INSURANCE LAW SURVEY

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INTRODUCTION

It has been another year of interesting cases from the New York courts. From COVID-19 business interruption cases, which appear to follow the national trend, to the endless battle of the breadth of additional insured coverage to fights over discovery in declaratory judgment actions, the New York appellate courts continue to offer a myriad of judicial pronouncements, to entertain and elucidate. We hope to provide insight on where New York insurance law is heading by reviewing where appellate court decisions have landed in recent memory.

I. COVID-19 BUSINESS INTERRUPTION COVERAGE

Since our prediction from last year's *Survey* forecast a heavy dose of COVID-19 business interruption decisions, we begin the discussion there. Although we have yet to see an appellate decision regarding COVID-19 business interruption claims in New York, trial courts in the state have, *en masse*, applied existing New York precedent in finding that the phrase "direct physical loss or damage" requires physical damage to the insured property itself as a condition for coverage.[1] Specifically, during the *Survey* period, all New York courts applying New York law to COVID-19 business interruption claims have soundly rejected policyholder argument that business closures due to New York State Executive Orders and a loss of use of property constitute physical loss of or damage to property.[2] We once again

1. *See* Roundabout Theatre Co. v. Cont'l Cas. Co., 302 A.D.2d 1, 2, 751 N.Y.S.2d 4, 5 (1st Dep't 2002).

2. *See e.g.* Buffalo Xerographix, Inc. v. Sentinel Ins. Co., No. 1:20-cv-520, 2021 U.S. Dist. LEXIS 114581, at *15 (W.D.N.Y. June 16, 2021); Off. Sol. Grp., LLC v. Nat'l Fire Ins. Co. of Hartford, No. 1:20-cv-4736-GHW, 2021 U.S. Dist. LEXIS 110007, at *19–20 (S.D.N.Y. June 11, 2021); Deer Mt. Inn LLC v. Union Ins. Co., No. 1:20-cv-0984, 2021 U.S. Dist. LEXIS 97602, at *22 (N.D.N.Y. May 24, 2021); Kim-Chee LLC v. Phila. Indem. Ins. Co., No. 1:20-cv-1136, 2021 U.S. Dist. LEXIS 78241, at *19 (W.D.N.Y. April 23, 2021); Rye Ridge Corp. v. Cincinnati Ins. Co., 535 F. Supp. 3d 250, 254 (S.D.N.Y. 2021); Mohawk Gaming Enters., LLC v. Affiliated FM Ins. Co., No. 8:20-CV-701, 2021 U.S. Dist. LEXIS 72724, at *14 (N.D.N.Y. Apr. 15, 2021); 6593 Weighlock v. Springhill SMC Corp., 71 Misc. 3d 1086, 1096, 147 N.Y.S.3d 386, 394 (Sup. Ct. Onondaga Cnty. 2021); Mangia Rest. Corp. v. Utica First Ins. Co., 72 Misc. 3d 408, 416, 148 N.Y.S.3d 606, 612 (Sup. Ct. Queens Cnty. 2021); Harvey v. Sentinel Ins. Co., No. 20-CV-3350 (PGG) (RWL),

predict that next year's *Survey* will contain numerous COVID-19 business interruption decisions construing the phrase "direct physical loss or damage" to various legal theories asserted by policyholders seeking coverage under commercial property insurance policies.

II. DEFENSE COST REIMBURSEMENT

An important consideration by carriers issuing disclaimers while providing an insured with a courtesy defense in an underlying tort action is whether, and if so, when, an insurance company is entitled to reimbursement of costs and fees associated with that defense following a declaration of non-coverage.

Indeed, a split between Appellate Divisions in New York on this issue emerged during this *Survey* period.[3] For instance, *Certain Underwriters at Lloyd's v. Advance Transit Co*. involved a claims-made insurance policy issued by Certain Underwriters at Lloyd's ("Underwriters"), which required the insured to notify the insurer of any claim within specified time period.[4] Pursuant to N.Y. Ins. Law section 3420(a)(5), such a claim can be filed either: (1) during the relevant policy period; (2) during any renewal period thereof; or (3) during any extended reported period.[5]

Although any one of these three ways prescribed by N.Y. Ins. Law section 3420(a)(5) is sufficient to put an insurer on timely notice, the insured here failed to timely notify the insurer.[6] The First Department noted that the insured did, in fact, put other parties on

2021 U.S. Dist. LEXIS 52552, at *42 (S.D.N.Y. Mar. 18, 2021); DeMoura v. Cont'l Cas. Co., No. 20-CV-2912 (NGG) (SIL), 2021 U.S. Dist. LEXIS 42384, at *17 (E.D.N.Y. Mar. 5, 2021); Food for Thought Caterers Corp. v. Sentinel Ins. Co., No. 20-cv-3418 (JGK), 2021 U.S. Dist. LEXIS 42828, at *19 (S.D.N.Y. Mar. 6, 2021); Visconti Bus Serv., LLC v. Utica Natl. Ins. Grp., 71 Misc. 3d 516, 536, 142 N.Y.S.3d 903, 918 (Sup. Ct. Orange Cnty. 2021); Soundview Cinemas Inc. v. Great Am. Ins. Group, 71 Misc. 3d 493, 507, 142 N.Y.S.3d 724, 735 (Sup. Ct. Nassau Cnty. 2021); Michael J. Redenburg, Esq., PC v. Midvale Indem. Co., 515 F. Supp. 3d 95, 106 (S.D.N.Y. 2021); Tappo of Buffalo, LLC v. Erie Ins. Co., No. 20-cv-754 (Sr), 2020 U.S. Dist. LEXIS 245436, at *12, (W.D.N.Y. Dec. 29, 2020); 10012 Holdings, Inc. v. Sentinel Ins. Co., 507 F. Supp. 3d 482, 488 (S.D.N.Y. 2020); Michael Cetta, Inc. v. Admiral Indem. Co., 506 F. Supp. 3d 168, 181 (S.D.N.Y. 2020).

3. *See, e.g.*, Certain Underwriters at Lloyd's London Subscribing to Policy No., PGIARK01449-05 v. Advance Transit Co., Inc., 188 A.D.3d 523, 523, 132 N.Y.S.3d 621, 621 (1st Dep't 2020) (holding that insurer may recover such fees); *compare* Am. W. Home Ins. Co. v. Gjonaj Realty & Mgt. Co., 192 A.D.3d 28, 42, 138 N.Y.S.3d 626, 636 (2d Dep't 2020) (holding that an insurer is not entitled to any such recoupment).

4. *See Certain Underwriters*, 188 A.D.3d at 524, 132 N.Y.S.3d at 621.

5. *See id.*; *see also* N.Y. INS. LAW § 3420(a)(5) (McKinney 2021)).

6. *See Certain Underwriters*, 188 A.D.3d at 524, 132 N.Y.S.3d at 621.

notice of the claim within the specified time, but this alone was insufficient under the policy.[7] After untimely notice, the insurer issued a disclaimer letter, but agreed to provide the insured with a defense and reserve its right to, *inter alia*, recover payments it had made, including fees, costs, and expenses incurred in defense of the underlying action.[8]

The First Department explained that since the insurer owed no duty to defend or indemnify the insured by reason of late notice, it was also entitled to reserve its right to recoup defense costs incurred while pursuing declaratory relief.[9] This was precisely what the insurer did, and the First Department upheld the trial court's ruling that obligated the insured to reimburse Underwriters for fees, costs, and expenses incurred in the defense.[10]

Meanwhile, the Second Department held just the opposite, within a few days of the First Department's decision.[11] In *American Western Home Insurance Co. v. Gjonaj Realty Management Co.*, it was held that an insurer cannot recoup costs associated with its provision of a defense, even where it is subsequently determined that there exists no duty to defend.[12] The applicable policy issued by American Western Home Insurance ("American") provided that American would defend the insured, Gjonaj Realty Management Company ("Gjonaj") so long as, *inter alia*, timely notice was provided.[13] Here, notice was untimely, with first notice occurring after a $900,000 default judgment was entered against Gjonaj over four years after the occurrence.[14] For this reason, American denied coverage and refused to provide a defense.[15] However, American indicated that if the verdict were set aside, it would reconsider its position.[16] Subsequently, the verdict was set aside

7. *See id.* (citing Gershow Recycling Corp. v. Transcon. Ins. Co., 22 A.D.3d 460, 462, 801 N.Y.S.2d 832, 833 (2d Dep't 2005)).

8. *See id.* at 524, 132 N.Y.S.3d at 622.

9. *See id.* (first citing Law Offs. of Zachary R. Greenhill P.C. v. Liberty Ins. Underwriters, Inc., 128 A.D.3d 556, 559–60, 9 N.Y.S.3d 264, 267–68 (1st Dep't 2015); and then citing Certain Underwriters at Lloyd's London Subscribing to Policy No. SYN-1000263 v. Lacher & Lovell-Taylor, *P.C.*, 112 A.D.3d 434, 435, 975 N.Y.S.2d 870, 870 (1st Dep't 2013)).

10. *See id.* at 523, 132 N.Y.S.3d at 621.

11. *See* Am. W. Home Ins. Co. v. Gjonaj Realty & Mgt. Co., 192 A.D.3d 28, 30, 138 N.Y.S.3d 326, 628 (2d Dep't 2020).

12. *See id.* at 33, 138 N.Y.S.3d at 630.

13. *See id.* at 30–31, 138 N.Y.S.3d at 629.

14. *See id.* at 31, 138 N.Y.S.3d at 629.

15. *See id.*

16. *See Am. W. Home Ins. Co.*, 192 A.D.3d at 31, 138 N.Y.S.3d at 629.

and American agreed to defend Gjonaj subject to a reservation of rights to recoup fees, costs and expenses in the immediate action.[17]

Although the Second Department agreed that American was indeed prejudiced by Gjonaj's late notice, eliminating its coverage obligations,[18] the court held that the insurer was not entitled to recover fees, costs, and expenses associated its initial defense of Gjonaj.[19]

American Western admittedly diverged from prior New York precedent that has allowed an insurer to recover defense costs,[20] in favor of other, more recent federal cases abandoning this doctrine.[21] Those courts found that recoupment of fees, costs, and expenses is inappropriate where, as here, the policy at issue provided for a duty to defend the insured without express provisions permitting insurer reimbursement.[22]

III. UM/SUM COVERAGE

New York courts issued several decisions within the uninsured/underinsured motorists coverage arena during the *Survey* period (respectively, "UM/SUM" coverage).

Recently, the Fourth Department undertook a clear-cut analysis that answers exactly how one may ascertain when UM/SUM provisions in a typical auto policy are triggered. In *Gross v. Travelers Insurance Co.*, the Fourth Department ruled that, to ascertain whether SUM coverage is triggered, a court must compare the two liability policies, and if the SUM claimant's policy limits are higher than the tortfeasor's, SUM coverage is indeed triggered.[23] There, George Gross, his wife, and another person who qualified as "an insured"

17. *See id.* at 31–32, 138 N.Y.S.3d 626 at 629.

18. *See id.* at 32, 138 N.Y.S.3d 626 at 630.

19. *See id.* at 37, 138 N.Y.S.3d 626 at 633–34.

20. *See id.* at 36, 138 N.Y.S.3d 626 at 634 (first citing Am. Home Assur. Co. v. Port Auth. of N.Y. & N.J., 166 A.D.3d 464, 465, 89 N.Y.S.3d 81, 82 (1st Dep't 2018); and then citing *Certain Underwriters at Lloyd's London Subscribing to Policy No. SYN-1000263 v. Lacher & Lovell-Taylor, P.C.*, 112 A.D.3d 434, 435, 975 N.Y.S.2d 870, 870 (1st Dep't 2013)).

21. *See Am. W. Home Ins. Co.*, 192 A.D.3d at 37–38, 138 N.Y.S.3d at 633 (first citing Crescent Beach Club LLC v. Indian Harbor Ins. Co., 468 F. Supp. 3d 515, 554 (E.D.N.Y 2020); and then citing Century Sur. Co. v. Vas & Sons Corp., No. 17-CV-5392 (DLI), 2018 U.S. Dist. LEXIS 151209, at *2 (E.D.N.Y. Aug. 31, 2018)).

22. *See id.* at 35, 138 N.Y.S.3d at 632. The authors believe that given the recent split in authority on this issue, including state and federal courts, the matter is ripe for consideration by the New York Court of Appeals.

23. *See* Gross v. Travelers Ins., 185 A.D.3d 1504, 1505, 128 N.Y.S.3d 403, 404 (4th Dep't 2020) (citing Prudential Prop. & Cas. Co. v. Szeli, 83 N.Y.2d 681, 687–88, 635 N.E.2d 282, 285–86, 613 N.Y.S.2d 113, 116–17 (1994)).

under an insurance policy issued by Travelers Insurance ("Travelers") were injured in a rear-end collision caused by a tortfeasor.[24] The Travelers policy contained liability limits of $300,000 per person and $300,000 per accident.[25] The tortfeasor, meanwhile, was insured by The Hartford, with policy limits of $100,000 per person and $300,000 per accident.[26]

Gross and his wife settled with the tortfeasor for $100,000, including $16,000 for the wife's claim.[27] After settlement, the Grosses submitted a claim to Travelers SUM coverage.[28] Travelers denied coverage on the grounds that SUM coverage was never triggered.[29]

The Fourth Department noted that SUM coverage is to be assessed by placing the insured in the shoes of the tortfeasor, asking whether the insured would have greater protection from bodily injury than the tortfeasor.[30] An affirmative answer indicates that SUM coverage is triggered.[31] After careful consideration of the limits within the Travelers and The Hartford policies, the Court held that SUM coverage was indeed triggered, since the purpose of SUM coverage is to allow an insured to obtain the same level of protection for themselves as they purchased to protect against liability to others.[32]

During the *Survey* period, the Fourth Department also provided concrete analysis on the applicable statute of limitations and accrual rules surrounding UM/SUM claims. In *Haggerty v. Allstate Insurance Company*, the Fourth Department held that SUM claims are subject to the six-year statute of limitations applicable to ordinary breach of contract actions, and generally accrue on the date of the accident, unless the insured can provide evidence of a later date of accrual. [33]

24. *See id.* at 1504, 128 N.Y.S.3d at 404.

25. *See id.*

26. *See id.*

27. *See id.*

28. *See Gross*, 185 A.D.3d at 1504, 128 N.Y.S.3d at 404.

29. *See id.* at 1504–05, 128 N.Y.S.3d at 404.

30. *See id.* (citing Prudential Prop. & Cas. Co. v. Szeli, 83 N.Y.2d 681, 687–88, 635 N.E.2d 282, 285–86, 613 N.Y.S.2d 113, 116–17 (1994)).

31. *See id.* (citing *Szeli*, 83 N.Y.2d at 684, 635 N.E.2d at 283, 613 N.Y.S.2d at 114).

32. *See id.* (first citing N.Y. INS. LAW § 3420(f)(2)(A) (McKinney 2021); then citing Matter of Gov't Empls. Ins. Co. v. Lee, 120 A.D.3d 497, 498–99, 991 N.Y.S.2d 105, 107 (2d Dep't 2014); and then citing Jones v. Peerless Ins. Co., 281 A.D.2d 888, 888–89, 712 N.Y.S.2d 890, 890 (4th Dep't 2001)).

33. *See* Haggerty v. Allstate Ins. Co., 195 A.D.3d 1496, 1496, 145 N.Y.S.3d 484, 484 (4th Dep't 2021) (quoting Jenkins v. State Farm Ins. Co., 21 A.D.3d 529, 530, 801 N.Y.S.2d 42, 43 (2d Dep't 2005)).

Michele Haggerty, driving her mother's vehicle, was involved in a collision.[34] The other driver involved did not own his vehicle, which had an expired registration.[35] Haggerty sued Allstate Insurance Company ("Allstate"), her mother's auto insurer, nine years following the accident to recover SUM benefits.[36]

In dismissing Haggerty's action against Allstate as time-barred, the Fourth Department provided two key pieces of information: (1) that SUM claims are subject to a six-year statute of limitations;[37] and that (2) this statute of limitations begins to run on the date of the accident, unless the insured can come forward with sufficient proof that a different accrual date applies.[38] Accordingly, absent proof of another accrual date, Haggerty surpassed the statute of limitations by three years.[39]

A more substantive SUM question centered around the type of business entity insured. The Fourth Department addressed this issue in *In the Matter of Arbitration Between New York Schools Insurance Reciprocal and Kalbfliesh*.[40]

Deborah Kalbfliesh, a student aide, was injured when a van in which she was a passenger was struck by another motor vehicle.[41] The van was being operated on behalf of Kalbfliesh's employer by another company.[42] Following the accident, Kalbfliesch accepted a $100,000 settlement offer from the tortfeasor's insurer.[43] After settlement, Kalbfliesch submitted a SUM claim to her employer, organized as a corporation.[44] The employer's insurer, New York Schools Insurance Reciprocal ("NYSIR"), denied coverage on the ground that Kalbfliesch was not "an insured" under the employer's insurance policy.[45]

Finding that NYSIR's denial was improper, the Fourth Department held that Kalbfliesch was indeed "an insured" under her

34. *See id.*
35. *See id.*
36. *See id.*
37. *See id.* (quoting *Jenkins*, 21 A.D.3d at 530, 801 N.Y.S.2d at 43).
38. *See Haggerty*, 195 A.D.2d at 1496, 145 N.Y.S.3d at 484.
39. *See id.* at 1496, 145 N.Y.S.3d at 484–85 (first citing Matter of New York City Tr. Auth. v. Hill, 107 A.D.3d 897, 898, 968 N.Y.S.2d 134, 136 (2d Dep't 2013); and then citing *Jenkins*, 21 A.D.3d at 530, 801 N.Y.S.2d at 43).
40. 186 A.D.3d 1026, 1027 127 N.Y.S.3d 387, 388 (4th Dep't 2020).
41. *See id.* at 1026, 127 N.Y.S.3d at 388.
42. *See id.*
43. *See id.*
44. *See id.*
45. *See Kalbfliesh*, 186 A.D.3d at 1026, 127 N.Y.S.3d at 388.

employer's policy, as is anyone who is injured while occupying an automobile owned by a corporate-insured or while being operated on behalf of that corporate-insured.[46]

In related context, the Second Department in *Matter of United Financial Casualty Company v. Tekel* assessed the availability of SUM coverage to members of a limited liability company.[47]

Alan Tekel, a pedestrian, sustained injuries after being struck by a vehicle.[48] At this time, Tekel had formed a single-member limited liability company, Air Repair, LLC (the "LLC"), naming himself as the lone member thereof.[49] After a policy-limit settlement with the tortfeasor, Tekel submitted a claim for SUM benefits with Progressive Casualty Insurance Company ("Progressive"), the LLC's commercial automobile insurance carrier.[50] The question up for consideration by the Second Department was whether Tekel himself was "an insured" under the commercial automobile insurance policy.[51]

Finding that an LLC is more like a partnership than a corporation, the Second Department held that Tekel was indeed an insured.[52] Here, the Court noted that, where an automobile policy is issued to an individual, other people in that individual's family, in addition to the individual themselves, are afforded SUM coverage, so long as such other people may also be injured in any vehicle.[53] The Court distinguished this analysis from that of an insured corporation, noting that when applied to a corporation, the SUM provision does not follow any particular individual, but rather, covers any injured person while occupying a company vehicle.[54] The Court advanced this analysis by reasoning that policies issued to partnerships are distinguishable from those issued to corporations, because partnerships are a combination of individuals, each of whom is capable of suffering bodily injury,

46. *See id.* at 1027, 127 N.Y.S.3d at 388 (first quoting Matter of Progressive Cas. Ins. Co. v. Beardsley, 133 A.D.3d 1273, 1275, 19 N.Y.S.3d 845, 846 (4th Dep't 2015); and then quoting Buckner v. Motor Vehicle Accident Indem. Corp., 66 N.Y.2d 211, 215, 486 N.E.2d 810, 812, 495 N.Y.S.2d 952, 954 (1985)).

