the United States, causing extensive damage to properties unfortunate enough to merely exist along its path.<sup>257</sup> An Albany, New York hotel, owned by Superhost Hotels Inc. (“Superhost”), was one such property that suffered extensive damage due to Irene’s heavy rain.<sup>258</sup>

Superhost filed a claim with its all-risk commercial liability carrier, Selective Insurance Company of America (“Selective”), asserting that it was owed coverage for physical loss and damage under that policy.<sup>259</sup> Selective denied coverage pursuant to a wear and tear exclusion within its policy.<sup>260</sup> Superhost then commenced this action.<sup>261</sup> In granting Selective’s motion for summary judgment, the lower court noted that the defendant had established its prima facie burden as to the application of the wear and tear exclusion, and Superhost was unable to establish a

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254. *Id.* at 149 (internal quotations omitted) (quoting *In re Viking Pump*, 27 N.Y.3d at 255, 52 N.E.3d at 1149, 33 N.Y.S.3d at 123).

255. *Id.* (citing *Stonewall Inc. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1254, 1260 (Del. 2010)). Although a win for OneBeacon, it is important to mention what Condition C does not say. The Second Circuit rejects an argument by OneBeacon that would have had it construe Condition C as allowing OneBeacon to avoid liability altogether by imposing all liability on the policies preceding OneBeacon’s 1970 excess policy. *Id.* at 150.

256. (*Superhost Hotels II*), 160 A.D.3d 1162, 1165, 75 N.Y.S.3d 124, 128 (3d Dep’t 2018) (first citing *Platek v. Town of Hamburg*, 24 N.Y.3d 688, 694, 26 N.E.3d 1167, 1171, 3 N.Y.S.3d 312, 316 (2015); and then citing *State v. Schenectady Hardware & Elec. Co.*, 223 A.D.2d 783, 785, 636 N.Y.S.2d 861, 863 (3d Dep’t 1996)).

257. *See id.* at 1162, 75 N.Y.S.3d at 125–26.

258. *Id.*

259. *Id.* at 1162, 75 N.Y.S.3d at 126.

260. *Id.*

261. *Superhost Hotels Inc. v. Selective Ins. Co. of Am. (Superhost Hotels I)*, No. 468-12, 2016 WL 11507207, at \*1 (Sup. Ct. Albany Cty. Dec. 22, 2016), *aff’d*, *Superhost Hotels II*, 160 A.D.3d 1162, 75 N.Y.S.3d 124 (3d Dep’t 2018).

triable issue of fact to the contrary.<sup>262</sup>

The Third Department agreed.<sup>263</sup> Selective established that the “wear and tear” exclusion was unambiguous.<sup>264</sup> The plain meaning of “wear and tear” is “the loss, injury, or stress to which something is subjected by or in the course of use,”<sup>265</sup> and “[n]othing in the policy language suggests that an average insured would expect the phrase to have another meaning or that the language is subject to any other reasonable interpretation.”<sup>266</sup>

Applying the reading of the “wear and tear” exclusion above to the facts submitted on the motion, the Third Department found the defendant’s expert affidavit and deposition transcripts credible.<sup>267</sup> The engineering expert’s affidavit submitted by Selective and report credited the interior damage to issues with the exterior walls, including “‘improper flashing detail’ consisting of failed caulk that had originally been installed to seal the areas where each room’s exterior walls and windows met the hotel’s concrete floors and surrounding masonry walls.”<sup>268</sup> Continuing, the expert stated that “the caulk had separated from these surfaces as a result of age and lack of maintenance, creating spaces through which water could migrate into the walls,” and observed “significant deterioration in the walls’ internal framing, as well as other indications that water had been seeping into the walls for a long time . . . .”<sup>269</sup> Ultimately, the expert concluded that to “a reasonable degree of engineering certainty that the cause of the water damage to the hotel during the hurricane was the failure of the caulk as a result of age and poor maintenance—that is, wear and tear.”<sup>270</sup>

