INSURANCE LAW

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TABLE OF CONTENTS

INTRODUCTION 444
I. ADDITIONAL INSURED COVERAGE POST-*BURLINGTON* 445
II. LATE NOTICE 453
III. UM/SUM 454
IV. TIMELY DISCLAIMER 463
V. POST-JUDGEMENT INTEREST 467
VI. NUMBER OF OCCURRENCES 469
VII. DUTY TO DEFEND 470
VIII. CGL EXCLUSIONS 473
A. Employee/WC 474
B. Business Pursuits 477
C. Construction Manager 479
D. Recently Completed Construction 480
IX. APPLICATION OF INSURANCE LAW § 3420 (D) 481

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X. ESTOPPEL/WAIVER 484
XI. AGENTS ERRORS AND OMISSIONS 486
XII. VOLUNTARY PAYMENTS 489
XIII. PROPERTY INSURANCE 490
XIV. AUTO INSURANCE 495
X. ALLOCATION 499
CONCLUSION 500

INTRODUCTION

During this *Survey* period, we saw many interesting decisions on issues involving the scope of coverage, number of occurrences and application of exclusions. As this issue goes to press, we are in the middle of the COVID-19 pandemic. While this *Survey* looks to the past, we recognize that the future will bring numerous insurance coverage lawsuits requiring courts to rule on the many intriguing and challenging questions arising from this difficult time. But, again, let us look to where we have been before we can analyze what is next.

This current period has been marked by the appellate division being asked numerous times to apply the 2017 Court of Appeals decision in *Burlington Ins. Co. v. New York City Transit Authority.*[1] The *Burlington* decision interpreted the "caused, in whole or in part, by [the] acts or omissions" language found in many additional insured endorsements.[2] While the Court of Appeals found that this language required a showing of proximate causation, it left open many questions concerning how to determine whether certain conduct is a proximate cause of the loss, and what is a non-negligent proximate cause, which the courts are now exploring.[3] In this context, and, we submit, contrary to established precedent, the appellate division also seemed to expand an insurer's duty to defend beyond the allegations in the primary complaint to third-party complaints.[4] This expansion, we believe, is beyond the bounds of the prior case law and permits a purported additional insured to trigger an insurer's duty to defend with its own statements.

Beyond those topics, this *Survey* period also saw several decisions addressing Supplementary Underinsured Motorist Coverage, post-judgment interest, voluntary payments and arguments made over whether an insurer timely denied coverage under New York Insurance Law

1. 29 N.Y.3d 313, 327, 79 N.E.3d 477, 485, 57 N.Y.S.3d 85, 93 (2017).
2. *Id.* at 317, 79 N.E.3d at 478, 57 N.Y.S.3d at 86.
3. *Id.* at 324, 79 N.E.3d at 483, 57 N.Y.S.3d at 91.
4. *Id.* at 317, 79 N.E.3d at 478, 57 N.Y.S.3d at 86.

section 3420(d). Below represents a survey of the most notable decisions over the past year.

I. ADDITIONAL INSURED COVERAGE POST-*BURLINGTON*

As touched upon in the introduction, the appellate division was repeatedly asked during this *Survey* period to determine the scope of additional insured coverage and the appropriate application of the *Burlington* decision. In the first decision we highlight, New York's Fourth Department concluded that the insurer owed neither a duty to defend nor indemnify a purported additional insured because the loss was not "caused, in whole or in part, by" its named insured's acts or omission.[5]

In *Pioneer Central School District v. Preferred Mutual Insurance Company*, the Fourth Department considered the following facts.[6] Dawn Ayers, an employee of Kleanerz, a janitorial service company, sued Pioneer Central School District (Pioneer) after slipping on snow or ice in the parking lot of Pioneer Middle School after completing her shift.[7] Kleanerz was insured by Preferred Mutual Ins. Co. (Preferred) under a policy containing an additional insured endorsement listing Pioneer as an additional insured in cases of bodily injury caused "in whole or in part" by "acts or omissions" of Kleanerz, or those acting on Kleanerz's behalf.[8] As relevant to this discussion, Pioneer commenced an action against Preferred seeking a declaration that Preferred was obligated to indemnify Pioneer as an additional insured under Kleanerz's policy with Preferred.[9]

The Fourth Department determined Pioneer was not an additional insured under Kleanerz's policy because Ayers' injuries were not proximately caused by Kleanerz.[10] The court, citing *Burlington Insurance Company v. New York City Transit Authority*, interpreted the policy language "caused, in whole or in part, by" to require proximate causation of the injury rather than but-for causation.[11] Because Kleanerz was not responsible for clearing snow and ice from the parking lot, it was not the proximate cause of Ayers' injury despite the fact that Kleanerz instructed

5. Pioneer Cent. Sch. Dist. v. Preferred Mut. Ins. Co., 165 A.D.3d 1646, 1648, 86 N.Y.S.3d 364, 366 (4th Dep't 2018).

6. *Id.* at 1646, 86 N.Y.S.3d at 364.

7. *Id.* at 1646, 86 N.Y.S.3d at 365–66.

8. *Id.* at 1646, 86 N.Y.S.3d at 365.

9. *Id.* at 1646–47, 86 N.Y.S.3d at 366 (It is worth noting that, in the alternative, Pioneer sought to recover under an indemnity provision contained in the janitorial contract).

10. *Pioneer Cent. Sch. Dist.*, 165 A.D.3d at 1647, 86 N.Y.S.3d at 366.

11. *Id.* (citing *Burlington Ins. Co.*, 29 N.Y.3d at 324, 79 N.E.3d at 483, 57 N.Y.S.3d at 91.

Ayers to exit the school by use of a door near the location of her injury.[12] "[F]ortuitously plac[ing Ayers] in a location or position in which . . . [an alleged] separate instance of negligence acted independently upon [her] to produce harm" was not a sufficient causal connection to trigger the additional insured clause of the policy.[13]

The *Pioneer* court granted Preferred's motion for summary judgment, holding that Preferred had no duty to defend or indemnify Pioneer in the pending Ayers action because its insured was not the proximate cause of the injury.[14] "Moreover, because the policy [did] not provide coverage to Pioneer, Preferred Mutual was not required to timely disclaim coverage."[15]

The other decisions handed down by the appellate division found either a defense was owed, but indemnity was premature, or coverage was owed.[16] New York's First Department decided *Breeze National, Inc. v. Century Insurance Company*, granting plaintiff, Breeze National's (Breeze) motion for a declaration that defendant Century Insurance Co. (Century) was obligated to provide insurance coverage in an underlying wrongful death action because of sufficient proof that the named insured *may* have proximately caused the injury.[17]

The underlying action in the case was brought by the estate of Jozef Wilk, an employee of Breeze, after he fell fifteen to twenty feet from an exterior scaffold through a third-floor window in the elevator shaft of a building.[18] ACT Abatement Corporation (ACT) was the asbestos abatement subcontractor on the site who removed the window as required by its contract.[19] The additional insured endorsement linking Century and Breeze stated coverage would be provided "only with respect to liability

12. *Id.*

13. *Id.* (quoting Hain v. Jamison, 28 N.Y.3d 524, 531–32, 68 N.E.3d 1233, 1239–40, 46 N.Y.S.3d 502, 508–09 (2016)) (first citing Ventricelli v. Kinney Sys. Rent A Car, 45 N.Y.2d 950, 952, 383 N.E.2d 1149, 1149, 411 N.Y.S.2d 555, 556 (1978); and then citing Duggal v. St. Regis Hotel, 262 A.D.2d 805, 805, 695 N.Y.S.2d 602, 603 (2d Dep't 1999)).

14. *Id.* at 1648, 86 N.Y.S.3d at 366–67 (quoting 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)) (citing Total Concept Carpentry, Inc. v. Tower Ins. Co. of N.Y., 95 A.D.3d 411, 411, 943 N.Y.S.2d 473, 473–74 (1st Dep't 2012)).

15. *Pioneer Cent. Sch. Dist.*, 165 A.D.3d at 1648, 86 N.Y.S.3d at 367 (citing Progressive Cas. Ins. Co. v. HARCO Nat'l. Ins. Co., 70 A.D.3d 1495, 1497, 85 N.Y.S.2d 611, 613 (4th Dep't 2010)).

16. *See, e.g.*, Breeze Nat'l Inc. v. Century Sur. Co., 170 A.D.3d 591, 592, 96 N.Y.S.3d 56, 57 (1st Dep't 2019).

17. *Id.* at 591, 96 N.Y.S.3d at 57.

18. Breeze Nat'l Inc. v. Century Sur. Co., No. 652611/2016, 2018 N.Y. Slip Op. 31738(U), at 1 (Sup. Ct. N.Y. Cty. Mar. 27, 2018).

19. *Id.*

'caused, in whole or in part, by' its named insured [ACT's] acts or omissions" where ACT proximately caused the injury.[20]

Century argued it was not responsible for Breeze's defense as "ACT has never been adjudicated negligent, and had no control over the means and methods of Wilk's work."[21] The court found Century's arguments "misplaced", determining the language "'caused, in whole or in part, by' d[id] not compel the conclusion that the endorsement incorporate[d] a negligence requirement, but simply mean[t] more than 'but for' causation."[22]

The court concluded the act of window removal, which Wilk was performing at the time of the fall, combined with a failure to guard the windows was proof enough to establish a possibility of proximate causation.[23]

This proximate causation triggered Century's duty to defend Breeze but was not sufficient to conclusively determine the existence of a duty to indemnify.[24] Because there were unresolved issues of fact as to whether Breeze was solely, or only partially responsible for the accident, the court determined "the issue of indemnification [could not] be determined at this time."[25]

Similarly, in two other appellate division cases, the court articulated that, for an insurer's duty to defend an additional insured to be triggered, there need only be a "reasonable possibility" that the underlying injury was proximately caused by the additional insured.[26]

20. *Breeze Nat'l Inc.*, 170 A.D.3d at 591–92, 96 N.Y.S.3d at 57 (quoting *Burlington Ins. Co.*, 29 N.Y.3d at 317, 79 N.E.3d at 478, 57 N.Y.S.3d at 86).

21. *Id.* at 592, 96 N.Y.S.3d at 57.

22. *Id.* (quoting *Burlington Ins. Co.*, 29 N.Y.3d at 324, 79 N.E.3d at 483, 57 N.Y.S.3d at 91).

23. *Id.*

24. *Id.* (first citing Indian Harbor Ins. Co. v. Alma Tower, LLC, 165 A.D.3d 549, 549, 87 N.Y.S.3d 9, 10 (1st Dep't 2018); and then citing Vargas v. City of New York, 158 A.D.3d 523, 525, 71 N.Y.S.3d 415, 417 (1st Dep't 2018)).

25. *Breeze Nat'l Inc.*, 170 A.D.3d at 592, 96 N.Y.S.3d at 57 (first citing *Indian Harbor Ins. Co.*, LLC, 165 A.D.3d at 549, 87 N.Y.S.3d at 10; and then citing *Vargas*, 158 A.D.3d at 525, 71 N.Y.S.3d at 417).

26. *Indian Harbor Ins. Co.*, 165 A.D.3d at 549, 87 N.Y.S.3d at 10 (first citing *Burlington Ins. Co.*, 29 N.Y.3d at 320–21, 79 N.E.3d at 481, 57 N.Y.S.3d at 89; and then citing Hanover Ins. Co. v. Philadelphia Indem. Ins. Co., 159 A.D.3d 587, 588, 73 N.Y.S.3d 549, 550 (1st Dep't 2018)); Mt. Hawley Ins. Co. v. Am. States Ins. Co., 168 A.D.3d 558, 559, 92 N.Y.S.3d 238, 239 (1st Dep't 2019) (citing *Indian Harbor Ins. Co.*, 165 A.D.3d at 549, 87 N.Y.S.3d at 10). This "reasonable possibility" language was introduced into New York duty to defend jurisprudence by the Court of Appeals in Fitzpatrick v. American Honda Motor Co., Inc., 78 N.Y.2d 61 (1991).

The First Department discussed this issue in *Indian Harbor Insurance Company v. Alma Tower, LLC*, holding *Burlington* inapplicable when there is actual knowledge of facts establishing a reasonable possibility of coverage.[27]

In *Indian Harbor*, an employee of a subcontractor sustained an injury while working for Vordonia Contracting & Supplies Corp. (Vordonia) at a property owned by Alma Tower, LLC (Alma).[28] The employee subsequently brought common-law negligence and Labor Law violation actions against Vordonia and Alma.[29] In response, Vordonia and Alma commenced third-party actions against the subcontractor, S & S HVAC Corp. (S & S), alleging negligence, and seeking indemnification and contribution.[30] Importantly, Vordonia and Alma also wrote to plaintiff, Indian Harbor Insurance Co. (Indian Harbor), S & S's insurer, seeking coverage.[31]

Upon receiving Vordonia and Alma's correspondence, Indian Harbor had "actual knowledge" that S & S may have proximately caused the underlying injury.[32] In light of this "actual knowledge" and the reasonable possibility that S & S proximately caused the injury, neither *Burlington* nor *Hanover* restricted Indian Harbor's coverage.[33]

Accordingly, the *Indian Harbor* court granted Vordonia and Alma's motion for summary judgment, holding that Indian Harbor had a duty to defend the underlying action which remained unaltered by *Burlington* and *Hanover*.[34]

Months later, the First Department built upon its *Indian Harbor* decision, determining in *Mt. Hawley Insurance Company v. American States Insurance Company* that defendant American States Insurance Company (American) had a duty to defend its additional insured based on the reasonable possibility that coverage existed.[35]

In *Mt. Hawley*, a man was injured while working at a construction site owned by West 27th on a project for which Chatsworth was the

27. 165 A.D.3d at 549, 87 N.Y.S.3d at 10 (first citing *Burlington Ins. Co.*, 29 N.Y.3d at 320–21, 79 N.E.3d at 481, 57 N.Y.S.3d at 89; and then citing *Hanover Ins. Co.*, 159 A.D.3d at 588, 73 N.Y.S.3d at 550).

28. *Id*. at 549, 87 N.Y.S.3d at 9–10.

29. *Id.*

30. *Id*. at 549, 87 N.Y.S.3d at 10.

31. *Id.*

32. *Indian Harbor Ins. Co.*, 165 A.D.3d at 549, 87 N.Y.S.3d at 10.

33. *Id*. (first citing *Burlington Ins. Co.*, 29 N.Y.3d at 320-21, 79 N.E.3d at 481, 57 N.Y.S.3d at 89; and then citing *Hanover Ins. Co*, 159 A.D.3d at 588, 73 N.Y.S.3d at 550).

34. *Id*. at 549, 87 N.Y.S.3d at 9.

35. 168 A.D.3d at 559, 92 N.Y.S.3d at 239 (citing *Indian Harbor Ins. Co.*, 165 A.D.3d at 549, 87 N.Y.S.3d at 10).

general contractor.[36] The man was directly employed by subcontractor J & R Glassworks (J & R), who was insured by American.[37] West 27th and Chatsworth contended they were entitled to a defense provided by American as additional insureds under J & R's policy.[38]

The *Mt. Hawley* court agreed with West 27th and Chatsworth, explaining "[b]ecause there was a reasonable possibility of coverage, and the underlying personal injury action was filed while the American policy was in effect, American ha[d] a duty to defend . . . [the] additional insureds."[39]

Further, the court differentiated between American's duty to defend and its duty to indemnify its additional insureds.[40] While the duty to defend was "clear" based on the reasonable possibility of coverage and the filing of the claim while the policy was in effect, the duty to indemnify remained subject to a factual determination.[41]

In another similar decision**,** *M&M Realty of New York, LLC v. Burlington Insurance Co.*, the First Department explored the duty to defend.[42] L&M Restoration (Restoration) was hired by defendant M&M Realty (M&M) to perform work at M&M's property.[43] Restoration's insurance policy, issued by Burlington Insurance Company (Burlington), provided "additional insured coverage for loss caused, in whole or in part, by Restoration's acts or omissions to any entity that L&M agreed in writing to name as an additional insured."[44] Tower Insurance Company (Tower), M&M's insurer, assumed the defense of M&M for an action brought against M&M by a Restoration employee who was injured on the job, and then commenced this action seeking reimbursement for costs incurred in defending and settling the underlying action on M&M's behalf.[45]

The First Department found that the contract between M&M and Restoration was ambiguous as to whether Restoration was required to

36. *Id.* at 558, 92 N.Y.S.3d at 239.

37. *Id.* at 559, 92 N.Y.S.3d at 239.

38. *Id.* at 558, 92 N.Y.S.3d at 239.

39. *Id.* at 559, 92 N.Y.S.3d at 239 (citing *Indian Harbor Ins*., 165 A.D.3d at 549, 87 N.Y.S.3d at 10).

40. *Mt. Hawley Ins. Co.*, 168 A.D.3d at 558, 92 N.Y.S.3d at 239 (first citing Chunn v. N.Y.C. Hous. Auth., 55 A.D.3d 437, 438, 866 N.Y.S.2d 145, 147 (1st Dep't 2008); and then citing N. River Ins. Co. v. ECA Warehouse Corp., 172 A.D.2d 225, 226, 568 N.Y.S.2d 71, 71 (1st Dep't 1991)).

41. *Id.*

42. 170 A.D.3d at 407, 95 N.Y.S.3d at 179.

43. *Id.*

44. *Id.*

45. *Id.*

name M&M as an additional insured under the Burlington policy, and the extrinsic evidence did not conclusively demonstrate the parties' intent, rather it presented an issue of credibility which needed to be determined by a factfinder.[46]

Nonetheless, the Court found that if it is established that Restoration intended to name M&M as an additional insured under the Burlington policy, then Burlington must reimburse Tower for its defense costs because the allegations of the underlying complaint and the known facts suggested a reasonable possibility of coverage, and Tower provided evidence demonstrating that the acts or omissions of Restoration were a proximate cause of the plaintiff's injuries.[47]

The First Department also recently declined to allow *Burlington* to revive time-barred appeals when it did not allow a defendant to renew a motion in which its additional insured status was conclusively decided, and which was filed after the passage of the appeal deadline.[48] In *Aspen Specialty Insurance Company v. Ironshore Indemnity Inc*., defendant Ironshore attempted to appeal the decision issued against it in November of 2016 after letting the time to appeal lapse.[49] Ironshore based its late appeal on the then-newly released *Burlington* decision; the court determined that an otherwise expired appeal of a final determination of additional insured status was not revived under *Burlington*.[50]

The most troubling decision this year was the First Department's opinion in *All State Interior Demolition Inc. v. Scottsdale Insurance Company.*[51] Traditionally, the obligation to defend any party under any policy of liability insurance arises from the underlying plaintiff's claims. The reasons are so very clear. If the court permits a party who is claiming

46. *Id.* at 407-08, 95 N.Y.S.3d at 179–80 (first citing Ins. Co. of N.Y. v. Cent. Mut. Ins. Co., 47 A.D.3d 469, 471, 850 N.Y.S.2d 56, 58 (1st Dep't 2008); and then citing Trapani v. 10 Arial Way Assoc., 301 A.D.2d 644, 647, 755 N.Y.S.2d 396, 398–99 (2d Dep't 2003)).

47. *M&M Realty of N.Y., LLC*, 170 A.D.3d at 408, 95 N.Y.S.3d at 180 (first citing *Wausau Underwriters Ins. Co.*, 145 A.D.3d at 617, 45 N.Y.S.3d at 6; then citing *Fitzpatrick*, 78 N.Y.2d at 67, 575 N.E.2d at 93, 571 N.Y.S.2d at 675; then citing *Pioneer Cent. Sch. Dist.*, 165 A.D.3d at 1647, 86 N.Y.S.3d at 366; then citing *B P A.C. Corp.*, 8 N.Y.3d at 714, 871 N.E.2d at 1131, 840 N.Y.S.2d at 305; and then citing *Burlington Ins. Co.*, 29 N.Y.3d at 321–22, 79 N.E.3d at 481–82, 57 N.Y.S.3d at 89–90).

48. Aspen Specialty Ins. Co. v. Ironshore Indem. Inc., 167 A.D.3d 420, 420, 87 N.Y.S.3d 469, 469 (1st Dep't 2018) (first citing *Burlington Ins. Co.* 29 N.Y.3d at 327, 79 N.E.3d at 485, 57 N.Y.S.3d at 93; and then citing *In re* Huie, 20 N.Y.2d 568, 572, 232 N.E.2d 642, 644, 285 N.Y.S.2d 610, 612 (1967)).