47. *See* 185 A.D.3d 830, 831, 128 N.Y.S.3d 53, 54 (2d Dep't 2020).

48. *See id.*

49. *See id.*

50. *See id.*

51. *See id.*

52. *See Tekel*, 185 A.D.3d at 832, 128 N.Y.S.3d at 55.

53. *See id.* at 831, 128 N.Y.S.3d at 54–55 (citing Matter of Progressive Cas. Ins. Co. v. Beardsley, 133 A.D.3d 1273, 1275, 19 N.Y.S.3d 845, 846 (4th Dep't 2015)).

54. *See id.* at 831, 128 N.Y.S.3d at 55 (quoting Buckner v. Motor Vehicle Accident Indem. Corp., 66 N.Y.2d 211, 215, 486 N.E.2d 810, 812, 495 N.Y.S.2d 952, 954 (1985) (citing *Beardsley*,133 A.D.3d at 1275, 19 N.Y.S.3d at 846).

having a spouse, a house, and a family, whereas a corporation is its own living and breathing entity.[55] Since an LLC is more akin to a partnership, the Second Department held that Tekel was an insured.[56]

One final decision of note in the UM/SUM context, *Hartford Accident & Indemnity Co. v. Dellegrazie*, should remind all to remain vigilant in distinguishing between UM and SUM coverage.[57]

On April 4, 2016, Feliece Dellegrazie's business truck, insured under a business automobile policy with Hartford Accident & Indemnity Company, was stolen.[58] During the commission of the theft, Dellegrazie was run over by the truck, killing him.[59] The administratrix of Dellegrazie's estate made a claim for uninsured motorist coverage under the Hartford policy.[60] Hartford disclaimed coverage, asserting that the term "uninsured motor vehicle" did not include a vehicle insured under the liability portion of the policy; although the vehicle was in fact stolen, it was still nevertheless insured in the liabilities section thereof.[61] Hartford then petitioned for a permanent stay of arbitration.[62]

After determining that Hartford's disclaimer was timely, and as relevant for our purposes, the Second Department assessed whether Hartford's disclaimer was proper.[63] The court noted that the definition of "uninsured motor vehicle" relied upon by Hartford pertains only to the SUM endorsement; not the UM endorsement.[64] Stated differently, the definition relied upon by Hartford applies only to the supplemental uninsured motorist coverage required by section 3420(f)(2), and does not apply to the basic uninsured motorist coverage required by section 3420(f)(1), which is what Dellegrazie's estate sought.[65] Rather, "[o]nce it was determined that the subject vehicle was stolen, it

55. *See id.* at 832, 128 N.Y.S.3d at 55 (first citing *Buckner*, 66 N.Y.2d at 214, 486 N.E.2d at 812, 495 N.Y.S.2d at 954; and then citing N.Y. P'SHIP LAW § 10(1) (McKinney 2021).

56. *See id.* (citing Morette v. Kemper Unitrin Auto & Home Ins. Co., Inc. 35 Misc. 3d 200, 208, 941 N.Y.S.2d 440, 446 (Sup. Ct. Essex Cnty. 2012).

57. 190 A.D.3d 855, 858, 140 N.Y.S.3d 550, 553 (2d Dep't 2021).

58. *See id.* at 856, 140 N.Y.S.3d at 551.

59. *See id.*

60. *See id.*

61. *See id.*

62. *See Dellegrazie* 190 A.D.3d at 856, 140 N.Y.S.3d at 551.

63. *See id.* at 856–57, 140 N.Y.S.3d at 551–52.

64. *See id.* at 857, 140 N.Y.S.3d at 552 (first citing Matter of State Farm Mut. Auto. Ins. Co. v. Fitzgerald, 25 N.Y.3d 799, 805, 38 N.E.3d 325, 328, 16 N.Y.S.3d 796, 799 (2015); and then citing Rowell v. Utica Mut. Ins. Co., 77 N.Y.2d 636, 639–40, 571 N.E.2d 707, 709, 569 N.Y.S.2d 399, 401 (1991)).

65. *See id.*

'became an uninsured vehicle pursuant to the terms of the [Hartford] policy' . . . and was not a vehicle '[i]nsured under the liability coverage of [the] policy' at the time of the accident."[66]

IV. ADDITIONAL INSURED COVERAGE

An important consideration in any contractual relationship is risk transfer through trade contract indemnification and insurance procurement requirements, including additional insured coverage. Counsel should be aware of the triggering language utilized in the relevant additional insured endorsement, since the use of "caused, in whole or in part, by" versus "arising out of" could mean the difference between a covered loss or otherwise.[67] Many recent cases have turned on this very issue—that of causation—but perhaps the best starting place is *Parsons McKenna Construction Co. v. Allied Insurance Cos*.[68]

There, an injured laborer sued Auburn Real Estate Company ("Auburn") for damages incurred while working at a construction project on a premises owned by Auburn.[69] Parsons McKenna Construction Company ("Parsons") was the general contractor on the project, who had contracted with the laborer's employer, Keating, to perform certain work as part of the project.[70] Keating was insured by Allied Insurance Company ("Allied").[71]

The relevant policy listed Parsons as an additional insured, but only with respect to liability for bodily injury caused by the employer's ongoing operations, and only to the extent that the bodily injury was "caused by" the employer's acts or omissions, or by that of those performing on the employer's behalf.[72] Thus, to qualify as an additional insured, as the Fourth Department was careful to note, the

66. *Id.* at 858, 140 N.Y.S.3d at 553 (citing Liberty Mut. Ins. Co. v. Saravia, 271 A.D.2d 534, 535, 705 N.Y.S.2d 685, 687 (2d Dep't 2000)); *see also Rowell*, 77 N.Y.2d at 640, 571 N.E.2d at 709, 569 N.Y.S.2d at 401. We note that the decision sets aside the plain language of the policy and decides the case on public policy grounds. *See id.*

67. *See, e.g.*, First Mercury Ins. Co. v. Preferred Contractors Ins. Co. Risk Retention Grp., LLC, 190 A.D.3d 586, 586, 136 N.Y.S.3d 728, 728–29 (1st Dep't 2021) (first citing Burlington Ins. Co. v. N.Y.C. Transit Auth., 29 N.Y.3d 313, 322, 79 N.E.3d 477, 482, 57 N.Y.S.3d 85, 90 (2017)); and then citing BP A.C. Corp. v. One Beacon Ins. Grp., 8 N.Y.3d 708, 715, 871 N.E.2d 1128, 1132, 840 N.Y.S.2d 302, 306 (2007)).

68. *See* 194 A.D.3d 1478, 1478, 143 N.Y.S.3d 660, 660 (4th Dep't 2021).

69. *See id.*

70. *See id.*

71. *See id.*

72. *See id.* at 1478–79, 143 N.Y.S.3d at 660.

underlying plaintiff's injuries must have been proximately caused by the named insured—here, the injured party's employer.[73] This was the exact issue that precluded summary judgment in favor of the insured; although Parsons was indeed listed as an additional insured, coupled with the fact that the underlying plaintiff was performing operations on behalf of his employer, an issue of fact remained with respect to the proximate cause of the underlying plaintiff's injuries.[74] Accordingly, the Court declined to grant summary judgment in favor of the insurer.[75]

Even where it is determined in an underlying action that the named insured, in fact, was not the proximate cause of the underlying plaintiff's bodily injury, the duty to defend the additional insured still may exist where the pleadings state otherwise.[76] In *Live Nation Marketing, Inc. v. Greenwich Insurance Co.*, the underlying plaintiff, an employee of Best Buy, was injured on the job, suffering bodily injury.[77]

In an underlying personal injury action, Mark Perez alleged that he was injured while assembling an advertising structure on behalf of Best Buy, at the Jones Beach Theatre.[78] It was additionally asserted that an employee of Live Nation negligently disrupted metal trussing with a fork-lift, causing Perez to fall.[79]

In the instant action, Live Nation argued that it was entitled to coverage from Best Buy's insurers, Greenwich Insurance Company and XL Specialty Insurance Company (collectively, "XL"), under the relevant additional insured provision.[80] The XL policy provides additional insured coverage to persons or organizations that Best Buy has agreed by written contract to so designate, but only insofar as bodily injury is caused by acts and/or omissions by Best Buy, the named insured.[81] However, Best Buy was, in fact, found not to have caused Perez's bodily injury in the underlying action.[82]

73. *See Parsons*, 194 A.D.3d at 1479, 143 N.Y.S.3d at 661.

74. *See id.*

75. *See id.*

76. *See* Live Nation Mktg., Inc. v. Greenwich Ins. Co., 188 A.D.3d 422, 423, 135 N.Y.S.3d 87, 88 (1st Dep't 2020).

77. *See id.* at 422–23, 135 N.Y.S.3d at 88.

78. *See* Live Nation Mktg., Inc. v. Greenwich Ins. Co., No. 655784/2016, 2019 NY Slip Op. 31776(U), at 1 (Sup. Ct. N.Y. Cnty. June 12, 2019).

79. *Id.*

80. *Live Nation Mktg.*, 188 A.D.3d at 422–23, 135 N.Y.S.3d at 88.

81. *Id.* at 423, 135 N.Y.S.3d at 88.

82. *Id.*

Unphased by this finding in the underlying action, the First Department held that XL owed Live Nation a defense nonetheless.[83] Relying upon the breadth of an insurer's defense obligation, the court provided that since the underlying complaint alleged that Best Buy had caused Perez's injuries, such allegations were sufficient to establish a reasonable possibility of coverage.[84]

Not only can an insurer's defense obligation remain despite disproven causation in the underlying action, but also where a proposed additional insured's indemnification claims against the named insured are dismissed.[85] Indeed, that was the case in *WDF, Inc. v. Harleysville Insurance Co. of NY*.[86]

An employee of Vamco Sheet Metal Inc. ("Vamco") was injured on a worksite.[87] Vamco was insured by Harleysville Insurance Company of New York ("Harleysville") under an insurance policy that had named WDF Inc. ("WDF") as an additional insured thereunder.[88] WDF asserted indemnification claims against Vamco, which were later dismissed, and Harleysville argued that the dismissal of those claims eliminated WDF's entitlement to coverage as an additional insured.[89]

In rejecting this contention, the First Department reasoned that Vamco's contractual obligation to indemnify WDF was separate and distinct from Harleysville's coverage obligations under the additional insured endorsement.[90] The court reasoned that WDF submitted evidence demonstrating that the acts or omissions of Vamco, who directed and controlled the claimant's work as his ostensible

83. *Id.* (first citing Fieldston Prop. Owners Assn., Inc. v. Hermitage Ins. Co., Inc., 16 N.Y.3d 257, 264, 945 N.E.2d 1013, 1018, 920 N.Y.S.2d 763, 768 (2011); and then citing, BP A.C. Corp. v. One Beacon Ins. Grp., 8 N.Y.3d 708, 714–15, 871 N.E.2d 1128, 1131–32, 840 N.Y.S.2d 302, 305–06 (2007)).

84. *Id.* (first citing *Fieldston*, 16 N.Y.3d at 264, 945 N.E.2d at 1018, 920 N.Y.S.2d at 768; and then citing *BP A.C. Corp.*, 8 N.Y.3d at 714–15, 871 N.E.2d at 1131–32; 840 N.Y.S.2d at 305–06. For another example of this type of reasoning, see Colon v. Aetna Life & Cas. Ins. Co., 66 N.Y.2d 6, 8–9, 484 N.E.2d 1040, 1041, 494 N.Y.S.2d 688, 689 (1985).

85. *See e.g.*, WDF Inc. v. Harleysville Ins. Co. of N.Y., 193 A.D.3d 667, 667, 146 N.Y.S.3d 128, 129 (1st Dep't 2021).

86. *See id.*

87. *See id.*

88. *See id.*

89. *See id.*

90. *See WDF Inc.*, 193 A.D.3d at 667, 146 N.Y.S.3d at 129 (first citing Lexington Ins. Co. v. Kiska Dev. Grp. LLC, 182 A.D.3d 462, 463, 122 N.Y.S.3d 590, 592 (1st Dep't 2020); and then citing Singh v. N.Y.C. Transit Auth., 17 A.D.3d 262, 263, 793 N.Y.S.2d 408, 410 (1st Dep't 2005)).

employer, raised a reasonable possibility that Vamco's acts or omissions were the proximate cause of his injuries.[91] These findings were sufficient to trigger the duty to defend, despite the elimination of any obligation to indemnify WDF.[92]

Often, where parties enter into contracts with one another that require insurance procurement provisions, certificates of insurance are issued by the procuring party's broker signifying the inclusion of the requisite coverage in the relevant insurance policy. However, the import and use of a certificate of insurance is often limited. Still, New York's Fourth Department has proven itself to afford some credence to certificates of insurance where other departments have not.[93] Indeed, *County of Erie v. Gateway-Longview, Inc.* stands for this very proposition.[94]

Therein, Philadelphia Insurance Companies ("Philadelphia") had successfully moved for summary judgment before the trial court, arguing that the plaintiff, the County of Erie, was not an additional insured under the relevant policy issued to Gateway-Longview, Inc.[95] Reversing, however, the Fourth Department found that Philadelphia

91. *See id.* at 668, 146 N.Y.S.3d at 129 (citing Burlington Ins. Co. v. N.Y.C. Transit Auth., 29 N.Y.3d 313, 321–25, 79 N.E.3d 477, 482–84, 57 N.Y.S.3d 85, 90–93 (2017)).

92. *Id.* This was not the only time that the First Department had been faced with this issue during the *Survey* period, as *Allied World Assurance Co. v. Aspen Specialty Ins. Co.* relied upon *Live Nation Mktg.* in arriving at the same conclusion. 192 A.D.3d 449, 450, 139 N.Y.S.3d 816, 817 (1st Dep't 2021) (first citing Live Nation Mktg., Inc. v. Greenwich Ins. Co., 188 A.D.3d 422, 423, 135 N.Y.S.3d 87, 89 (1st Dep't 2020); and then citing Paramount Ins. Co. v. Fed. Ins. Co., 174 A.D.3d 476, 476, 106 N.Y.S.3d 300, 301 (1st Dep't 2019)). We note a broadening of the duty to defend in these decisions, based on the consideration of a "reasonable possibility of coverage." In most cases, courts cite to the landmark Court of Appeals decision in *Fitzpatrick v. Am. Honda Motor Corp.* In that decision, the Court held that an insurer obligation to defend arises whenever the allegations in the complaint give rise to a "reasonable possibility of coverage." 78 N.Y.2d 61, 66, 575 N.E.2d 90, 92, 571 N.Y.S.2d 672, 674 (1991). The Court also instructed insurers to consider extrinsic evidence and when underlying facts made known to the insurer create a "reasonable possibility that the insured may be held liable for some act or omission. *Id.* at 71, 575 N.E.2d at 96, 571 N.Y.S.2d at 678. Indeed, the Court speaks to true facts. *Id.* at 67, 575 N.E.2d at 95, 571 N.Y.S.2d at 677 (citing A. Meyers & Sons Corp. v. Zurich Am. Ins. Grp., 74 N.Y.2d 298, 302, 545 N.E.2d 1206, 1208, 546 N.Y.S.2d 818, 820 (1989)). In these recent cases, instead of focusing on true facts, the intermediate appellate courts are looking at evidence, which may suggest true facts. One wonders what the quality of the extrinsic evidence needs to be to trigger the duty to defend.

93. *See* Cnty. of Erie v. Gateway-Longview, Inc., 193 A.D.3d 1336, 1337–38, 147 N.Y.S.3d 769, 771 (4th Dep't 2021) (citing Landsman Dev. Corp. v. RLI Ins. Co., 149 A.D.3d 1489, 1490–91, 53 N.Y.S.3d 428, 430 (4th Dep't 2017)).

94. *See id.* (citing *Landsman*, 149 A.D.3d at1490–91, 53 N.Y.S.3d at 430).

95. *See id.* at 1337, 147 N.Y.S.3d at 770.

failed to meet its burden as movant to establish that the County of Erie was not an additional insured.[96] Instrumental and important to navigating additional insured issues in New York State is the Fourth Department's discussion of certificates of insurance—at least in Western New York.[97]

First, the Fourth Department provides that a certificate of insurance does not confer insurance coverage where it merely provides that it is issued as a matter of information only and thus confers not rights onto the beholder.[98] Rather, a certificate of insurance is mere evidence of a carrier's intention to provide coverage, and is to be distinguished from the contract itself, such that: (1) it is not the contract; and (2) it is not evidence that any such contract exists.[99] However, and perhaps most importantly, the Fourth Department provides an exception to this general rule that, where an insurance company—itself—issues a certificate of insurance which names a particular party as an additional insured, such company may be estopped from denying coverage to that party where that party: (1) relies on the certificate; (2) to its detriment.[100] The Court further noted that, for this estoppel exception to apply, the certificate must have been issued by the insurer itself, or by an agent thereof.[101] Carriers must tread carefully in New York's Fourth Department on this issue.

V. FORTUITY

Perhaps nothing in insurance law is more rudimentary than the concept of "fortuity." It is the touchstone upon which insurance law operates. To obtain coverage under virtually any insurance policy, the event giving rise to the claim must be exactly that—"fortuitous"—an accident. Indeed, the very definition of an *insurance contract* in New York speaks to a *fortuitous event*.[102]

This appeared to be a very simple idea—until now. Assume you regularly put gas in your friend's car for them with the expectation that she will pay you back later and assume that she usually does. Now

96. *See id.* at 1337, 147 N.Y.S.3d at 771.

97. *See, e.g.*, *id.* at 1337–38, 147 N.Y.S.3d at 771 (citing *Landsman*, 149 A.D.3d at 1490–91, 53 N.Y.S.3d at 430).

98. *See, e.g.*, *Gateway-Longview, Inc.*, 193 A.D.3d at 1337–38, 147 N.Y.S.3d at 771 (citing *Landsman*, 149 A.D.3d at 1490, 53 N.Y.S.3d at 430).

99. *See, e.g.*, *id.* at 1338, 147 N.Y.S.3d at 771 (citing *Landsman*, 149 A.D.3d at 1490–91, 53 N.Y.S.3d at 430).

100. *See, e.g.*, *id.* (citing *Landsman*, 149 A.D.3d at 1491, 53 N.Y.S.3d at 430).

101. *See, e.g.*, *id.* (citing *Landsman*, 149 A.D.3d at 1491, 53 N.Y.S.3d at 430).

102. *See* N.Y. INS. LAW § 1101(a)(1) (McKinney 2021).

assume that, one day, she drives off into the sunset with your gas in her tank.