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262. *Id.* at \*2. More specifically, New York’s supreme court precluded Superhost’s proposed window expert, “who opined that the rain had entered the building as a result of high winds—a covered cause of loss—interacting with the hotel’s windows,” because he was “was not qualified to render a reliable opinion on the cause of the damage and, further, based his opinions upon speculation.” *Superhost Hotels II*, 160 A.D.3d at 1162, 75 N.Y.S.3d at 126; *Superhost Hotels I*, 2016 WL 11507207, at \*2–3 (first citing *Ray v. New York*, 305 A.D.2d 791, 792, 760 N.Y.S.2d 571, 573 (3d Dep’t 2003); and then citing *Martin v. New York*, 305 A.D.2d 784, 786, 759 N.Y.S.2d 802, 805 (3d Dep’t 2003)).

263. *Superhost Hotels II*, 160 A.D.3d at 1165, 75 N.Y.S.3d at 128.

264. *Id.* at 1162–63, 75 N.Y.S.3d at 126.

265. *Id.* at 1163, 75 N.Y.S.3d at 126 (internal quotations omitted) (quoting *Wear and Tear*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/wearandtear> (last visited May 15, 2019)) (citing *Lynch v. Liberty Mut. Fire Ins. Co.*, 58 A.D.3d 939, 940, 870 N.Y.S.2d 166, 167 (3d Dep’t 2009)).

266. *Id.*

267. *Id.*

268. *Superhost Hotels II*, 160 A.D.3d at 1163, 75 N.Y.S.3d at 126.

269. *Id.* at 1163, 75 N.Y.S.3d at 127.

270. *Id.*

Affirming the lower court, the Third Department agreed that there was insufficient evidence presented to refute Selective's engineering expert opinion. Superhost's expert affidavit was precluded as insufficient to establish that the purported window expert "possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable."<sup>271</sup>

#### XI. "ACCIDENTAL" VS "INTENTIONAL"

One of the most commonly occurring issues in insurance coverage litigation involves the threshold question of whether or not coverage has been triggered by the happening of an "occurrence." This issue is often resolved by determining whether or not the underlying claim involved conduct that was "accidental" or "intentional" in nature. There were several such cases this year in the New York appellate courts.

In the case of *In re Progressive Advanced Insurance Co. (Widdecombe)*, the Third Department determined that an assault can be viewed from the victim's perspective as "accidental" for the purposes of uninsured motorist coverage.<sup>272</sup>

In February 2015, Robert Germain left a bar after over-indulging in liquid refreshments.<sup>273</sup> Concerned for Mr. Germain's well-being, Michael Widdecombe attempted to persuade Mr. Germain to return to the bar.<sup>274</sup> However, while attempting take Mr. Germain's keys from the ignition, Mr. Germain started the engine and placed the car in drive, dragging Mr. Widdecombe for about twenty feet and injuring his leg.<sup>275</sup>

Following the incident, Mr. Widdecombe filed a claim for uninsured motorist benefits under a SUM endorsement included within his Hartford Underwriters Insurance Company ("Hartford"), as Mr. Germain was determined uninsured at the time of the incident.<sup>276</sup> The lower court

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271. *Id.* at 1164, 75 N.Y.S.3d at 127 (internal quotations omitted) (quoting *Flanger v. 2461 Elm Realty Corp.*, 123 A.D.3d 1196, 1197, 998 N.Y.S.2d 502, 504 (3d Dep't 2014)).

272. (*Progressive II*), 157 A.D.3d 1047, 1049–50, 68 N.Y.S.3d 576, 578 (3d Dep't 2018) (citing *State Farm Mut. Auto. Ins. Co. v. Langan*, 16 N.Y.3d 349, 356, 947 N.E.2d 124, 128, 922 N.Y.S.2d 233, 237 (2011)).

273. *Id.* at 1048, 68 N.Y.S.3d at 577.