49. *Id.*

50. *Id.* (first citing *Burlington Ins. Co.* 29 N.Y.3d at 327, 79 N.E.3d at 485, 57 N.Y.S.3d at 93; and then citing *In re* Huie, 20 N.Y.2d at 572, 232 N.E.2d at 644, 285 N.Y.S.2d at 612).

51. All State Interior Demolition Inc. v. Scottsdale Ins. Co., 168 A.D.3d 612, 92 N.Y.S.3d 256 (1st Dep't 2019).

additional insured status to please itself into coverage, then any party seeking that status could and likely would do just that. The *All State Interior* decision tipped *Burlington* by allowing the allegations contained in third-party complaints to serve as a roadmap to the determination of additional insured status.[52]

In *All State*, defendant Scottsdale issued a policy to United Interior (United) which included language stating an organization would be added as an additional insured thereto "when [United] and such . . . organization have agreed in writing in a contract or agreement that such . . . organization be added as an additional insured on your policy."[53] According to that language, plaintiff All State Interior Demolition Inc. (All State) was considered the only additional insured, as it was the only organization with which United entered into a written agreement.[54]

United contended that it did not owe a duty to defend All State, as the policy provided "an additional insured will be covered only when the underlying injury or damage was caused, in whole or in part, by United's acts or omissions."[55]

The *All State* court disagreed.[56] Conceding the amended complaint and bill of particulars contained no allegations of negligence against United—which was not even named as a defendant—the court found a duty to defend nonetheless existed because (1) All State was employed by United at the time of the accident, and (2) the third-party complaint brought against United in the underlying action alleged United's negligence.[57] Given these factors, the court concluded United's duty to defend was triggered.[58]

Burlington's significance, when first rendered, was that additional insured coverage was not merely based on the underlying plaintiff's employment with the named insured, but based on proximate causation

52. *Id.* at 613, 92 N.Y.S.3d at 257 (first citing City of New York v. Evanston Ins. Co., 39 A.D.3d 153, 157, 830 N.Y.S.2d 299, 303 (2nd Dep't 2007); then citing Belt Painting Corp. v. TIG Ins. Co., 100 N.Y.2d 377, 383, 795 N.E.2d 15, 17, 763 N.Y.S.2d 790, 792 (2003); and then citing N.Y.C. Transit Auth. v. Aetna Cas. & Sur. Co., 207 A.D.2d 389, 391, 615 N.Y.S.2d 709, 710 (2nd Dep't 1994)).

53. *Id.* at 612, 92 N.Y.S.3d at 257.

54. *Id.* at 612–613, 92 N.Y.S.3d at 257 (citing AB Green Gansevoort, LLC v. Peter Scalamandre & Sons, Inc., 102 A.D.3d 425, 426, 961 N.Y.S.2d 3, 5 (1st Dep't 2013).

55. *Id.* at 613, 92 N.Y.S.3d at 257.

56. *All State Interior Demolition Inc.*, 168 A.D.3d at 613, 92 N.Y.S.3d at 257.

57. *Id.* at 613, 92 N.Y.S.3d at 257.

58. *Id.* (first citing *Evanston Ins. Co.*, 39 A.D.3d at 157, 830 N.Y.S.2d at 303; then citing *Belt Painting Corp.*, 100 N.Y.2d at 383, 795 N.E.2d at 17, 763 N.Y.S.2d at 792; and then citing *N.Y.C. Transit Auth.*, 207 A.D.2d at 391, 615 N.Y.S.2d at 710).

of the named insured's conduct.[59] If coverage is to be predicated solely on the *All State* court's factors, *Burlington* would, in effect, only be relevant in cases where the named insured's negligence has already been adjudicated.[60]

Secondarily, the court's determination that the third party—purported additional insured's allegation—could trigger coverage contradicts the New York Court of Appeals' 1991 holding in *Fitzpatrick v. American Honda Motor Company*.[61] *Fitzpatrick* recognized an insurer's duty to defend as triggered when (a) the allegation's in the underlying complaint trigger coverage or (b) the insurer had knowledge of facts which potentially brought the claim within the policy's indemnity coverage.[62] This decision goes significantly further than *Fitzpatrick*. While *All State* based its finding of coverage solely on All State's employment, and allegations contained in a third-party complaint, *Fitzpatrick* would have required a showing of facts aside from the allegations to support such a finding.[63] Instead, it allows a party who is seeking to become an additional insured to plead itself into coverage.[64]

59. *Compare Burlington*, 29 N.Y.3d at 326, 79 N.E.3d at 485, 57 N.Y.S.3d at 93 (finding that the plain meaning in the industry intends for there to be a proximate causation requirement to extending coverage to the additional insureds), *with All State Interior Demolition Inc.*, 168 A.D.3d at 613, 92 N.Y.S.3d at 257 (noting coverage can be found on plaintiff's affirmative status as an employee of the named insured in conjunction with allegations in third-party complaints brought against the named insured in order to lend meaning to additional insured status).

60. *See Burlington*, 29 N.Y.3d at 327, 79 N.E.3d at 485, 57 N.Y.S.3d at 93 (holding that there was a proximate cause requirement to hold extended coverage to additional insureds); *see also All State Interior Demolition Inc.*, 168 A.D.3d at 613, 92 N.Y.S.3d at 257 (finding that proof of employment by the named insured and third-party complaints brought in the underlying action alleging negligence is sufficient to the insured's obligation to defend).

61. Fitzpatrick v. Am. Honda Motor Co., 78 N.Y.2d 61, 67, 575 N.E.2d 90, 93, 571 N.Y.S.2d 672, 675 (1991).

62. *Id.* at 66, 575 N.E.2d at 92, 571 N.Y.S.2d at 674 (citing Technicon Elec. Corp. v. Am. Home Assurance Co., 74 N.Y.2d 66, 73, 542 N.E.2d 1050, 1048, 544 N.Y.S.2d 531, 532 (1989)).

63. *See id.* at 67, 575 N.E.2d at 93, 571 N.Y.S.2d at 675; *see also All State Interior Demolition Inc.*, 168 A.D.3d at 613, 92 N.Y.S.3d at 257.

64. *Id.* In fact, retracing the caselaw relied upon by the *All State* court, we see distinguishable procedural postures abound. For example, the First Department relied upon New York City Tr. Auth. v. Aetna Cas. & Sur. Co., 207 A.D.2d 389, 391, 615 N.Y.S.2d 709 (2nd Dept. 1994). In that case, the purported additional insured was itself implead into the action, rather than the carrier's named insured—who was an original, named defendant. *Id*. at 390, 615 N.Y.S.2d at 710. In that scenario, coverage existed for the additional insured—merely a third-party defendant in the action—because the claimant alleged negligence directly against the named insured as a named defendant in the action and any duty to defend for the carrier solely existed in the third-party action. In another distinguishable case. City of New York v. Evanston Ins. Co., 39 A.D.3d 153, 830 N.Y.S.2d 299 (2nd Dep't 2007), the third-party complaint was the only relevant complaint because the purported additional insured, as

Other jurisdictions have persuasively held that a complaint filed by a third party should not be allowed to bolster a claim of coverage.[65]

II. LATE NOTICE

We next turn to late notice. A recent case decided in the Second Department, *Villavicencio v. Erie Insurance Company*, found sufficient evidence of prejudice to uphold a carrier's disclaimer based upon late notice of a claim.[66]

On February 11, 2011, a fire occurred in a building owned by Elliot's Apartments, within which plaintiff, Christina Villavicencio, was a tenant.[67] Erie Insurance Company (Erie) provided first-party property and liability coverage for the premises.[68]

The plaintiff filed suit against the building owner in October of 2013 to recover for damage to her property.[69] The property owner failed to appear or answer, and the plaintiff took a default judgment by order dated July 10, 2014.[70]

Subsequently, on July 16, 2014, the property owners first notified Erie of the action by sending copies of the motion for a default and the order granting the default judgment to Erie.[71] Thereafter, on July 25, 2014, Erie disclaimed coverage under the liability section of the policy on the ground that the insured, although properly served with the process, failed to provide Erie with notice until after default was entered.[72]

Plaintiff entered a judgment in February of 2015 against the property owner and served a copy of the judgment on Erie.[73] Arguing that Erie's

well as the named insured, were merely involved in the third-party action as co-third-party defendants. Since negligence was alleged against the named insured in the third-party action—the only action it was a party to—the carrier's defense obligation for the purported additional insured was triggered. The distinguishing characteristic between these cases and *All State* is that the carrier's duty to defend was relevant only to the third-party action, permitting inquiry into the allegations contained therein. Where, as was the case in *Allstate*, the third-party complaint is brought by the purported additional insured itself against the named insured, the procedural dynamic is completely different.

65. *See* Nat'l Fire Ins. of Hartford v. Walsh Constr. Co., 392 Ill. App. 3d 312, 322, 909 N.E.2d 285, 293 (1st Dist. 2009); *see also* Dale Corp. v. Cumberland Mut. Fire Ins. Co., No. 09-1115, 2010 U.S. Dist. LEXIS 127126, at *25 (E.D. Pa. 2010).

66. 172 A.D.3d 1276, 1277–78, 101 N.Y.S.3d 361, 362–63 (2nd Dep't 2019).

67. *Id.* at 1276–77, 101 N.Y.S.3d at 362.

68. *See id.* at 1277, 101 N.Y.S.3d at 362; Complaint at 1, Villavicencio v. Erie Ins. Co., 172 A.D.3d 1276, 101 N.Y.S.3d 361 (2d Dep't 2019) (No. 518202015).

69. *Villavicencio*, 172 A.D.3d at 1277, 101 N.Y.S.3d at 362.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

disclaimer was flawed and it suffered no prejudice by its insured's late notice, plaintiff commenced a direct action against Erie.[74] Plaintiff contended that Erie, which had adjusted the insured's first-party property damage claim, should have known that the plaintiff would file a third-party claim for property damage.[75]

Thereafter, the parties cross-moved for summary judgment, with Erie seeking dismissal of the complaint on the ground that Erie suffered irrebuttable prejudice pursuant to Insurance Law section 3420(c)(2)(B).[76] The lower court granted the plaintiff's motion and denied Erie's cross-motion.[77] Erie appealed.[78]

The Second Department reversed, finding the statutory provision of the Insurance Law to be clear and unambiguous.[79] The courts must give effect to the plain meaning of Insurance Law section 3420(c)(2)(B), which states that "an irrebuttable presumption of prejudice shall apply if, prior to notice, the insured's liability has been determined by a court of competent jurisdiction or by binding arbitration; or if the insured has resolved the claim or suit by settlement or other compromise."[80] Thus, the statute applied in this case to create the presumption of irrebuttable prejudice to Erie as the liability of Erie's insured was determined by a court of competent jurisdiction prior to notice of the claim, thereby warranting dismissal of the complaint.[81]

III. UM/SUM

In the Uninsured Motorist/Supplementary Uninsured Motorist (UM/SUM) arena, the Second Department was certainly busy for the *Survey* period. To begin, *Matter of Allmerica Financial Benefit Insurance v. Kokotos* offers a quick primer on applications to stay UM arbitrations.[82]

For those unfamiliar with New York practice, if an individual claims to have been involved in a hit-and-run accident, there is a requirement,

74. *Villavicencio*, 172 A.D.3d at 1277, 101 N.Y.S.3d at 362.

75. Affirmation in Support of Cross Motion & in Opposition to Motion at 5, Villavicencio v. Erie Ins. Co., 172 A.D.3d 1276, 101 N.Y.S.3d 361 (2d Dep't 2019) (No. 518202015).

76. *Villavicencio*, 172 A.D.3d at 1277, 101 N.Y.S.3d at 362–63 (citing N.Y. INS. LAW § 3420(c)(2)(B) (McKinney 2015 & Supp. 2019)).

77. *Id.* at 1277, 101 N.Y.S.3d at 363.

78. *Id.*

79. *Id.*

80. *Id.* at 1278, 101 N.Y.S.3d at 363 (quoting INS. LAW § 3420(c)(2)(B)).

81. *Villavicencio*, 172 A.D.3d at 1278, 101 N.Y.S.3d at 363 (citing INS. LAW § 3420(c)(2)(B)).

82. 168 A.D.3d 721, 721, 89 N.Y.S.3d 634, 634 (2d Dep't 2016).

among others, that physical contact with that vehicle is established.[83] If the UM carrier believes that no physical contact has occurred, it must bring a petition to permanently stay arbitration within twenty days of the demand under Article 75 of the New York Civil Practice Law and Rules (CPLR).[84] This was such petition.[85]

The lower court scheduled a "framed-issue", fact-finding hearing to determine whether there was physical contact.[86] The lower court denied the application to stay, finding physical contact, and this appeal ensued.[87]

The appellate court noted that "[t]he insured has the burden of establishing that the loss sustained was caused by an uninsured vehicle, namely, that physical contact occurred, that the identity of the owner and operator of the offending vehicle could not be ascertained, and that the insured's efforts to ascertain such identity were reasonable."[88] The court affirmed the finding that the insured lost control of his vehicle after he was struck from behind by another vehicle, which then fled the scene.[89]

Another Second Department decision, *Colella v. GEICO General Insurance Company* should serve as a warning to policyholders seeking SUM coverage to ensure that allegations are raised indicating exhaustion of the tortfeasor's liability limits.[90]

The insured Maria Colella [plaintiff], was injured when her vehicle was struck by a vehicle owned and operated by Darrin Moran.[91] "In May 2014, the plaintiff commenced this action against GEICO General Insurance Company (hereinafter GEICO), the insurer of her vehicle at the

83. *Id.* at 722, 89 N.Y.S.3d at 634 (first citing N.Y. INS. LAW § 5217 (McKinney 2016); then citing Allstate Ins. Co. v. Killakey, 78 N.Y.2d 325, 328, 580 N.E.2d 399, 400, 574 N.Y.S.2d 927, 928 (1991); then citing Motor Vehicle Acc. Indemnification Corp. v. Eisenberg, 18 N.Y.2d 1, 3, 218 N.E.2d 524, 525, 271 N.Y.S.2d 641, 642 (1966); then citing Progressive Nw. Ins. Co. v. Scott, 123 A.D.3d 932, 932, 999 N.Y.S.2d 442, 443 (2014); then citing Progressive Specialty Ins. Co. v. Lubeck, 111 A.D.3d 947, 947, 978 N.Y.S.2d 153, 154 (2d Dep't 2013); and then citing Nova Cas. Co. v. Musco, 48 A.D.3d 572, 573, 852 N.Y.S.2d 229, 230 (2d Dep't 2008)).

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

85. *In re Allmerica Fin. Benefit Ins.*, 168 A.D.3d at 721, 89 N.Y.S.3d at 634.

86. *Id.* at 721–22, 89 N.Y.S.3d at 634.

87. *Id.* at 722, 89 N.Y.S.3d at 634.

88. *Id.* at 722, 89 N.Y.S.3d at 634–35 (quoting *Nova Cas. Co.*, 48 A.D.3d at 573, 852 N.Y.S.2d at 230).

89. *Id.* at 722, 89 N.Y.S.3d at 635.

90. 164 A.D.3d, 745, 746, 83 N.Y.S.3d 157, 159 (first quoting N.Y. INS. LAW § 3420(f)(2) (McKinney 2015 & Supp. 2019) (first citing Ducz v. Progressive Ne. Ins. Co., 113 A.D.3d 849, 850, 978 N.Y.S.2d 906, 906 (2d Dep't 2014); and then citing Russell v. N.Y. Central Mut. Fire Ins. Co., 11 A.D.3d 668, 669, 783 N.Y.S.2d 404, 405 (2d Dep't 2004) (finding that exhaustion is a "condition precedent" to recovery)).

91. *Id.*

time of the accident."[92] "The plaintiff sought a judgment declaring that she was entitled to supplementary uninsured/underinsured motorist (hereinafter SUM) benefits" under her GEICO policy in the sum of $200,000.[93]

"GEICO moved pursuant to CPLR 3211(a)(7) to dismiss the complaint."[94] As recognized by the Second Department, it is axiomatic that as a condition precedent to SUM coverage, there is exhaustion of the limits of liability for all insurance policies applicable at the time of the accident.[95] "Here, the complaint failed to allege that the limit of the tortfeasor's insurance policy had been exhausted by payment."[96]

Keeping itself busy downstate, GEICO was involved in another Second Department SUM matter, *GEICO Insurance Company v. Rice*.[97] That matter concerned the interpretation of the term "occupying" under New York's mandatory SUM endorsement.[98]

Davon Rice, a New York resident who lived with his mother, was visiting his aunt in Pennsylvania when a friend of Rice's cousin requested the keys to Rice's vehicle in order to retrieve his house keys that he had supposedly dropped in the backseat; or so he claimed.[99] That "friend failed to return, and Rice later found his vehicle double-parked in the street."[100] Rice, attempting to unlock the vehicle, "placed his hand into a partially opened window to unlock the door, at which point the vehicle moved forward and dragged Rice along the roadway."[101]

Rice, after his own insurer disclaimed coverage, made a SUM claim under his mother's automobile insurance policy issued by GEICO.[102] Following Rice's attempt to arbitrate under the terms of that policy, GEICO commenced this proceeding to permanently stay arbitration.[103]

92. *Id.*

93. *Id.*

94. *Id.*

95. *Colella*, 164 A.D.3d at 746, 83 N.Y.S.3d at 159 (first quoting N.Y. INS. LAW § 3420(f)(2) (McKinney 2015 & Supp. 2019) (first citing *Ducz*, 113 A.D.3d at 850, 978 N.Y.S.2d at 906; and then citing *Russell*, 11 A.D.3d at 669, 783 N.Y.S.2d at 405).

96. *Id.* (first citing Federal Ins. Co. v. Watnick, 80 N.Y.2d 539, 546, 607 N.E.2d 771, 774, 592 N.Y.S.2d 624, 627 (1992); then citing Continental Ins. Co. v. Richt, 253 A.D.2d 818, 820, 677 N.Y.S.2d 634, 635 (2d Dep't 1998); then citing Polesky v. GEICO Ins. Co., 241 A.D.2d 551, 552, 661 N.Y.S.2d 639, 640 (2d Dep't 1997); and then citing Sutorius v. Hanover Ins. Co., 233 A.D.2d 332, 333–34, 649 N.Y.S.2d 183, 184 (2d Dep't 1996)).

97. 167 A.D.3d 884, 90 N.Y.S.3d 256 (2d Dep't 2018).

98. *Rice*, 167 A.D.3d at 885, 90 N.Y.S.3d at 257.

99. *Id.* at 884, 90 N.Y.S.3d at 257.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Rice*, 167 A.D.3d at 884, 90 N.Y.S.3d at 257.

> Upon review, it was apparent that the SUM endorsement language did not apply . . .
>
> to bodily injury to an insured incurred while occupying a motor vehicle owned by that insured, if such motor vehicle is not insured for SUM coverage by the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of this policy.[104]

"The term 'occupying' was defined in the policy as 'in, upon, entering into, or exiting from a motor vehicle,'" and thus GEICO was entitled to disclaim coverage because Rice was occupying his own vehicle, and not one insured by GEICO under his mother's policy.[105]

The issue of "occupancy" was addressed in the First Department as well in *Progressive Insurance Company v. Bartner*.**[106]** There it was determined that the question of "occupancy" in the SUM context is one for the court, and not an arbitrator.[107]

If an individual seeks to recover SUM benefits, she must be the named insured, a resident relative of the named insured, or an "occupant" of the vehicle.[108] The issue of "occupancy" has always been an interesting one; because it is not necessary that the person be inside the car but "in or upon" it.[109]

The First Department concluded that the issue of "occupancy" is a question for the court, not the arbitrator, as the answer determines arbitrability of the claim itself.[110] If the insurer believes that the SUM claimant is not an occupant, it must bring a claim to permanently stay

104. *Id.* at 885, 90 N.Y.S.3d at 257.

105. *Id.* (first citing Gov't Emps. Ins. Co. v. Avelar, 108 A.D.3d 672, 673, 969 N.Y.S.2d 521, 522 (2d Dep't 2013); then citing USAA Cas. Ins. Co. v. Cook, 84 A.D.3d 825, 826, 925 N.Y.S.2d 86, 86 (2d Dep't 2011); then citing Baughman v. Merchants Mut. Ins. Co., 87 N.Y.2d 589, 592, 663 N.E.2d 898, 900, 640 N.Y.S.2d 857, 859 (1996); then citing Gov't Emps. Ins. Co. v. Kligler, 42 N.Y.2d 863, 864–65, 366 N.E.2d 865, 866, 397 N.Y.S.2d 777, 778 (1977); and then citing MDW Enters. v. CNA Ins. Co., 4 A.D.3d 338, 340, 772 N.Y.S.2d 79, 82 (2d Dep't 2004)).