This, of course, is a metaphor for an issue actually faced by the First Department in *Carlyle Commodity Management., LLC v. Certain Underwriters at Lloyd's London*.[103] There, Carlyle Commodity Management, LLC ("Carlyle") habitually paid for crude oil for which the refinery had contracted to purchase from third parties.[104] Carlyle, having fronted capital, would permit the refinery to use the oil prior to actual reimbursement.[105] This arrangement continued until the refinery's bank accounts were shut down by the Moroccan Government, rendering the refinery unable to repurchase oil from Carlyle.[106] Despite an inability to pay, the refinery continued its use of the oil.[107]

Losing money by the second, Carlyle tendered its losses to its insurer, Lloyd's of London, seeking coverage for the value of the oil used by the refinery.[108] Agreeing with Lloyd's that the losses were not covered, the First Department reasoned that such losses were non-fortuitous.[109] Since Carlyle permitted the refinery to use the oil prior to payment, the loss was neither unexpected nor unintended from the insured's standpoint.[110]

VI. "SUBSTANTIAL BUSINESS PRESENCE" UNDER *CARLSON*

New York Insurance Law section 3420(d)(2) pertains to liability policies issued and delivered in New York State.[111] However, questions have arisen as to when exactly this provision applies. This very question was raised in *Carlson v. Am. Int'l Group, Inc.*,[112] where New York's high court first noted that, for the provisions of section 3420(d)(2) to apply, two prongs must be met: (1) the policy at issue must cover risks that are located in the State of New York; and (2) the

103. *See* 193 A.D.3d 496, 497, 141 N.Y.S.3d 848, 848 (1st Dep't 2021).
104. *See id.*
105. *See id.*
106. *See id.*
107. *See id.*
108. *Carlyle*, 193 A.D.3d at 497, 141 N.Y.S.3d at 848.
109. *See id.*
110. *See id.* (citing Int'l Multifoods Corp. v. Com. Union Ins. Co., 309 F.3d 76, 83–84 (2d Cir. 2002)).
111. N.Y. INS. LAW § 3420(d)(2) (McKinney 2021).
112. *See* 30 N.Y.3d 288, 306, 67 N.E.3d 490, 501, 67 N.Y.S.3d 100, 111 (2017).

insured company must be located in New York.[113] To be located in New York, the *Carlson* Court continued, the company would have to have a "substantial business presence" there.[114]

Now, just what does "substantial business presence" mean? This past year, the First Department considered this very question. In *Vista Enginering Corp. v. Everest Indemnity Insurance Co.*, there was no dispute that a policy issued by Everest Indemnity Insurance Company ("Everest") to East Coast Painting & Maintenance ("East Coast") covered risks located in New York.[115] Thus, the first prong under the *Carlson* test was met.[116] The dispute centered on whether East Coast, the insured, had a "substantial business presence" in the State of New York.[117]

In holding that East Coast held a substantial business presence in the state, and thus, that the provisions of section 3420(d)(2) applied to Everest, the First Department found that: (1) East Coast, while it maintained an office in New Jersey, submitted sworn testimony that it never did work there; (2) East Coast maintained another office in New York to stage and coordinate its work, as well as store equipment; and (3) all East Coast employees had been hired from a New York-based painting union.[118]

VII. TRADE CONTRACT INDEMNITY

Returning to the nuances of risk transfer—a must know for any litigator—it is crucial to understand the differences between an additional insured and an indemnitee. The importance of this issue can be seen in the outcome in *Wesco Insurance Co. v. Travelers Property Casualty Company of America*.[119]

Capital One Financial Group ("Capital One") leased a building from Waldman Management Corp. ("Waldman"), the owner of a

113. *See id.* (citing Preserver Ins. Co. v. Ryba, 10 N.Y.3d 635, 642, 893 N.E.2d 97, 101, 862 N.Y.S.2d 820, 823 (2008)).

114. *Id.*

115. *See* 190 A.D.3d 508, 509, 135 N.Y.S.3d 818, 819 (1st Dep't 2021).

116. *See id.* (citing *Carlson*, 30 N.Y.3d at 306, 67 N.E.3d at 501, 67 N.Y.S.3d at 111).

117. *See id.*

118. *See id. Vista* is instructive and provides an important gloss on how exactly the ever-important standards under Insurance Law § 3420(d)(2) apply to foreign insurers under the Court of Appeals landmark decision in *Carlson*. *See id.* Out-of-state insurers need to be vigilant here as policies issued to policyholders in other states may still require compliance with the stringent New York disclaimer protocols in Insurance Law §3420(d)(2).

119. *See* 188 A.D.3d 476, 477, 135 N.Y.S.3d 384, 386 (1st Dep't 2020).

shopping center.[120] The underlying claimant slipped and fell on ice while walking on a sidewalk abutting Capital One's space at the shopping center.[121] Capital One was insured by Travelers Property Casualty Company of America ("Travelers"), under a policy naming Waldman as an additional insured, but "only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to Capital One and shown in the Schedule."[122] The lease defined the "leased premises" to include the building and "all appurtenances."[123] Meanwhile, Waldman was by Wesco Insurance Company ("Wesco") under a policy which did not name Capital One as an additional insured.[124] However, Waldman's policy did state that "in the event that Wesco defend[s] Waldman in an action to which an indemnitee of Waldman was also a party, [Wesco will also] defend that indemnitee 'if all of the [listed] conditions [were] met.'"[125] On such condition, it was required that the indemnitee be in a conflict position with the indemnitor-insured.[126]

The First Department held that Waldman was covered as an additional insured under Capital One's policy because the underlying action arose from the use of the leased premises, such as the underlying plaintiff's use of the sidewalk as a means of egress from the bank branch building.[127] Conversely, the First Department held that Wesco, Waldman's insurer, was entitled to a declaratory judgment that there was no obligation to defend Capital One in the underlying action because Capital One was not an additional insured, nor an indemnitee.[128] The court reasoned that even if Capital One were an indemnitee of Waldman, it would still not be entitled to coverage as such, because the interests of Waldman and Capital One conflicted in the underlying action, a clear violation of policy conditions.[129]

120. *See id.* at 477, 135 N.Y.S.3d at 385.

121. *See id.*

122. *Id.* at 477, 135 N.Y.S.3d at 385–86.

123. *Id.* at 477, 135 N.Y.S.3d at 386.

124. *Wesco*, 188 A.D.3d at 477, 135 N.Y.S.3d at 386.

125. *Id.*

126. *See id.*

127. *Id.* (first citing ZKZ Assocs. 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 Pub. Serv. Mut. Ins. Co. v. Nova Cas. Co., 177 A.D.3d 472, 473, 114 N.Y.S.3d 47, 48 (1st Dep't 2019); and then citing Tower Ins. Co. of N.Y. v. Leading Ins. Grp. Ins. Co., Ltd., 134 A.D.3d 510, 510, 21 N.Y.S.3d 240, 241 (1st Dep't 2015)).

128. *See id.* (citing Meleon v. Kreisler Borg Florman Gen. Constr. Co., 304 A.D.2d 337, 339, 758 N.Y.S.2d 621, 623 (1st Dep't 2003)).

129. *See Wesco*, 188 A.D.3d at 477, 135 N.Y.S.3d at 386.

VIII. RESCISSION

Understanding the conditions upon which an insurer may rescind a policy is of the utmost importance. The New York Appellate Courts have enjoyed numerous opportunities to opine on this area within the past year, starting with *Starr Indemnity & Liability Co. v. Monte Carlo, LLC*.[130] There, the court affirmed several basic ground-rules that insurance carriers must abide by when rescinding policies.[131] First, the insurer can generally rescind a policy of insurance where the insured made a material misrepresentation in their application.[132] The burden to prove the materiality of the misrepresentation rests with the insurer, who must prove either: (1) that the insurer would not have issued the policy knowing the truth about the misrepresentation; or (2) that the insurer would have issued the policy at a higher premium than that charged.[133] The court further stated that the misrepresentation need not be intentional or fraudulent; rather, mere inaccuracy is sufficient to satisfy the threshold.[134] However, the First Department was careful to note that rescission is not the appropriate remedy where an ambiguity exists on an application for insurance.[135]

Specifically, in *Starr*, the relevant question at issue on the insured's application for insurance read: "Any uncorrected code violations?"[136] The court noted that five different witnesses proposed five different understandings as to what the question was asking, although all of them were reasonable proposals.[137] Thus, the court

130. *See* 190 A.D.3d 441, 441–42 139 N.Y.S.3d 57, 58 (1st Dep't 2021).

131. *See id.*

132. *See id.*

133. *See id.* (citing Interested Underwriters at Lloyd's v. H.D.I. III Assocs., 213 A.D.2d 246, 247, 623 N.Y.S.2d 871, 873 (1st Dep't 1995)).

134. *See id.* at 442, 139 N.Y.S.3d at 58 (first citing 128 Hester LLC v. N.Y. Mar. & Gen. Ins. Co., 126 A.D.3d 447, 447, 5 N.Y.S.3d 69, 70 (1st Dep't 2015); and then citing Feldman v. Feldman, 241 A.D.2d 433, 434, 661 N.Y.S.2d 9, 10 (1st Dep't 1997)). Another case decided by the First Department this past year, *Konstantakopoulos v. Union Mut. Ins. Co.*, held that the fact that there was a material misrepresentation made on a question that was unambiguous was enough to allow the insurer to rescind the policy. *See* 194 A.D.3d 572, 573, 144 N.Y.S.3d 346, 347 (1st Dep't 2021) The Court noted that whether or not the misrepresentation was fraudulent was irrelevant, such that the materiality of the misrepresentation alone was sufficient to allow the insurer to rescind the policy. *See id.* (citing Tennenbaum v. Ins. Co. of Ireland, 179 A.D.2d 589, 592, 579 N.Y.S.2d 351, 352–53 (1st Dep't 1992).

135. *See Starr*, 190 A.D.3d at 442, 139 N.Y.S.3d at 58 (citing Bleecker St. Health & Beauty Aids, Inc. v. Granite State Ins. Co., 38 A.D.3d 231, 232, 834 N.Y.S.2d 1, 2 (1st Dep't 2007).

136. *Id.*

137. *See id.*

found this question to be ambiguous, thus, the insurer was precluded from rescinding the policy on the basis of a material misrepresentation made in the answer to that question.[138]

Aside from these general rules of rescission, the New York Appellate Courts confronted a few more nuanced fact patterns this past year. First, in *5512 OEAAJB Corp. v. Hamilton Insurance Co.*,[139] the insured purchased a business owners insurance policy from Hamilton Insurance Company ("Hamilton"), but on the application for insurance, represented that his business had a fire sprinkler system.[140] Subsequent to the inception of the policy period, the insured's business was damaged as a result of fire, forcing the insured to file a claim.[141] After the insured filed the claim, Hamilton requested proof that the business was indeed equipped with a fire sprinkler system.[142] Upon finding out that it was not, Hamilton disclaimed coverage, but continued to accept premium payments, and, at one point, renewed the policy.[143]

The question facing the Second Department was whether Hamilton waived its right to assert material misrepresentation as a basis for rescission of the policy by its continued acceptance of premium payments, together with its renewal of the policy after discovering alleged material misrepresentations made by the insured.[144] Finding for the insured, the court held that continued acceptance of policy premiums by an insurer after learning of sufficient facts permitting rescission constitutes a waiver of the right to rescind.[145]

This *Survey* period, the Court of Appeals considered the effect rescission of a primary insurance policy might have on an excess insurance policy. In *Chen v. Insurance Co. of the State of Pennsylvania*, New York's high court ruled that the rescission of a

138. *See id.* at 441–42, 139 N.Y.S.3d at 58–59.

139. 189 A.D.3d 1136, 1137, 138 N.Y.S.3d 555, 557 (2d Dep't 2020).

140. *See id.*

141. *See id.*

142. *See id.*

143. *See id.*

144. *See 5512 OEAAJB Corp.*, 189 A.D.3d at 1138, 138 N.Y.S.3d at 557–58.

145. *Id.* (first citing Leading Ins. Grp. Ins. Co., Ltd. v. Xiao Wu Chen, 150 A.D.3d 977, 978, N.Y.S.3d 299, 300 (2d Dep't 2017); then citing U.S. Life Ins. Co. in the City of N.Y. v. Blumenfeld, 92 A.D.3d 487, 489, 938 N.Y.S.2d 84, 86 (1st Dep't 2012); and then citing Scalia v. Equitable Life Assur. Soc'y of U.S., 251 A.D.2d 315, 315, 673 N.Y.S.2d 730, 730 (2d Dep't 1998)).

primary insurance policy does not put the excess insurer on the hook for the entire underlying judgment.[146]

There, Kam Cheung Construction, Inc. ("Kam") was the general contractor on a construction site upon which Chen was injured while working.[147] Kam held a primary insurance policy with Arch Specialty Insurance Company ("Arch") with limits of $1,000,000 per occurrence (the "Arch Policy").[148] Kam also held an excess insurance policy with Insurance Company of the State of Pennsylvania ("ICSOP"), with limits of $4,000,000 per occurrence (the "ICSOP Policy").[149] Arch rescinded the Arch Policy for material misrepresentations, leaving only the excess ICSOP Policy available for a personal injury judgment of $2,330,000 plus $396,933.70 in prejudgment interest against Kam.[150] Since only the ICSOP Policy remained available, with limits below the total judgment amount, Chen brought an action against ICSOP seeking a declaratory judgment that it must pay the entirety of the underlying award, plus the interest, according to an "Ultimate Net Loss" provision.[151]

In holding that ICSOP was not required to pay any amount above that for which it would have paid had the Arch policy remained valid and enforceable, the Court of Appeals reasoned that ICSOP's payment obligations were described in the excess policy's "Coverage" provision, which stated that ICSOP would pay "Ultimate Net Loss in excess of the Underlying Insurance as shown in Item 4 of the Declarations."[152] "Ultimate Net Loss" was defined as "the amount payable in settlement of the liability of the Insured after making deductions for all recoveries and for other valid and collectible insurance, excepting however the Underlying Insurance shown in Item 4 of the Declarations."[153] Thus, Kam was to maintain underlying primary insurance, but if it did not, ICSOP was only liable to the same extent that it would have been had Kam maintained primary insurance *in tandem* with the excess insurance.[154]

146. *See* 36 N.Y.3d 133, 138, 163 N.E.3d 447, 450, 139 N.Y.S.3d 579, 582 (2020).

147. See *id.* at 136, 163 N.E.3d at 448, 139 N.Y.S.3d at 580.

148. *Id.*

149. *Id.*

150. *Id.*

151. *See Chen*, 36 N.Y.3d at 138, 163 N.E.3d at 450, 139 N.Y.S.3d at 582.

152. *Id.* at 139–40, 163 N.E.3d at 450 139 N.Y.S.3d at 582.

153. *Id*. at 140, 163 N.E.3d at 450–51, 139 N.Y.S.3d at 582.

154. *See id.* at 140, 163 N.E.3d at 451, 139 N.Y.S.3d at 583.

IX. UNTIMELY DISCLAIMER

Timeliness of an insurer's disclaimer under New York Insurance Law section 3420(d)(2) is among the most crucial insurance issues in New York. First, a few baseline rules will be discussed, followed by some pragmatic considerations of these rules.

As a primer, we begin with a discussion of *Bowers v. Grier*.[155] There, Arcadia Management Services, Inc. ("Arcadia") served as general contractor, while Visual Construction Inc. subcontracted with Arcadia to complete specific work on the project.[156] The contract between Arcadia and Visual required Visual to add Arcadia as an additional insured on Visual's liability policy, which it procured through Rutgers Casualty Insurance Company ("Rutgers").[157] That policy excluded coverage for any accident, claim, or suit brought by an employee of Visual for personal injury.[158] An employee of Visual was injured on the job, and brought suit against Visual for personal injury.[159] Visual tendered the claim to Rutgers, who investigated and determined that the above-referenced exclusion applied, issuing a disclaimer letter to Visual on August 16, 2016.[160] On September 27, 2016, Arcadia tendered to Rutgers seeking coverage as an additional insured.[161] Although Rutgers received this tender the day after it was sent, Rutgers did not mail a disclaimer to Arcadia until November 15, 2016, 48 days after receipt of tender.[162]

In considering whether this 48-day delay in disclaiming coverage was timely, absent a reasonable explanation for such delay, the Second Department eloquently provided a few baseline rules.[163] First, the Court noted that N.Y. Ins. Law section 3420(d)(2) states that an insurer must provide notice of its disclaimer to its insured "as soon as reasonably possible."[164] The court provided that the timeliness of a disclaimer is assessed from the point at which an insurer first learns of

155. 185 A.D.3d 998, 999, 128 N.Y.S.3d 279, 280 (2d Dep't 2020).
156. *See id*. at 999, 128 N.Y.S.3d at 280–81.
157. *See id.*
158. *See id.*
159. *See id.*
160. *See Bowers*, 185 A.D.3d at 999, 128 N.Y.S.3d at 281.
161. *See id.*
162. *See id.*
163. *See id*. at 1000, 128 N.Y.S.3d at 281.
164. *Id.* (citing AVR-Powell C. Dev. Corp. v. Utica First Ins. Co., 174 A.D.3d 772, 775, 106 N.Y.S.3d 320, 323 (2d Dep't 2019)).

the grounds for disclaimer of liability or a denial of coverage.[165] Applying this framework, the Second Department found that Rutgers' disclaimer to Arcadia was untimely as a matter of law because Rutgers first learned of grounds for a disclaimer when Visual tendered the complaint.[166]

Indeed, if an insurer's disclaimer of coverage is timely as to its named insureds, such is not always the case as to the additional insureds under the policy. Such was again the case in *Valiant Insurance Co. v. Utica First Insurance Co.*[167] There, Utica received notice of tender for defense and immunity in connection with an underlying case from its named insured, and sent the named insured a disclaimer letter dated July 25, 2014.[168] Although the disclaimer letter was addressed to the named insureds, Utica also copied the additional insureds, though it addressed nothing to them specifically.[169] The question up for consideration in the First Department was whether merely copying the additional insureds on the disclaimer letter, as opposed to addressing it to the additional insureds themselves, was sufficient to place the addition insureds on notice of the disclaimer.[170] In holding that it was, the Court reasoned that because it was clearly stated on the disclaimer that the exclusions serving as the basis for the disclaimer letter also preclude coverage as to the additional insureds, the additional insured were essentially put on notice of such a disclaimer at the same time as the named insureds.[171]

The First Department was asked to assess whether an insurer's delay in disclaiming may be acceptable if such delay was due to a lack

165. *Bowers*, 185 A.D.3d at 999, 128 N.Y.S.3d at 281 (first citing First Fin. Ins. Co. v. Jetco Contr. Corp., 1 N.Y.3d 64, 68–69, 801 N.E.2d 835, 838–39, 769 N.Y.S.2d 459, 462–63 (2003)); and then citing Robinson v. Glob. Liberty Ins. Co. of N.Y., 164 A.D.3d 1385, 1387. 84 N.Y.S.3d 255, 257 (2d Dep't 2018)).

166. *See id.* Although not the issue confronted here, it is important to note that Arcadia, as an additional insured, had a duty to notify Rutgers of the claim independent from Visual's duty to notify Rutgers. Accordingly, Rutgers was not obligated to issue a disclaimer of coverage to Arcadia upon receipt of Visual's notice. However, upon such receipt, Rutgers should have issued its disclaimer much sooner than it did due to its prior investigation associated with Visual's notice of claim.