274. *Id.*

275. *Id.*

276. *Id.* Notably, this decision upholds the decision of the supreme court that Mr. Germain was undisputedly an uninsured motorist at the time of the incident, despite Hartford's argument to the contrary. *Progressive II*, 157 A.D.3d at 1048–49, 68 N.Y.S.3d at 577; *Progressive Advanced Insurance Co. v. Widdecombe (Progressive I)*, No. 2051/2015, 2016 WL 11373224, at \*2 (Sup. Ct. Sullivan Cty. Dec. 8, 2016), *rev'd*, *Progressive II*, 157 A.D.3d 1047, 68 N.Y.S.3d 576 (3d Dep't 2018).

permanently stayed arbitration, pursuant to the alleged existence of a policy exclusion.<sup>277</sup>

The Third Department agreed with Mr. Widdecombe that the lower court had erred to the extent that it found Hartford's reliance upon a nonexistent intentional acts exclusion under the SUM endorsement a proper disclaimer.<sup>278</sup>

Turning to the dispositive question as to whether Widdecombe's injuries were caused "accidentally," the Third Department noted that the Hartford SUM endorsement stated that it would pay for "all sums that the insured shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury *caused by an accident* arising out of such uninsured motor vehicle's ownership, maintenance or use."<sup>279</sup> Relying upon the Court of Appeals' decision in *State Farm Mutual Automobile Insurance Co. v. Langan*, which held that "the intentional assault of an innocent insured is an accident within the meaning of his or her own policy," the Third Department held that "this incident was an accident from Widdecombe's perspective," triggering coverage.<sup>280</sup> The uncontroverted testimony of Widdecombe established that his leg was trapped and he was suddenly dragged, which was "unexpected, unusual and unforeseen" from his prospective as the insured.<sup>281</sup>

A Second Department case, *Castillo v. Motor Vehicle Accident Indemnification Corp.*, involved a similar question to that above, albeit in a no-fault context under Article 52 of the Insurance Law.<sup>282</sup> The Second Department in *Castillo* distinguished their facts from the Court of Appeals decision in *Langan*, citing the differences between SUM and no-fault coverage case law.<sup>283</sup>

In *Castillo*, a bicyclist was involved in a hit-and-run incident with a motorist who fled the scene.<sup>284</sup> The bicyclist commenced an action under Insurance Law § 5218(c) against the Motor Vehicle Accident

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277. *Progressive I*, 2016 WL 11373224, at \*1–3.

278. *Progressive II*, 157 A.D.3d at 1049, 68 N.Y.S.3d at 577.

279. *Id.* at 1049, 68 N.Y.S.3d at 578 (internal quotations omitted).

280. *Id.* at 1049–50, 68 N.Y.S.3d at 578 (internal quotations omitted) (quoting 16 N.Y.3d 349, 355–56, 947 N.E.2d 124, 127–28, 922 N.Y.S.2d 233, 236–37 (2011)).

281. *Id.* at 1050, 68 N.Y.S.3d at 578 (quoting *Langan*, 16 N.Y.3d at 357, 947 N.E.2d at 129, 922 N.Y.S.2d at 238) (first citing *Utica Mut. Ins. Co. v. Burrous*, 121 A.D.3d 910, 911, 994 N.Y.S.2d 646, 647 (2d Dep't 2014); and then citing *Progressive Northeastern Ins. Co. v. Vanderpool*, 85 A.D.3d 926, 927, 924 N.Y.S.2d 583, 5834 (2d Dep't 2011)).

282. *See* 161 A.D.3d 937, 938, 78 N.Y.S.3d 162, 164 (2d Dep't 2018).

283. *Id.* at 939, 78 N.Y.S.3d at 164–65 (citing 16 N.Y.3d at 356, 947 N.E.2d at 129, 922 N.Y.S.2d at 237).

284. *Id.* at 938, 78 N.Y.S.3d at 164.