106. 171 A.D.3d 598, 598, 98 N.Y.S.3d 181, 182 (1st Dep't 2019).

107. *Id.* (citing Cont'l Cas. Co. v. Lecei, 47 A.D.3d 509, 510, 850 N.Y.S.2d 76, 78 (1st Dep't 2008)).

108. *See* Metro. Prop. & Liab. Co. v. Feduchka, 135 A.D.2d 715, 716, 522 N.Y.S.2d 616, 616 (2d Dep't 1987); *see also* Faragon v. Am. Home Assurance Co., 52 A.D.3d 917, 918, 859 N.Y.S.2d 301, 303 (3d Dep't 2008).

109. *Rice*, 167 A.D.3d at 885, 90 N.Y.S.3d at 257.

110. *Bartner*, 171 A.D.3d at 598, 98 N.Y.S.3d at 182 (citing *Lecei*, 47 A.D.3d at 510, 850 N.Y.S.2d at 78).

arbitration within twenty days of the demand for arbitration.[111] That question is not one for the arbitrator.[112]

Another question that was raised in the SUM context was whether an insured may have dual residence for the purposes of SUM coverage.[113] The case is *Allstate Insurance Company v. Campanella*.[114]

In 2013, Alexis Campanella was struck by an automobile.[115] "After arbitrating her claim against the tortfeasor, she served the petitioner, Allstate Insurance Company, with a demand to arbitrate" a SUM claim under the terms of her father's automobile insurance policy.[116] Allstate sought a permanent stay of arbitration, "contending that the appellant did not qualify as an insured person under that policy."[117] Allstate argued that she was not a resident relative of her father's household at the time of the accident.[118] The trial court granted Allstate's petition, permanently staying the arbitration and this appeal followed.[119]

Allstate presented evidence that the appellant did not reside at her father's household at the time of the accident, in order to trigger insured status under the policy.[120] The evidence proffered included, *inter alia*, a police report and certain other records.[121] Those documents indicated that the appellant resided at a location other than her father's address listed on the policy.[122]

However, the appellant provided evidence that she had more than one residence for the purposes of automobile insurance coverage.[123] "Appellant testified that her father's home was her primary residence, but that she also resided at an Amsterdam Avenue address that was listed on the evidence provided by Allstate, typically on nights she worked . . . near

111. *See* N.Y. C.P.L.R. § 7503(c) (McKinney 2013).

112. *Bartner*, 171 A.D.3d at 598, 98 N.Y.S.3d at 182 (citing *Lecei*, 47 A.D.3d at 510, 850 N.Y.S.2d at 78).

113. Allstate Ins. Co. v. Campanella, 170 A.D.3d 994, 996, 95 N.Y.S.3d 559, 561 (2d Dep't 2019).

114. *Id.*

115. *Id.* at 995, 95 N.Y.S.3d at 560.

116. *Id.*

117. *Id.*

118. *Campanella*, 170 A.D.3d at 995, 95 N.Y.S.3d at 560.

119. *Id.*

120. *Id.* at 995, 95 N.Y.S.3d at 560–61.

121. *Id.* at 995, 95 N.Y.S.3d at 561.

122. *Id.*

123. *Campanella*, 170 A.D.3d at 995–96, 95 N.Y.S.3d at 561 (first citing Progressive N. Ins. Co. v. Pedone, 139 A.D.3d 958, 959, 31 N.Y.S.3d 586, 587 (2d Dep't 2016); and then citing A. Cent. Ins. Co. v. Williams, 105 A.D.3d 1042, 1042–43, 963 N.Y.S.2d 379, 380 (2d Dep't 2013)).

that location."[124] Appellant also testified that she had keys to her father's home on Lamont Avenue, as well as a garage door opener, and that her dog was there along with other personal belongings.[125] Appellant's father testified "that his home was the appellant's primary residence, that she stayed there at least four nights per week, and that she stayed at the other address when she worked late."[126] Appellant also proffered a neighbor's testimony who stated "that she had lived near the father's home for 41 years, had observed the appellant residing there, and had frequently seen the appellant's vehicle parked there."[127] Additionally, appellant tendered "personal checks, her driver license, and correspondence to her from Allstate and the tortfeasor's insurer regarding the accident as documentary proof that she resided at her father's home on Lamont Avenue at the time of the accident."[128]

Because Allstate failed to establish that appellant's connection to her father's home was temporary or ephemeral, nor that the SUM endorsement precluded an insured from having more than one residence, the Second Department reversed and dismissed the proceeding.[129]

As with many areas of insurance law, timing is often of utmost importance and the UM/SUM arena is no different. The next case, *Progressive Northwestern Insurance Company v. Valenti*, outlines the standard for sufficient notice by an insured of an intention to settle an Underinsured Motorist (UIM) claim.[130]

Tina Valenti, insured by Progressive, was involved in a car accident in 2005 and sued the other driver-tortfeasor.[131] On January 29, 2014, Valenti's lawyer advised Progressive that he was negotiating a settlement with the tortfeasor's carrier, that the tortfeasor had $50,000 in auto

124. *Id.* at 996, 95 N.Y.S.3d at 561 (first citing *Pedone*, 139 A.D.3d at 959, 31 N.Y.S.3d at 587; and then citing Dutkanych v. United States Fid. & Guar. Co., 252 A.D.2d 537, 538, 675 N.Y.S.2d 623, 625 (2d Dep't 1998)).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Campanella*, 170 A.D.3d at 996, 95 N.Y.S.3d at 561.

129. *Id.*

130. 170 A.D.3d 1024, 1025, 95 N.Y.S.3d 557, 558 (2d Dep't 2019) (quoting Gov't Empls. Ins. Co. v. Arciello, 129 A.D.3d 1083, 1084, 12 N.Y.S.3d 228, 229 (2d Dep't 2015)) (first citing Weinberg v. Transamerica Ins. Co., 62 N.Y.2d 379, 381–82, 465 N.E.2d 819, 820, 477 N.Y.S.2d 99, 100–01 (1984); then citing Travelers Home & Marine Ins. Co. v. Kanner, 103 A.D.3d 736, 738, 962 N.Y.S.2d 153, 156 (2d Dep't 2013); and then citing Integon Ins. Co. v. Battaglia, 292 A.D.2d 527, 527–28, 739 N.Y.S.2d 590, 590–91 (2d Dep't 2002)).

131. *Id.* at 1024–25, 95 N.Y.S.3d at 558.

liability coverage and no excess or umbrella coverage and that unless Progressive objected he would issue a release and file a UIM claim.[132]

When no response materialized, Valenti proceeded with settlement on April 29, 2014, for $50,000, and notified Progressive accordingly.[133] By letter dated October 16, 2014, Progressive indicated to its insured that the matter was closed and settlement funds were subsequently released on November 1, 2014.[134]

Then, in December, Valenti's counsel informed Progressive that Valenti intended to pursue SUM benefits under her policy.[135] Progressive issued a disclaimer, dated January 19, 2015, indicating that the release was signed without Progressive's permission or written consent.[136]

Upon Valenti's demand for arbitration of her SUM benefits, Progressive sought to permanently stay arbitration, contending that its insured had settled with the driver-tortfeasor without Progressive's consent.[137]

In handling the questions posed, the Second Department noted that "[a]s a general rule, an insured who settles with a tortfeasor in violation of a policy condition requiring his or her insurer's consent to settle, thereby prejudicing the insurer's subrogation rights, is precluded from asserting a claim for SUM benefits under the policy."[138] However, under New York's prescribed SUM language in 11 N.Y.C.R.R. 60-2.3(f), an exception to this rule exists in Condition 10, where an insured advises her insurer of an offer to settle which fully exhausts tortfeasor's policy, and obligates the insurer to consent to the settlement or advance that amount to the insured and stand in the insured's shoes regarding the prosecution of the tort action within thirty days.[139] Failure of an insurer to timely respond allows the insured to settle with the tortfeasor without the insurer's consent and without forfeiting her rights to SUM benefits.[140]

132. *Id.* at 1025, 95 N.Y.S.3d at 558.

133. *Id.*

134. *Id.*

135. *Valenti*, 170 AD3d at 1025, 95 N.Y.S.3d at 558.

136. *Id.*

137. *Id.*

138. *Id.* (quoting *Arciello*, 129 A.D.3d at 1084, 12 N.Y.S.3d at 229) (first citing *Weinberg*, 62 N.Y.2d at 381–82, 465 N.E.2d at 820, 477 N.Y.S.2d at 100–01; then citing *Kanner*, 103 A.D.3d at 738, 962 N.Y.S.2d at 156; and then citing *Battaglia*, 292 A.D.2d at 527–28, 739 N.Y.S.2d at 590–91).

139. *Id.* at 1026, 95 N.Y.S.3d at 559 (quoting *Arciello*, 129 A.D.3d at 1084, 12 N.Y.S.3d at 230) (citing *In re* Cent. Mut. Ins. Co., 12 N.Y.3d 648, 656, 912 N.E.2d 54, 58 (2009)).

140. *Valenti*, 170 A.D.3d at 1026, 95 N.Y.S.3d at 559 (quoting *Arciello*, 129 A.D.3d at 1084, 12 N.Y.S.3d at 230).

Condition 10 resurfaced in another 2019 Second Department decision, *Unitrin Direct Insurance Company v Muriqi*.[141] In that case, Anna Maria Muriqi was injured in an automobile accident with a vehicle owned and operated by Christian Javier Vega, who was insured by Esurance.[142] Muriqi had an automobile insurance policy issued by Unitrin, which included SUM coverage.[143] By letter dated January 8, 2017, Esurance tendered $25,000 to Muriqi, exhausting its limits to settle the claim against its insured.[144]

Subsequently, Muriqi demanded arbitration of her SUM benefits claim from Unitrin and Unitrin, in response, moved to permanently stay arbitration due to Muriqi's alleged failure to comply with certain conditions relating to settling with a third party, among others.[145]

Just as the court above in *Valenti*, here, an exception to general rules against settlement without consent was found under Condition 10 of the SUM endorsement's mandatory language.[146] Under Condition 10, where an insured advises its SUM carrier of its desire to settle following receipt of an offer of the full policy limits of the tortfeasor, the insurer must either consent to the settlement or advance the settlement amount to the insured and assume the prosecution of the tort action within thirty days.[147] An insurer's failure to "timely respond in accordance with such condition" allows the insured to "settle with the tortfeasor without the insurer's consent and without forfeiting [the] right[s] to SUM benefits."[148]

Because the submissions indicated that Muriqi "executed a release with Esurance and Vega, [the tortfeasor] 'after thirty calendar days actual

141. 172 A.D.3d 1382, 1383–84, 102 N.Y.S.3d 633, 636 (2d Dep't 2019).

142. *Id.* at 1382, 102 N.Y.S.3d at 635.

143. *Id.*

144. *Id.*

145. *Id.* (citing N.Y. INSURANCE § 7503(b) (McKinney 2013)).

146. *See Valenti*, 170 A.D.3d at 1025–26, 95 N.Y.S.3d at 558–59 ("[T]he language set forth in 11 NYCRR 60-2.3(f), which must be included in all motor vehicle liability insurance policies in which SUM coverage has been purchased, creates an exception" to the "general rule" precluding an insured from settling with a tortfeasor without the insurer's consent to do so.) (first citing *Arciello*, 129 A.D.3d at 1084, 12 N.Y.S.3d at 229–30; then citing *Weinberg*, 62 N.Y.2d at 382–83, 465 N.E.2d at 821, 477 N.Y.S.2d at 101–02; then citing *Kanner*, 103 A.D.3d at 737, 962 N.Y.S.2d at 155; then citing *Battaglia*, 292 A.D.2d at 527, 739 N.Y.S.2d at 590–91; and then citing *In re* Cent. Mut. Ins. Co., 12 N.Y.3d at 659, 912 N.E.2d at 60, 884 N.Y.S.2d at 228); *see Muriqi*, 172 A.D.3d at 1383–84, 102 N.Y.S.3d at 636 (citing *Arciello*, 129 A.D.3d at 1084, 12 N.Y.S.3d at 229).

147. *Muriqi*, 172 A.D.3d at 1383, 102 N.Y.S.2d at 636 (first citing 11 N.Y.C.R.R. § 60–2.3(f) (2019); then citing *Bemiss*, 12 N.Y.3d at 659, 912 N.E.2d at 60, 884 N.Y.S.2d at 228; and then citing *Arciello*, 129 A.D.3d at 1084, 12 N.Y.S.3d at 229).

148. *Id.* at 1383, 102 N.Y.S.3d at 636 (first citing 11 N.Y.C.R.R. § 60–2.3(f); then citing *Bemiss*, 12 N.Y.3d at 659, 912 N.E.2d at 60, 884 N.Y.S.2d at 228; and then citing *Arciello*, 129 A.D.3d at 1084, 12 N.Y.S.3d at 229).

written notice' to [Unitrin], as provided for in Condition 10," under the SUM endorsement, coverage was preserved.[149]

But Condition 10 does not always protect the policyholder.[150] In *State Farm Fire and Casualty Company v. McLaurin*, the Second Department reminded insureds that settling with a tortfeasor without the SUM carrier's consent breaches that condition of the SUM endorsement.[151]

Jovanee McLaurin and Kathy Corbin were involved in an accident while in Corbin's vehicle insured by State Farm.[152] The State Farm policy included SUM coverage.[153] McLaurin and Corbin commenced an action against Maria Martinez and her husband, who were in the second vehicle.[154] However, they also sought to arbitrate a claim under the State Farm policy based on the involvement of a third vehicle.[155] The Martinez action was settled by stipulation upon the execution of general releases and payment by Martinez's insurance carrier of its policy limits.[156]

However, McClarin and Corbin breached the SUM policy by not seeking State Farm's consent.[157] "Once the existence of a release in settlement of the relevant tort claim is established, the burden is on the insured to establish, by virtue of an express limitation in the release, or of a necessary implication arising from the circumstances of its execution, that the release did not operate to prejudice the subrogation rights of the

149. *Id.* at 1383–84, 102 N.Y.S.3d at 636.

150. *See* State Farm Fire & Cas. Co. v. McLaurin, 171 A.D.3d 1191, 1192, 98 N.Y.S.3d 616, 618 (2d Dep't 2019) (quoting State Farm Auto. Ins. Co. v. Blanco, 208 A.D.2d 933, 934, 617 N.Y.S.2d 898, 898–99 (2d Dep't 1994)) (first citing *Kanner*, 103 A.D.3d at 737, 962 N.Y.S.2d at 155; then citing Metlife Auto & Home v. Zampino, 65 A.D.3d 1151, 1152–53, 886 N.Y.S.2d 697, 699 (2d Dep't 2009); then citing *Battaglia*, 292 A.D.2d at 527–28, 739 N.Y.S.2d at 590–91; and then citing State Farm Mut. Ins. Co. v. Lopez, 163 A.D.2d 390, 391, 558 N.Y.S.2d 118, 119 (2d Dep't 1990)) (holding an insured's failure to obtain consent prior to settling with a tortfeasor "constitute[d] a breach of a condition of the insurance contract" and as such, "disqualifie[d] the insured from availing himself [or herself] of the pertinent benefits of the policy.").

151. *Id.*

152. *Id.* at 1192, 98 N.Y.S.3d at 617.

153. *Id.*

154. *Id.* at 1192, 98 N.Y.S.3d at 617–18.

155. *McLaurin*, 171 A.D.3d at 1192, 98 N.Y.S.3d at 617.

156. *Id.* at 1192, 98 N.Y.S.3d at 618.

157. *Id.*

insurer."[158] McLaurin and Corbin failed to negate this presumption that such a release prejudiced the subrogation rights of State Farm.[159]

In yet another case involving an application to stay SUM arbitration, *GEICO General Insurance Company v. Glazer*, GEICO received a demand for arbitration from its insured, Benjamin Glazer, and instead of applying for a permanent stay within that statutory twenty days, they waited three months.[160]

The First Department noted that an untimely application to stay may be entertained when "its basis is that the parties never agreed to arbitrate, as distinct from situations in which there is an arbitration agreement which is nevertheless claimed to be invalid or unenforceable because its conditions have not been complied with."[161]

Glazer's "refusal to submit to an independent medical examination or examination under oath involves a condition precedent to coverage as opposed to an issue of arbitrability."[162] Had a timely request been made, discovery could have gone forward, but GEICO failed to do so and thus waived discovery.[163]

IV. TIMELY DISCLAIMER

Any carrier issuing policies on risks in New York must be cognizant of the unforgiving penalties imposed by New York Insurance Law section 3420(d)(2).[164] Those failing to abide by the principles of that section waive the right to rely upon certain defenses predicated on the application of exclusions and, in the case of *Robinson v. Global Liberty Insurance Company of New York*, breaches of policy conditions.[165]

In 2008, Keith Robinson and Antonio Bethea (plaintiffs) were involved in a car accident with a vehicle owned by Cherubin Noel (Noel)

158. *Id.* at 1193, 98 N.Y.S.3d at 618 (quoting *Kanner*, 103 A.D.3d at 738, 962 N.Y.S.2d at 156) (first citing *Weinberg*, 62 N.Y.2d at 380–83, 465 N.E.2d at 820–21, 477 N.Y.S. 2d at 100–01; and then citing Prudential Prop. & Cas. Ins. Co. v. Bacchus, 226 A.D.2d 384, 385, 640 N.Y.S.2d 237, 238 (2d Dep't 1996)).

159. *Id.* (citing *Zampino*, 65 A.D.3d at 1153, 886 N.Y.S.2d at 697).

160. 173 A.D.3d 499, 499, 103 N.Y.S.3d 57, 58 (1st Dep't 2019).

161. *Id.* at 499–500, 103 N.Y.S.3d at 58 (quoting Matarasso v. Cont'l Cas. Co., 56 N.Y.2d 264, 266, 436 N.E.2d 1305, 1305, 451 N.Y.S.2d 703, 704 (1982)).

162. *Id.* at 500, 103 N.Y.S.3d at 58 (citing GEICO Gen. Ins. Co. v. Schwartz, 953 N.Y.S.2d 549, 549 (Sup. Ct. Kings Cty. May 4, 2012)).

163. *Id.* at 500, 103 N.Y.S.3d at 59.

164. *See* N.Y. INS. LAW § 3420(d)(2) (McKinney 2015 & Supp. 2019).

165. 164 A.D.3d 1385, 1387, 84 N.Y.S.3d 255, 256–57 (2d Dep't 2018) (first citing Okumus v. Nat'l Specialty Ins. Co., 112 A.D.3d 797, 798, 977 N.Y.S.2d 338, 339 (2d Dep't 2013) and then citing Pa. Lumbermans Mut. Ins. Co. v. D & Sons Constr. Corp., 18 A.D.3d 843, 845, 796 N.Y.S.2d 122, 124 (2d Dep't 2005)); *see* INS. LAW § 3420(d)(2).

and operated by Okey Onwuzurulke.[166] Noel was insured by Global Liberty Ins. Co. of New York (Global).[167] Plaintiffs' sued Noel and Onwuzurulke to recover for their injuries (underlying action).[168] Global advised Noel and Onwuzurulke in December of 2010, that they must cooperate in the investigation and defense of the underlying action.[169] In January of 2011, Global disclaimed coverage on the ground that Noel and Onwuzurulke failed to meet their obligation to cooperate and subsequently, in September of 2012, the plaintiffs obtained a judgment against Noel and Onwuzurulke.[170]

Plaintiffs then filed a direct action against Global and moved for summary judgment, seeking a declaration that Global was obligated to indemnify Noel and Onwuzurulke for the judgment obtained in the underlying action.[171]

Under the *Thrasher* standard in New York, "[t]o effectively deny coverage based upon lack of cooperation, an insurance carrier must demonstrate (1) that it acted diligently in seeking to bring about the insured's cooperation, (2) that the efforts employed by the insurer were reasonably calculated to obtain the insured's cooperation, and (3) that the attitude of the insured, after his or her cooperation was sought, was one of willful and avowed obstruction."[172]

Global met these requirements with regard to Onwuzurulke.[173] Global "hired an investigator to locate Onwuzurulke, the investigator communicated with him, and Onwuzurulke refused to cooperate."[174] However, the same was not true of Noel, where Global repeatedly sent

166. *Id.* at 1385, 84 N.Y.S.3d at 256.