167. *See* 185 A.D.3d 435, 436, 124 N.Y.S.3d 783, 783 (1st Dep't 2020).

168. *See id.*

169. *See id.*

170. *See id.*

171. *Id.* (first citing Sierra v. 4401 Sunset Park, LLC, 24 N.Y.3d 514, 518, 25 N.E.3d 921, 923, 2 N.Y.S.3d 8, 10 (2014); then citing Gen. Accident Ins. Grp. v. Cirucci, 46 N.Y.2d 862, 864, 387 N.E.2d 223, 225, 414 N.Y.S.2d 512, 514 (1979); and then citing Matter of Aetna Cas. & Sur. Co. v. Rodriguez, 115 A.D.2d 418, 420, 496 N.Y.S.2d 956, 957 (1st Dep't 1985).

of cooperation by the insured in *Burlington Insurance Co. v. Sublink Ltd.*[172]

Therein, Burlington Insurance Company ("Burlington") was denied default judgment against its insured, Sublink Ltd., after failing to establish timeliness of its disclaimer.[173] Affirming the lower court, Burlington was reminded that "[t]he reasonableness of any delay is computed from the time that the insurer becomes sufficiently aware of the facts which would support a disclaimer, and 'where the basis for the disclaimer was, or should have been, readily apparent before the onset of the delay, any explanation by the insurer for its delay will be insufficient as a matter of law.'"[174] Although the Court recognized that it is generally difficult for an insurer to show when non-cooperation by an insured becomes "readily apparent" under this standard, the First Department nevertheless held that the insurer's disclaimer was untimely here because, by the time the insurer issued its first reservation of rights letter to the insured, it had already possessed all of the information necessary to disclaim on the basis of lack of cooperation.[175]

Another decision by the First Department, *ADD Plumbing, Inc. v. The Burlington Insurance Co.*, held that an insurer's proverbial "timer" for disclaimer began once the insurer had notice of an accident and reason to disclaim, rather than upon first notice of a claim from an insured.[176]

Burlington Insurance Company ("Burlington") was officially tendered a claim by its insured on December 16, 2014, and disclaimed coverage on December 24.[177] Despite receiving tender within ten days of disclaimer, it was established that the insurer was on notice of the underlying accident several months prior.[178] At that time, Burlington

172. *See* 195 A.D.3d 404, 404–05, 144 N.Y.S.3d 580, 580 (1st Dep't 2021).

173. *See id.* at 404, 144 N.Y.S.3d at 580.

174. *Id.* at 404–05, 144 N.Y.S.3d at 580 (quoting Hunter Roberts Constr. Grp., LLC v. Arch Ins. Co., 75 A.D.3d 404, 409, 904 N.Y.S.2d 52, 57 (1st Dept. 2010)).

175. *See id.* Burlington additionally argued that it needed to wait for a determination by the Second Department regarding the insured's failure to appear for a deposition, in order to prove that it was prejudiced. *Id.* at 405, 144 N.Y.S.3d at 581. However, in holding that this argument was unavailing, the First Department provided that an insurer is not required to establish prejudice prior to disclaiming coverage. *Burlington*, 195 A.D.3d at 405, 144 N.Y.S.3d at 581.

176. *See* 192 A.D.3d 496, 497, 140 N.Y.S.3d 408, 408–09 (1st Dep't 2021) (citing GPH Partners, LLC v. Am. Home Assur. Co., 87 A.D.3d 843, 844, 929 N.Y.S.2d 131, 133 (1st Dep't 2011)).

177. *See id.* at 497, 140 N.Y.S.3d at 408.

178. *See id.* at 497, 140 N.Y.S.3d at 408–09 (citing *GPH Partners, LLC*, 87 A.D.3d at 844, 929 N.Y.S.2d. at 133).

undertook an investigation and was aware of facts that would support a disclaimer around the same time it became aware of the underlying accident.[179] Accordingly, the court held that Burlington's disclaimer of coverage was untimely, since it delayed nearly two full months prior to disclaiming coverage.[180]

As is apparent, timeliness of a disclaimer under Insurance Law section 3420(d)(2) is key. However, the First Department has drawn a distinction between the interests of an insured in a timely disclaimer of coverage pursuant to Insurance Law section 3420 and the interests of another insurer regarding the same.[181] Indeed, the First Department in *Technology Insurance Co. v. First Mercury Insurance Co.* provided the latest example.[182]

P&R Equities ("P&R") contracted with Terra Nova Construction Corp. ("Terra Nova") to perform re-roofing and masonry repairs.[183] In accordance with the contract, Terra Nova named P&R as an additional insured on its insurance policy issued by First Mercury Insurance Company ("First Mercury").[184] During the project, an employee of Terra Nova, Edman DeLeon, was injured when he tripped and fell while carrying roofing material.[185] Technology Insurance Company ("Technology") insured P&R, and tendered DeLeon's claim and lawsuit to First Mercury on behalf of itself and P&R seeking additional insured status.[186] First Mercury disclaimed coverage pursuant to a policy exclusion, but addressed its denial letter to Technology alone, not P&R.[187]

Since First Mercury refused to defend P&R, Technology and P&R filed suit against First Mercury seeking coverage.[188] During the pendency of this declaratory judgment action, Technology settled the

179. *See id.*

180. *See id.*

181. *See* Tech. Ins. Co. v. First Mercury Ins. Co., 194 A.D.3d 530, 531, 143 N.Y.S.3d 869, 870 (1st Dep't 2021) (citing Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co., 27 A.D.3d 84, 92–93, 806 N.Y.S.2d 53, 60 (1st Dep't 2005)).

182. *See id.*

183. Complaint at ¶ 11, Tech. Ins. Co. v. First Mercury Ins. Co.,194 A.D.3d 530, 143 N.Y.S.3d 869 (1st Dep't 2021) (No. 160472/2017).

184. *See id.* ¶ 20.

185. *See id.* ¶ 7.

186. *See id.* ¶¶ 9–10. Technology's parent-company, Amtrust North America, was actually responsible for this tender and Technology's claims handling. *See id.* ¶¶ 22–24.

187. *See* Complaint at ¶¶ 22–24, Tech. Ins. Co. v. First Mercury Ins. Co., 194 A.D.3d 530, 143 N.Y.S.3d 869 (1st Dep't 2021) (No. 160472/2017).

188. *See id.* ¶¶ 46–48.

underlying action and claimed entitlement to reimbursement for those amounts.[189] The First Department, however, held that the settlement paid by Technology rendered P&R without actual interest in the case, leaving any claim for coverage by P&R moot.[190] Since Technology was the real party in interest, the First Department relied upon its prior precedent in concluding that First Mercury's disclaimer was not untimely under section 3420(d)(2), since section 3420(d)(2) does not apply to one insurer's claim for reimbursement from another insurer.[191]

X. DUTY TO DEFEND

It is well-known in the world of insurance law that an insurer holds a duty to defend its insured in litigation where the factual allegations suggest a reasonable possibility of coverage.[192] To avoid this obligation, an insurer must establish that there is no possible factual or legal basis upon which the policy might eventually be held to afford coverage.[193] However, as reminded by the First Department in *American States Insurance Co. v. Graphic Arts Mutual Insurance*

189. *See* Tech. Ins. Co. v. First Mercury Ins. Co., 194 A.D.3d 530, 531, 143 N.Y.S.3d 869, 870 (1st Dep't 2021).

190. *See id.* (citing Amherst & Clarence Ins. Co. v. Cazenovia Tavern, 59 N.Y.2d 983, 984, 453 N.E.2d 1077, 1078, 466 N.Y.S.2d 660, 661 (1983)).

191. *See id.* (citing Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co., 27 A.D.3d 84, 93, 806 N.Y.S.2d 53, 60 (1st Dep't 2005)). Notably, the New York Court of Appeals made clear in *Sierra v. 4401 Sunset Park, LLC* that where an insurer tenders on behalf of its own insured, as in the instant matter, the insurer does indeed owe an obligation to send the disclaimer to the purported additional insured, and not just the insurer. *See* 24 N.Y.3d 514, 518, 25 N.E.3d 921, 922, 2 N.Y.S.3d 8, 9 (2014). In *dicta*, the Court of Appeals in *Sierra* distinguished from First Department decisions, including *Excelsior Ins. Co. v. Antretter Contr. Corp.*, 262 A.D.2d 124, 127, 693 N.Y.S.2d 100, 104 (1st Dep't 1999), in which it has been held that the protections of Insurance Law section 3420(d) are inapplicable to one insurer's claim for reimbursement from another insurer. *Sierra*, 24 N.Y.3d at 519, 25 N.E.3d at 923, 2 N.Y.S.3d at 10. The Court of Appeals has not squarely addressed whether the First Department's reading of this issue is proper, although the authors believe there is little practical reason to draw the distinction that has been drawn by the First Department.

192. *See, e.g.*, Axis Surplus Ins. Co. v. GTJ Co., Inc., 139 A.D.3d 604, 604, 33 N.Y.S.3d 187, 188 (1st Dep't 2016) (quoting Regal Constr. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 15 N.Y.3d 34, 37, 930 N.E.2d 259, 261, 904 N.Y.S.2d 338, 340 (2010)).

193. *See, e.g.*, Greenwich Ins. Co. v. City of New York, 122 A.D.3d 470, 471, 997 N.Y.S.2d 32, 34 (1st Dep't 2014) (quoting Servidone Constr. Corp. v. Sec. Ins. Co. of Hartford, 64 N.Y.2d 419, 424, 477 N.E.2d 441, 444, 488 N.Y.S.2d 139, 142 (1985)).

Co., an insurer is not entitled to rely upon extrinsic evidence to do so.[194]

The complaint in an underlying action alleged that New York Ready Mix, Inc. ("Ready Mix") was responsible for "illegal discharges" during the washing-out of concrete mixing trucks, which caused damage to the claimant's property.[195] Nova Casualty Company ("Nova") disclaimed coverage to Ready Mix, asserting that Ready Mix was neither the owner nor permissive user of the trucks in question.[196]

Finding that the underlying complaint alleged Ready Mix was the owner, however, the First Department found that Nova was required to provide a defense to that entity.[197] Regardless of whether extrinsic evidence seemed to refute Ready Mix's ownership or permissive use of the trucks, the court provided that an insurer may not rely on such extrinsic evidence to rid itself of the duty to defend, reasoning that the complaint gave rise to the possibility that Ready Mix was indeed the owner or permissive user of the trucks.[198]

The First Department also considered the exact point in time at which it is appropriate for an insurer to establish that a claim falls into a policy exclusion, eliminating a duty to defend. In *Wesco Insurance Co. v. Hellas Glass Works Corp.*, the insurer was found to have prematurely attempted to make move for dispositive relief on indemnity.[199] In holding that Wesco Ins. Co. ("Wesco") had not made this requisite showing, the First Department reasoned that, based on the underlying pleadings, third-party pleadings, testimony and documents that had already been provided in discovery, coupled with the fact that discovery and depositions were still ongoing, Wesco was

194. *See* 193 A.D.3d 608, 609, 142 N.Y.S.3d 818, 818 (1st Dep't 2021) (citing Port Auth. of N.Y. & N.J. v. Brickman Grp. Ltd., LLC, 181 A.D.3d 1, 20, 115 N.Y.S.3d 246, 260 (1st Dep't 2019)).

195. *Id.*

196. *See id.*

197. *See id.* (citing *Port Auth. of N.Y. & N.J.*, 181 A.D.3d at 20, 115 N.Y.S.3d at 260).

198. *See id.* We note that if there is no factual or legal basis upon which an insurer may be required to ultimately indemnify an insured—through the use of extrinsic evidence or otherwise—there is likewise no duty to defend. However, it appears from this decision that the court was not persuaded that this was the case, framing the decision by indicating that *"[e]ven if the extrinsic evidence presented* by Nova refutes any allegation that Ready Mix was an owner or permissive user of the subject trucks . . ." *Am. States Ins. Co.*, 193 A.D.3d at 609, 142 N.Y.S.3d at 818 (emphasis added).

199. *See* 188 A.D.3d 621, 621, 132 N.Y.S.3d 758, 758 (1st Dep't 2020).

unable to show that there was no possible factual or legal basis on which the policy afforded coverage.[200]

XI. ERRORS AND OMISSIONS

Errors and Omissions coverage exists to provide protection for those employed to provide professional services to others, where errors committed during the provision of such services tend to injure others.[201] Among the most important concepts involved with errors and omissions coverage is the scope of the services intended to be covered.

In *Napoli Shkolnik, PLLC v. Greenwich Insurance Co.*, the insurer, Greenwich Insurance Company ("Greenwich") insured a law firm, Napoli Shkolnik, PLLC ("Napoli") on a professional liability insurance policy.[202] Napoli was sued by a client, Keyes, for recovery of contingency fees allegedly withheld in violation of a fee-sharing joint representation agreement between Keyes and Napoli's predecessor firm.[203] Keyes' complaint against Napoli alleged several causes of action, including, *inter alia*, negligence.[204] Specifically, Napoli was alleged to have negligently made false representations to Keyes regarding the agreement.[205]

In holding that there was no possible factual or legal basis on which Greenwich could eventually be obligated to indemnify Napoli for professional liability in the Keyes action, the First Department provided that the Keyes action was premised on actions Napoli took as a business, as opposed to a law firm.[206] The underlying complaint did not allege that Napoli committed legal malpractice, but rather mere

200. *See id.* at 622, 132 N.Y.S.3d at 758 (citing Greenwich Ins. Co. v. City of New York, 122 A.D.3d 470, 471, 997 N.Y.S.2d 32, 34 (1st Dep't 2014)).

201. *See, e.g.*, DAVID GOODWIN & MARI BONTHUIS, ERRORS AND OMISSIONS (E&O) LIABILITY INSURANCE, (2019), https://www.lexisnexis.com/supp/LargeLaw/no-index/coronavirus/insurance/insurance-errors-and-omissions-liability-ins.pdf. Some examples include medical or legal malpractice insurance, or policies issued to provide coverage for architects, engineers, insurance brokers, to name just a few. *Id.*

202. *See* 193 A.D.3d 620, 620, 142 N.Y.S.3d 810, 810 (1st Dep't 2021).

203. *See id.*

204. *See id.*

205. *See id.*

206. *See id.* at 620–21, 142 N.Y.S.3d at 810–11 (first citing Atlantic Mut. Ins. Co. v. Terk Techs. Corp., 309 A.D.2d 22, 29, 763 N.Y.S.2d 56, 62 (1st Dep't 2003); then citing Auto. Ins. Co. of Hartford v. Cook, 7 N.Y.3d 131, 137, 850 N.E.2d 1152, 1155–56, 818 N.Y.S.2d 176, 180 (2006); and then citing Town of Massena v. Healthcare Underwriters Mut. Ins. Co., 98 N.Y.2d 435, 445, 779 N.E.2d 167, 171, 749 N.Y.S.2d 456, 460 (2002)).

negligence generally.[207] Simply stated, the purpose of a professional liability policy does not include providing coverage for ordinary negligence.[208]

XII. CLAIMS-MADE POLICY

For there to be coverage on a claims-made policy, the claim against an insured must generally be tendered within the effective dates of a policy. Such policies are distinguishable from occurrence-based policies, which provide coverage for claims arising from events that occurred within a policy period, regardless of whether they are reported.

Fundamentally, in order to determine the availability of coverage under a claims-made policy, one must determine exactly what constitutes a "claim" under the relevant policy. In *Hyperion Medical, P.C. v. Trinet HR III, Inc.*, a former employee of Hyperion Medical, P.C. ("Hyperion") filed suit against that entity for discrimination during the effective policy period of a claims-made policy issued to Hyperion by Steadfast Insurance Company ("Steadfast").[209] However, two years prior to the discrimination lawsuit, the claimant had filed a complaint with the Equal Employment Opportunity Commission ("EEOC").[210]

The question before the First Department was whether Hyperion had provided Steadfast with adequate notice of the claim under the policy.[211] The Steadfast policy at issue stated that claims were "first made" when the insured receives notice of the claim; that more than one claim involving the same wrongful act is to be treated as a single claim; and that claims dating from before the inception date of the policy would be excluded.[212] Thus, in order to ascertain whether Hyperion had met these conditions, the court assessed whether the EEOC complaint and lawsuit were the "same claim" under the policy.[213]

Finding that the two constituted the same claim, the First Department held that no coverage existed under the Steadfast

207. *See Napoli*, 193 A.D.3d at 621, 142 N.Y.S.3d at 811, (citing *Atlantic Mut. Ins. Co*, 309 A.D.2d at 22, 763 N.Y.S.2d at 64).

208. *See id.*

209. *See* 190 A.D.3d 456, 457, 140 N.Y.S.3d 207, 208 (1st Dep't 2021).

210. *See id.*

211. *See id.*

212. *Id.*

213. *See id.*

policy.[214] Since Hyperion first "had notice" of the claim, as defined by the Steadfast policy, when the EEOC claim was filed, the claim impermissibly predated the policy's inception.[215]

In contrast to *Hyperion* above, the First Department's decision in *WMOP, LLC v. Scottsdale Insurance Co.* provides an example of what does not constitute a claim under a claims-made policy.[216] WMOP, LLC ("WMOP") was insured under a claims-made policy issued by Scottsdale Insurance Company.[217] Counsel for the claimant in an underlying action sent a letter requesting records from WMOP on May 19, 2017.[218] Despite threatening litigation, the letter itself made no demand for relief.[219]

Exemplifying the limitations associated with coverage under a claims-made policy, the First Department held that because there was no demand for relief in the claimant's letter, the letter did not constitute a "claim" within the meaning of the Scottsdale policy.[220] Accordingly, the claims-made portion of that policy was left untriggered.[221]

Even without a "claim" made for coverage under a claims-made policy, an insured may still nevertheless be obligated to report facts for which a reasonable person would expect to form the basis of a claim.[222] This concept was elaborated upon in *American Medical Alert Corp. v. Evanston Insurance Co.*[223] There, American Medical Alert Corporation ("AMAC") was insured under a claims-made policy issued by Evanston Insurance Company.[224] AMAC admitted knowledge of "relevant facts;" specifically, that its errors had caused

214. *See Hyperion*, 190 A.D.3d at 457, 140 N.Y.S.3d at 209.

215. *See id.*

216. *See* 192 A.D.3d 411, 412, 139 N.Y.S.3d 540, 541 (1st Dep't 2021).

217. *See id*. at 412, 139 N.Y.S.3d at 540.

218. *Id.* at 412, 139 N.Y.S.3d at 541.

219. *Id.*

220. *Id.* (citing Purcigliotti v. Risk Enter. Mgmt., Ltd., 240 A.D.2d 205, 206, 658 N.Y.S.2d 296, 297 (1st Dep't 1997)).

221. *See WMOP*, 192 A.D.3d at 412, 139 N.Y.S.3d at 541 (citing Great Canal Realty Corp. v. Seneca Ins. Co. Inc., 5 N.Y.3d 742, 743, 833 N.E.2d 1196, 1197, 800 N.Y.S.2d 521, 522 (2005)); see also *Purcigliotti*, 240 A.D.2d at 206, 658 N.Y.S.2d at 297; see also Evanston Ins. Co. v. GAB Bus. Servs., 132 A.D.2d 180, 185, 521 N.Y.S.2d 692, 695 (1st Dep't 1987).