Indemnification Corporation (MVAIC) to recover for his injuries.<sup>285</sup> The Second Department analyzed the purpose of Article 52 of the Insurance Law.<sup>286</sup> Officially known as the Motor Vehicle Accident Indemnification Act, Article 52 “seeks to provide ‘for the payment of loss on account of injury to or death of persons who, through no fault of their own, were involved in motor vehicle accidents caused by’ vehicles that, for a variety of reasons, are not covered by insurance.”<sup>287</sup> Importantly, the application of Article 52 does not extend to incidents resulting from a tortfeasor’s intentional conduct, since those incidents are not caused by accident.<sup>288</sup> Relying on the Fourth Department’s no-fault determination in *McCarthy v. Motor Vehicle Accident Indemnification Corp.*, the Second Department stated that “if the driver of the motor vehicle that injured the petitioner acted intentionally, the petitioner may not recover in an action against the MVAIC.”<sup>289</sup>

Disagreeing with the bicyclist’s contention that *Langan* should control, the Second Department noted that *Langan* occurred within the context of coverage under a SUM endorsement.<sup>290</sup> In particular, the Court of Appeals in *Langan* distinguished its facts from those present in *McCarthy*, as it was a SUM endorsement at issue, rather than no-fault coverage through MVAIC.<sup>291</sup> Thus, the Second Department upheld the decision of the lower court in granting MVAIC’s motion to reargue and hold a framed-issue hearing regarding whether the hit-and-run was the result of intentional conduct by the motorist.<sup>292</sup>

In an interesting twist on this area of insurance law, the Third Department in *State Farm Fire and Casualty Co. v. McCabe* held that even where coverage is denied for injuries stemming from an intentional assault, it may exist for additional or exacerbated injuries sustained

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285. *Id.* (citing N.Y. INS. LAW § 5218(c) (McKinney 2016)).

286. *Id.* (quoting N.Y. INS. LAW § 5201(b) (McKinney 2016)).

287. *Castillo*, 161 A.D.3d at 938, 78 N.Y.S.3d at 164 (quoting Ins. § 5201(b)).

288. *Id.* (citing *McCarthy v. Motor Vehicle Accident Indem. Corp.*, 16 A.D.2d 35, 41, 224 N.Y.S.2d 909, 915–16 (4th Dep’t 1962)).

289. *Id.* at 938–39, 78 N.Y.S.3d at 164; *see also McCarthy*, 16 A.D.2d at 41, 224 N.Y.S.2d at 915–16.

290. *Id.* at 939, 78 N.Y.S.3d at 164–65; *see also State Farm Mut. Auto. Ins. Co. v. Langan*, 16 N.Y.3d 349, 356, 947 N.E.2d 124, 128, 922 N.Y.S.2d 233, 237 (2011).

291. *Langan*, 16 N.Y.3d at 356, 947 N.E.2d at 128, 922 N.Y.S.2d at 237 (“This case differs from *McCarthy* in two important respects. First, UM coverage, although required by statute, is part of the insured’s own policy—a policy that the insured selected and for which he pays premiums. Benefits received through coverage under the UM endorsement do not come out of a state fund. Second, the insured is the victim in this case, not the tortfeasor, and the public policy against providing coverage for an insured’s criminal acts is not implicated.”).

292. *Castillo*, 161 A.D.3d at 939, 78 N.Y.S.3d at 165.

accidentally either prior or subsequent to the assault.<sup>293</sup>

In August 2014, Rebekah Haschyts was visiting her boyfriend, Chauncey McCabe, when she was physically assaulted by him, including strangulation by a rope and several blows to the head.<sup>294</sup> Following a jury trial, McCabe was criminally convicted of first degree assault, first degree strangulation, and fourth degree criminal possession of a weapon.<sup>295</sup> Haschyts subsequently filed a personal injury action against McCabe and his mother, the owner of the house within which the assault occurred.<sup>296</sup> It was alleged that subsequent to McCabe rendering Haschyts partially incapacitated, she tripped and fell due to a defective condition on the property.<sup>297</sup>

State Farm Fire & Casualty Company (“State Farm”), who had issued a homeowner’s insurance policy covering both McCabe and his mother as resident insureds, disclaimed coverage on the theory that the victim’s injuries resulted from intentional conduct, which would not qualify as a covered “occurrence,” and was also explicitly excluded from coverage.<sup>298</sup> State Farm filed this declaratory judgment action seeking a judicial determination that its disclaimer was, in fact, correct.<sup>299</sup> State Farm moved successfully for summary judgment on the matter and the victim appealed.<sup>300</sup>