167. *Id.* at 1385–86, 84 N.Y.S.3d at 257.

168. *Id.* at 1386, 84 N.Y.S.3d at 257.

169. *Id.*

170. *Robinson*, 164 A.D.3d at 1386, 84 N.Y.S.3d at 257.

171. *Id.*

172. *Id.* (quoting Allstate Ins. Co. v. United Int'l Ins. Co., 16 A.D.3d 60, 606, 792 N.Y.S.2d 549, 550–51 (2d Dep't 2005) (first citing Thrasher v. United States Liab. Ins. Co., 19 N.Y.2d 159, 168–69, 225 N.E.2d 503, 508, 278 N.Y.S.2d 793, 800 (1967); and then citing DeLuca v. RLI Ins. Co., 153 A.D.3d 662, 662–63, 60 N.Y.S.3d 291, 293 (2d Dep't 2017)). Under the *Thrasher* standard, "[m]ere efforts by the insurer and mere inaction on the part of the insured, without more, are insufficient to establish non-cooperation." (first quoting Gov't Empls. Ins. Co. v Fletcher, 147 A.D.3d 940, 941, 48 N.Y.S.3d 173, 174 (2d Dep't 2017); and then quoting Country-Wide Ins. Co. v Henderson, 50 A.D.3d 789, 791, 856 N.Y.S.2d 184, 186 (2d Dep't 2008)).

173. *Id.*

174. *Id.*

letters to an address it knew was incorrect and searched for Noel under an incorrect name.[175]

More critically, with respect to both Noel and Onwuzurulke the disclaimers issued by Global were untimely.[176] "Insurance Law Section 3420(d)(2) provides that, when an insurer disclaims liability or denies coverage for bodily injury arising out of a motor vehicle accident occurring within the 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.'"[177] Failure to act promptly upon discovery of the grounds for disclaimer results in the insurer losing its ability upon those policy provisions and defenses.[178]

Here, Global had sufficient information to support disclaimer of coverage at the latest, as of September 20, 2010, when Onwuzurulke affirmatively refused to cooperate, Noel avoided multiple depositions dates, and Global's investigator had failed to locate Noel.[179] Thus, Global's delay in disclaiming coverage was not "as soon as is reasonably possible" within the meaning of Insurance Law section 3420(d)(2).[180]

The issue of timeliness was also considered in *Battisti v. Broome Cooperative Insurance Company*.[181] In that decision, the insurer assigned a defense, relative to a dog bite case, based upon the insured's statement that her dog never bit anyone.[182] On October 20, 2013, while visiting the home of Sheryl L. Dieter (Dieter) and Paul T. Dieter, plaintiff was bitten by Dieter's dog resulting in injuries.[183] Dieter timely submitted a claim to Broome Cooperative Insurance Company (Broome), her homeowners' insurer.[184]

175. *Robinson*, 164 A.D.3d at 1386, 84 N.Y.S.3d at 257 (first citing *Thrasher*, 19 N.Y.2d at 168–69, 225 N.E.2d at 508, 278 N.Y.S.2d at 800; and then citing *Country-Wide Ins. Co.*, 50 A.D.3d at 791, 856 N.Y.S.2d at 186).

176. *Id.* at 1387, 84 N.Y.S.3d at 257.

177. *Id.* (quoting N.Y. INS. LAW § 3420(d)(2) (McKinney 2015 & Supp. 2019)).

178. *Id.* (quoting Evanston Ins. Co. v. P.S. Bruckel, Inc., 150 A.D.3d 693, 694, 54 N.Y.S.3d 57, 59 (2d Dep't 2017)).

179. *Id.* at 1387, 84 N.Y.S.3d at 258. Interestingly enough, the court held that there was insufficient proof that Noel failed to cooperate. *Id.* Your authors are puzzled as to how a disclaimer on failure to cooperate grounds could be untimely if those grounds for disclaimer were yet to be fulfilled.

180. *Robinson*, 164 A.D.3d at 1387, 84 N.Y.S.3d at 258 (quoting N.Y. INS. LAW § 3420(d)(2) (McKinney 2015 & Supp. 2019)) (first citing *Okumus*, 112 A.D.3d at 798, 977 N.Y.S.2d at 339; and then citing *Pa. Lumbermans Mut. Ins. Co.*, 18 A.D.3d at 845, 796 N.Y.S.2d at 124).

181. 163 A.D.3d 1091, 1093, 79 N.Y.S.3d 765, 768 (3d Dep't 2018).

182. *Id.* at 1092, 79 N.Y.S.3d at 767.

183. *Id.* at 1092, 79 N.Y.S.3d at 766.

184. *Id.*

Two weeks after Dieter submitted her claim to Broome, Broome discovered that the dog had bitten Dieter's mother approximately one month prior to biting plaintiff.[185] After uncovering this information, Broome disclaimed coverage citing the policy's "Misrepresentation, Concealment or Fraud" provision, which stated that the policy does "not provide coverage if, whether before or after a loss: a. An insured has willfully concealed or misrepresented . . . any material fact or circumstance concerning this insurance; or . . . b. There has been fraud or false swearing by an insured regarding any matter relating to this insurance or the subject thereof."[186] Broome also relied upon an exclusion for "Canine Related Injuries or Damages," which stated, in pertinent part, that the "policy [does] not apply to any injury to persons . . . caused by any dog . . . in your care . . . when such injury . . . is caused by or contributed to by . . . any canine that has a history of one or more attacks on people, property or other animals that is verifiable from insurance claims records, police, or public record sources."[187]

In support of the dispositive motions in the coverage action, defendant submitted an affidavit of Broome's claims manager attesting that when she talked to Dieter after the incident, she asked Dieter whether the dog had previously bitten anyone and Dieter answered "[n]o."[188] Dieter stated that she was aware that the dog had a history of being abused but she was unaware of any history of biting.[189] Broome also submitted records from a hospital, the county public health department and the town dog control officer, as well as an affidavit from Dieter's mother, indicating that the mother was bitten by the dog approximately one month before the dog bit plaintiff.[190]

Dieter submitted in response an affidavit asserting that the dog did not bite her mother but scratched her, and at the time, Dieter's mother was on blood thinners which caused her to bleed more heavily.[191] Other proof was equivocal which resulted in the court finding a question of fact as to whether Dieter willfully concealed or misrepresented any material fact.[192]

185. *Id.* at 1092, 79 N.Y.S.3d at 766–67.
186. *Battisti*, 163 A.D.3d at 1092, 79 N.Y.S.3d at 767.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Battisti*, 163 A.D.3d at 1092–93, 79 N.Y.S.3d at 767.
192. *Id.* at 1093, 79 N.Y.S.3d at 767.

The canine exclusion required proof of "a history of at least one attack on a person or animal that is verifiable from public records."[193] Records from public health departments such as the town dog control officer substantiated that the dog attacked a person one month prior to when it bit plaintiff; however, the court found that the transcript of the claims manager's call with Dieter did not contain a specific question about whether Dieter was aware of any history of biting and could be viewed as contradictory to the affidavit submitted.[194] Thus, although Broome established the applicability of the policy's canine exclusion, it was required be raised timely or waived under Insurance Law section 3420(d).[195] If Broome failed to provide timely notice of disclaimer, it may not rely on that exclusion.[196]

Broome argued that it was entitled to summary judgment because any delay was due to its reliance on Dieter's statement that the dog had not previously bitten anyone.[197] The Third Department found a question of fact pertaining to whether Broome's claims manager in truth directly addressed the issue of any prior biting events to Dieter.[198] If the claims manager failed to ask this question, then there is a triable issue of fact as to whether Broome failed to conduct a thorough investigation into the potential applicability of the canine exclusion.[199]

Furthermore, given that the Dieters had owned the dog for one month, the court found there was a triable question of fact regarding the thoroughness of Broome's investigation, and that neither party established the reasonableness or unreasonableness of the delay in the disclaimer.[200]

V. POST-JUDGEMENT INTEREST

Many of the questions posed in the insurance law arena concern not just whether an insurer should provide coverage, but also which insurer should pay for what. In *Chen v. Insurance Company of the State of*

193. *Id.*

194. *Id.* at 1093, 79 N.Y.S.3d at 767–68.

195. *Id.* at 1093, 79 N.Y.S.3d at 768.

196. *Battisti*, 163 A.D.3d at 1093, 79 N.Y.S.3d at 768.

197. *Id.* at 1094, 79 N.Y.S.3d at 768.

198. *Id.*

199. *Id.* (citing Wood v. Nationwide Mut. Ins. Co., 45 A.D.3d 1285, 1287, 845 N.Y.S.2d 641, 643 (4th Dep't 2007)).

200. *Id.* at 1094, 79 N.Y.S.3d at 768–69 (first citing Stachowski v. United Frontier Mut. Ins. Co., 148 A.D.3d 1716, 1717–18, 50 N.Y.S.3d 682, 683 (4th Dep't 2017); then citing City of New York v. Welsbach Elec. Corp., 49 A.D.3d 322, 323, 852 N.Y.S.2d 134, 136 (1st Dep't 2008); and then citing Those Certain Underwriters at Lloyds, London v. Gray, 49 A.D.3d 1, 4–6, 856 N.Y.S.2d 1, 3–4 (1st Dep't 2007)).

Pennsylvania, the First Department confronted the question of which layer—primary or excess—should pay for post-judgment interest accrued on the entire judgment.[201]

The First Department was unpersuaded by Plaintiff's interpretation of a "follow form" provision in the Insurance Company of the State of Pennsylvania's (ICSOP) excess policy.[202] While a follow form policy is read in accord with the terms and conditions of the underlying policy, it is not absolute.[203] Where, as here, the "terms and conditions" of the underlying primary policy included that the primary insurer agreed to cover prejudgment interest "on that part of the judgment we pay," as well as "all" post-judgment interest on the "full amount of any judgment," the excess carrier was not responsible for such amounts.[204] This was especially true in light of the ICSOP "follow form" provision stating: "Except for the . . . conditions . . . of this policy, the coverage provided by this policy shall follow the terms, definitions, conditions and exclusions of the First Underlying Insurance Policy as shown in Item 4 of the Declarations."[205]

Equally telling were provisions in the ICSOP excess policy for the "Maintenance of Underlying Insurance," pursuant to which ICSOP's excess coverage was triggered only upon exhaustion of the "limits of insurance of the Underlying Insurance shown in Item 4 of the Declarations," which "limits" included the interest payments set forth in the Supplementary Payments provision.[206]

In another post-judgment interest decision, *Gyabaah v. Rivlab Transportation Corporation*, the First Department noted the difference between an insurer's offer of the policy limits and actual payment, tendering, or deposit into the court of the relevant amount.[207] In that decision, the tortfeasor's "bare offer to pay the policy limit was not a 'tender' of the policy for the purposes of stopping the accrual of prejudgment interest under 11 N.Y.C.R.R. 60-1.1(b)."[208] Despite language limiting payment of interest by a carrier until "we have paid,

201. 165 A.D.3d 588, 590 87 N.Y.S.3d 24, 26 (1st Dep't 2018).

202. *Id.* at 589, 87 N.Y.S.3d at 25.

203. *Id.* (citing Jefferson Ins. Co. of N.Y. v. Travelers Indem. Co., 92 N.Y.2d 363, 369, 703 N.E.2d 1221, 1224, 681 N.Y.S.2d 208, 211 (1998)).

204. *Chen*, 165 A.D.3d at 589, 87 N.Y.S.3d at 25.

205. *Id.* at 589, 87 N.Y.S.3d at 25–26.

206. *Id.* at 589, 87 N.Y.S.3d at 26.

207. 170 A.D.3d 616, 617, 96 N.Y.S.3d 562, 563 (1st Dep't 2019). *See* Gyabaah v Rivlab Transp. Corp., 102 A.D.3d 451, 958 N.Y.S.2d 109 (1st Dep't 2013) (providing procedural history).

208. *Id.* at 617, 96 N.Y.S.3d 563 (quoting 11 N.Y.C.R.R. § 60-1.1(b) (2019)).

offered to pay or deposited in court the part of the judgment that is within our Limit of Insurance," 11 N.Y.C.R.R. 60-1.1(b) prescribes payment of post-judgment interest to the carrier until it has "paid or tendered or deposited in court" that part of the judgment within the policy limit.[209] In essence the policy language's restrictions must be superseded by the regulatory minimums.[210]

VI. NUMBER OF OCCURRENCES

The next topic of interest addressed by the courts was number of occurrences. In *American Home Assurance Company v. Port Authority of New York and New Jersey*, the First Department was asked to consider whether injuries resulting from exposure to spray-on asbestos fireproofing applied at the World Trade Center site during construction, arose from a single occurrence that exhausted the policy limits.**[211]**

American Home sought a declaration that certain personal injuries allegedly arising from exposure to asbestos at the World Trade Center site were not covered under the subject insurance policy because defendants could not prove that those injuries occurred during the policy periods.[212] It also sought a declaration that the claims arising from the spray-on asbestos- fireproofing on the Twin Towers arose from a single occurrence that exhausted the policy limits.[213]

The First Department began with the language of the subject policy providing coverage for injuries arising out of the "Premises - Operations Hazard," meaning the policy covered injuries that resulted from o*perations* that occurred during the policy period.[214] In disagreeing with American Home's interpretation of the policy, "which would *limit coverage to injuries themselves occurring during the policy period," the court found "it was* not supported by that language and also is inconsistent with the broad 'Insuring Agreement[]' that requires plaintiff to pay 'all sums' that the insured becomes legally obligated to pay as damages for personal injuries in connection with the construction of [the WTC project]."[215]

The First Department acknowledged the trial court's correct conclusion that, in the absence of a single event or accident, all claims

209. *Id.*

210. *Id.* (citing Dingle v. Prudential Prop. & Cas. Ins. Co., 85 N.Y.2d 657, 660, 651 N.E.2d 883, 884, 628 N.Y.S.2d 15, 16 (1995)).

211. 166 A.D.3d 464, 464–65, 89 N.Y.S.3d 81, 82 (1st Dep't 2018).

212. *Id.* at 464–65, 89 N.Y.S.3d at 82.

213. *Id.*

214. *Id.* at 465, 89 N.Y.S.3d at 82.

215. *Am. Home Assurance Co.*, 166 A.D.3d at 465, 89 N.Y.S.3d at 82.

alleging exposure to asbestos from spray-on fireproofing at the site over a three-year period did not arise from a single occurrence under the policy.[216] It also concluded that as American Home reserved its right to recoup expenses it incurred that are not covered by the policies, the recoupment claims remain in play, and that the duty to defend does not survive exhaustion of the policy's liability limit since it explicitly provided that defense costs were subject to that limit.[217]

VII. DUTY TO DEFEND

Under New York law, an insurer's duty to defend is broader than its duty to indemnify, such that an insurer may be obligated to defend its insured even if, at the conclusion of an underlying action, it is found to have no obligation to indemnify its insured.[218] This is because an insurer must defend its insured whenever the allegations of a complaint in an underlying action "suggest . . . a reasonable possibility of coverage."[219]

In *Paramount Insurance Company v. Federal Insurance Company*, the First Department examined the duty to defend.[220] In an underlying personal injury action, the injured plaintiff alleged that she fell on the premises owned by David Ellis.[221] Ellis' property was leased to Blue Water Grill (Blue Water) and was insured by Paramount Insurance Company (Paramount).[222] The tenant Blue Water was insured by Federal

216. *Id.* (first citing Int'l Flavors & Fragrances, Inc. v. Royal Ins. Co. of Am. 46 A.D.3d 224, 228–29, 844 N.Y.S.2d 257, 260–61 (1st Dep't 2007); and then citing Appalachian Ins. Co. v. Gen. Elec. Co., 8 N.Y.3d 162, 171–72, 863 N.E.2d 994, 998, 831 N.Y.S.2d 742, 746 (2007)).

217. *Id.* at 465–66, 89 N.Y.S.3d at 82–83 (first citing Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Turner Constr. Co., 119 A.D.3d 103, 108–09, 986 N.Y.S.2d 74, 79 (1st Dep't 2014); then citing BX Third Ave. Partners, LLC v. Fidelity Nat'l Title Ins. Co., 112 A.D.3d 430, 431, 977 N.Y.S.2d 9, 10 (1st Dep't 2013); and then citing Am. Guar. & Liab. Ins. Co. v. CNA Reinsurance Co., 16 A.D.3d 154, 155, 791 N.Y.S.2d 525, 526 (1st Dep't 2005)).

218. *See* M&M Realty of N.Y., LLC v Burlington Ins. Co., 170 A.D.3d 407, 408, 95 N.Y.S.3d 178, 180 (1st Dep't 2019) (first citing City of New York v. Wausau Underwriters Ins. Co., 145 A.D.3d 614, 617, 45 N.Y.S.3d 3, 6 (1st Dep't 2016); then citing *Fitzpatrick*, 78 N.Y.2d at 67, 575 N.E.2d at 93, 571 N.Y.S.2d at 675; then citing *Pioneer Cent. Sch. Dist.*, 165 A.D.3d at 1647–48, 86 N.Y.S.3d at 366; and then citing BP A.C. Corp. v. One Beacon Ins. Group, 8 N.Y.3d 708, 715, 871 N.E.2d 1128, 1132, 840 N.Y.S.2d 302, 306 (2007)) (determining that if an insurer had a reasonable possibility of covering a party under its policy, it must reimburse that party for the costs of its defense).

219. *Id.*

220. 174 A.D.3d 476, 476, 106 N.Y.S.3d 300, 301 (1st Dep't 2019) (first citing Atl. Mut. Ins. Co. v. Terk Techs. Corp., 309 A.D.2d 22, 29, 763 N.Y.S.2d 56, 61 (1st Dep't 2003); and then citing Kassis v. Ohio Cas. Ins. Co., 12 N.Y.3d 595, 599–600, 913 N.E.2d 933, 934–35, 855 N.Y.S.2d 241, 242–43 (2009)).

221. *Id.*

222. *Id.*

Insurance Company (Federal Insurance).[223] The Federal Insurance policy covered David Ellis as an additional insured.[224]

The First Department held that based upon the lease between Ellis and Blue Water, and the policy issued by Federal Insurance, the allegations in the complaint triggered the insurer's defense obligation since they "give rise to a reasonable possibility of recovery under the policy."[225]

The trial court declined to consider facts presented in the underlying action, focusing only the complaint and the appellate division agreed.[226] It held that "the courts of this State have refused to permit insurers to look beyond the complaint's allegations to avoid their obligation to defend."[227] The court however could not rule on primacy since all policies that provide coverage were not before the court.[228]

Another similar decision is *McCoy v. Medford Landing, L.P.*, which found that a snowplow contractor had an obligation to defend, irrespective of the truth of the claims.[229] In February of 2009, plaintiff allegedly was injured when she slipped and fell on ice in a parking lot on property owned by Medford Landing, L.P. (Medford).[230] Plaintiff commenced this action against Medford to recover damages for personal injuries.[231] Medford then commenced a third-party action against the snow plow contractor pursuant to the terms of a contract between it and

223. *Id.*

224. *Id.*

225. *Paramount Ins. Co.*, 174 A.D.3d at 476, 106 N.Y.S.3d at 301 (first citing *Atl. Mut. Ins. Co.*, 309 A.D.2d at 29, 763 N.Y.S.2d at 61; and then citing *Kassis*, 12 N.Y.3d at 599–600, 913 N.E.2d at 934–35, 855 N.Y.S.2d at 242–43).

226. *Id.* at 477, 106 N.Y.S.3d at 301 (first citing ZKZ Assocs., LP v. CNA Ins. Co., 89 N.Y.2d 990, 991, 679 N.E.2d 629, 629, 657 N.Y.S.2d 390, 390 (1997); then citing Jenel Mgmt. Corp. v. Pacific Ins. Co., 55 A.D.3d 313, 313, 865 N.Y.S.2d 58, 58 (1st Dep't 2008); and then citing New York Convention Ctr. Operating Corp., v. Morris Cerullo World Evangelism, 269 A.D.2d 275, 275, 704 N.Y.S.2d 211, 212 (1st Dep't 2000)).