222. *See, e.g.*, Am. Med. Alert Corp. v. Evanston Ins. Co. 185 A.D.3d 433, 433 127 N.Y.S.3d 73, 74 (1st Dep't 2020).

223. *See id.*

224. *See id.*

"serious delay" in the administration of an underlying claimant's necessary patient care.[225]

In considering whether Evanston owed AMAC a duty to defend in the underlying action, the First Department applied a two-pronged subjective/objective analysis.[226] The first prong of this approach requires a court to first consider the subjective knowledge of the insured (i.e., what knowledge of the relevant facts the specific insured actually possesses).[227] Second, the court should consider whether a reasonable person possessing the same knowledge would believe those facts to form the basis of a claim under the relevant insurance policy.[228]

In holding that Evanston was not obligated to defend AMAC in the underlying action, the court reasoned that a reasonable person knowing that AMAC's errors had caused "serious delay" in the claimant's necessary patient care would have expected such facts to form the basis of a claim for coverage under the Evanston policy.[229] Thus, because AMAC possessed "prior knowledge" of these facts, based on the terms of the policy, and yet failed to disclose them to the insurer, coverage was precluded based upon the policy's prior knowledge condition precedent to coverage.[230]

XIII. DEDUCTIBLES VS SELF-INSURED RETENTIONS

The difference between a deductible and a self-insured retention ("SIR") is subtle and yet important. Where the former reduces the amount of insurance available, the latter does not.[231] For instance, a policy with an applicable limit of $1,000,000 and a deductible of $50,000 leaves the insured with $950,000 remaining in limits after the insured has paid the deductible. If that deductible were instead an SIR, the insured would still be obligated to pay the first $50,000 of the claim but would be left with a full $1,000,000 in applicable limits thereafter.

225. *Id.*

226. *See id.*

227. *See Am. Med. Alert Corp.*, 185 A.D.3d at 433, 127 N.Y.S.3d at 74.

228. *See id.* (first citing Liberty Ins. Underwriters, Inc. v. Corpina Piergrossi Overzat & Klar LLP, 78 A.D.3d 602, 604, 913 N.Y.S.2d 31, 33 (1st Dep't 2010); and then citing CPA Mut. Ins. Co. of Am. Risk Retention Grp. v. Weiss & Co., 80 A.D.3d 431, 431, 915 N.Y.S.2d 57, 58 (1st Dep't 2011)).

229. *See id.*

230. *See id.*

231. *See*, e.g., Trumbull Equities, LLC v. Mt. Hawley Ins. Co., 191 A.D.3d 587, 588, 138 N.Y.S.3d 874, 874 (1st Dep't 2021).

This past year, the First Department addressed this question. In *Trumbull Equities, LLC v. Mt. Hawley Insurance Co.*, there was a provision in the applicable insurance policy issued by Mt. Hawley Insurance Company ("Mt. Hawley") to its insured Trumbull Equities, LLC ("Trumbull"), entitled "deductible liability insurance."[232] This provision "state[d] that Mt. Hawley's 'obligation . . . to pay damages' on its insured's behalf 'applie[d] only to the amount of damages in excess of any deductible.'"[233] Mt. Hawley was permitted to settle any case on Trumbull's behalf, pay any part of the deductible itself, and subsequently seek reimbursement from Trumbull of the deductible.[234] The policy also allowed Mt. Hawley to, "upon receipt or notice of any claim or at any time thereafter request [Trumbull] to pay over and deposit with [Mt. Hawley] all or a part of the deductible amount, to be held and applied per the terms of the policy."[235]

Trumbull had a claim made against it and paid a deductible in the amount of $35,000.[236] Mt. Hawley proceeded to deduct this $35,000 from the available policy limits.[237] The question for the First Department was whether this deduction from the available limits was proper.[238] In holding that it was, the court reasoned that the above-referenced policy language made it clear that the provision was a true deductible.[239] Thus, the subtraction of the $35,000 from the available policy limits was proper.[240]

XIV. RESIDENCY

Homeowners' insurance policies typically require that a policyholder reside at the premises insured on the date of loss as a condition precedent to coverage. Exemplifying this condition, the First

232. *Id.*

233. *Id.*

234. *See id.*

235. *Id.*

236. *See Trumbull*, 191 A.D.3d at 588, 138 N.Y.S.3d at 874.

237. *See id.*

238. *See id.* As stated above, such a deduction is proper where the provision is a true deductible, but likely improper if the provisions are construed as an SIR.

239. *Id.* (first citing Tokio Marine & Fire Ins. Co. v. Ins. Co. of N. Am., 262 A.D.2d 103, 103 (1st Dep't 1999); and then citing New York State Thruway Auth. v. KTA-Tator Eng'g Servs., P.C., 78 A.D.3d 1566, 1567, 913 N.Y.S.2d 438, 440 (4th Dep't 2010)).

240. *See id.*

Department addressed the issue in *Tower Insurance Co. of N.Y. v. Ginin*.[241]

Walter Ginin and Nelly Campoverde (the "insureds") were sued by Jose Luis Crespo in an underlying personal injury action.[242] The insureds tendered the lawsuit to their insurer, Tower Insurance Company of New York ("Tower"), who denied the claim following an investigation and filed this declaratory judgment action to confirm its disclaimer.[243]

Tower submitted an adjuster affidavit providing that the policyholder had advised that he did not reside at the premises on the date of loss, as was required by the policy.[244] This was sufficient to establish Tower's prima facie burden that the insured was not a resident at the time of the loss.[245] Since the insureds themselves failed to appear in the action, the only proof submitted in opposition to Tower's motion was the conclusory affirmation of the claimant's counsel, insufficient to establish residency of the insureds.[246] Accordingly, there was "no evidence that at the time of Crespo's alleged incident, [the insureds] actually resided at the insured location where Crespo was a tenant in one of the two units."[247]

However, residency is frequently a factual issue to be determined by a fact finder. That was the case in *MIC General Insurance Co. v. Okapa*.[248]

MIC General Insurance Corporation ("MIC General") had issued a homeowners' insurance policy to Agnieszka and Mariusz Okapa.[249] Following the submission of a claim, MIC General assigned an investigator to determine the facts surrounding the loss.[250] The investigator determined that the Okapas no longer resided at the premises insured at the time of the loss, and MIC General filed this declaratory judgment action to confirm the propriety of its disclaimer on that ground.[251] In support of the declaratory relief sought, MIC

241. *See* 190 A.D.3d 443, 443, 139 N.Y.S.3d 196, 197 (1st Dep't 2021).

242. *See id.* at 443, 139 N.Y.S.3d at 196–97.

243. *See id.*

244. *See id.* at 443, 139 N.Y.S.3d at 197.

245. *See id.*

246. *See Tower*, 190 A.D.3d at 444, 139 N.Y.S.3d at 197.

247. *See id.* (citing Tower Ins. Co. of N.Y. v. Brown, 130 A.D.3d 545, 546, 14 N.Y.S.3d 37, 38 (1st Dep't 2015)).

248. *See* 191 A.D.3d 479, 479, 138 N.Y.S.3d 305, 306 (1st Dep't 2021).

249. *See id.* at 191 A.D.3d at 479, 138 N.Y.S.3d at 305.

250. *See id.*

251. *See id.*

General submitted an affidavit from its investigator providing that Agnieszka Okapa had admitted that the pair no longer resided at the insured property on the date of loss, as was required by the policy.[252] However, and unlike the *Tower* decision discussed above, Mariusz Okapa submitted a separate affidavit, testifying that although he had in fact moved out of the insured premises before the date of loss, he had moved back into it for a period of time and did reside there on the date of loss due to marital difficulties.[253] The First Department held that, on these facts, Mariusz's affidavit was sufficient to raise triable issues of fact as to whether the husband resided there, precluding summary judgment.[254]

XV. SUBROGATION AND ANTI-SUBROGATION

An insurer's right to subrogation against a responsible party is a fundamental tenant of the relationship between policyholder and carrier.[255] However, understanding subrogation is not without its challenges, especially when confronting the rule of anti-subrogation. A prime example was decided during the *Survey* period by the First Department in *Goya v. Longwood Housing Development Fund Co.*, which clarified that an action by one insured against an additional insured is barred by the doctrine of anti-subrogation only where their common insurer has agreed to indemnify both.[256]

Longwood Housing Development Fund Company ("Longwood"), a general contractor, hired Melcara Corporation ("Melcara"), a subcontractor, to complete certain portions of the work on a project.[257] As a condition to this hiring, Longwood required that

252. *See id.* 191 A.D.3d at 479, 138 N.Y.S.3d at 305.

253. *See id.* at 191 A.D.3d at 479, 138 N.Y.S.3d at 306.

254. *See Okapa*, 191 A.D.3d at 479, 138 N.Y.S.3d at 306 (first citing Katz v. 260 Park Ave. S. Condo. Assocs., 168 A.D.3d 615, 616, 92 N.Y.S.3d 255, 256 (1st Dep't 2019); and then citing Fernandez v. VLA Realty, LLC, 45 A.D.3d 391, 391, 845 N.Y.S.3d 304, 305 (1st Dep't 2007)).

255. *See* Randy J. Sutton, Annotation, *Conduct or Inaction by Insurer Constituting Waiver of, or Creating Estoppel to Assert, Defense of Consent to Settle Provision Under Insurance Policy*, 16 A.L.R. 6th § 2 (2006).

256. *See* Goya v. Longwood Hous. Dev. Fund Co., 192 A.D.3d 581, 584–85, 146 N.Y.S.3d 59, 64 (1st Dep't 2021) (citing ELRAC, Inc. v. Ward, 96 N.Y.2d 58, 76, 748 N.E.2d 1, 9, 724 N.Y.S.2d 692, 699 (2001)).

257. *See* Brief for Defendant/Third-Party Plaintiff-Respondent Longwood Housing Development Fund Company, Inc., Goya v. Longwood Hous. Dev. Fund Co., 192 A.D.3d 581, 146 N.Y.S.3d 59 (1st Dep't 2021) (No. 2019-05532), 2020 NY App. Div. Briefs Lexis 3579.

Melcara add it as an additional insured on its CGL policy, and Melcara did so.[258] During the project, a worker was injured and suit was brought for damages under New York Labor Law.[259] Longwood filed a third-party action against Melcara and, as relevant for our purposes, an issue arose as to whether the doctrine of anti-subrogation barred Longwood's claim for contractual indemnification against Melcara.[260]

The First Department notes that under New York law, "anti-subrogation would bar Longwood's claim for contractual indemnity if both Longwood and Melcara in its capacity as an additional tortfeasor qualify as insureds under the same policy . . . at least up to the limits of the policy."[261] Here, it was undisputed that Melcara's insurer was providing Longwood with a defense to the underlying action, and further that Melcara itself agreed to indemnify Longwood.[262] However, Melcara's insurer had never agreed to indemnify Longwood for the loss.[263] Accordingly, there was no basis for the dismissal of Longwood's indemnification claim on the basis of the anti-subrogation doctrine, since an insurer's agreement to defend is not synonymous with agreeing to indemnify.[264]

Likewise, the Court in *Bosquez v. RXR Realty* held that claims for contribution and indemnification brought by one common insured against another were barred by the doctrine of anti-subrogation insofar as common coverage was afforded to each by the applicable policies.[265]

There, the underlying claimant was injured while working for Global Iron Works, Inc. ("Global"), and proceeded to sue both Global

258. *See id.*

259. Brief for Third-Party Defendant-Respondent Triboro Maintenance Corp., Goya v. Longwood Hous. Dev. Fund Co., 192 A.D.3d 581, 146 N.Y.S.3d 59 (1st Dep't 2021) (No. 2019-05532), 2020 NY App. Div. Briefs Lexis 3459.

260. *See id.*

261. *Goya*, 192 A.D.3d at 584, 146 N.Y.S.3d at 64 (first citing *ELRAC, Inc.*, 96 N.Y.2d at 76, 748 N.E.2d at 9, 724 N.Y.S.2d at 699; and then citing Mitchell v. NRG Energy, Inc., 142 A.D.3d 1366, 1367, 38 N.Y.S.3d 860, 861 (4th Dep't 2016)).

262. *See id.* (citing *ELRAC, Inc.*, 96 N.Y.2d at 76, 748 N.E.2d at 9, 724 N.Y.S.2d at 699).

263. *See id.*

264. *See id.* at 584–85, 146 N.Y.S.3d at 64. It appears that there was insufficient proof on the record and the outcome may have been different if the actual coverage correspondence from the insurer in agreeing to defend Longwood had been introduced into evidence. *See id.*

265. *See* 195 A.D.3d 536, 536–37, 150 N.Y.S.3d 264, 266 (1st Dep't 2021).

and RXR Pier 57 ("RXR") for negligence and labor law violations.[266] RXR sued Global, and Global moved to dismiss on the grounds that the claims for indemnity and contribution were barred by the doctrine of anti-subrogation, since both Global and RXR were entitled to coverage under the same insurance policies. [267]

Multiple insurance policies were at issue, including a CCIP CGL policy issued by Arch (the "Arch Policy"), a CCIP Corridor Excess Policy issued by National Union Fire Insurance Company ("National Union"), and two additional excess policies including an AIG Lead Excess Policy and an AIG Corridor Excess Policy issued by AIG Insurance Company ("AIG").[268]

The First Department held that the claims for contribution and indemnification were barred by the doctrine of anti-subrogation insofar as the Arch and National policies afforded common coverage to RXR and Global.[269] However, once the limits of those policies were exhausted, the Court stated that these claims were viable, since the AIG Lead Excess Policy and the AIG Corridor Excess Policy were not impacted by the anti-subrogation doctrine.[270]

Outside of the anti-subrogation rule, it is important to understand exactly what rights an insurer is subrogated to following payment of a claim. This was the issue before the Second Department in *Colabella v. Hernandez*, where a vehicle operated by Dominick Colabella, which was insured by ACE Private Risk Services ("ACE"), collided with another owned by Jose Hernandez and operated by Bertina Hernandez. [271] ACE adjusted Colabella's claim, paid for his cost of repair, and proceeded to settle Hernandez' claim against Colabella.[272] Once the claim was settled, ACE issued a release in favor of Hernandez.[273] Subsequently, however, Colabella asserted additional claims against Hernandez for diminution of value and loss of use.[274] The question before the Second Department on appeal was whether Colabella may permissibly assert other claims against Hernandez after ACE's settlement and execution of a release.[275]

266. *See id.* at 536, 150 N.Y.S.3d at 266.
267. *See id.* Global also moved in the alternative for summary judgment. *See id.*
268. *See id.* at 537, 150 N.Y.S.3d at 266.
269. *See Bosquez*, 195 A.D.3d at 536–37, 150 N.Y.S.3d at 266.
270. *See id.* at 536–37, 150 N.Y.S.3d at 266.
271. *See* 185 A.D.3d 545, 545, 126 N.Y.S.3d 717, 718 (2d Dep't 2020).
272. *See id.*
273. *See id.*
274. *See id.*
275. *See id.* at 545–46, 126 N.Y.S.3d at 718.

Fundamentally, the Second Department notes that the insurer was only subrogated to those claims directly related to the actual damage of the plaintiff's vehicle and not claims such as those asserted here.[276] Holding that Colabella was permitted to pursue his claims for diminution of value and loss of use, the Second Department found that an insurer-subgrogee may only release the tortfeasor from liability insofar as claims that it paid.[277] Stated differently, ACE was only subrogated to Colabella's rights regarding the actual physical damage to the vehicle. ACE did not possess Colabella's rights for any claims beyond that.[278]

XVI. SCOPE OF DISCOVERY

A hot button issue perennially dividing carriers and policyholders is the appropriate scope of discovery on any number of claims and underwriting materials, depending upon the specific claim at hand. This year was no different.

The Second Department's decision in *Wasserman v. Amica Mutual Insurance Company* should serve as a cautionary tale to coverage counsel asserting privilege regarding claims file materials.[279]

Helene and Paul Wasserman, commenced this action against Amica Mutual Insurance Company ("Amica") to recover damages for breach of an insurance contract and loss of consortium, following a motor vehicle accident in February 2017 that left Helene with serious injuries.[280] The Wassermans had procured automobile insurance through Amica, including supplemental underinsured/uninsured motorist ("SUM") coverage.[281] However, Amica was alleged to have "failed or refused to provide adequate compensation as required under the policy terms."[282]

As relevant here, the Wassermans moved to compel disclosure of Amica's SUM claim file for the accident.[283] The trial court granted their motion to compel and, among other things, denied Amica's cross

276. *See Colabella*, 185 A.D.3d at 546, 126 N.Y.S.3d at 719.

277. *See id.* (citing Winkelmann v. Hockins, 204 A.D.2d 623, 624, 612 N.Y.S.2d 230, 231 (2d Dep't 1994)).

278. *See id.* (citing Duane Reade v. Reva Holding Corp., 30 A.D.3d 229, 233–34, 818 N.Y.S.2d 9, 13–14 (1st Dep't 2006)).

279. *See* 193 A.D.3d 795, 798, 141 N.Y.S.3d 859, 860 (2d Dep't 2021).

280. *See id.* at 796–97, 141 N.Y.S.3d at 859.

281. *See id.* at 796, 141 N.Y.S.3d at 859.

282. *Id.* at 796–97, 141 N.Y.S.3d at 859–60.

283. *See id.* at 797, 141 N.Y.S.3d at 860.

motion which sought an in camera review of the SUM claim file prior to disclosure.[284]

Although Amica's counsel claimed that the SUM claim file was "irrelevant information and/or material protected by attorney-client privilege or attorney work product," the conclusory assertions of same in an attorney affirmation alone is insufficient absent further factual support on the record.[285] In other words, Amica should have submitted evidence that the materials sought were, in fact, protected, by submitting a client affidavit attesting to the nature of materials contained within the file, among other documentary evidence of same.[286]

Despite this evidentiary shortfall, the Second Department provided Amica with a safety valve, holding further that the trial court had "improvidently exercised its discretion in directing the disclosure of the entire SUM file without first requiring its production for an in-camera review of the allegedly privileged documents," remitting the matter to the trial court for such a review prior to disclosure.[287]

Where Amica found mercy from the court in *Wasserman* above, another carrier in *Zimmerman v. Jurek Builders, Inc.* was not so lucky before the Fourth Department.[288]

284. *See Wasserman*, 193 A.D.3d at 797, 141 N.Y.S.3d at 860. Production of the claim file was stayed by order of the Second Department, pending resolution of this appeal.

285. *Id.* at 797–98, 141 N.Y.S.3d at 860 (citing Ligoure v. City of New York, 128 A.D.3d 1027, 1029, 9 N.Y.S.3d 678, 679–80 (2d Dep't 2015)).

286. *See id.* at 797, 141 N.Y.S.3d at 860 (first citing Ural v. Encompass Ins. Co. of Am., 97 A.D.3d 562, 566, 948 N.Y.S.2d 621, 626 (2d Dep't 2012); then citing Cioffi v. S.M. Foods, Inc., 142 A.D.3d 520, 522, 36 N.Y.S.3d 475, 479 (2d Dep't 2016); and then citing New York Schools Ins. Reciprocal v. Milburn Sales Co., Inc., 105 A.D.3d 716, 717–18, 963 N.Y.S.2d 152, 154 (2d Dep't 2013)).