State Farm’s argument for summary judgment was predicated on the doctrine of collateral estoppel, whereby two requirements must be met: “‘that the identical issue was necessarily decided in the prior action and is decisive in the present action,’ and that ‘the party to be precluded from relitigating an issue must have had a full and fair opportunity to contest the prior determination.’”<sup>301</sup> Where appropriate, the Third Department noted that “an issue decided in a criminal proceeding may be given preclusive effect in a subsequent civil action.”<sup>302</sup>

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293. 162 A.D.3d 1294, 1297, 79 N.Y.S.3d 324, 328 (3d Dep’t 2018) (citing *Massa v. Nationwide Mut. Fire Ins. Co.*, 74 A.D.3d 1661, 1662–63, 904 N.Y.S.2d 531, 533 (3d Dep’t 2010)).

294. *Id.* at 1294, 79 N.Y.S.3d at 326.

295. *Id.*

296. *Id.*

297. *Id.*

298. *McCabe*, 162 A.D.3d at 1294–95, 79 N.Y.S.3d at 326.

299. *Id.* at 1295, 79 N.Y.S.3d at 326.

300. *Id.*

301. *Id.* at 1295, 79 N.Y.S.3d at 328 (quoting *D’Arata v. New York Cent. Mut. Fire Ins. Co.*, 76 N.Y.2d 659, 664, 564 N.E.2d 634, 636, 563 N.Y.S.2d 24, 26 (1990)).

302. *Id.* (quoting *D’Arata*, 76 N.Y.2d at 664, 564 N.E.2d at 636, 563 N.Y.S.2d at 26) (citing *Allstate Ins. Co. v. Zuk*, 78 N.Y.2d 41, 45, 574 N.E.2d 1035, 1036, 571 N.Y.S.2d 429, 430 (1991)).



The Third Department agreed to an extent with this collateral estoppel argument, specifically regarding the intentional nature of the assault alleged in the victim's civil action following McCabe's criminal jury conviction; it could not "be magically transformed into [a negligent assault] merely by [the] defendant's allegations . . . ." <sup>303</sup> However, with regard to the victim's allegations of "failing to maintain the property by permitting a tripping hazard" and "failing to obtain medical care," the Third Department refused to extend collateral estoppel beyond its limits. <sup>304</sup>

To establish the convictions, it was unnecessary for the jury to have made findings regarding whether McCabe created a tripping hazard, allowed [the] defendant to walk on her own after he had rendered her partially incapacitated or failed to seek medical help for her after the criminal assault. Hence, the issues as to insurance coverage and exclusions are not identical to the issues decided in McCabe's criminal trial, and [the] defendants here did not have a full and fair opportunity in the criminal trial to address some of the issues regarding McCabe's negligence allegedly committed before and after the criminal assault. <sup>305</sup>

Therefore, the Third Department reversed the lower court decision, instead denying State Farm's motion for summary judgment, since the collateral estoppel doctrine did not apply. <sup>306</sup>

The Second Circuit shared some insight into the question of "accidental" versus "intentional" conduct in a pair of cases recently. In *Philadelphia Indemnity Insurance Co. v. Central Terminal Restoration Corp.*, the Second Circuit held that despite the intentional sale of alcohol to a patron prior to an automobile accident, it was the automobile accident and not the sale that was the operative cause of the accident for the purpose of determining insurance coverage. <sup>307</sup>

The Central Terminal Restoration Corporation (CTRC), a not-for-profit corporation located in Buffalo, New York, hosted a Dyngus Day fundraising event after obtaining a temporary license to sell liquor. <sup>308</sup> Following his attendance at the event, Thomas Gilray struck two pedestrians with his vehicle while driving intoxicated, seriously injuring

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303. *McCabe*, 162 A.D.3d at 1296, 79 N.Y.S.3d at 328.

304. *Id.*

305. *Id.* at 1297, 79 N.Y.S.3d at 328.