227. Paramount Ins. Co. v. Fed. Ins. Co., 170 A.D.3d 464, 465, 96 N.Y.S.3d 19, 21 (1st Dep't 2019) (quoting *Fitzpatrick*, 78 N.Y.2d at 66, 575 N.E.2d at 92, 571 N.Y.S.2d at 674) (This decision does raise a few questions. While an insurer may be called upon to defend a complaint where the allegations suggested a reasonable possibility of coverage, the duty to defend is not triggered, however, when, "as a matter of law . . . there is no possible factual or legal basis upon which the insurer might eventually be held to be obligated to indemnify the claimant under any provision of the insurance policy," or when the only interpretation of the allegations against the insured is that the factual predicate for the claim falls wholly within a policy exclusion. Thus, if the insurer had evidence that there was no possibility that it would be obligated to indemnity the insured, shouldn't it have been able to present that evidence?).

228. *Paramount Ins. Co.*, 174 A.D.3d at 477, 106 N.Y.S.3d at 301–02.

229. 164 A.D.3d 1436, 1438, 84 N.Y.S.3d 224, 227 (2d Dep't 2018).

230. *Id.*

231. *Id.*

Medford.[232] The third-party complaint asserted claims based on contractual and common-law indemnification, as well as a cause of action sounding in breach of contract for failure to procure insurance naming Medford as an additional insured.[233]

"Medford also commenced a second third-party action against NGM Insurance Company [(NGM)], which issued a general liability insurance policy to the [snowplow contractor]."[234]

In the coverage suit, the trial court granted that branch of Medford's motion for summary judgment declaring that it was an additional insured under the NGM policy, but denied those branches seeking declarations that NGM was obligated to defend and indemnify Medford in the main action and to reimburse it for costs, disbursements, and attorneys' fees incurred in defending the main action.[235] "The [trial] court explained that in light of triable issues of fact as to the liability of Medford or [the third-party defendants], the Court cannot determine at this juncture whether the plaintiff's accident would be covered under the subject insurance policy."[236]

The First Department also found that Medford failed to establish as a matter of law that the accident arose out of the snow plow contract and thus rightly denied the motion on contractual indemnification.[237] However, "Medford's motion which was for summary judgment declaring that NGM is obligated to reimburse Medford for costs, disbursements, and attorneys' fees incurred in defending the main action" should have been granted.[238] An additional insured is entitled to the same coverage as if it were a named insured.[239] "Here, Medford established,

232. *Id.*

233. *Id.* at 1436, 84 N.Y.S.3d at 226.

234. *McCoy*, 164 A.D.3d at 1438, 86 N.Y.S.3d at 227.

235. *Id.* at 1439, 86 N.Y.S.3d at 228.

236. *Id.*

237. *Id.* at 1439–40, 86 N.Y.S.3d at 228 (first citing Caban v. Plaza Constr. Corp., 153 A.D.3d 488, 490, 61 N.Y.S.3d 47, 49 (2d Dep't 2017); then citing Curreri v. Heritage Prop. Inv. Tr., Inc., 48 A.D.3d 505, 507, 852 N.Y.S.2d 278, 281 (2d Dep't 2008); and then citing Soto v. Alert No. 1 Alarm Sys., 272 A.D.2d 466, 467, 707 N.Y.S.2d 507, 508 (2d Dep't 2000)).

238. *Id.* at 1440, 86 N.Y.S.3d at 229.

239. *McCoy*, 164 A.D.3d at 1440–41, 86 N.Y.S.3d at 229 (citing Mack–Cali Realty Corp. v. NGM Ins. Co., 119 A.D.3d 905, 908, 990 N.Y.S.2d 253, 256 (2d Dep't 2014)).

prima facie, that the allegations in the complaint suggested a reasonable possibility of coverage."[240] Accordingly, a duty to defend existed.[241]

Finally, in *Combs v. Superintendent of Financial Services of the State of New York as Ancillary Receiver for Reliance Insurance Company*, the First Department highlighted a risk of failing to defend, holding that where an insur**er** breaches its duty to defend, reasonable settlement by insured must be indemnified.[242] In this decision, Reliance Insurance Company in Ancillary Receivership (Receiver), disclaimed coverage to its insured, Sean Combs, relative to a personal injury action brought against him by three individuals who were injured in a 1999 nightclub shooting.[243]

In the underlying action, plaintiffs asserted claims for *respondeat superior* and negligent hiring, retention, and supervision, which survived summary judgment.[244] The evidence presented was inconclusive in showing that the individual convicted for shooting plaintiffs was employed by Combs.[245] The First Department found that Receiver failed to meet its burden in demonstrating that it was not obligated to indemnify Combs since it conceded the settlement was reasonable, and Receiver failed to establish that Combs could not be subject to liability on the injured plaintiffs' claims for negligent hiring, retention and supervision, even if the *respondeat superior* claims are found to be excluded from coverage, thus breaching the duty to defend.[246]

VIII. CGL EXCLUSIONS

We next turn to a number of exclusions considered by the courts.

240. *Id.* at 1440, 84 N.Y.S.3d at 229 (first citing Pinon v. 99 Lynn Ave., LLC, 124 A.D.3d 746, 748, 2 N.Y.S.3d. 173, 175 (2d Dep't 2015), and then citing Stellar Mech. Servs. of N.Y., Inc., v. Merchs. Ins. of N.H., 74 A.D.3d. 948, 952, 903 N.Y.S.2d 471, 475 (2d Dep't 2010)).

241. *Id.* at 1440–41, 84 N.Y.S.3d at 229 (citing *Mack–Cali Realty Corp.*, 119 A.D.3d at 908, 990 N.Y.S.2d at 256).

242. 168 A.D.3d 479, 479, 92 N.Y.S.3d 1, 2 (1st Dep't 2019) (citing Servidone Constr. Corp. v. Sec. Ins. Co. of Hartford, 64 N.Y.2d 419, 424–25, 477 N.E.2d 441, 444, 488 N.Y.S.2d 139, 142 (1985)). We suggest a thorough reading of *Servidone*, however, since it concludes that where issues bearing on indemnification under the policy remain outstanding at the time of settlement, an insurer in breach of its defense obligation is still entitled to argue those facts that remain outstanding. 64 N.Y.2d 419, 424–25, 477 N.E.2d 441, 444-45, 488 N.Y.S.2d 139, 142-43.

243. *Id.* at 479–80, 92 N.Y.S.3d at 1–2 (first citing *Servidone Constr. Corp.*, 64 N.Y.2d at 424–25, 477 N.E.2d at 444, 488 N.Y.S.2d at 142; and then citing Seaboard Sur. Co. v. Gillette Co., 64 N.Y.2d 304, 307, 476 N.E.2d 272, 272, 486 N.Y.S.2d 873, 874 (1984)).

244. *Id.* at 480, 92 N.Y.S.3d at 2.

245. *Id.* (citing People v. Barrow, 19 A.D.3d 189, 190, 796 N.Y.S.2d 600, 603 (1st Dep't 2005)).

246. *Id.*

A. Employee/WC

In *Davis v. EAB-TAB Enterprises*, the appellate division considered the application of an employee exclusion, finding a question of fact as to whether the injured party was an employee or independent contractor so as to trigger the exclusion.[247]

Davis, a short term laborer working for defendant, Thomas Bender, was injured when he came into contact with a drill operated by his employer.[248] He sued, alleging various negligence and Labor Law violations.[249] The defendants notified their insurer, Utica First Insurance Company (Utica), of the claim and Utica "denied coverage based primarily on an employee exclusion within the policy."[250]

Then the plaintiffs amended their pleading to remove "allegation of Labor Law violations, including averments that Davis was an employee.[251] The amended pleading only asserted causes of action sounding in negligence."[252] Utica was also impleaded.[253] Utica moved "to dismiss the third-party complaint arguing, as a matter of law, that it had no obligation to defend or indemnify defendants, as the insurance policy clearly excluded employees."[254] Utica "further alleged collusion among the other parties to 'create coverage where none had existed' by amending the pleadings and steering discovery to trigger coverage."[255]

The court found that there was a question of fact as to whether the injured party was an employee or independent contractor.[256] "The critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results[,] and the factors relevant to assessing control include whether the worker (1) worked at his or her own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll, and (5) was on a fixed schedule."[257]

247. 166 A.D.3d 1449, 1450, 88 N.Y.S.3d 302, 303 (3d Dep't 2018).
248. *Id.* at 1449, 88 N.Y.S.3d at 303.
249. *Id.*
250. *Id.*
251. *Id.*
252. *Davis*, 166 A.D.3d at 1449, 88 N.Y.S.3d at 303.
253. *Id.*
254. *Id.* at 1449–50, 88 N.Y.S.3d at 303.
255. *Id.* at 1450, 88 N.Y.S.3d at 303.
256. *Id.*
257. *Davis*, 166 A.D.3d at 1450, 88 N.Y.S.3d at 303 (first quoting Gagen v. Kipany Prods., Ltd., 27 A.D.3d 1042, 1043, 812 N.Y.S.2d 689, 690–91 (3d Dep't 2006); then quoting Bynog v. Cipriani Grp., Inc., 1 N.Y.3d 193,198, 802 N.E.2d 1090, 1093, 770 N.Y.S.2d 692, 695 (2003); and then quoting Berger v. Dykstra, 203 A.D.2d 754, 754, 610 N.Y.S.2d 401, 402 (3d

Next, in *Northfield Insurance Company v. Fancy General Construction, Inc*., the Second Department held that an employee exclusion in a commercial general liability policy was clear.[258]

On October 5, 2011, Singh allegedly sustained injury while working for Fancy General Construction (Fancy).[259] Northfield insured Fancy and that policy contained an exclusion for bodily injury to an employee if the injury occurred in the course of employment.[260]

Singh sued the property owner and tenant, and those defendants then commenced a third-party action against Fancy.[261] Northfield sought a determination that the "injury to employee" exclusion applied, leaving the carrier with no obligation to defend Fancy or any other party in the underlying action.[262]

An exclusion from coverage "must be specific and clear in order to be enforced."[263] The plain meaning of a policy's language may not be disregarded to find an ambiguity where none exists.[264]

The Second Department held that the plain meaning of the exclusion removed coverage for damages arising out of bodily injury sustained by an employee of any insured in the course of his or her employment.[265] Since Singh was an employee of Fancy, his injuries were not covered by the policy.[266]

Lastly, in *Northfield Insurance Company v. Golob*, the Second Department considered an exclusion which removed coverage both for injury sustained by employees and those providing contracted for work.[267] The Golobs contracted with ADT for the performance of certain

Dep't 1994), *appeal dismissed and denied*, 84 N.Y.2d 965, 965, 645 N.E.2d 1212, 1212, 621 N.Y.S.2d 513, 513 (1994)).

258. 167 A.D.3d 916, 918, 91 N.Y.S.3d 250, 252 (2d Dep't 2018).

259. *Id*. at 917, 91 N.Y.S.3d at 251.

260. *Id*. at 917, 91 N.Y.S.3d at 251–52.

261. *Id*. at 917, 91 N.Y.S.3d at 252.

262. *Northfield*, 167 A.D.3d at 917–18, 91 N.Y.S.3d at 252.

263. *Id.* at 918, 91 N.Y.S.3d at 252 (quoting Seaboard Sur. Co. v. Gillette Co., 64 N.Y.2d 304, 311, 476 N.E.2d 272, 486 N.Y.S.2d 873 (1984).

264. *Id.* (quoting Howard & Norman Baker, Ltd. v. Am. Safety Cas. Ins. Co., 75 A.D.3d 533, 534, 904 N.Y.S.2d 770, 772 (2d Dep't 2010)); (citing Bassuk Bros. v. Utica First Ins. Co., 1 A.D.3d 470, 471, 768 N.Y.S.2d 479, 481 (2d Dep't 2003)).

265. *Id.* (first citing Bayport Constr. Corp. v. B.H.S. Ins. Agency, 117 A.D.3d 660, 661, 985 N.Y.S.2d 143, 145 (2d Dep't 2014); and then citing *Howard & Norman Baker, Ltd.*, 75 A.D.3d at 534–35, 904 N.Y.S.2d at 772).

266. *Id.*

267. 164 A.D.3d 682, 682–83, 81 N.Y.S.3d 192, 194 (2d Dep't 2018).

services at their home.[268] Daniel Christensen, an ADT employee, was allegedly injured during the work and sued the Golobs, among others.[269]

The Golobs sought protection from Northfield, their own commercial general liability carrier, and tendered the claim.[270] Northfield disclaimed coverage citing a policy exclusion, which removed coverage for bodily injury sustained by any person "employed by . . . any organization that . . . [c]ontracted with [the named insured] or with any insured for services" where the injuries "[arose] out of and in the course of employment by that organization."[271]

Nonetheless, Northfield agreed to defend its insured and commenced this action to confirm the disclaimer.[272] The insured contended that the exclusion did not apply because ADT had been instructed to hold off performing the work, and for that reason, Christensen was "nothing more than a trespasser" on the property at the time of the accident.[273]

"To be relieved of its duty to defend by way of an exclusion, the insurer must demonstrate that the allegations [in the underlying action] complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision."[274]

In this decision, the Court found that Northfield established its prima facie entitlement to judgment as a matter of law by submitting evidence that the defendants contracted with ADT for the performance of services, that Christensen was employed by ADT, and that Christensen was acting in the course of that employment at the time he was injured at the premises.[275] These facts demonstrated that the exclusion unambiguously

268. *Id.* at 682, N.Y.S.3d at 193.

269. *Id.* at 682, N.Y.S.3d at 193–194.

270. *Id.* at 682, N.Y.S.3d at 194.

271. *Id.* at 682–683, N.Y.S.3d at 194.

272. *Northfield*, 164 A.D.3d at 683, N.Y.S.3d at 194. Where an insurer's disclaimer is arguable, the New York Court of Appeals has advised, in *dicta*, that an insurer should provide a defense and "seek a declaratory judgment concerning the duty to defend or indemnify the purported insured. If it disclaims and declines to defend in the underlying lawsuit . . . , the insurance carrier may litigate only the validity of its disclaimer and cannot challenge the liability or damages determination underlying the judgment." *Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350, 356, 820 N.E.2d 855, 858-59, 787 N.Y.S.2d 211, 214-15 (2004).

273. *Id.*

274. *Id.* (quoting Frontier Insulation Contractors v. Merchs. Mut. Ins. Co., 91 N.Y.2d 169, 175, 690 N.E.2d 866, 868–69, 667 N.Y.S.2d 982, 984–85 (1997) (citing Exeter Bldg. Corp. v. Scottsdale Ins. Co., 79 A.D.3d 927, 929, 913 N.Y.S.2d 733, 735 (2d Dep't 2010)).

275. *Id.*

applied to bar coverage.[276] The insureds' claim that ADT performed the work earlier than instructed did not render the exclusion inapplicable, as the timing of the work did not negate the fact that the work was performed pursuant to a contract with the insureds, or that Christensen was acting within the scope of his employment with ADT at the time he was injured.[277]

B. Business Pursuits

Considering a different exclusion in *Waddy v. Genessee Patrons Cooperative Insurance Company*, the Third Department found the business pursuits exclusion inapplicable.[278] Genesee Patrons issued a homeowners' policy to two individuals (insureds), who operated a certified respite home for the elderly and special needs adults out of their home.[279] In July 2013, the insureds' son, who was eleven years old at the time, was with his cousin and his friend in the garage attached to the insureds' home.[280] "[T]hey were playing with a gas grill lighter and accelerants. A fire subsequently ignited and spread to the home."[281]

"Three adult residents in the respite home [decedents] were not evacuated . . . and died."[282] Separate actions were commenced against the insureds, alleging negligence and wrongful death due to negligent supervision and entrustment.[283] Genesee "disclaimed coverage and, after the insureds failed to appear in those actions, separate default judgments were entered against them."[284]

The decedents' estates subsequently commenced separate "direct" actions under Insurance Law section 3420 (a)(2) against Genesee Patrons claiming that it was responsible for coverage up to the per occurrence limit under the policy issued to the insureds.[285] Genesee Patrons claimed

276. *Id.* (citing Nautilus Ins. Co. v. Matthew David Events, Ltd., 69 A.D.3d 457, 460, 893 N.Y.S.2d 529, 532 (1st Dep't 2010) (where the employee exclusion in the insurance policy applied to those employed by a subcontractor that was performing duties related to the conduct of the insured's business).

277. *Northfield*, 164 A.D.3d at 683, N.Y.S.3d at 194.

278. 164 A.D.3d 1055, 1058, 84 N.Y.S.3d 271, 275 (3d Dep't 2018).

279. *Id.*

280. *Id.* at 1055, 84 N.Y.S.3d at 272–73.

281. *Id.* at 1055, 84 N.Y.S.3d at 273.

282. *Id.*

283. *Waddy*, 164 A.D.3d at 1055, 84 N.Y.S.3d at 273.

284. *Id.*

285. *Id.* at 1056, 84 N.Y.S.3d at 273 (citing N.Y. INS. LAW § 3420(a)(2) (McKinney 2015 & Supp. 2019)).

that coverage was properly disclaimed under the business pursuits exclusion and that the nonbusiness exception thereto was inapplicable.[286]

"Under the applicable insurance policy [Genesee Patrons] provided coverage for 'bodily injury or property damages caused by an occurrence.'"[287] The policy, however, had a business pursuits exclusion stating that the policy did not apply to liability "resulting from activities in connection with an insured's business, except as provided under Incidental Liability and Medical Payments Coverages."[288] The "exception to this business pursuits exclusion provided that [Genesee Patrons] would pay for bodily injury resulting from 'activities in conjunction with business pursuits which are ordinarily considered non-business in nature.'"[289]

> [A]s a general rule[,] if the injury was caused by an act that would not have occurred but for the business pursuits of the insured, said act is beyond the scope of the policy; however, if the injurious act would have occurred regardless of the insured's business activity, the exception applies and coverage is provided even though the act may have had a causal relationship to the insured's business pursuits[.][290]

Genesee Patrons, as the party relying on the exclusion, bore the burden of establishing that losses fell wholly within the insurance policy's exclusionary clauses.[291]

Genesee Patrons argued "that decedents' deaths were caused by the gross negligence of the insureds in operating a respite home—i.e., the failure to have an adequate fire evacuation plan, among other things."[292] The estates countered "that the deaths were caused by the fire started by children playing with a gas grill lighter and accelerants in the garage" and thus "the fire would have occurred regardless of the insureds' operation of a respite home and, therefore, the exception to the exclusion applied."[293]

286. *Id.*

287. *Id.* at 1057, 84 N.Y.S.3d at 274.

288. *Waddy*, 164 A.D.3d at 1057, 84 N.Y.S.3d at 274.

289. *Id.* at 1057, 84 N.Y.S.3d at 274.

290. *Id.* (quoting Outwater v. Ballister, 253 A.D.2d 902, 905, 678 N.Y.S.2d 396, 399 (3d Dep't 1998)).

291. *Id.* (first citing *Servidone Constr. Corp.*, 64 N.Y.2d at 421, 477 N.E.2d at 442, 488 N.Y.S.2d at 140; and then citing Prashker v. U.S. Guar. Co., 1 N.Y.2d 584, 592, 136 N.E.2d 871, 875, 154 N.Y.S.2d 910, 916 (1956)).

292. *Id.*

293. *Waddy*, 164 A.D.3d at 1057, 84 N.Y.S.3d at 274.