287. *Id.* at 798, 141 N.Y.S.3d at 860–61 (first citing Donohue v. Fokas, 112 A.D.3d 665, 667, 976 N.Y.S.2d 559, 562 (2d Dep't 2013); and then citing *Ural*, 97 A.D.3d at 567, 948 N.Y.S.2d at 626). Despite the Second Department's mercy, this should serve as a warning that requests for irrelevant and/or otherwise protected materials in coverage litigation should be met with dotted "i's" and crossed "t's." Otherwise, the protections afforded to these materials, including conditional exemption from disclosure under C.P.L.R. section 3101(d)(2), may very well needlessly continue eroding.

288. *See* 192 A.D.3d 1485, 1485 140 N.Y.S.3d 797, 798 (4th Dep't 2021). This decision is comprised of three sentences concerning the "disclos[ure of] certain documents," however its unanimous affirmation of the trial court decision is troubling for insurance carriers. *Id.*; *see also* Zimmerman v. Jurek Builders., Inc.,

This matter concerned a dispute over documents maintained in the claims file of Southwest Marine and General Insurance Company ("SW Marine").[289] SW Marine provided insurance for defendant, Jurek Builders.[290] The plaintiffs, Darren and Jennifer Zimmerman (the "Zimmermans"), sought discovery of a sixteen-page report prepared by an insurance investigator, as well as two-pages of correspondence exchanged between SW Marine and Jurek prior to the commencement of the instant lawsuit.[291]

Upon review *in camera*, the trial court found that these documents were "prepared as part of the regular business of the insurance company in investigating a claim as well as for safety purposes," and as such fell outside of the conditional exemption afforded to disclosure under CPLR section 3101(d)(2).[292] Specifically, the Supreme Court in Erie County held that in order "[t]o fall within the conditional privilege of CPLR [section] 3101 (d)(2), the material sought must be prepared solely in anticipation of litigation," and a mixed purpose report such as this one was not exempt from disclosure.[293]

XVII. "COVERAGE B" – PERSONAL AND ADVERTISING INJURY

Many comfortable navigating third-party liability claims for "bodily injury" and "property damage," remain perplexed regarding coverage for claims of "personal and advertising injury" under what the insurance industry has coined "Coverage B."[294] This lesser-known coverage provides protections for claims arising out of a "personal and advertising injury," defined as follows:

No. 811810/2017, 2020 N.Y. slip. op. 34459(U), at 2–3 (Sup. Ct. Erie Cnty. Mar. 3, 2020)).

289. *See Zimmerman*, 2020 N.Y. slip. op. 34459(U), at 1–2.

290. *See id.* at 1.

291. *See id.* at 2.

292. *Id.* at 3.

293. *Id.* Admittedly we don't know what the report in question actually was. If it was prepared, at all, to assist in the defense of SW Marine's insured, Jurek, it should categorically be exempt from disclosure. If, however, it was a document related to a coverage investigation by SW Marine, we cannot understand how it would be relevant to the underlying action.

294. *See, e.g., Commercial General Liability Coverage Form*, ISO PROPERTIES, INC. 6 (2006), https://pdf4pro.com/amp/view/commercial-general-liability-coverage-form-a394.html.

i. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:
   a. False arrest, detention or imprisonment;
   b. Malicious prosecution;
   c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
   d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
   e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
   f. The use of another's advertising idea in your "advertisement"; or
   g. Infringing upon another's copyright, trade dress or slogan in your "advertisement."[295]

A couple of decisions rendered during the *Survey* period provide an interesting commentary on the purpose served by Coverage B, including what it is and what it is not.

The First Department *Continental Casualty Co. v. KB Insurance Co., Ltd.* had occasion to assess a claim involving an injury arising from the infringement upon another's copyright, trade dress or slogan in an advertisement.[296]

As relevant herein, Value Wholesale, Inc. ("Value") was insured under a commercial general liability policy with Kookmin Best Insurance Company ("Kookmin").[297] In November 2015, Abbott Laboratories, Abbott Diabetes Care, Inc., and Abbott Diabetes Care Sales (collectively, "Abbott") sued hundreds of defendants including Value alleging, among other things, that Abbott held the patent to Freestyle and Freestyle Life blood glucose strips (the "Underlying Action").[298] Abbott sold these strips within the United States and

295. *Id.* at 14.

296. *See* 185 A.D.3d 414, 415, 124 N.Y.S.3d 788, 789 (1st Dep't 2020), *aff'g* No. 652103/2018, 2019 N.Y. slip. op. 31513(U) at 3 (Sup. Ct. N.Y. Cnty. May 29, 2019).

297. *See id.* at 415, 124 N.Y.S.3d at 788.

298. *See Cont'l Cas. Co.*, 2019 N.Y. slip. op. 31513(U) at 2.

internationally, with differences between the two justifying a higher price for the United States product.[299] In the Underlying Action, Abbott alleges that the defendants, including Value, resold the international strips in the United States at an elevated price, using Freestyle packaging,[300] and asserted cause of action for trademark infringement, trade dress infringement, fraud, racketeering, unfair competition, and other illegal and wrongful acts.[301]

Value tendered the Underlying Action to Kookmin, who disclaimed coverage due to a purported "insufficient causal nexus between Value's alleged advertising and Abbott's injuries" and reliance upon "exclusions for knowing acts and knowing publication of false material . . ."[302]

With respect to the first point, the trial court found that the Underlying Action contained explicit allegations that "[u]sing Abbott's trademarks and trade dress, [Value] *advertise* to consumers and the marketplace [its] ability and willingness to sell FreeStyle test strips. These advertisements are made through websites, emails, facsimiles, point-of-sale displays, and other media."[303] Accordingly, "[b]ecause 'misappropriation of advertising ideas or style of doing business encompasses the wrongful taking of the manner by which another advertises its goods or services, including the misuse of another's trademark . . . the complaint states a valid advertising injury."[304] The First Department agreed, summarily dismissing such claims as "unavailing."[305]

Additionally, regarding Kookmin's reliance upon exclusions for knowing acts, the First Department found that "there is no evidence conclusively showing that Value's conduct was to intentionally or knowingly advertise Abbott's unapproved products domestically."[306] As indicated by the trial court, despite allegations in the Underlying Action that Value "participated in a deliberate scheme to substitute

299. *See id.* at 3–4.

300. *See id.* at 2–4.

301. *Id.* at 2.

302. *Id.* at 2–3.

303. *Cont'l Cas. Co.*, 2019 N.Y. slip. op. 31513(U) at 8.

304. *Id.* (quoting Allou Health & Beauty Care, Inc. v. Aetna Cas. & Sur. Co., 269 A.D.2d 478, 480, 703 N.Y.S.2d 253, 256 (2d Dep't 2000)).

305. *See* Cont'l Cas. Co. v. KB Ins. Co., Ltd., 185 A.D.3d 414, 415, 124 N.Y.S.3d 788, 789 (1st Dep't 2020).

306. *Id.* (first citing Cosser v. One Beacon Ins. Grp., 15 A.D.3d 871, 873, 789 N.Y.S.2d 586, 587 (4th Dep't 2005); and then citing PG Ins. Co. of N.Y. v. Day Mfg. Co., 251 A.D.2d 1065, 1066, 674 N.Y.S.2d 199, 200 (4th Dep't 1998)).

unapproved test strips in place of the approved strips," it remained possible that Abbott can establish Value's liability without finding that Value knowingly violated Abbott's rights.[307]

In another decision, *Pro's Choice Beauty Care, Inc. v. Great Northern Insurance Co.*, the Second Department provided an example of the limits of Coverage B.[308] Bumble and Bumble, LLC ("B&B") sued Pro's Choice Beauty Care, Inc. ("Pro's Choice") for, *inter alia*, trademark infringement (the "Underlying Action").[309] Pro's Choice tendered its defense in the Underlying Action to its insurance company, Great Northern Insurance Company ("Great Northern").[310] However, Great Northern disclaimed coverage.[311] Although it was undisputed that there was "coverage for, among other things, an advertising injury," the policy excluded "coverage for 'advertising injury . . . arising out of, giving rise to or in any way related to any actual or alleged . . . infringement or violation by any person or organization (including the insured) of any intellectual property law or right.'"[312]

The Second Department found that B&B alleged in the Underlying Action that Pro's Choice "counterfeited and infringed on another's trademark and engaged in the sale and distribution of offending goods."[313] In so finding, the court held that the relevant exclusion applied, since "intellectual property law or right" was "defined by the policy to include trademarks."[314]

> Further, although an exception to the exclusion existed for injuries caused by an offense described in the definition of advertising injury; and does not arise out of, give rise to or in any way relate to any actual or alleged assertion, infringement or violation of any intellectual property law or right, other than one described in the definition of advertising injury.

307. *Cont'l Cas. Co.*, 2019 N.Y. slip. op. 31513(U) at 9 (citing Bridge Metal Indus., LLC v. Travelers Indem. Co., 812 F. Supp. 2d 527, 545 (S.D.N.Y. 2011)).

308. *See* 190 A.D.3d 868, 871, 140 N.Y.S.3d 544, 547 (2d Dep't 2021).

309. *See id.* at 869, 140 N.Y.S.3d at 545.

310. *See id.* at 869, 140 N.Y.S.3d at 545–46.

311. *See id.*

312. *Id.* at 871, 140 N.Y.S.3d at 546.

313. *Pro's Choice Beauty Care, Inc.* 190 A.D.3d at 871, 140 N.Y.S.3d at 546–47.

314. *Id.* at 871, 140 N.Y.S.3d at 546.

Pro's Choice was unable to place B&B's claims within the exception.[315] Specifically, the "trademark" claims asserted against Pro's Choice in the Underlying Action were entirely "unrelated to advertising injury."[316]

XVIII. BROKER LIABILITY

Left with no alternative following an insurer's valid disclaimer of coverage, insureds frequently—and usually unsuccessfully—take aim at their insurance agent or broker and its errors and omissions insurance policy, in the hopes of establishing that, but for the broker's failure to procure the proper coverage, the insured would have been covered for a particular claim. The First Department provided a concise statement of the limitations existing with respect to broker liability in *Trimasa Restaurant Partners, LLC v. Global Coverage, Inc.*[317]

In 2011, Chef Masa Takayama ("Chef Masa") began planning a new restaurant, Tetsu.[318] As part of that process, Chef Masa contacted Global Coverage, Inc. ("Global") to obtain "the same insurance and business advice and services they had provided for his business ventures for nearly two decades."[319] In turn, Global "researched, investigated, and decided what types and amounts of insurance coverage were needed to protect Tetsu during the construction of the restaurant, and then procured those coverages," and "regularly inquired as to the progress of construction and development of Tetsu, including reviewing and commenting on drafts of the lease for the space, requesting status reports on negotiations and asking to be notified when lease signing was imminent."[320] In accordance with the longstanding relationship between Global and Chef Masa, Global "ultimately decided the amount and nature of the insurance that would

315. *See id.* at 871, 140 N.Y.S.3d at 547 (first citing Castillo v. Prince Plaza, LLC, 164 A.D.3d 1418, 1420, 84 N.Y.S.3d 529, 530 (2d Dep't 2018); and then citing Spandex House, Inc. v. Hartford Fire Ins. Co., 407 F. Supp. 3d 242, 258–59 (S.D.N.Y. 2019)).

316. *Id.* (first citing *Castillo,* 164 A.D.3d at 1420, 84 N.Y.S.3d at 530; and then citing *Spandex*, 407 F. Supp. 3d at 248).

317. *See* 191 A.D.3d 490, 490, 138 N.Y.S.3d 299, 300 (1st Dep't 2021) (citing STB Invs. Corp. v. Sterling & Sterling Inc., 178 A.D.3d 413, 413, 111 N.Y.S.3d 170, 170 (1st Dep't 2019)).

318. *See* Trimasa Rest. Partners, LLC v. Glob. Coverage, Inc., 2020 WL 2404958, at *1 (Sup. Ct. N.Y. Cnty. April 1, 2021).

319. *Id.*

320. *Id.*

be purchased to provide the protection Defendants advised Tetsu should have."[321] Ultimately, Global procured commercial general liability insurance from North American Capacity Insurance Company ("North American").[322]

During construction, Chef Matsa's contractor found lead paint on columns in the space and attempted to remove it by sanding, which caused lead dust to become airborne and enter apartments in adjacent high-rises.[323] Following claims for cleanup costs and other damages, North American, who disclaimed coverage in reliance upon an "Absolute Lead Exclusion."[324]

In reliance upon New York Court of Appeals precedent in *Murphy v. Kuhn* and *Hoffend & Sons, Inc. v. Rose & Kierman, Inc.*, the trial court's decision notes that "insurance agents and brokers do not owe any duty to advise their customers and are only obligated to respond to specific requests made by their customers," and further that "[a]bsent a specific request for coverage, an insurance broker is not liable to an insured for any failure to procure any particular type or

321. *Id.* Specifically, this longstanding relationship encompassed the following conduct relevant to this action:

> As they had in the past, Defendants did not merely respond to requests from Chef Masa or Tetsu for the purchase of specific insurance, but undertook to evaluate and advise them about what insurance was necessary. For example, after reviewing the nature of the proposed transaction and construction, Share told Tetsu that it would need to obtain 'vacant building coverage' upon taking possession of the restaurant space, and maintain that coverage until the construction work began . . . As they had always done in the past, Defendants then purchased vacant building insurance coverage, without consulting with Chef Masa or Tetsu on the terms of that coverage, and afterwards notified Tetsu of the price for the policy . . . . When construction planning for the project was underway, Defendants also requested and reviewed numerous documents relating to the Tetsu construction plans, including documents that indicated that routine testing for contaminants would have to be done because, among other reasons, the site was a historic pre-war building . . . . Additionally, Defendants reviewed contractors' copies of the insurance policies, and represented that the contractors had sufficient and appropriate insurance coverage to protect Tetsu. Defendants also reviewed and revised Tetsu's agreement with its general contractor before its execution . . . Based on Defendants' contractors' approval of the insurance coverage and revisions to the agreement, and relying upon their special relationship, Tetsu entered into a contract with CNY Construction Agreement" Management, Inc. ("CNY") to construct Tetsu ("GC Agreement") . . . *Id.*

322. *Trimasa Rest. Partners, LLC*, 2020 WL 2404958 at *2.

323. *See id.* at *2.

324. *Id.*

amount of coverage not already in the policy."[325] An exception exists for brokers that have a "special relationship" with their client.[326] For a special relationship to exist, an insured-client must establish either that:

> (1) The agent receives compensation for consultation apart from the payment of the premiums; (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent; or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on.[327]

These "special relationships" are exceedingly rare and, "in the insurance brokerage context are the exception, not the norm."[328]

Affirming the trial court, the First Department holds that "[t]he complaint neither alleges that plaintiff made a specific request for insurance coverage for liability arising from the presence of lead paint at its property nor contains allegations that establish a special relationship between the parties that would support plaintiff's tort and contract claims against defendants."[329] Rather, "[t]he allegations only describe a generalized request for adequate insurance, not an ongoing course of action and discussion regarding the specific coverage at issue."[330]

325. *Id.* (first citing Murphy v. Kuhn, 90 N.Y.2d 266, 270, 273, 682 N.E.2d 972, 974, 976, 660 N.Y.S.2d 371, 373, 375 (1997); and then citing Hoffend & Sons, Inc. v. Rose & Kierman, Inc., 7 N.Y.3d 152, 157–58, 851 N.E.2d 1149, 1152, 818 N.Y.S.2d 798, 801 (2006)).

326. *Id.* at *3 (first citing Voss v. Neth. Ins. Co., 22 N.Y.3d 728, 734–35, 8 N.E.3d 823, 828, 985 N.Y.S.2d 448, 452 (2014); and then citing *Murphy*, 90 N.Y.2d at 272, 682 N.E.2d at 975, 660 N.Y.S.2d at 374).

327. *Trimasa Rest. Partners, LLC*, 2020 WL 2404958 at *3. (first quoting *Voss*, 22 N.Y.3d at 735, 8 N.E.3d at 828, 985 N.Y.S.2d at 452; and then quoting *Murphy*, 90 N.Y.2d at 272, 682 N.E.2d at 975–76, 660 N.Y.S.2d at 374–75).

328. *Id.* (quoting *Voss*, 22 N.Y.3d at 736, 8 N.E.3d at 829, 985 N.Y.S.2d at 453).

329. Trimasa Rest. Partners, LLC v. Glob. Coverage, Inc., 191 A.D.3d 490, 490, 138 N.Y.S.3d 299, 299–300 (1st Dep't 2021) (first citing *Voss*, 22 N.Y.3d at 734, 8 N.E.3d at 828, 985 N.Y.S.2d at 452; and then citing *Hoffend*, 7 N.Y.3d at 158, 851 N.E.2d at 1152, 818 N.Y.S.2d at 801).

330. *Id.* at 490, 138 N.Y.S.3d at 300 (citing STB Invs. Corp. v. Sterling & Sterling, Inc., 178 A.D.3d 413, 413, 111 N.Y.S.3d 170, 170 (1st Dep't 2019)). In other words, Trimasa did not allege a "special relationship" based on a course of dealing about the specific coverage at issue herein, lead paint liability coverage, and thus the court dismissed that claim altogether as insufficient as a matter of law. *Id.*

XIX. ASSAULT AND BATTERY

During the *Survey* period, the Fourth Department in *Scalzo v. Central Co-Operative Insurance Co.* took an opportunity to remind all litigants that there is no such thing as a negligent assault.[331]

In the underlying action, Anthony Scalzo was alleged to have struck Robert Salerno with his fists while defending his wife.[332] Although criminal charges were dismissed, Salerno sued Scalzo, alleging that Scalzo "'assault[ed] [Salerno] by seizing him, striking him and punching him in the face and in particular the left eye, among other areas of the body' and that those actions were 'willful, intentional, unwarranted and without just cause or provocation.'"[333] However, for good measure, Salerno also alleged that Scalzo "'negligently struck [Salerno] so as to sustain serious injury' and that plaintiff 'acted in a reckless, careless and negligent manner toward [Salerno].'"[334]

Scalzo submitted a claim to his homeowners' insurance carrier, Central Co-Operative Insurance Company ("Central"), seeking a defense in the underlying action filed by Salerno, but Central denied coverage by way of the policy's exclusion for "liability . . . caused intentionally by or at the direction of any insured."[335] This action ensued, with Scalzo seeking a declaratory judgment that Central was obligated to defend and indemnify him in the underlying action.[336]

Finding for Central in upholding its disclaimer of coverage, the Fourth Department reminded that "[i]n assessing whether a policy exclusion for injuries 'intentionally caused' by the insured applies, a court must look to the pleadings in the underlying action and 'limit [its] examination to the nature of the conduct [of the insured] as it is there described.'"[337] Continuing, the court notes that "the 'analysis depends on the facts which are pleaded, not conclusory assertions,'"[338] and further that "[w]hen a complaint alleges in a conclusory manner that an assault was committed negligently, an insurer has no duty to

331. *See* 186 A.D.3d 998, 999–1000, 128 N.Y.S.3d 759, 762 (4th Dep't 2020).

332. *See id.* at 999, 128 N.Y.S.3d at 761.

333. *Id.*

334. *Id.*

335. *Id.*

336. *Scalzo*, 186 A.D.3d at 999, 128 N.Y.S.3d at 761.