306. *Id.* (citing *Zuk*, 78 N.Y.2d at 47, 574 N.E.2d at 1036, 571 N.Y.S.2d at 430).

307. (*Phila. Indem. II*), 722 Fed. App'x 79, 83–84 (2d Cir. 2018).

308. *Id.* at 81. For those who may be unaware, Buffalo, New York, with its proud Polish population, is a wonderful city to celebrate your next Dyngus Day. Visitors are reminded to drink responsibly.

both while one eventually died.<sup>309</sup>

The pedestrians filed separate personal injury lawsuits against CTRC among others, asserting, *inter alia*, violations of Dram Shop laws.<sup>310</sup> The complaints alleged that at some point within seven hours of the accident, CTRC served Gilray alcohol at their event despite his visible intoxication.<sup>311</sup>

Prior to the fundraising event, Philadelphia Indemnity Insurance Company (PIIC) had issued CTRC two insurance policies including primary and excess coverage.<sup>312</sup> The primary policy included both commercial general liability (CGL) and liquor liability coverage parts.<sup>313</sup> The excess policy mirrored this CGL grant of coverage.<sup>314</sup> The CGL coverage part was also modified by a fundraising endorsement, providing coverage for bodily injury “arising out of” the Dyngus Day event.<sup>315</sup>

The instant action involved a declaratory judgment action filed by PIIC, seeking a determination that any obligation that it had to CTRC existed only under the liquor liability coverage part of the primary policy.<sup>316</sup> PIIC argued that Gilray’s accident was not a covered “occurrence” under the CGL coverage part because it arose from CTRC’s intentional serving of alcohol.<sup>317</sup> Following a wholesale filing of summary judgment by all parties, the district court granted the three defendants’ motions while denying PIIC’s motion for the same.<sup>318</sup>

Relevant for our purposes, the Second Circuit concluded that under New York law, a violation of a Dram Shop statute that results in a car accident qualifies as an “occurrence” for the purposes of insurance

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309. *Id.* at 81 & n.2.

310. *Id.* at 81 (first citing N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 2010); and then citing N.Y. ALCO. BEV. CONT. LAW § 65 (McKinney 2011)).

311. *Id.*

312. *Phila. Indem. II*, 722 Fed. App’x at 81.

313. *Id.*

314. *Id.* at 82.

315. *Id.* at 81–82.

316. *Phila. Indem. Ins. Co. v. Cent. Terminal Restoration Corp.* (*Phila. Indem. I*), No. 16-CV-280, 2017 U.S. Dist. LEXIS 69465, at \*1–2 (W.D.N.Y. May 7, 2017), *aff’d*, *Phila. Indem. II*, 722 Fed. App’x 79 (2d Cir. 2018).

317. *Id.* at \*6 (citing N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 2010)).

318. *Id.* at \*2, \*12; *see also Phila. Indem. II*, 722 Fed. App’x at 82 (citing *Markevics v. Liberty Mut. Ins. Co.*, 278 A.D.2d 285, 288, 717 N.Y.S.2d 305, 307 (2d Dep’t 2000)) (“[T]he court held that (1) coverage exists under the CGL part of the Primary Policy because a violation of the Dram Shop statutes qualifies as an ‘occurrence’ under New York law; (2) the plain language of the fundraising endorsement in the Primary Policy establishes coverage under the CGL part because the claims ‘indisputably involve claims of bodily injury arising out of the Dyngus Day’ event; and (3) coverage exists under the Excess Day Policy for the same reasons coverage existed under the CGL part of the Primary Policy.”).

coverage.<sup>319</sup> Despite CTRC's intentional sale of alcohol to Gilray, the subsequent accident and injuries to pedestrians were neither expected nor intended by CTRC, although arguably foreseeable.<sup>320</sup>

Also, the Second Circuit disagreed with PIIC's characterization of the sale of alcohol to Gilray as the operative event, rather than the accident itself.<sup>321</sup> Given that a Dram Shop claim *requires* an underlying injury and not just the unlawful sale of alcohol, the court concluded that without the requisite injury inducing accident, the alleged unlawful sale would be meaningless.<sup>322</sup>