The Second Department agreed with the insureds, finding "that the act of the insureds' son and the other children in playing with the gas grill lighter and accelerants was the impetus for the fire."[294]

> Although the insureds' negligence in operating their business—i.e., the failure to have an adequate fire evacuation plan—may have been a contributing cause of decedents' deaths, it could not be said as matter of law that the fire also was not a contributing cause. In other words, the fire would have occurred regardless of the insureds' business operations, thereby rendering the exception to the business pursuits exclusion applicable.[295]

C. Construction Manager

In *U.S. Specialty Insurance Company v. SMI Construction Management, Inc.*, the First Department found that whether the "Construction Manager" exclusion applied depended on facts, not title.[296] "The relevant contract described defendant's duties in relation to the project owner as, inter alia, supplying an adequate supply of workers and materials and performing the work."[297] "Defendant's owner characterized defendant as both a construction manager and a general contractor and described its work on the project as 'the total supervision of . . . the construction,' the provision of some laborers, and supervision of maintenance and carpentry."[298] Moreover,

> the contract [was] divided into two phases—preconstruction and construction—and defendant performed services at the inception of the project, such as working with the owner, architect, and engineer, and when the work was ready to proceed, obtained permits, hired and paid the subcontractors, and allegedly acted as a general contractor.299

The court found issues of fact, and determined discovery was warranted as to whether defendant performed as the construction manager on the project and therefore was subject to the insurance policy's exclusion for "Construction Management for a Fee."[300] "The label of construction manager versus general contractor is not necessarily

294. *Id.*
295. *Id.* at 1057–58, 84 N.Y.S.3d at 274–75.
296. 168 A.D.3d 431, 431, 91 N.Y.S.3d 50, 51 (1st Dep't 2019).
297. *Id.* at 431, 91 N.Y.S.3d at 51.
298. *Id.* at 431–32, 91 N.Y.S.3d at 51.
299. *Id.*
300. *Id.* at 432, 91 N.Y.S.3d at 51–52.

determinative," and depends on the duties the defendant was assigned and performed.[301]

D. Recently Completed Construction

The next decision, *Tower 111, LLC v. Mt. Hawley Insurance Company*, addressed an exclusion for "Recently Completed Construction."[302] The First Department found that the exclusion did not apply to a later decision to dismantle and relocate walls a year after construction was over.[303]

> Construction of the building at issue was completed in June 2011. After construction of the building was finished, plaintiff Tower 111, LLC (Tower) decided to dismantle and relocate three elevator-machine-room walls on the first floor of the building so that the space would be suitable for a prospective tenant. The plaintiff in the underlying personal injury action was injured while removing the elevator-machine-room walls in October 2012, more than a year after construction of the building was complete.[304]

The sole issue on appeal was whether the insurance policy's designated work exclusion applied to the underlying personal injury action.[305] The language at issue stated that there is no coverage for: "Claims arising out of construction recently completed or that might still be ongoing from finishing the construction of the building. Does not include non-structural build-out work for tenants on premises."[306]

Considering this language, the court held that Tower was entitled to coverage because the unambiguous exclusion was inapplicable to the claims made in the underlying personal injury action.[307]

> The designated work exclusion does not apply because the undisputed facts establish that the removal of the elevator-machine-room walls did not "arise out of construction recently completed or . . . still . . . ongoing from finishing the construction of the building." To the contrary, the elevator-machine-room walls were being removed and relocated to

301. *U.S. Specialty Ins. Co.*, 168 A.D.3d at 431, 91 N.Y.S.3d at 51 (first citing Rodriguez v. Dormitory Auth. of N.Y., 104 A.D.3d 529, 531, 962 N.Y.S.2d 102, 105 (1st Dep't 2013); and then citing Carollo v. Tishman Constr. & Research Co., 109 Misc. 2d 506, 508, 440 N.Y.S.2d 437, 439–440 (Sup. Ct. N.Y. Cty. 1981)).

302. 165 A.D.3d 474, 85 N.Y.S.3d 59, 60 (1st Dep't 2018) (addressing an exclusion for recently completed construction projects).

303. *Id.*

304. *Id.*

305. *Tower 111, LLC*, 165 A.D.3d at 474, 85 N.Y.S.3d at 60.

306. *Id.*

307. *Id.*

make space for a prospective tenant over one year after the construction of the building had already been completed.[308]

IX. APPLICATION OF INSURANCE LAW § 3420 (D)

As harsh as New York Insurance Law section 3420 can be for insurance carriers, it has its limits.[309] One such limitation, as discussed by the New York Court of Appeals in *Nadkos, Inc. v. Preferred Contractors Insurance Company*, is that it has minimal applicability to risk retention groups in accordance with Insurance Law section 5904.[310]

Nadkos, Inc., a general contractor, sought coverage from Preferred Contractors Insurance Company Risk Retention Group LLC (PCIC), the general liability carrier for Nadkos' subcontractor, in connection with an underlying action for injuries sustained by an employee of the subcontractor.[311] PCIC is and was a risk retention group (RRG) chartered in Montana and doing business in New York.[312]

Insurance Law section 5904 requires non-domiciliary RRGs doing business in New York to comply with New York's unfair claims settlement practices provisions set forth in Insurance Law section 2601(a).[313] Those provisions include acts by insurers that, if committed as a general business practice, constitute unfair settlement practices.[314] Insurance Law section 2601(a)(6) includes "failing to promptly disclose coverage pursuant to Insurance Law sections 3420(d) or (f)(2)(A)."[315] RRGs are otherwise generally exempt from state law regulation.[316]

After PCIC disclaimed coverage, Nadkos commenced this action seeking a declaration that the disclaimer was untimely as a matter of law under Insurance Law section 3420(d)(2), requiring certain liability insurers to disclaim coverage, as "soon as is reasonably possible."[317]

308. *Id.*

309. *See generally* Nadkos, Inc. v. Preferred Contractors Ins. Co., 34 N.Y.3d 1, 132 N.E.3d 568, 108 N.Y.S.3d 375 (2019) (discussing one such limitation).

310. *Id.* at 4, 132 N.E.3d at 569, 108 N.Y.S.3d at 376.

311. *Id.*

312. *Id.*

313. N.Y. INS. LAW § 2601(a), 5904 (McKinney 2015).

314. *Id.*

315. INS. LAW § 2601(a)(6); N.Y. INS. LAW § 3420 (d), (f)(2)(A) (McKinney 2015).

316. 15 U.S.C. § 3902(a) (2017).

317. *Nadkos, Inc.*, 34 N.Y.3d at 4–6, 132 N.E.3d at 569–70, 108 N.Y.S.3d at 376–77; INS. LAW § 3420.

PCIC moved for summary judgment arguing that Insurance Law section 3420(d)(2) is inapplicable to it as a nondomiciliary RRG.[318] Nadkos cross-moved for summary judgment asserting that Insurance Law section 2601(a)(6), by referencing section 3420(d), subjects PCIC to the timely disclaimer requirements of section 3420(d)(2).[319] After the Supreme Court granted judgment to PCIC and the appellate division affirmed, the Court of Appeals granted leave to appeal.[320]

The Court of Appeals, in a six-to-one vote with Judge Wilson dissenting, examined the statutory text and structure as well as the legislative history of the relevant statutes and concluded that the disclosure mandates of Insurance Law sections 3420(d)(1) and 3420(f)(2)(A) differ from the disclaimer provisions of section 3420(d)(2).[321] Insurance Law section 2601(a)(6) qualifies its reference to Insurance Law section 3420(d) by limiting its reach to an insurer's failure "to promptly disclose coverage."[322] The majority found that term distinct from an obligation to disclaim coverage and affirmed the order of the appellate division.[323]

Another such limitation on Insurance Law section 3420 was, until last *Survey* period, that it applied solely to policies issued in New York.[324] However, the Court of Appeals on November 20, 2017, issued its decision in *Carlson v. American International Group, Inc.*, which held that where the named insured has a substantial business presence in New York, the carrier must also abide by the terms of Insurance Law section 3420.[325] But what does substantial business presence mean? In *Vista Engineering Corporation v. Everest Indemnity Insurance Company*, the Second Department held that more discovery was necessary to determine that question and kicked the can further down the road.[326]

318. *Id.* at 4, 132 N.E.3d at 569, 108 N.Y.S.3d at 376; INS. LAW § 3420(d)(2); INS. LAW § 2601(a)(6).

319. *Id.*

320. *Id.* at 4–5, 132 N.E.3d at 569, 108 N.Y.S.3d at 376; INS. LAW § 3420(d)(2) (first citing Nadkos, Inc. v. Preferred Contractors Ins. Co. Risk Retention Grp. LLC, 162 A.D.3d 7, 8, 76 N.Y.S.3d 528, 529 (1st Dep't 2018); and then citing Nadkos, Inc. v. Preferred Contractors Ins. Co. Risk Retention Grp. LLC, 32 N.Y.3d 905, 905, 84 N.Y.S.3d 859, 859, 109 N.E.3d 1159, 1159 (2018)).

321. *Id* at 6, 132 N.E.3d at 570, 108 N.Y.S.3d at 377; INS. LAW §§ 3420(d)(1)-(d)(2), (f)(2)(A).

322. INS. LAW § 2601(a).

323. *Nadkos, Inc.*, 34 N.Y.3d at 12, 132 N.E.3d at 575, 108 N.Y.S.3d at 382.

324. INS. LAW § 3420.

325. 30 N.Y.3d 288, 309, 89 N.E.3d 490, 504, 67 N.Y.S.3d 100, 113 (2017).

326. *Vista Eng'g Corp.*, 170 A.D.3d 915, 917, 93 N.Y.S.3d 875, 876 (2d Dep't 2019).

Vista Engineering Corporation (Vista) was hired as a general contractor for a project at Queensboro Plaza Station.[327] Vista subcontracted with a New Jersey company, East Coast Painting & Maintenance (East Coast).[328] That subcontract identified the project owner, Metropolitan Transportation Authority (MTA) and the architect/engineer, New York City Transit Authority (NYCTA), and required East Coast to procure insurance naming Vista and MTA as additional insureds.[329]

East Coast procured the necessary coverage from Everest, covering the period of July 6, 2010, to July 6, 2011.[330] As required by the subcontract, NYCTA and MTA were named as additional insureds.[331]

On April 19, 2011, an East Coast employee was injured while working on the project.[332] In March 2012, that employee sued Vista, NYCTA, and MTA to recover for his injuries.[333] Vista's insurer tendered Vista's defense and indemnity to Everest.[334] By letter dated December 5, 2011, Everest disclaimed defense and indemnity to Vista based upon a "Third Party Action Over Exclusion Endorsement" in the policy, which excluded coverage for bodily injuries to East Coast employees.[335]

Vista, MTA, and NYCTA (plaintiffs) then commenced this action.[336] The plaintiffs sought a declaration that Everest failed to supply a timely disclaimer as required by Insurance Law section 3420(d)(2), waiving its ability to disclaim based upon policy exclusions in the underlying action.[337]

As mentioned above, and subsequent to the Supreme Court issuing the order appealed from, the Court of Appeals, on November 20, 2017, issued its decision in *Carlson*.[338] In relevant part, *Carlson* held that Insurance Law section 3420 "applies to policies that cover insureds and risks located in" New York, and further determined that a company was "located in" New York if it had a "substantial business presence" there.[339]

327. *Id.* at 916, 93 N.Y.S.3d 875.
328. *Id.*
329. *Id.*
330. *Id.*
331. *Vista Eng'g Corp.*, 170 A.D.3d at 916, 93 N.Y.S.3d 875.
332. *Id.*
333. *Id.*
334. *Id.* at 916, 93 N.Y.S.3d at 875–76.
335. *Id*. at 916, 93 N.Y.S.3d 876.
336. *Vista Eng'g Corp.*, 170 A.D.3d at 916, 93 N.Y.S.3d 876.
337. *Id*. at 916–17, 93 N.Y.S.3d at 876.
338. *Carlson*, 30 N.Y.3d at 288, 67 N.Y.S.3d at 100, 89 N.E.3d at 490.
339. *Id.* at 305–06, 67 N.Y.S.3d 110–11, 89 N.E.3d 500–01.

The Second Department held that based upon the record before it, it could not determine whether such a "substantial business presence" existed and remitted to the trial court to allow further discovery and development of the record.[340]

X. ESTOPPEL/WAIVER

The First Department had a pair of estoppel/waiver decisions this *Survey* period.[341] The first, *U.S. Specialty Insurance Company v. Navarro*, held that an insurance carrier cannot waive itself into coverage when it did not first issue a policy providing coverage for the relevant risk.[342]

The immediate action involved an insurance company, U.S. Specialty, seeking a permanent stay of arbitration following a claim by Navarro for SUM benefits under a policy the carrier had issued.[343] It was undisputed that the relevant vehicle was a police vehicle and, thus, did not fall within the scope of SUM coverage under the policy.[344] Instead, Navarro argued that U.S. Specialty was estopped from denying coverage because, in relevant part, the insurer did not deny or disclaim coverage until approximately four years after it was notified.[345]

Finding for the carrier, U.S. Specialty, the court held the doctrine of estoppel may not create coverage where it never existed.[346] Since Navarro was not an insured under the policy, there was no coverage as a matter of

340. *Vista*, 170 A.D.3d at 917, 93 N.Y.S.3d at 876 (citing Vista Eng'g Corp. v. Everest Indem. Ins. Co., 161 A.D.3d 596, 596, 78 N.Y.S.3d 43, 43 (1st Dep't 2018)).

341. *See generally* U.S. Specialty Ins. Co. v. Navarro, 169 A.D.3d 415, 93 N.Y.S.3d 35 (1st Dep't 2019) (holding that an insurance carrier cannot waive itself into coverage when it did not first issue a policy providing coverage to the relevant risk); Temple Beth Sholom, Inc. v. Commerce & Indus. Ins. Co., 173 A.D.3d 637, 103 N.Y.S.3d 413 (1st Dep't 2019) (insurance carrier is estopped from denying coverage where it provided defense in the underlying action without reservation).

342. *Id.* at 416, 93 N.Y.S.3d at 36 (first citing Progressive Ins. Co. v. Dillon, 68 A.D.3d 448, 448, 889 N.Y.S.2d 583, 584 (1st Dep't 2009); then citing Wausau Ins. Co. v. Feldman, 213 A.D.2d 179, 180, 623 N.Y.S.2d 242, 244 (1st Dep't 1995); then citing *In re* U.S. Specialty Ins. Co., 151 A.D.3d 1520, 1524, 57 N.Y.S.3d 743, 747–748 (3d Dep't 2017); and then citing Ward v. County of Allegany, 34 A.D.3d 1288, 1290, 824 N.Y.S.2d 542, 544 (4th Dep't 2006)).

343. *Id*. at 415, 93 N.Y.S.3d at 35.

344. *Id*. (citing State Farm Mut. Auto Ins. Co. v. Fitzgerald, 25 N.Y.3d 799, 801, 16 N.Y.S.3d 796, 797, 38 N.E.3d 325, 326 (2015)).

345. *Id*. at 415–416, 98 N.Y.S.3d at 35–36.

346. *Navarro*, 169 A.D.3d at 416, 98 N.Y.S.3d at 36 (first citing *Progressive Ins. Co.*, 68 A.D.3d at 448, 889 N.Y.S.2d at 584; then citing *Wausau Ins. Co.*, 213 A.D.2d at 180, 623 N.Y.S.2d at 244; then citing *In re* U.S. Specialty Ins. Co., 151 A.D.3d at 1524, 57 N.Y.S.3d at 747–748; and then citing *Ward*, 34 A.D.3d at 1290, 824 N.Y.S.2d at 544).

law.[347] Moreover, a disclaimer cannot be untimely where it was unnecessary.[348] Since the claim fell outside of the coverage grant itself, a disclaimer in the immediate matter was certainly unnecessary.[349]

In addition, U.S. Specialty's minimal involvement in the arbitration process was insufficient to constitute a waiver of its right to seek a judicial determination with respect to the SUM coverage dispute.[350]

In the second case, *Temple Beth Sholom, Inc v. Commerce & Industry Insurance Company*, an insurance carrier was estopped by the First Department from denying coverage when it provided a defense in the underlying action without reservation.[351]

Quite simply, "Temple relied to its detriment on the defense provided by defendant Commerce [& Industry Insurance Company (Commerce)], which was in conflict with the defense Commerce provided to the general contractor, and as a result, Temple lost control of its defense."[352] The carrier, Commerce, was thus estopped from denying coverage by assuming control of the underlying litigation.[353]

Additionally, and relevant to this issue, Commerce accepted coverage immediately without reservation, despite information readily available through reasonable inquiry supporting a denial of coverage, thus waiving any right to rely upon later what could have been easily discovered at the outset, and through no fault of Temple.[354]

347. *Id.*

348. *Id.* (first citing Zappone v. Home Ins. Co., 55 N.Y.2d 131, 139, 432 N.E.2d 783, 787, 447 N.Y.S.2d 911, 915 (1982); then citing Markevics v. Liberty Mut. Ins. Co., 97 N.Y.2d 646, 648–649, 761 N.E.2d 557, 559, 735 N.Y.S.2d 865, 867 (2001); and then citing *In re U.S. Specialty Ins. Co.*, 151 A.D.3d at 1524, 57 N.Y.S.3d at 747).

349. *Id.*

350. *Id.* (first citing Arc Elec. & Mech. Contractors Corp. v. Invensys Bldg. Sys., 2 A.D.3d 314, 317, 770 N.Y.S.2d 299, 302 (1st Dep't 2003); then citing Cybex Int'l v. Fuqua Enters., 246 A.D.2d 316, 317, 667 N.Y.S.2d 348, 349 (1st Dep't 1998); and then citing *In re* County of Broome, 122 A.D.2d 314, 315, 503 N.Y.S.2d 919, 920 (3d Dep't 1986)).

351. 173 A.D.3d at 638, 103 N.Y.S.3d at 414 (citing Albert J. Schiff Assoc. v. Flack, 51 N.Y.2d 692, 699, 417 N.E.2d 84, 87, 435 N.Y.S.2d 972, 975 (1980)).

352. *Id.*

353. *Id.*

354. *Id.* (first citing Draper v. Oswego County Fire Relief Ass'n, 190 N.Y. 12, 17, 82 N.E. 755, 757 (1907); and then citing Yoda, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 88 A.D.3d 506, 508, 931 N.Y.S.2d 18, 20 (1st Dep't 2011)).

XI. AGENTS ERRORS AND OMISSIONS

The modern business of insurance is carried out through local insurance agents and brokers.[355] Two interesting decisions were handed down this *Survey* period regarding the extent to which such an agent or broker might have a duty to advise insurance decisions.[356]

First, the Fourth Department in *Gatto v. Allstate Indemnity Company*, held that an insurance agent has no duty to advise a decedent's devisee as to insurance requirements under a policy without the existence of a client relationship.[357]

In 2006, Rubino contacted Roman, an insurance agent, to procure a homeowner's policy for her residence.[358] Allstate issued a policy for the initial term of May 17, 2006, to May 17, 2007, which listed Rubino as the only insured.[359] The policy was renewed each year thereafter, and the policy was in force for the term of May 17, 2013, to May 17, 2014.[360] The only problem, Rubino died in 2010.[361]

After a complete fire loss of the property in January 2014, Rubino's daughter, Tomaino, filed a claim under the policy.[362] Allstate disclaimed coverage.[363]

Plaintiff, who served as administratrix of Rubino's estate, thereafter commenced this action against Allstate and Roman.[364] For our purposes, it was alleged that Roman "breached his duty to notify Allstate of [Rubino's] death and to ensure that the property was properly insured.[365] Specifically, it was claimed that Roman was informed of the death in 2011 and again in 2012 when Tomaino made payments directly to Roman to renew the policy."[366]

Roman established "as a matter of law that he owed no duty to plaintiff, Tomaino, or decedent's estate inasmuch as he demonstrated that

355. *See generally* Gatto v. Allstate Indem. Co., 173 A.D.3d 1711, 1711, 103 N.Y.S.3d 714, 715 (4th Dep't 2019) (where insurance policy was purchased through an insurance agent).

356. *Gatto*, 173 A.D.3d at 1711, 103 N.Y.S.3d at 715); Hefty v. Paul Seymour Ins. Agency, 163 A.D.3d 1376, 1376, 82 N.Y.S.3d 649, 650 (3d Dep't 2018).

357. 173 A.D.3d at 1712, 103 N.Y.S.3d at 715.

358. *Id.* at 1711, 103 N.Y.S.3d at 715.

359. *Id.*

360. *Id.*

361. *Id.*

362. *Gatto*, 173 A.D.3d at 1711, 103 N.Y.S.3d at 715.

363. *Id.*

364. *Id.*

365. *Id.* at 1711–12, 103 N.Y.S.3d at 715.

366. *Id.* at 1712, 103 N.Y.S.3d at 715.

neither was a client."[367] Roman established that Rubino alone was his client.[368] Additionally, after her death, no one represented Rubino's estate until September 2014, about eight months after the fire loss and years after Rubino's death.[369]

Even assuming Tomaino was a client, there is no common-law duty to advise, guide, or direct her to obtain insurance coverage for additional insureds in light of the decedent's death.[370] Roman "demonstrated that there were no payments made to him beyond the alleged premium payments, that there was no interaction with Tomaino regarding questions of coverage, and that no special relationship was formed between himself and Tomaino."[371]

The existence of a special relationship is key in the insurance agent liability context.[372] The Third Department held in *Hefty v. Paul Seymour Insurance Agency*, that no such duty to advise existed where the relevant homeowners did not have such a special relationship with the broker who sold the policy.[373]

In *Hefty*, plaintiffs purchased a property requiring renovation.[374] The defendant initially placed coverage with a replacement cost limit of $92,000 on the dwelling.[375] After $200,000 spent in renovations in three

367. *Gatto*, 173 A.D.3d at 1712, 103 N.Y.S.3d at 715.