337. *Id.* at 999, 128 N.Y.S.3d at 762 (quoting Allstate Ins. Co. v. Mugavero, 79 N.Y.2d 153, 159, 589 N.E.2d 365, 368, 581 N.Y.S.2d 142, 145 (1992)).

338. *Id.* (quoting *Allstate*, 79 N.Y.2d at 162, 589 N.E.2d at 370, 581 N.Y.S.2d at 147).

defend where the insured does not provide 'evidentiary support for the conclusory characterization of [the] conduct as negligent or provide an explanation of how the intrinsically intentional act[ ] of assault . . . could be negligently performed.'"[339] It is insufficient for an insured to "'exalt form over substance by labeling [an underlying tort] action as one to recover damages for negligence' where the conduct is inherently intentional."[340]

Accordingly, since Salerno's complaint was comprised of "no more than a conclusory characterization of plaintiff's conduct as negligent without any supporting factual allegations," it failed to provide "sufficient allegations of negligence to avoid the policy exclusion."[341]

Frequently, insurance policies will include assault and battery exclusions. However, despite express allegations of assault, such exclusions have their limits. The Fourth Department's decision in *O'Shei v. Utica First Insurance Co.* is a prime example.[342]

William Sager, Jr. died of injuries sustained when a bar manager at Molly's Pub shoved him down a flight of stairs.[343] The bar manager was sentenced to eighteen years in prison following a guilty plea to first degree manslaughter.[344] Molly's Pub was operated by NHJB, Inc. ("NHJB"), whose sole shareholder was Norman Habib, and an off-duty police officer, Adam O'Shei, who was providing security for the nightclub.[345]

NHJB and Habib were insured by Utica First Insurance Company ("Utica First").[346] However, Utica First disclaimed coverage pursuant to an assault and battery exclusion contained within their policy, and

339. *Id.* at 999–1000, 128 N.Y.S.3d at 762 (first citing *Allstate*, 79 N.Y.2d at 163, 589 N.E.2d at 371, 581 N.Y.S.2d at 147; then citing Pa. Millers Mut. Ins. Co. v. Rigo, 256 A.D.2d 769, 771, 681 N.Y.S.2d 414, 416 (3d Dep't 1998); and then citing Monter v. CNA Ins. Cos., 202 A.D.2d 405, 406, 608 N.Y.S.2d 692, 693 (2d Dep't 1994)).

340. *Id.* at 1000, 128 N.Y.S.3d at 762 (quoting State Farm Fire & Cas. Co. v. Joseph M., 106 A.D.3d 806, 808, 964 N.Y.S.2d 621, 623 (2d Dep't 2013)).

341. *Scalzo*, at 1000, 128 N.Y.S.3d at 762 (first citing *Allstate*, 79 N.Y.2d at 162–63, 589 N.E.2d at 370, 581 N.Y.S.2d at 147; and then citing Auto. Ins. Co. of Hartford v. Cook, 7 N.Y.3d 131, 137, 850 N.E.2d 1152, 1155–56, 818 N.Y.S.2d 176, 180 (2006)).

342. *See* 195 A.D.3d 1499, 1501, 150 N.Y.S.3d 180, 182 (4th Dep't 2021).

343. *Id.* at 1500, 150 N.Y.S.3d at 181.

344. *See id.*

345. *Id.*

346. *See id.*

its disclaimer was judicially verified by the Fourth Department in a separate declaratory judgment action.[347] Specifically, despite the insured's contentions that the underlying complaint contained a cause of action for premises liability, the court concluded that all claims arise out of the bar manager's assault, "without which [the plaintiff in the underlying personal injury action] would have no cause of action."[348] In other words, a conclusory allegation of "premises liability" cannot overcome the express factual allegations from which coverage is determined, and "there is simply 'no suggestion that [decedent] fell of his own accord.'"[349]

O'Shei thereafter commenced this declaratory judgment action, seeking coverage under the Utica First policy issued to NHJB and Habib.[350] Although the Fourth Department had found that the assault and battery exclusion precluded coverage for NHJB and Habib, it found O'Shei's claims distinguishable.[351] Despite the fact that O'Shei faced claims stemming from the bar manager's assault of Sager, the Fourth Department could not conclude "that all of the claims in the underlying action against plaintiff are based on or arise out of the bar manager's assault."[352] Alongside the assault claims, O'Shei was alleged to have "unlawfully arrested decedent following the bar manager's assault, and this cause of action is separate and distinct from the conduct to which the assault and battery exclusion would apply."[353] Such claims "would still exist notwithstanding the assault,"

347. *See O'Shei*, 195 A.D.3d at 1500, 150 N.Y.S.3d at 181–82 (citing NHJB, Inc. v. Utica First Ins. Co., 187 A.D.3d 1498, 1499, 131 N.Y.S.3d 452, 454 (4th Dep't 2020)).

348. *NHJB, Inc.*, 187 A.D.3d at 1501, 131 N.Y.S.3d at 455 (quoting U.S. Underwriters Ins. Co. v. Val-Blue Corp., 85 N.Y.2d 821, 823, 647 N.E.2d 1342, 1344, 623 N.Y.S.2d 834, 836 (1995)).

349. *Id.* (quoting Fish v. Dryden Mut. Ins. Co., 23 Misc. 3d 1105(A), 885 N.Y.S.2d 711 (Sup. Ct. Cortland Cnty. 2009)).

350. *See O'Shei*, 195 A.D.3d at 1501, 150 N.Y.S.3d at 182.

351. *Id.* (citing *NHJB, Inc.*, 187 A.D.3d at 1500, 131 N.Y.S.3d at 454).

352. *Id.* (first citing Mount Vernon Fire Ins. Co. v. Creative Hous., 88 N.Y.2d 347, 351, 668 N.E.2d 404, 405, 645 N.Y.S.2d 433, 434 (1996); and then citing *U.S. Underwriters Ins. Co.*, 85 N.Y.2d at 823, 647 N.E.2d at 1344, 623 N.Y.S.2d at 836).

353. *Id.* The Fourth Department dispelled Utica First's reliance on a dram shop exclusion for the same reason, but found an issue of fact as to whether O'Shei will ultimately be entitled to indemnification, as it could not be determined as a matter of law "whether, at the time of the incident, he was an employee of the nightclub acting within the scope of his employment." *Id.* (first citing Consol. Edison Co. of N.Y. v. Allstate Ins. Co., 98 N.Y.2d 208, 218, 774 N.E.2d 687, 690–91 746 N.Y.S.2d

placing them outside of the scope of the assault and battery exclusion.[354]

As was evident in *O'Shei* above, New York's flagbearer, with regard to the applicability of any assault and battery exclusion, is the New York Court of Appeals decision in *Mount Vernon Fire Insurance. Co. v. Creative Housing.*[355] However, at least one decision from the Second Department during this *Survey* period, *Union Mutual Fire Insurance Co. v. Johnson*, appeared to break ranks.[356]

On June 22, 2014, Christopher Briggs sustained several gunshot wounds to his abdomen at the premises owned by Cleveland Johnson.[357] Briggs sued Johnson, who tendered his defense in that action to his insurer, Union Mutual Fire Insurance Company ("Union Mutual").[358] Union Mutual disclaimed coverage due, in relevant part, to an assault and battery exclusion contained within Johnson's policy.[359]

Dissecting the underlying complaint, the Second Department indicated that Briggs alleged, in relevant part, that:

622, 6265–26 (2002); and then citing York Restoration Corp. v. Solty's Constr., Inc., 79 A.D.3d 861, 862, 914 N.Y.2d 178, 180 (2d Dep't 2010)).

354. *O'Shei*, 195 A.D.3d at 1501, 150 N.Y.S.3d at 182 (citing *Mount Vernon*, 88 N.Y.2d at 350, 668 N.E.2d at 405, 645 N.Y.S.2d at 434).

355. *See id.* (citing *Mount Vernon*, 88 N.Y.2d at 350, 668 N.E.2d at 405, 645 N.Y.S.2d at 434).

356. *See* 189 A.D.3d 1519, 1519–21, 134 N.Y.S.3d 736, 736–38 (2d Dep't 2020) (demonstrating that the Second Department did not cite or address *Mount Vernon*). The authors question whether the Second Department simply missed *Mount Vernon*, as it went unaddressed in the decision entirely despite its direct applicability to the facts and circumstances presented.

357. *Id.* at 1519, 134 N.Y.S.3d at 736–37.

358. *See id.* at 1519, 134 N.Y.S.3d at 737.

359. *See id.* Union Mutual's Disclaimer Letter, dated July 29, 2015, quotes the exclusion from the Union Mutual policy, in relevant part, as follows:

> Assault and/or battery shall not be deemed an "occurrence" or "injury" under the insurance. The Company shall not be obligated to pay on behalf of or defend the insured for any claim alleging an assault and/or battery no matter how the assault and/or battery is alleged to have occurred. It is understood and agreed that this insurance does not apply to "bodily injury" or "property damage" arising or alleged to arise out of: . . . Any act or omission of the insured, his agent or employee in connection with the prevention or suppression of an assault and/or battery or criminal acts by third parties.

Letter from Jeffrey B. Gold, Attorney at Law, Gold Benes LLP, to Cleveland Johnson, (July 29, 2015), https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=NX25mgHqIt6JJ9fnYSMWIA==. This Disclaimer goes on to cite *Mount Vernon* in support of its grounds for disclaimer. *Id.*

> he "sustained injuries while lawfully at the [subject] premises, including severe injuries to his abdomen"; Johnson was "negligent in failing to properly monitor, secure, supervise and/or intervene to prevent an individual from entering the residence with a firearm"; the "incident occurred as a result of [Johnson's] negligence."[360]

Further finding that the record was "silent as to the identity or motive of the shooter," the court held that Union Mutual failed to establish that allegations in the underlying action were "solely and entirely within the assault and/or battery exclusion."[361]

XX. DIRECTORS AND OFFICERS INSURANCE

Directors and Officers liability insurance ("D&O") provides coverage for the conduct of a corporate entity's officers in their capacity as such. Generally, insured directors or officers face litigation on account of their decisions and actions in furtherance of company objectives, in scenarios such as alleged securities violations. The First Department decided an appeal this year in *Westchester Fire Insurance Co. v. Schorsch*, which discusses the scope of coverage available to

360. *Id.* at 1520, 134 N.Y.S.3d at 737.

361. *Union Mut.*, 189 A.D.3d at 1520, 134 N.Y.S.3d at 738. This is where the opinion of the author's diverges from the Second Department's reasoning. In *Mount Vernon*, the Court of Appeals considered an assault and battery exclusion where an individual was assaulted by an unknown individual in an apartment house. *See* 88 N.Y.2d 347, 349, 668 N.E.2d 404, 405, 645 N.Y.S.2d 433, 434 (1996). The claim against the premises owner was "negligent supervision." *Id.* The Court of Appeals found that despite the negligence claims, the "operative act" that caused the injury was the assault and battery:

> Similarly, though Hunter's claim sounds in negligence, the theory she asserts has little to do with whether the injury sought to be compensated was based on an assault excluded under the policy. Instead, the language of the policy controls this question and while the theory pleaded may be the insured's negligent failure to maintain safe premises, the operative act giving rise to any recovery is the assault. While the insured's negligence may have been a proximate cause of plaintiff's injuries, that only resolves its liability; it does not resolve the insured's right to coverage based on the language of the contract between him and the insurer. Merely because the insured might be found liable under some theory of negligence does not overcome the policy's exclusion for injury resulting from assault. . . .

Id. at 352, 668 N.E.2d at 405, 645 N.Y.S.2d at 434 (first citing New Hampshire Ins. Co. v. Jefferson Ins. Co., 213 A.D.2d 325, 329–30, 624 N.Y.S.2d 392, 395–96 (1st Dep't 1995); and then citing Ruggerio v. Aetna Life & Cas. Co., 107 A.D.2d 744, 744–45, 484 N.Y.S.2d 106, 106–07 (2d Dep't 1985)). Given the language at issue in the relevant exclusion, it is entirely irrelevant who committed the assault, so long as the assault was the sole predicate to Briggs' alleged injuries.

directors under the "insured vs. insured" exclusion contained within the relevant D&O policy.[362]

The directors and officers of RCS Capital Corporation ("RCAP"), a wholesale broker-dealer and investment banking and advisory business, formed AR Capital LLC to create and manage non-traded investment vehicles, such as Real Estate Investment Trusts.[363] In 2014, RCAP's stock plummeted as a result of a financial scandal involving a related company, and sought a negotiated restructuring with its unsecured creditors.[364] Shortly thereafter, RCAP filed for chapter 11 bankruptcy pursuant to a Creditor Trust and Creditor Trust Agreement ("CTA").[365]

> Pursuant to the CTA, rather than all of RCAP's assets remaining with RCAP as the bankruptcy debtor or debtor-in-possession (DIP), under the default provisions of section 1141 of the Bankruptcy Code, certain assets were held free and clear of any creditor claims in the bankruptcy and vested in the Creditor Trust. The Creditor Trust, as a representative of the bankruptcy estate, was charged with liquidating and distributing those assets, outside of the bankruptcy proceeding, on behalf of the trust, and, importantly, for the benefit of RCAP's unsecured creditors. The CTA also provided that the Creditor Trust would be administered by a Trust Administrator, who would take direction from a Creditor Trust Board consisting of three Trustees chosen by creditors of RCAP.[366]

However, in March 2017, the Creditor Trust brought an action against numerous parties, including former directors and officers of RCAP, alleging that they breached fiduciary duties owed to RCAP for the benefit of AR Capital LLC.[367] It was alleged that the officers "use[d] . . . their dual control of AR Capital LLC and RCAP to enrich themselves and their affiliate entities at the expense of RCAP's public stockholders."[368] RCAP's former officers submitted insurance claims to Westchester Fire Insurance Company ("Westchester"), which had

362. *See* 186 A.D.3d 132, 133–34, 129 N.Y.S.3d 67, 70 (1st Dep't. 2020).

363. *See id.* at 135, 129 N.Y.S.3d at 70.

364. *See id.* at 135, 129 N.Y.S.3d at 71.

365. *Id.* at 136, 129 N.Y.S.3d at 71.

366. *Id.* at 136–37, 129 N.Y.S.3d at 71.

367. *Westchester Fire*, 186 A.D.3d at 137–38, 129 N.Y.S.3d at 72 (citing RCS Creditor Trust v. Schorsch, No. 2017-0178-SG, 2017 Del. Ch. LEXIS 820, at *3 (Nov. 30, 2017)).

368. *Id.* at 138, 129 N.Y.S.3d at 72.

issued a seventh layer excess liability D&O policy to RCAP for the relevant period.[369]

Westchester disclaimed coverage in reliance upon an exclusion contained within the policy issued to RCAP.[370] Westchester filed this declaratory judgment action seeking judicial approval of its reliance upon the "insured vs. insured" exclusion contained within its policy.[371]

Specifically, the Westchester policy incorporated an insured vs. insured exclusion from the underlying primary policy issued by XL Specialty Insurance Company, which excluded coverage for "any Claim made against an Insured Person . . . by, on behalf of, or at the direction of the Company or Insured Person."[372] However, that exclusion contained "a bankruptcy trustee exception, which restores coverage excluded under the insured vs. insured exclusion, for claims 'brought by the Bankruptcy Trustee or Examiner of the Company or any assignee of such Trustee or Examiner, or any Receiver, Conservator, Rehabilitator, or Liquidator or comparable authority of the Company.'"[373]

The court found, in a matter of first impression, that the bankruptcy trust exception applied and that, accordingly, the officers were entitled to coverage under Westchester's policy issued to RCAP.[374]

> Since the D & O policy covers the debtor in the insured vs. insured exclusion even in the advent of bankruptcy, the D & O policy allows the company when transformed into a [debtor-in-possession] or debtor corporation upon the filing of the petition to retain its factual identity as far as the insured vs. insured exclusion is concerned. This is because, "[l]iterally, the debtor's management remains in possession of the estate's property [including cause of action against officers and directors] and remains responsible for managing the estate's financial affairs while the case is pending."[375]

369. *See id.*

370. *See id.* at 138, 129 N.Y.S.3d at 72–73.

371. *See id.*

372. *Westchester Fire*, 186 A.D.3d at 137, 129 N.Y.S.3d at 72.

373. *Id.*

374. *See id.* at 141–42, 129 N.Y.S.3d at 75.

375. *Id.* at 142, 129 N.Y.S.3d at 75 (first citing JEFF FERRIELL & EDWARD J. JANGER, UNDERSTANDING BANKRUPTCY 143–50 (2d ed. 2007); and then citing Michael D. Sousa, *Making Sense of the Bramble-Filled Thicket: The "Insured vs. Insured" Exclusion in the Bankruptcy Context*, 23 EMORY BANKR. DEV. J. 365, 404 (2007)).

Since the D&O claims themselves are prosecuted by the Creditor Trust, rather than the debtor corporation, which is a creature of the bankruptcy court, the Creditor Trust is excepted from the insured vs. insured exclusion as a Bankruptcy Trustee contemplated by the policy's exception.[376] Additionally, since the bankruptcy trustee exception includes "comparable authority," the overly narrow construction proposed by Westchester impermissibly ignores the absence of any clear limiting language therein.[377]

XXI. FIRST-PARTY INSURANCE

Several cases addressing first-party, property insurance issues were handed down by appellate courts this *Survey* period, and we have chosen to address a few that addressed important concepts to remember. The first on our list, the Second Department's decision in *Parauda v. Encompass Insurance Company of America*, is a reminder that the definition of collapse means what it says.[378]

On October 8, 2014, insured homeowners (the "Parudas") filed an insurance claim with their carrier, Encompass Insurance Company of America ("Encompass").[379] Plaintiffs' claim was centered around extensive decay found in and throughout the wooden framing of their brick home.[380] The decay was caused by water infiltration over a long period of time.[381] Encompass eventually denied the claim on the basis that coverage for damage resulting from decay/rot was excluded.[382] In addition, as the home was still standing it did not satisfy the definition of collapse as set forth in the policy.[383]

The trial court found in favor of plaintiffs, and the Appellate Division reversed.[384] In so holding, the Court noted first that while a carrier bears the burden of establishing the application of a certain exclusion, the duty to establish coverage falls squarely upon the shoulders of the insured.[385]

376. *See id.* at 143–44, 129 N.Y.S.3d at 76.

377. *Westchester Fire*, 186 A.D.3d at 144–45, 129 N.Y.S.3d at 77.

378. *See* 188 A.D.3d 1083, 1085, 136 N.Y.S.3d 453, 456 (2d Dep't 2020).

379. *Id.* at 1084, 136 N.Y.S.3d at 455.

380. *See id.*

381. *See id.*

382. *See id.*; *see also* Parauda v. Encompass Ins. Co. of Am., No. 61128/15, 2018 N.Y. slip op. 50109(U), at 3 (Sup. Ct. Westchester Cnty. Jan. 25, 2018).

383. *See Parauda*, 188 A.D.3d at 1084, 136 N.Y.S.3d at 455.