The other Second Circuit case delving into this issue was *Hough v. USAA Casualty Insurance Co. (In re Margulies)*, where the court affirmed a holding by the Bankruptcy Court of the Southern District of New York denying any coverage obligations under certain insurance policies issued by USAA Casualty Insurance Company ("USAA").<sup>323</sup>

In August 2000, Dennis Hough was working as a flag man managing traffic at a construction site in Manhattan.<sup>324</sup> While holding traffic, including the vehicle driven by Joshua Margulies, Margulies became increasingly impatient with Hough when he missed two full cycles of a traffic light without a single construction vehicle entering or exiting the construction site.<sup>325</sup> When the light turned green once again, Margulies lifted his foot off the break and idled forward, and subsequently made contact with Hough, who fell and got back up.<sup>326</sup> Assuming Hough was unhurt, Margulies continued along his route without stopping and ultimately plead guilty to third degree misdemeanor assault.<sup>327</sup>

Hough sued Margulies for negligence, and when neither Margulies nor USAA defended, Hough was awarded \$4.8 million in a default judgment.<sup>328</sup> Following the judgment, Margulies filed for Chapter 7

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319. *Phila. Indem. II*, 722 Fed. App'x at 83.

320. *Id.* (first citing *Allegany Co-op Ins. Co. v. Kohorst*, 254 A.D.2d 744, 744, 678 N.Y.S.2d 424, 425 (4th Dep't 1998); and then citing *Johnstown v. Bankers Standard Ins. Co.*, 877 F.2d 1146, 1150 (2d Cir. 1989)).

321. *Id.* at 84.

322. *Id.* (citing *Sherman v. Robinson*, 80 N.Y.2d 483, 486, 606 N.E.2d 1365, 1367, 591 N.Y.S.2d 974, 976 (1992); and then citing GEN. OBLIG. § 11-101).

323. (*Hough III*), 721 Fed. App'x 98, 100 (2d Cir. 2018); *see also* *Hough v. Margulies (Hough I)*, 541 B.R. 156, 172 (Bankr. S.D.N.Y. 2015), *aff'd*, (*Hough II*), 566 B.R. 318 (Bankr. S.D.N.Y. 2017), *aff'd*, *Hough III*, 721 Fed. App'x 98 (2d Cir. 2018).

324. *Hough I*, 541 B.R. at 160.

325. *Id.* Making matters worse, Margulies was on his way to a meeting with former Governor Mario Cuomo and was running late. *Id.*

326. *Id.*

327. *Id.* (citing N.Y. PENAL LAW § 120.00(2) (McKinney 2015)).

328. *Hough I*, 541 B.R. at 160.

bankruptcy.<sup>329</sup> In order to preserve the default judgment as non-dischargeable, Hough filed this action, seeking, *inter alia*, to hold USAA liable for the judgment by seeking a judicial declaration that the underlying incident was an “accident.”<sup>330</sup> The bankruptcy court and district court disagreed, determining that the underlying incident was not accidental.<sup>331</sup>

The Second Circuit Court of Appeals concurred that the underlying incident was not accidental, and thus could not be a covered occurrence under the USAA policy.<sup>332</sup> “Under New York insurance law, an injury is ‘intentionally caused’ and thus not accidental if the ‘damages flow directly and immediately from an intended act’ rather than ‘a chain of unintended though expected or foreseeable events that occurred after an intentional act.’”<sup>333</sup> Because Margulies’ decision not to apply the brakes lead directly to Hough’s injuries, the incident was not an accident, and thus did not qualify as a covered occurrence as defined by the USAA policy.<sup>334</sup>

## XII. APPRAISAL AMIDST A COVERAGE DISPUTE

The First Department provided interesting commentary in the case of *Louati v. State Farm Fire and Casualty Co.* on the applicability of Insurance Law § 3408(c) during an ongoing coverage dispute.<sup>335</sup>

A homeowner, Bechir Louati, filed a claim with his homeowner’s insurance carrier, State Farm Fire and Casualty Company (“State Farm”), following water damage to the tile floor of the first-floor bathroom.<sup>336</sup> Although Louati contended that the damage was caused by a burst pipe, a covered cause of loss under the State Farm policy, State Farm denied the claim, citing another potential cause of loss that was excluded under the policy.<sup>337</sup> State Farm also denied coverage due to Louati’s lack of preservation of the tiles for inspection.<sup>338</sup>

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329. *Id.*

330. *Id.* at 160–61 (citing N.Y. INS. LAW § 3420 (McKinney 2015)).