368. *Id.*

369. *Id.*

370. *Id*. at 1712, 103 N.Y.S.3d at 716 (first citing Nicotera v. Allstate Ins. Co., 147 A.D.3d 1474, 1476, 47 N.Y.S.3d 830, 833 (4th Dep't 2017); then citing Sawyer v. Rutecki, 92 A.D.3d 1237, 1237, 937 N.Y.S.2d 811, 812 (4th Dep't 2012); and then citing Thompson & Bailey, LLC v. Whitmore Grp., Ltd., 34 A.D.3d 1001, 1002, 825 N.Y.S.2d 546, 548 (3d Dep't 2006)).

371. *Id*. (first citing *Nicotera*, 147 A.D.3d at 1477, 47 N.Y.S.3d at 833–34; then citing *Sawyer*, 92 A.D.3d at 1238, 937 N.Y.S.2d at 813; and then citing Petri Baking Prods., Inc. v. Hatch Leonard Naples, Inc., 151 A.D.3d 1902, 1904, 57 N.Y.S.3d 838, 841, (4th Dep't 2017)).

372. *See Hefty*, 163 A.D.3d at 1378, 82 N.Y.S.3d at 651 (quoting *Voss*, 22 N.Y.3d at 736, 8 N.E.3d at 829, 985 N.Y.S.2d at 453).

373. *Hefty*, 163 A.D.3d at 1378, 82 N.Y.S.3d at 652 (first citing Hoffend & Sons, Inc. v. Rose & Kiernan, Inc., 7 N.Y.3d 152, 158, 851 N.E.2d 1149, 1152, 818 N.Y.S.2d 798, 801 (2006); then citing Murphy v. Kuhn, 90 N.Y.2d 266, 271, 682 N.E.2d 972, 974–75, 660 N.Y.S.3d 371, 373–74 (1997); then citing Moutafis Motors, Ltd. v. MRW Grp., Inc., 144 A.D.3d 1000, 1002, 41 N.Y.S.3d 740, 741 (2d Dep't 2016); then citing Kaufman v. BWD Group LLC, 127 A.D.3d 433, 434, 9 N.Y.S.3d 179, 180 (1st Dep't 2015); then citing Trans High Corp. v. Pollack Assoc., LCC, 72 A.D.3d 489, 489, 902 N.Y.S.2d 83, 84 (1st Dep't 2010); then citing Sutton Park Dev. Corp. Trading Co. v. Guerin & Guerin Agency Inc., 297 A.D.2d 430, 432, 745 N.Y.S.2d 622, 624 (3d Dep't 2002); and then citing *Voss*, 22 N.Y.3d at 736, 8 N.E.3d at 829, 985 N.Y.S.2d at 453.)

374. *Id*. at 1377, 82 N.Y.S.3d at 650.

375. *Id*. at 1377, 82 N.Y.S.3d at 650–51.

years, the premises were destroyed by fire. Unfortunately, Plaintiffs failed to upgrade their replacement cost policy limit over that span.[376]

Plaintiffs sued their broker alleging negligence.[377] Generally, a broker is only liable where they fail to obtain requested coverage in a reasonable amount of time.[378] Thus, to make a claim for insufficient coverage, the policyholder must establish that they made a specific request for increased limits.[379]

The broker-defendant filed a dispositive motion, offering deposition transcripts from plaintiffs establishing their failure to request an increase in coverage from the broker.[380] In holding for the broker, the court noted that "[a]t best" the plaintiffs established an interest in additional insurance.[381] However, absent a specific request no obligation was created for the broker.[382]

Alternatively, plaintiffs argued that they enjoyed a "special relationship" with defendant-broker, and, as such, the broker owed a "duty of advisement."[383] Plaintiffs, however, failed to establish that any fee was paid to the broker for advisement services, detrimental reliance upon advice given by the broker, or a long-standing relationship which could have created a special relationship.[384] Despite having a relationship of over ten years, more is needed to establish the existence of a special relationship.[385] Also relevant to the court's decision in favor of the broker,

376. *Id*. at 1377, 82 N.Y.S.3d at 651.

377. *Id.*

378. *Hefty*, 163 A.D.3d at 1377–78, 82 N.Y.S.3d at 651 (quoting *Voss*, 22 N.Y.3d at 734, 8 N.E.3d at 828, 985 N.Y.S.2d at 452) (first citing Cromer v. Rosenzweig Ins. Agency Inc., 156 A.D.3d 1192, 1193, 68 N.Y.S.3d 169, 171 (3d Dep't 2017); and then citing Finch v. Steve Cardell Agency, 136 A.D.3d 1198, 1200, 25 N.Y.S.3d 441, 443 (3d Dep't 2016)).

379. *Id*. at 1378, 82 N.Y.S.3d at 651 (quoting American Bldg. Supply Corp. v. Petrocelli Grp. Inc., 19 N.Y.3d 730, 735, 979 N.E.2d 1181, 1184, 955 N.Y.S.2d 854, 857 (2012)) (first citing *Cromer*, 156 A.D.3d at 1193, 68 N.Y.S.3d at 171; and then citing *Finch*, 136 A.D.3d at 1200, 25 N.Y.S.3d at 443).

380. *Id.*

381. *Id.*

382. *Id*. (quoting *Petrocelli*, 19 N.Y.3d at 735, 979 N.E.2d at 1184, 955 N.Y.S.2d at 857) (first citing *Cromer*, 156 A.D.3d at 1194, 68 N.Y.S.3d at 172; then citing *Moutafis Motors, Ltd.*, 144 A.D.3d at 1001, 41 N.Y.S.3d at 741; and then citing M & E Mfg. Co. v. Frank H. Reis, Inc., 258 A.D.2d 9, 12, 692 N.Y.S.2d 191, 194 (3d Dep't 1999)).

383. *Hefty*, 163 A.D.3d at 1378, 82 N.Y.S.3d at 651.

384. *Id*. at 1378, 82 N.Y.S.3d at 651–52 (quoting *Voss*, 22 N.Y.3d at 735, 8 N.E.3d at 828, 985 N.Y.S.2d at 453) (first citing *Murphy*, 90 N.Y.2d at 272, N.E.2d at 975–76, 660 N.Y.S.2d at 374–75; and then citing *Cromer*, 156 A.D.3d at 1195, 68 N.Y.S.3d at 172–73).

385. *Id*. at 1379, 82 N.Y.S.3d at 652 (first citing *Rose & Kiernan, Inc*., 7 N.Y.3d at 158, 851 N.E.2d at 1152, 818 N.Y.S.2d at 801; then citing *Murphy*, 90 N.Y.2d at 271–72, N.E.2d at 975, 660 N.Y.S.2d at 374; and then citing *Kaufman*, 127 A.D.3d at 434, 9 N.Y.S.3d at 180).

Plaintiffs were sophisticated consumers (owning over ten properties) and should have known better themselves, without advisement.[386]

XII. VOLUNTARY PAYMENTS

An interesting question raised in a First Department case this *Survey* period contemplates whether emergency remediation payments are sufficiently involuntary so as to constitute payments that an entity was "legally obligated to pay."[387] The case is *E.E. Cruz & Company, Inc. v. Axis Surplus Insurance Company*.[388]

E.E. Cruz & Company (E. E. Cruz) was hired on a deck replacement project for the Throngs Neck Bridge.[389] E.E. Cruz sought recovery under various insurance policies for, *inter alia*, remediation costs incurred as a result of a fire that broke out on the bridge during the performance of its work.[390] E.E. Cruz complied with a notice provision in a policy issued by National Casualty Company (National), requiring it to notify National "as soon as practicable of an 'occurrence' or an offense . . . which may result in a claim."[391]

National argued that these remediation costs undertaken by E.E. Cruz were voluntary payments and not damages it was "legally obligated to pay."[392] However,

> [t]his contention fails to take into account the emergency nature of the remediation required; the bridge had been completely shut down as a result of the fire and was only partially opened as the damage was assessed and remediation work begun. Given that the costs incurred were covered under the policy, that time was of the essence in performing the remediation, and that plaintiff's damages would grow without remediation, we cannot conclude as a matter of law that the remediation costs were voluntary payments.[393]

386. *Id*. at 1378–79, 82 N.Y.S.3d at 652 (first citing *Petri Baking Prods., Inc*., 151 A.D.3d at 1904, 57 N.Y.S.3d at 841; then citing *Trans High Corp.*, 74 A.D.3d at 489–90, 902 N.Y.S.2d at 84; and then citing *Frank H. Reis, Inc*., 258 A.D.2d at 12–13, 692 N.Y.S.2d at 194).

387. 165 A.D.3d 603, 604, 87 N.Y.S.3d 173, 175 (1st Dep't 2018).

388. *Id.*

389. *Id.*

390. *Id.*

391. *Id.*

392. *E.E. Cruz & Co., Inc*, 165 A.D.3d at 604, N.Y.S.3d at 175.

393. *Id.*

XIII. PROPERTY INSURANCE

The source of water is frequently litigated in the first party, property insurance context.[394] For example, in *Wickline v. New York Central Mutual Fire Insurance Company*, a question of fact was found to exist as to whether water was "ground water" or originating from a plumbing system.[395]

A cracked basement wall was discovered in 2014, and plaintiff submitted a claim to New York Central Mutual Fire Insurance Company (NYCM).[396] As any diligent insurer would, NYCM immediately opened an investigation and had the home inspected by an engineer.[397] When the engineer posited that the crack resulted from the freezing and thawing of ground water, NYCM disclaimed pursuant to an exclusion precluding coverage for damage caused by the freezing/thawing of water to a foundation.[398] "Water" was defined by the policy, in relevant part, as "water below the surface of the ground . . . which exerts pressure on . . . [a] foundation . . . regardless of whether [the water] is caused by an act of nature or is otherwise caused."[399]

During repairs, plaintiff's own engineer discovered evidence suggesting the water possibly leaked from a hose bib that was not frost protected, prompting plaintiff, in turn, to ask NYCM to reconsider its coverage opinion that the loss was caused by frozen groundwater.[400]

NYCM eventually moved for summary judgment, standing firm on its coverage position.[401] In denying the motion, the trial court found a question of fact as to the source of the water as relevant under the terms of the policy.[402] On appeal, the Third Department affirmed, noting that the source of the water is relevant.[403] Since the policy does cover bulging of a foundation when caused by water which is accidentally discharged from a plumbing system, if the water was discharged from a plumbing system, coverage was triggered.[404]

394. *See* Wickline v. N.Y. Cent. Mut. Fire Ins. Co., 163 A.D.3d 1238, 1240–41, 80 N.Y.S.3d 702, 704 (3d Dep't 2018).

395. *Id.*

396. *Id.* at 1238, 80 N.Y.S.3d at 704.

397. *Id.* at 1238, 80 N.Y.S.3d at 704.

398. *Id.* at 1238–39, 80 N.Y.S.3d at 704.

399. *Wickline*, 163 A.D.3d at 1239–40, 80 N.Y.S.3d at 704.

400. *Id.* at 1239, 80 N.Y.S.3d at 704.

401. *Id.*

402. *Id.* at 1240, 80 N.Y.S.3d at 704.

403. *Id.*

404. *Wickline*, 163 A.D.3d at 1240, 80 N.Y.S.3d at 705 (first citing Pioneer Tower Owners Ass'n v. State Farm Fire & Cas. Co., 12 N.Y.3d 302, 308, 908 N.E.2d 875, 877, 880 N.Y.S.2d

Where first party coverage applies only for certain specified perils, it is vital that the insured establish that a loss falls within one such peril specified or otherwise potentially miss out on coverage entirely.[405] The Third Department found themselves analyzing this issue in *Calhoun v. Midrox Insurance Company*[406]

In that case, the plaintiff-insureds made an insurance claim for structural damage sustained by a barn when a tractor and bailer "broke through the . . . floor."[407] Midrox Insurance Company (Midrox) disclaimed coverage outright, and its insureds sued to recover under the policy.[408]

Upon service of the summons and complaint, Midrox moved to dismiss under N.Y.C.P.L.R. 3211(a)(1) based upon a certified copy of the policy as documentary evidence.[409] That certified Midrox policy included only eleven specified perils.[410] Not a single peril, however, reasonably encompassed this particular loss—a tractor "breaking through a barn floor."[411] As such, the court dismissed under the plain meaning of the terms in that insurance contract.[412] Notably, a properly certified insurance policy is often used in the way Midrox did here.[413] Midrox adduced proof by way of an affidavit from the President of the insurance company which swore to the completeness and accuracy of the policy in question.[414]

Where businesses are forced to close their doors to patrons for an extended period, they often seek insurance coverage for lost income as a result.[415] In a short decision, *Cohen & Slamowitz, LLP v. Zurich*

885, 887 (2009); and then citing Pichel v. Dryden Mut. Ins. Co., 117 A.D.3d 1267, 1270, 986 N.Y.S.2d 268, 273 (3d Dep't 2014)).

405. *See* Calhoun v. Midrox Ins. Co., 165 A.D.3d 1450, 1452, 86 N.Y.S.3d 769, 771 (3d Dep't 2018) (dismissing plaintiff's claim where damage did not fall into one of the eleven specified perils).

406. *Id.*

407. *Id.* at 1450, 86 N.Y.S.3d at 770.

408. *Id.*

409. *Id.* (citing N.Y. C.P.L.R. § 3211(a)(1) (McKinney 2016)).

410. *Calhoun*, 165 A.D.3d at 1452, 86 N.Y.S.3d at 771.

411. *Id.*

412. *Id.* (first citing Kilmer v. Miller, 96 A.D.3d 1133, 1135–36, 946 N.Y.S.2d 288, 291 (3d Dep't 2012), *dismissing appeal from*, 19 N.Y.3d 1042, 978 N.E.2d 596, 954 N.Y.S.2d 4 (2012); and then citing Nisari v. Ramjohn, 85 A.D.3d 987, 990, 927 N.Y.S.2d 358, 361 (2d Dep't 2011)).

413. *Id.* at 1451, 86 N.Y.S.3d at 770 (first citing Hefter v. Elderserve Health, Inc., 134 A.D.3d 673, 675, 22 N.Y.S.3d 454, 456 (2d Dep't 2015); and then citing Muhlhahn v. Goldman, 93 A.D.3d 418, 418–19, 939 N.Y.S.2d 420, 420–21 (1st Dep't 2012)).

414. *Id.*

415. *See* Cohen & Slamowitz, LLP v. Zurich Am. Ins. Co., 168 A.D.3d 905, 905, 92 N.Y.S.3d 365, 366 (2d Dep't 2019).

American Insurance Company, the Second Department outlined the requirements to collect.[416]

Cohen & Slamowitz, LLP submitted a claim for business interruption due to alleged loss of revenue caused by telephone service issues during Superstorm Sandy.[417] Zurich American Insurance Company (Zurich) denied the claim on the basis that the loss did not arise from a "Covered Cause of Loss" at the plaintiff's facility or a "dependent property."[418] Rather, this interruption was caused by flood waters disabling the service provider's switch center.[419]

As defined in the Zurich policy, "dependent property" is a premises on which the insured relied to deliver materials or services (not including water, communications, or power supply services).[420] Since the interruption was caused due to a loss of communication services, it followed that there was not a "Covered Cause of Loss" to the insured's premises or to "dependent property."[421]

In insurance, the causation requirement is often language—and coverage—dependent, and the failure of a trial court to charge a jury with the correct causal standard is reversible error.[422] That much was discussed by the Second Department in *Greenberg v. Privilege Underwriters Reciprocal Exchange*.[423]

This decision arose out of a trial involving first-party coverage following Superstorm Sandy.[424] Greenberg's home was damaged by storm surging water that inundated the basement and garage of the residence.[425] Allegedly, the storm water spawned mold which traveled throughout the house causing a total loss.[426] During trial, Greenberg established that some water had entered the basement through a

416. *See generally id.* (discussing requirements to collect lost income).

417. *Id.* at 905, 92 N.Y.S.3d at 366.

418. *Id.* at 906, 92 N.Y.S.3d at 367.

419. *Id.* at 906–07, 92 N.Y.S.3d at 367.

420. *Cohen & Slamowitz, LLP*, 168 A.D.3d at 906, 92 N.Y.S.3d at 367.

421. *Id.* at 907, 92 N.Y.S.3d at 367.

422. *See* Greenberg v. Privilege Underwriters Reciprocal Exch., 169 A.D.3d 878, 879, 93 N.Y.S.3d 686, 689 (2d Dep't 2019) (first citing Rakoff v. N.Y.C. Dep't of Educ., 110 A.D.3d 780, 781, 973 N.Y.S.2d 267, 268 (2d Dep't 2013); then citing J. R. Loftus, Inc. v. White, 85 N.Y.2d 874, 876, 649 N.E.2d 1196, 1197, 626 N.Y.S.2d 52, 53; and then citing Moore v. N.Y. Elevated R.R. Co., 130 N.Y. 523, 529, 29 N.E. 997, 998 (1892)).

423. *Id.*

424. *Id.* at 879, 93 N.Y.S.3d at 687.

425. *Id.*

426. Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, Greenberg v. Privilege Underwriters Reciprocal Exch., No. 2109/2013, 2016 WL 439821, at 3 (Sup. Ct. Kings Cty. Jan. 7, 2016) (No. 2109/2013), 2015 WL 9914958.

pressurized sump pump backup.[427] Privilege Underwriters Reciprocal Exchange (PURE) countered that the vast majority of water entered due to the storm surge that broke through windows and doors and poured into the basement.[428] Ultimately, the basement was filled to about the first floor joists.[429]

The above distinction is important because the policy issued by PURE contained a general surface and ground water exclusion which excluded flood, tidal overflow, waves, etc.[430] However, the PURE policy also contained coverage for damage resulting from water backup from sewers and drains.[431] In addition, coverage potentially extended to resultant damage from overflowed sumps.[432]

> At the charge conference, the trial court advised that the jury would be instructed . . .
>
> that if the plaintiffs' home "was damaged by two or more conditions or events, any one of which is covered under the insurance policy . . . then [the defendant] may be liable if . . . the conditions or events acted together to cause the damage to the [plaintiffs'] home."[433]

PURE objected on the theory that the court was presenting the wrong causation standard to the jury.[434] Over PURE's objection, the jury received the instruction and issued judgment against the carrier.[435]

On appeal, the Second Department began its analysis by noting the two competing theories of causation in first-party cases.[436] Some jurisdictions employ a concurrent caus[ation] test which, essentially, rules that if two causes of loss contribute to damage then coverage is confirmed even though one of the causes of loss might be

427. Attorney Affirmation in Support of Defendant's Motion for Summary Judgment, Greenberg v. Privilege Underwriters Reciprocal Exch., No. 2109/2013, 2016 WL 439821, at 8 (Sup. Ct. Kings Cty. Jan. 7, 2016) (No. 2109-2013), 2015 WL 9914957.

428. *Id.*

429. *See id.* ("[W]ater from the storm surge . . . completely submerged the basement . . . .").

430. *Greenberg*, 169 A.D.3d at 879, 93 N.Y.S.3d at 688.

431. *Id.*

432. *Id.*

433. *Id.*

434. *Id.*

435. *Greenberg*, 169 A.D.3d at 879, 93 N.Y.S.3d at 688.

436. *See id.* at 880, 93 N.Y.S.3d 688–89 (first citing Album Realty Corp. v. Am. Home Assur. Co., 80 N.Y.2d 1008, 1010, 607 N.E.2d 804, 805, 592 N.Y.S.2d 657, 658 (1992)); then citing Neuman v. United Servs. Auto. Ass'n, 74 A.D.3d 925, 925–26, 905 N.Y.S.2d 202, 203 (2nd Dep't 2010); then citing Kannatt v. Valley Forge Ins. Co., 228 A.D.2d 564, 564–65, 644 N.Y.S.2d 530 (2nd Dep't 1996); and then citing Marc J. Shrake, New Appleman on Insurance Law Library Edition § 44.03[3] 2–4 (2019)).

excluded.[437] The Second Department noted that while this theory of causation existed, it was not followed by New York courts.[438] Rather, New York follows the dominant and efficient cause of loss theory.[439] Accordingly, where two causes of loss are identified, it is only the "proximate, efficient, and dominant cause" which governs whether coverage triggers.[440]

By failing to recognize this distinction, the trial court committed reversible error with its decision to charge concurrent causation.[441] Accordingly, the matter was remanded for a new trial.[442]

Although many are familiar with the limitations of coverage for defective work product cases, it is important to also understand the extent to which the ensuing loss exception may apply to extend coverage for fire loss.[443] The Second Department applied this concept in *Fruchthandler v. Tri-State Consumer Insurance Company*.[444]

In 2014, a fire broke out and damaged Fruchthandler's home.[445] After an inspection, Tri-State Consumer Insurance Company (Tri-State) determined that the fire was caused by a faulty junction box found within the premises.[446] Subsequently, Tri-State issued a disclaimer based upon the faulty workmanship exclusion found within Fruchthandler's policy.[447]

Fruchthandler sued, arguing that Tri-State failed to acknowledge an exception to the faulty workmanship exclusion for ensuing losses arising from a covered cause of action.[448] Fruchthandler reasoned that damage to the junction box itself might be excluded by faulty workmanship,

437. *Id.*

438. *Id.*

439. *Id.*

440. *Greenberg*, 169 A.D.3d at 880, 93 N.Y.S at 688.

441. *Id.* at 880, 93 N.Y.S at 689.

442. *Id.* (first citing *Rakoff*, 110 A.D.3d at 781, 973 N.Y.S.2d at 268; then citing *J.R. Loftus Inc.*, 85 N.Y.2d at 876, 649 N.E.2d at 1198, 626 N.Y.S.2d at 54; and then citing Moore, 130 N.Y. at 529, 29 N.E. at 998).

443. *See* Fruchthandler v. Tri-State Consumer Ins. Co., 171 A.D.3d 706, 708, 96 N.Y.S.3d 649, 651 (2d Dep't 2019) (first citing Narob Dev. Corp. v. Ins. Co. of N. Am., 219 A.D.2d 454, 631 N.Y.S.2d 155, 155–56 (1st Dep't 1995); then citing Copacabana Realty LLC v. Fireman's Fund Ins. Co., No. 10/2919, 2013 N.Y. Slip Op. 30960(U), at 1 (Sup. Ct. Suffolk Cty. Apr. 29, 2013), *aff'd*, 130 A.D.3d 771, 772, 15 N.Y.S.3d 357, 358 (2nd Dep't 2015); and then citing Laquila Constr., Inc. v. Travelers Indem. Co., 66 F. Supp.2d 543, 545 (S.D.N.Y. 1999), *aff'd*, 216 F.3d 1072, 1072 (2d Cir. 2000)).

444. *Id.*

445. *Id.*

446. *Id.* at 706–07, 96 N.Y.S.3d at 650.

447. *Id.*

448. *Fruchthandler*, 171 A.D.3d at 707, 96 N.Y.S.3d at 650.

however, the ensuing fire damage arose from a covered cause of loss (i.e., fire) and, thus, should have been covered.[449]

The Second Department, in reversing the trial court, acknowledged that the insured bears the burden of establishing the applicability of an exception to an exclusion.[450] However, the court noted that "an ensuing loss provision . . . provide[s] coverage when, as a result of an excluded peril, a covered peril arises and causes damage," and where, as here, the fire occurred two years after the allegedly defective work, it followed that the exception applied for ensuing loss.[451]

XIV. AUTO INSURANCE

There is significant caselaw concerning the liabilities involved with the ownership of a vehicle, including that of permissive users of the vehicle. But what if we told you that someone other than the titular owner of a vehicle can actually own the vehicle for the purposes of auto insurance? Furthermore, what if we told you that insurance company records may be relevant to such a determination? The case is *Portillo v. Carlson*.[452]

In 2007, Portillo was injured when the bicycle he was riding was struck by a motor vehicle.[453] Thereafter, Portillo sued Carlson on the theory that Carlson owned and controlled the vehicle—allegations that Carlson denied in his answer.[454] During depositions, Carlson and his wife stated that the wife was operating the vehicle during the accident, the title and registration were in the wife's name, and they shared an insurance policy covering all family-owned vehicles, including the relevant vehicle.[455]

The plaintiff subsequently served discovery on Carlson, which included a request for authorization to obtain all documentation in the possession of the vehicle's insurer relating to that vehicle and the accident.[456]

449. *Id.*

450. *Id.* (citing Borg-Warner Corp. v. Ins. Co. of N. Am., 174 A.D.2d 24, 31, 575 N.Y.S.2d 953, 957 (3d Dep't 1992)).

451. *Id.* at 707–08, 96 N.Y.S.3d at 651 (first citing Platek v. Town of Hamburg, 24 N.Y.3d 688, 695, 26 N.E.3d 1167, 1172, 3 N.Y.S.3d 312, 317 (2015); and then citing Montefiore Med. Ctr. v. Am. Prot. Ins. Co., 226 F. Supp. 2d 470, 479 (S.D.N.Y. 2002)).

452. 167 A.D.3d 792, 792, 89 N.Y.S.3d 270, 271 (2d Dep't 2018).

453. *Id.*

454. *Id.*

455. *Id.*

456. *Id.*

Although a certificate of title is prima facie evidence of ownership, "this presumption may be rebutted by evidence demonstrating that another individual owns the subject vehicle."[457] Such evidence may include that an individual exercised "dominion and control" over a vehicle held without title.[458]

The Second Department held that "documents from the insurer concerning the vehicle and the accident are material and relevant to the issue of whether the defendant exercised dominion and control over the vehicle."[459] Accordingly, the appellate division reversed and ordered Carlson to provide authorization to obtain "documents in the insurer's possession concerning the vehicle and the accident."[460]

Residency is a recurring theme in auto-based insurance coverage matters. In *Liang v. Progressive Casualty Insurance Company*, questions of fact remained as to residency, thus avoiding premature judgment on that issue.[461]

In 2005, Liang and her husband, Lu, procured automobile insurance through Progressive.[462] On the application, Liang and Lu claimed to be the only two resident drivers at an address in Randolph, Vermont.[463] Progressive issued and reissued a Vermont policy.[464] "The policy contained an uninsured/underinsured motorist (UM/UIM) provision, which applied to the named insureds, who are Liang and Lu, or a

457. *Portillo*, 167 A.D.3d at 793, 89 N.Y.S.3d at 271–72 (first citing Zegarowicz v. Ripatti, 77 A.D.3d 650, 653, 911 N.Y.S.2d 69, 72 (2d Dep't 2010); then citing N.Y. VEH. & TRAF. LAW § 128 (McKinney 2005); then citing N.Y. VEH. & TRAF. LAW §§ 2101(g), 2108(c) (McKinney 2011); then citing Dorizas v. Island Insulation Corp., 254 A.D.2d 246, 247, 678 N.Y.S.2d 388, 390 (2d Dep't 1998); then citing Spratt v. Sloan, 280 A.D.2d 465, 466, 720 N.Y.S.2d 173, 174 (2d Dep't 2001); then citing Dickerson v. Diaz, 256 A.D.2d 435, 436, 681 N.Y.S.2d 605, 606 (2d Dep't 1998); and then citing Young v. Seckler, 74 A.D.2d 155, 157–58, 426 N.Y.S.2d 311, 313 (2d Dep't 1980)).

458. *Id.* at 793, 89 N.Y.S.3d at 272 (first citing RLI Ins. Co. v. Steely, 88 A.D.3d 975, 977, 932 N.Y.S.2d 80, 83 (2d Dep't 2011); then citing Terranova v. Waheed Brokerage, Inc., 78 A.D.3d 1040, 1040, 912 N.Y.S.2d 253, 254 (2d Dep't 2010); then citing Estate of Zimmerman v. Mitsubishi Motors Credit of Am. Inc., 34 A.D.3d 628, 629, 824 N.Y.S.2d 667, 669 (2d Dep't 2006); then citing *Spratt*, 280 A.D.2d at 466, 720 N.Y.S.2d at 174; and then citing *Young*, 74 A.D.2d at 157, 426 N.Y.S.2d at 313).

459. *Id.* (first citing Corrigan v. DiGuardia, 166 A.D.2d 408, 408–09, 560 N.Y.S.2d 472, 473 (2d Dep't 1990); and then citing *Young*, 74 A.D.2d at 157–58, 426 N.Y.S.2d at 313).

460. *Id.* (citing Knapp v. Town of Hempstead, 130 A.D.3d 579, 580, 13 N.Y.S.3d 218, 219 (2d Dep't 2015)).

461. 172 A.D.3d 696, 697, 99 N.Y.S.3d 449, 451 (2d Dep't 2019) (first citing Vincel v. State Farm Fire & Cas. Co., 136 A.D.3d 893, 895, 25 N.Y.S.3d 317, 318–19 (2d Dep't 2016); and then citing Hochhauser v. Elec. Ins. Co., 46 A.D.3d 174, 184–85, 844 N.Y.S.2d 374, 382 (2d Dep't 2007)).

462. *Id.* at 696, 99 N.Y.S.3d at 450.

463. *Id.* at 696, 99 N.Y.S.3d at 450–51.

464. *Id.* at 696, 99 N.Y.S.3d at 451.

'relative,' [and] 'relative' was defined in the policy to mean 'a person residing in the same household' as the named insured and related by blood or marriage."[465]

In 2012, Liang's mother, Guan, was killed by an underinsured vehicle while crossing a street in Brooklyn.[466] At the time of her death, Guan resided at East 14th Street in Brooklyn, in a house owned by Liang and Lu.[467]

Liang commenced this action against her carrier alleging breach of contract for refusal to pay for Guan's injuries under the UM endorsement of the policy.[468]

Progressive argued that the policy required Liang to reside in the same household as her mother, the decedent, in order to trigger coverage for her under the UM endorsement.[469] However, because the terms "residing" and "household" are not defined in the policy, the Second Department determined that the definition of "relative" was ambiguous.[470] Notably and in general, "[a]n individual can have more than one residence for purposes of insurance coverage."[471]

Although Liang averred that in 2002 she began living and working in Vermont, she also considered the Brooklyn premises her second residence.[472] Liang stated that, in addition to her mother and father, "her three sons lived in the East 14th Street premises until each son went to college and at various times thereafter."[473] Liang and Lu each testified that between 2002 and 2012, Liang would stay at the East 14th Street premises "on average about seven or eight times per year for around three days at a time, in addition to certain holidays and vacations."[474] Liang also kept clothes and other items at the East 14th Street premises.[475] Furthermore, although Liang had a Vermont driver's license, her tax

465. *Id.*

466. *Liang*, 172 A.D.3d at 696–97, 99 N.Y.S.3d at 451.

467. *Id.* at 697, 99 N.Y.S.3d at 451.

468. *Id.* Although not relevant for our purposes, plaintiff also alleged bad faith in Progressive's refusal to provide coverage, seeking extracontractual damages. *Id.*

469. *Id.*

470. *Id.* (citing Auerbach v. Otsego Mut. Fire Ins. Co., 36 A.D.3d 840, 841, 829 N.Y.S.2d 195, 197 (2d Dep't 2007)).

471. *Liang*, 172 A.D.3d at 697, 99 N.Y.S.3d at 451 (citing *Progressive N. Ins. Co.*, 139 A.D.3d at 959, 31 N.Y.S.3d at 587).

472. *Id.* at 697–98, 99 N.Y.S.3d at 451.

473. *Id.* at 698, 99 N.Y.S.3d at 451–52.

474. *Id.* at 698, 99 N.Y.S.3d at 452.

475. *Id.*

returns indicated her address as the East 14th Street premises, and she served as a juror in New York.[476]

Additionally, Progressive failed to establish an alleged material misrepresentation by Liang.[477] "[T]o establish its right to rescind an insurance policy, an insurer must demonstrate that the insured made a material misrepresentation," and for such a material misrepresentation, the insurer must establish that it "would not have issued the policy had it known the facts misrepresented."[478] Progressive failed to establish Liang misrepresented the resident drivers in her household, where "household residents" was not defined in the application and was ambiguous.[479] Additionally, mere self-serving statements by an underwriter that the premium "'may have been increased' by the addition of another individual as a resident of their household was insufficient to establish materiality as a matter of law."[480]

In another Second Department case, *State Farm Fire and Casualty Company v. Jewsbury*, the court found a carrier's claim for material representation remained plausible and allowed it to survive dismissal in light of other pending actions.[481]

Jewsbury was injured in an auto accident in a vehicle insured by State Farm.[482] He was treated for his injuries by several providers, including Dr. Parisien.[483] State Farm declined to pay first-party benefit claims submitted by Parisien, and Parisien commenced two actions for payment.[484]

"While those actions were pending, State Farm commenced this [declaratory judgment] action," seeking a declaration that "it is not required to pay any claims related to the accident on the policy it issued to Jewsbury, on the ground that Jewsbury [had] made material misrepresentations in his policy application."[485] State Farm alleged that

476. *Liang*, 172 A.D.3d at 698, 99 N.Y.S.3d at 452.

477. *Id.*

478. *Id.* (first quoting Parmar v. Hermitage Ins. Co., 21 A.D.3d 538, 540, 800 N.Y.S.2d 726, 728 (2d Dep't 2005); then quoting Zilkha v. Mut. Life Ins. Co., 287 A.D.2d 713, 714, 732 N.Y.S.2d 51, 52 (2d Dep't 2001); and then quoting N.Y INS. LAW § 3105(b) (McKinney 2015)).

479. *Id.* (first citing Fanger v. Manhattan Life Ins. Co. of N.Y., 273 A.D.2d 438, 439, 709 N.Y.S.2d 622, 624 (2d Dep't 2000); and then citing Nadel v. Manhattan Life Ins. Co., 211 A.D.2d 900, 901–02, 621 N.Y.S.2d 180, 182 (3d Dep't 1995)).

480. *Id.* (citing *Parmar*, 21 A.D.3d at 541, 800 N.Y.S.2d at 728).

481. 169 A.D.3d 949, 950, 93 N.Y.S.3d 692, 693 (2d Dep't 2019).

482. *Id.* at 950, 93 N.Y.S.3d at 693.

483. *Id.*

484. *Id.* (citing N.Y. INS. LAW § 5106 (McKinney 2015)).

485. *Id.*

Jewsbury stated on the policy application that the car would be garaged in Albany when, in fact, Jewsbury garaged the vehicle in Kings County.[486]

Parisien moved to dismiss the lawsuit in light of the other actions then pending.[487] However, the Second Department determined that the Civil Court did not have the power to grant declaratory relief and this proceeding involved not only Dr. Parisien but also, other providers.[488]

In a rather short—yet interesting—decision, *New York City School Construction v. New South Insurance Company*, the First Department held that a third party (as compared to an owner) might not have coverage for "loading and unloading" a motor vehicle.[489]

The language regarding New South's coverage of New York City School Construction Authority (SCA) under the policy it issued was clear that since the accident occurred while the vehicle was parked, rather than "while driving," SCA failed to qualify as an "Insured."[490] The First Department noted that while "loading and unloading" can constitute "use and operation" for the purposes of holding an owner derivatively liable under Vehicle and Traffic Law section 388, here SCA was not the vehicle owner, and the owner, Sukhman Construction Inc., was not a party to the underlying action.[491]

X. ALLOCATION

Allocation of policy limits within successive policies for remediation and other long-tail type claims raise interesting questions in the coverage world. A recent First Department decision, *Century Indemnity Company v. Brooklyn Union Gas Company*, provides a glimpse into the nuances of these types of issues.[492]

The insured defendant settled and agreed to pay for the remediation of a former manufactured gas plant.[493] Century Indemnity Company

486. *Jewsbury*, 169 A.D.3d at 950, 93 N.Y.S.3d at 693.

487. *Id.* at 949–50, 93 N.Y.S.3d at 693.

488. *Id.* at 951, 93 N.Y.S.3d at 694 (first citing Fresh Acupuncture, P.C. v. Interboro Ins. Co., 56 Misc. 3d 98, 100, 56 N.Y.S.3d 768, 769 (2d Dep't 2017); then citing N.Y. C.P.L.R. 3001 (McKinney 2015); then citing N.Y. INS. LAW § 3420(a)(6) (McKinney 2015); and then citing Mazzei v. Kyriacou, 139 A.D.3d 823, 824, 33 N.Y.S.3d 291, 293 (2d Dep't 2016)).

489. 173 A.D.3d 539, 540, 103 N.Y.S.3d 76, 77 (1st Dep't 2019) (first citing Argentina v. Emery World Wide Delivery Corp., 93 N.Y.2d 554, 560, 715 N.E.2d 495, 498, 693 N.Y.S.2d 493, 495 (1999); and then citing N.Y. VEH. & TRAF. LAW §388(1) (McKinney 2015)).

490. *Id.*

491. *Id.*

492. 170 A.D.3d 632, 632, 97 N.Y.S.3d 72, 73 (1st Dep't 2019).

493. *Id.* at 633, 97 N.Y.S.3d at 73.

(Century) moved for summary judgment on three separate issues.[494] Relevant for our purposes, Century argued that policies it had issued over the course of time required "pro rata allocation of losses," and that the per-occurrence limits in certain policies were limits for the respective policies' entire terms, rather than annual per-occurrence limits. [495]

The appellate division held that the trial court "correctly determined that the 'other insurance' clauses in four of the policies [failed to] contain 'non-cumulation' or 'anti-stacking' clauses."[496] This meant that losses spanning successive policies, such as environmental remediation, "must be allocated pro rata across the successive policies."[497] However, policies with multi-year terms were determined to be ambiguous "as to whether the per-occurrence limits were limits for the respective policies' entire terms or were annual per-occurrence limits."[498]

CONCLUSION

The insurance coverage cases decided during this *Survey* period highlight how courts are wrestling with complicated questions concerning additional insured coverage and varying exclusions relied upon by the insurers. We believe the courts will continue to wrangle with these issues, and in our next *Survey* period be asked to deal with many new coverage issues created by the New York Legislature's passage of the Child Victims Act, which extends the state's strict statute of limitations on sexual crimes against children and opens up a one-year window to revive past claims of any age. We anticipate that with the passage of this act, it will create a flood of new decisions on lost policies, number of co-occurrences, and late notice. Our next *Survey* period will no doubt address another flood of litigation arising from the COVID-19

494. *See id*. at 632–33, 97 N.Y.S.3d at 73.

495. *Id*. Although not pertinent to our analysis, the appellate division held that Century's commencement of this litigation constituted a repudiation of liability under the policies for the remediation claims against the insured, relieving the insured of its obligation under the policies to obtain "Century's consent before agreeing to pay for remediation costs for the manufactured gas plant." *Id.* (first citing J.P. Morgan Sec. Ins. v. Vigilant Ins. Co., 151 A.D.3d 632, 632, 58 N.Y.S.3d 38, 39 (1st Dep't 2017)); and then citing AJ Contracting Co. v. Forest Datacom Servs., 309 A.D.2d 616, 617–18, 767 N.Y.S.2d 411, 412 (1st Dep't 2003)).

496. *Id*. (first citing *In re* Viking Pump, Inc., 27 N.Y.S. 244, 260–61, 52 N.E.3d 1144, 1153, 33 N.Y.S. 118, 128 (2016); then citing Consol. Edison Co. of N.Y. v. Allstate Ins. Co., 98 N.Y.2d 208, 223, 774 N.E.2d 687, 694, 746 N.Y.S.2d 622, 629 (2002); and then citing Boston Gas Co. v. Century Indem. Co., 454 Mass. 337, 362, 910 N.E.2d 290, 309 (2009)).

497. *Century Indem. Co.*, 170 A.D.3d at 633, 52 N.E.3d 1144, 93 N.Y.S.3d at 73 (first citing *In re Viking Pump, Inc.*, 27 N.Y.S. at 260–61, 52 N.E.3d at 1153, 33 N.Y.S. at 128; then citing *Consol. Edison Co. of N.Y.*, 98 N.Y.2d at 223, 774 N.E.2d at 694, 746 N.Y.S.2d at 629; and then citing Boston Gas Co., 454 Mass. at 362, 910 N.E.2d at 309).

498. *Id.*

pandemic and resulting legislative and regulatory initiatives concerning claims of business interruption, bodily injury, personal and advertising injury and others.