331. *Id.* at 168.

332. *Hough III*, 721 Fed. App’x at 100.

333. *Id.* (citing *Brooklyn Law Sch. v. Aetna Cas. & Surety Co.*, 849 F.2d 788, 789 (2d Cir. 1988)).

334. *Id.*

335. 161 A.D.3d 701, 702, 77 N.Y.S.3d 51, 52 (1st Dep’t 2018) (citing N.Y. INS. LAW § 3408(c) (McKinney 2015)).

336. *Id.* (citing *Pottenburgh v. Dryden Mut. Ins. Co.*, 55 Misc. 3d 775, 778, 48 N.Y.S.3d 885, 885 (Sup. Ct. Tompkins Cty. 2017)).

337. *Id.* (citing *Pottenburgh*, 55 Misc. 3d at 778, 48 N.Y.S.3d at 885). The decision is silent on what that potential, excluded cause of loss might have been.

338. *Id.* (citing *Fuchs v. Sun Ins. Office, Ltd.*, 149 Misc. 600, 600, 267 N.Y.S. 83, 83

While the coverage dispute above was ongoing, Louati sought to compel State Farm to proceed with an appraisal to determine the amount of damages stemming from the claim.<sup>339</sup> However, State Farm's position on the matter was that § 3408(c) first required resolution of the ongoing coverage dispute.<sup>340</sup>

The First Department upheld the lower court's reading of § 3408(c).<sup>341</sup> That section provides:

*In the event of a covered loss, whenever an insured or insurer fails to proceed with an appraisal upon demand of the other, either party may apply to the court in the manner provided in subsection (a) of this section for an order directing the other to comply with such demand.*<sup>342</sup>

Thus, until such time as it is determined that there is a covered loss, one party to an insurance claim cannot compel the other to proceed with an appraisal.<sup>343</sup> Where, as here, a coverage dispute involving covered and non-covered losses existed, it is necessary to resolve the dispute prior to any action under § 3408(c).<sup>344</sup>

### XIII. THE YEAR IN REVIEW

New York continues to be a bell-weather state for insurance-coverage related decisions in most areas, other than "bad faith." For the nineteenth consecutive year, since the high Court's decision in *Smith v. General Accident Insurance Co.*, there has not been a single New York State court appellate decision upholding a bad faith verdict against an insurer, a truly remarkable record.<sup>345</sup> However, courts continued to hold insurers to a high standard of compliance and that trend is likely to continue.

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(N.Y.C. Mun. Ct. 1933)).

339. *Id.* (first citing *Pottenburgh*, 55 Misc. 3d at 777–78, 48 N.Y.S.3d at 887–88; and then citing *Quick Response Com. Div., LLC v. Cincinnati Ins. Co.*, No. 14-CV-779 (GLS/DEP), 2015 U.S. Dist. LEXIS 120415, at \*6–8 (N.D.N.Y. Sept. 10, 2015)).

340. *Louati*, 161 A.D.3d at 702, 77 N.Y.S.3d at 52 (first 4th citing *Pottenburgh*, 55 Misc. 3d at 777–78, 48 N.Y.S.3d at 887–88; and then citing *Quick Response*, 2015 U.S. Dist. LEXIS 120415, at \*6–8).

341. *Id.* (citing N.Y. INS. LAW § 3408(c) (McKinney 2015)).

342. INS. § 3408(c) (emphasis added).

343. *Id.*

344. *Id.*

345. *See* 91 N.Y.2d 648, 654–55, 697 N.E.2d 168, 172, 674 N.Y.S.2d 267, 271 (1998).