384. *See id.*

385. *See id.* at 1084–85, 136 N.Y.S.3d at 455 (first citing Fruchthandler v. Tri–State Consumer Ins. Co., 171 A.D.3d 706, 707, 96 N.Y.S.3d 649, 650 (2d Dep't

Here, the policy language at issue required collapse, defined as "an abrupt falling down or caving in of . . . any part of [the property]."[386] The evidence submitted by Encompass demonstrated that the home never "fell down or caved in," and thus the Parudas could not demonstrate that a "collapse" had occurred.[387] In so holding, the Court further rejected the Parudas proffered expert because he, likewise, failed to identify "any portion of the property [that] was no longer standing or identify any specific damage which fell within the definition of a covered 'collapse.'"[388]

In a Fourth Department decision on another first-party issue, *Lynch v. Preferred Mutual Insurance Co.*, the court assessed the scope of coverage available following application of an insurer's latent defect exclusion.[389]

Preferred Mutual Insurance Company ("Preferred") issued a homeowners' insurance policy to Ryan Lynch.[390] Lynch subsequently filed an insurance claim involving "bulging of the walls in the living room."[391] Preferred disclaimed coverage due to an exclusion for design defects within the relevant policy.[392] Although short on facts, the Fourth Department accepted an affidavit from Preferred's retained expert, a professional engineer,

> who inspected the home and opined that the bulging of the walls in the living room was "likely the result of rafter spread due to an inherent pre-existing design defect relating to the construction of the vaulted ceiling and wall structure in the

2019); and then citing Platek v. Town of Hamburg, 24 N.Y.3d 688, 694, 26 N.E.3d 1167, 1171, 3 N.Y.S.3d 312, 316 (2015)).

386. *Id.* at 1085, 136 N.Y.S.3d at 456 (first citing Squairs v. Safeco Natl. Ins., 136 A.D.3d 1393, 1394, 25 N.Y.S.3d 502, 503 (4th Dep't 2016); and then citing Rapp B. Props., LLC v. RLI Ins. Co., 65 A.D.3d 923, 924–25, 885 N.Y.S.2d 283, 285 (1st Dep't 2009)).

387. *See id.*

388. *Parauda*, 118 A.D.3d at 1085, 136 N.Y.S.3d at 456. The court also agreed with Encompass that the claimed damages fell within certain exclusions in the policy. *Id.* (first citing *Squairs*, 136 A.D.3d at 1394, 25 N.Y.S.3d at 503; and then citing Cali v. Merrimack Mut. Fire Ins. Co., 43 A.D.3d 415, 417, 841 N.Y.S.2d 128, 130 (2d Dep't 2007)).

389. *See* 194 A.D.3d 1460, 1461, 147 N.Y.S.3d 841, 842 (4th Dep't 2021).

390. *Id.* at 1460–61, 147 N.Y.S.3d at 842.

391. *Id.* at 1461, 147 N.Y.S.3d at 842.

392. *See id.*

> living room when the residence was constructed approximately 25 years" earlier.[393]

The court notes that the opinion above was consistent with that of Lynch's own retained expert, and further that such a cause met the policy's definition of "inherent vice" or "latent defect," which are excluded from coverage.[394] Specifically, the Fourth Department indicates that "[a] latent defect within the meaning of a policy exclusion is an imperfection in the material used. . . . It has also been defined as a defect that is hidden or concealed from knowledge as well as from sight and which a reasonable customary inspection would not reveal."[395] Further, the court determined that an "inherent vice" is defined as "[a] property or good's defect, hidden or obvious, that causes or contributes to damage suffered by the property or good."[396] Such a design defect, whether characterized as a "latent defect" or "inherent vice" was excluded from coverage.[397]

Finally, the Third Department in *Imrie v. Ratto* discussed the difference between the claim of an insured versus that of a mortgagee.[398]

Daniel F. Imrie II owned an auto repair business and garage which he leased to Ratto Restorations, Inc. ("Ratto Inc.").[399] In 2010, plaintiff formally sold the garage to Ratto's principal, Andrew Ratto.[400] In connection with that deal, plaintiff retained two mortgage security interests on the property and requested that Ratto procure fire insurance naming plaintiff as a mortgagee/payee under the policy.[401] After closing, Andrew Ratto's spouse (a co-principal in Ratto Inc.) advised Erie Insurance Company's agent, Jeffrey D. Howard, to include Imrie as a mortgagee under the policy.[402] Several years later, the property was destroyed by fire, and Imrie provided

393. *Id.*

394. *Lynch*, 194 A.D.3d at 1461, 147 N.Y.S.3d at 842.

395. *See id.* (quoting Luttenberger v. Allstate Ins., 122 Misc. 2d 365, 366, 470 N.Y.S.2d 988, 989 (Dist. Ct. Suffolk Cnty. 1984)) (citing St. John Fisher Coll. v. Cont'l Corp., 184 A.D.2d 1063, 1063, 586 N.Y.S.2d 912, 912 (4th Dep't 1992), *lv. denied* 80 N.Y.2d 761 (1992)).

396. *Id.* (quoting *Inherent Vice*, BLACK'S LAW DICTIONARY 1877 (11th ed. 2019)).

397. *See id.*

398. *See* 187 A.D.3d 1344, 1350, 134 N.Y.S.3d 101, 108 (3d Dep't 2020).

399. *See id.* at 1344, 134 N.Y.S.3d at 103.

400. *Id.* at 1344, 134 N.Y.S.3d at 104.

401. *Id.*

402. *Id.*

notice of a claim under the relevant Erie policy.[403] Erie disclaimed coverage for the loss for, among other reasons, the alleged non-cooperation of the Rattos and/or Ratto Inc., and plaintiff sought a declaratory judgment against Erie to secure his rights as a mortgagee.[404]

Addressing the scope of rights afforded to a mortgagee under an insurance policy, the Third Department notes that Imrie's rights were separate and independent from the policyholder/insureds.[405] As such, any alleged non-cooperation by Ratto Inc. was irrelevant as to whether Imrie's coverage attached.[406] Having decided he was an insured, and having decided there was no basis to remove coverage for Imrie, the Court granted Imrie's demand for a declaratory judgment and resulting damages.[407]

XXII. POLICY REFORMATION

When policyholders are met with a disclaimer of coverage, there is often confusion regarding why they ever purchased insurance in the first place. Some challenge the scope of coverage available by seeking reformation of the policy to ensure that its terms match the intent of the parties. An example of when reformation is sought was assessed by the Third Department in *Hilgreen v. Pollard Excavating, Inc.*[408]

In June 2016, Matthew Hilgreen allegedly sustained injuries when he fell on the staircase outside of his apartment.[409] Hilgreen sued the Pollards who owned the apartment complex and operated a cafe on the lower level of the building.[410] Importantly for our purposes, Hilgreen also named Pollard Excavating, Inc. and Pollard Disposal

403. *See Imrie*, 187 A.D.3d at 1345, 134 N.Y.S.3d at 104.

404. *See id.*; *see also id.* at 1350, 134 N.Y.S.3d at 108. For our purposes, we have intentionally removed discussion in this matter regarding reformation of the policy to reflect Imrie as the mortgagee. Suffice it to say that Imrie was successful in arguing that he was, in fact, intended to be mortgagee on the relevant policy.

405. *Id.* at 1349–50, 134 N.Y.S.3d at 108 (quoting Syracuse Sav. Bank v. Yorkshire Ins. Co., Ltd., 301 N.Y. 403, 407, 94 N.E.2d 73, 75 (1950)) (citing Murray v. N. Country Ins. Co., 277 A.D.2d 847, 849, 716 N.Y.S.2d 820, 822 (3d Dep't 2000)).

406. *Id.* at 1350, 134 N.Y.S.3d at 108.

407. *See id.*

408. 193 A.D.3d 1134, 1135, 146 N.Y.S.3d 323, 325 (3d Dep't 2021).

409. *Id.* at 1135, 146 N.Y.S.3d at 324.

410. *See id.*

Service Inc. (the "Pollard Entities") as defendants, each of which was owned and operated by the Pollards.[411]

The Pollards tendered their defense to Central Mutual Insurance Company and National Interstate Insurance Company (the "Insurers"), who had issued policies to one of the Pollard Entities.[412] Both Insurers disclaimed coverage, asserting that the Pollards were not named insureds under either policy.[413] Subsequently, the Pollards sued the Insurers and an agency that procured those policies for reformation, claiming that the parties intended to include the Pollards as insureds thereunder.[414]

The Third Department notes that the Pollards bore the burden to show "by clear and convincing evidence, that the writing in question was executed under mutual mistake or unilateral mistake coupled with fraud and to demonstrate in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties."[415]

In assessing the relevant allegations, the Third Department provides that

> the Pollards allege in the second amended third-party complaint that Central Mutual mistakenly failed to name the Pollards as insureds or additional insureds under the insurance policy contract issued to Pollard Excavating, that Central Mutual mistakenly believed that the Pollards were covered in their individual capacities under said insurance policy contract, that [the insurance agent] mistakenly believed that the Pollards were covered in their individual capacities under the insurance policy contract, and that it was the intent of [insurance agent], as the agent of Central Mutual, that the Pollards be covered individually. The Pollards further allege that they believed that they were covered in their individual capacities and that the failure of Central Mutual to name them as such was the product of a mutual mistake.[416]

411. *See id.*

412. *Id.*

413. *Hilgreen*, 193 A.D.3d at 1135, 146 N.Y.S.3d at 324–25.

414. *Id.* at 1135, 146 N.Y.S.3d at 325.

415. *Id.* at 1137, 146 N.Y.S.3d at 326 (quoting Imrie v. Ratto, 187 A.D.3d 1344, 1346, 134 N.Y.S.3d 101, 105 (3d Dep't 2020)) (citing George Backer Mgmt. Corp. v. Acme Quilting Co., 46 N.Y.2d 211, 219, 385 N.E.2d 1062, 1066, 413 N.Y.S.2d 135, 139 (1978)).

416. *Id.*

However, the Pollards failed to plead that Central Mutual agreed to provide coverage to the Pollards individually, whether orally or otherwise.[417] Accordingly, the complaint failed to sufficiently allege that the parties "reached an oral agreement and, unknown to either [party], the signed writing d[id] not express that agreement."[418]

XXIII. LONG-TAIL CLAIMS

There is complexity and nuance involved in claims arising from long-tail toxic exposures to materials like asbestos and lead paint. Exemplary of a few of the more important issues involved, the Fourth Department in *Carrier Corporation v. Allstate Insurance Company* had an opportunity to address the transfer of insurance coverage from one company to successor companies, while also addressing the timing of an "injury-in-fact" trigger of coverage, as well as proper allocation amongst overlapping insurers.[419]

Carrier Corporation ("Carrier") and Elliott Company ("Elliot") were once-related entities that have since faced countless asbestos exposure lawsuits from their products.[420] In this declaratory judgment action, those entities sought coverage under a number of insurance policies, including fifth-layer excess policies issued by Fireman's Fund Insurance Company ("Fireman's Fund").[421]

At issue on appeal were two main issues: first, whether the "corporate reorganization agreement that spun off Elliott's predecessor business, Carrier transferred to Elliott the right to

417. *See id.* at 1138, 146 N.Y.S.3d at 326.

418. *Hilgreen*, 193 A.D.3d at 1138, 146 N.Y.S.3d at 326–27 (first quoting Chimart Assocs. v. Paul, 66 N.Y.2d 570, 573, 489 N.E.2d 231, 233–34, 498 N.Y.S.2d 344, 347 (1986); then quoting Friedland Realty, Inc. v. 416 W, LLC, 120 A.D.3d 1185, 1186, 993 N.Y.S.2d 43, 45 (2d Dep't 2012); then quoting Greater N.Y. Mut. Ins. Co. v. United States Underwriters Ins. Co., 36 A.D.3d 441, 443, 827 N.Y.S.2d 147, 149 (1st Dep't 2007); and then quoting *Imrie*, 187 A.D.3d at 1346–47, 134 N.Y.S.3d at 105). Notably, two judges dissented, likely resulting in review by the Court of Appeals. *See id.* at 1139, 146 N.Y.S.3d at 327. In comparison to this case, we will also flag for your attention that the Third Department in *Imrie*, discussed above, provided an example of a successful claim for reformation. *See* 187 A.D.3d at 1352, 134 N.Y.S.3d at 110.

419. *See* 187 A.D.3d 1616, 1617, 133 N.Y.S.3d 697, 699–700 (4th Dep't 2020). There is a lot to unpack in this decision. Not only do long-tail claims, by their nature, extend continuously for a number of years, but they involve bet-the-company damages and long defunct entities in dying industries like asbestos manufacturing.

420. *Id.* at 1617, 133 N.Y.S.3d at 700.

421. *See id.*

insurance coverage for liabilities arising out of business activities conducted by Elliott's predecessor business prior to that date;"[422] and second, exactly how coverage was triggered and allocated amongst carriers.[423]

Finding coverage under the Fireman's Fund policy extended to Elliot following corporate reorganization, the Fourth Department concluded that after

> extensive discovery in the action before [it], plaintiffs met their initial burden on the motion by establishing with extrinsic evidence in admissible form that, notwithstanding the ambiguity arising from the absence of an exhibit referred to in the reorganization agreement that ostensibly was to set forth the assets being transferred, the insurance rights were transferred to Elliott under the reorganization agreement.[424]

Accordingly, despite issuing its insurance policy to Carrier, Fireman's Fund owed insurance coverage to Elliott as a matter of law.[425]

Once the court determined who owed what to whom, the question then became when and how much? Specifically, the court next addressed whether the "injury-in-fact in an asbestos action occurs from the date of the first claimed exposure through death or the filing of a suit, thereby triggering each and every policy in effect from the date of first claimed exposure."[426] Not surprisingly, "the parties dispute[d] when an asbestos-related injury actually begins."[427] Where the plaintiffs argued that injury-in-fact occurs at the time of first exposure, the insurer argued that "injury-in-fact occurs only when a

422. *Id.*

423. *See id.* at 1618–19, 133 N.Y.S3d at 701.

424. *Carrier*, 187 A.D.3d at 1618, 133 N.Y.S.3d at 700 (first citing Wolfson v. Faraci Lange, LLP, 103 A.D.3d 1272, 1273, 959 N.Y.S.2d 792, 794 (4th Dep't 2013); and then citing Curiale v. DR Ins. Co., 198 A.D.2d 52, 52–53 (1st Dep't 1993)). Continuing, the court notes that "documents prepared contemporaneously with the reorganization, the deposition testimony of employees involved in the reorganization, and evidence of post-reorganization conduct, that the parties to the reorganization agreement, consistent with the language therein, intended to, and did, transfer assets including insurance rights to Elliott." *Id.* (citing *Wolfson*, 103 A.D.3d at 1273, 959 N.Y.S.2d at 794).

425. *See id*. at 1619, 133 N.Y.S.3d at 701.

426. *Id.* at 1619, 133 N.Y.S.3d at 700–01.

427. *Id.* at 1619, 133 N.Y.S.3d at 701.

threshold level of asbestos fiber or particle burden is reached that overtakes the body's defense mechanisms."[428]

Reversing the trial court's agreement with the plaintiffs, the Fourth Department noted that the lower court had "improperly rejected defendant's contention that the coverage trigger issue under the injury-in-fact test presented a question of fact . . ."[429] However, the Fourth Department agreed with the trial court regarding allocation, since it "properly concluded that the losses among triggered policies must be allocated through the all sums method, which 'permits the insured to collect its total liability . . . under any policy in effect during the periods that the damage occurred, up to the policy limits.'"[430] This was because "[t]he non-cumulation and prior insurance provisions incorporated in the fifth-layer excess policies 'plainly contemplate that multiple successive insurance policies can indemnify the insured for the same loss or occurrence by acknowledging that a covered loss or occurrence may "also [be] covered in whole or in part under any other excess [p]olicy issued to the [insured] prior to the inception date" of the instant polic[ies],' thus rendering all sums the appropriate allocation method."[431] The Fourth Department also agreed that

428. *Id.*

429. *Carrier*, 187 A.D.3d at 1619, 133 N.Y.S.3d at 701. The cases the trial court relied on involved one of two different scenarios. The first scenario was where "the parties stipulated or otherwise did not dispute that first exposure triggered coverage." *Id.* (first citing Pacific Empls. Ins. Co. v. Troy Belting & Supply Co., No. 1:11-CV-912, 2015 LEXIS 130681, at *13 (N.D.N.Y., Sept. 29, 2015,); and then citing United States Fid. & Guar. Co. v. Treadwell Corp., 58 F. Supp. 2d 77, 95 (S.D.N.Y. 1999)). The second scenario was "where the issue was not, in fact, specifically resolved on summary judgment and instead presented a factual question for resolution by the factfinder at trial based on medical evidence." *Id.* (citing Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178, 1193 (2d Cir. 1995); then citing Am. Home Prods. Corp. v. Liberty Mut. Ins. Co., 748 F.2d 760, 765 (2d Cir. 1984); then citing Fulton Boiler Works, Inc. v. Am. Motorists Ins. Co., 828 F. Supp. 2d 481, 489 (N.D.N.Y. 2011); then citing *In re* Viking Pump, Inc., 148 A.3d 633, 684 (Del. 2016); and then citing Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1083 (5th Cir. 1973).

430. *Id.* at 1621, N.Y.S.3d at 702–03 (quoting *Matter of* Viking Pump, Inc., 27 N.Y.3d 244, 255, 52 N.E.3d 1144, 1149, 33 N.Y.S.3d 118, 123 (2016)) (first citing Roman Cath. Diocese of Brooklyn v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 21 N.Y.3d 139, 154, 991 N.E.2d 666, 676, 969 N.Y.S.2d 808, 818 (2013); and then citing Consol. Edison Co. of N.Y. v. Allstate Ins. Co., 98 N.Y.2d 208, 222, 774 N.E.2d 687, 693, 746 N.Y.S.2d 622, 628 (2002)).

431. *Id.* at 1621, N.Y.S.3d at 703 (quoting *Viking Pump*, 27 N.Y.3d at 261, 52 N.E.3d at 1153, 33 N.Y.S.3d at 123,); (citing *Matter of* Liquidation of Midland Ins. Co., 171 A.D.3d 564, 564–65, 98 N.Y.S.3d 195, 196 (1st Dep't 2019)).

"vertical exhaustion—which 'allow[s] the [i]nsureds to access each excess policy once the immediately underlying policies' limits are depleted, even if other lower-level policies during different policy periods remain unexhausted'—is required here."[432]

XXIV. BAD FAITH

The standard in New York to plead and prove an insurer's breach of the implied covenant of good faith and fair dealing has long proven challenging to insureds and other claimants. Exemplary of the challenges faced, the Second Department in *Waters et al. v. Geico Insurance Agency, Inc., et al.*, held that an insured failed to establish bad faith by its insurer and assigned counsel when it failed to settle an underlying action within the available insurance policy limits.[433]

Following a three-car accident in April 2010, Derek Fruendt and his wife sued William Waters, as well as Louis J. Maccarone and Maccarone Leasing (collectively, "Maccarone") to recover for personal injuries sustained in the collision.[434] Geico Insurance Agency Inc. ("Geico") had issued Waters an automobile insurance policy providing $100,000 in liability limits.[435]

Geico provided Waters with a defense in the personal injury action, appointing Russo Apoznanski & Tambasco ("Russo") as counsel for Waters.[436] After a trial on liability, Waters was apportioned eighty-five percent liability for the accident.[437] Subsequently, a judgment awarded damages against both Waters and Maccarone.[438] In turn, however, Maccarone sought and obtained a judgment awarding $323,000 in damages for contribution against Waters, representing the amount paid by Maccarone in excess of its proportionate share of the judgment obtained by the Fruendt.[439]

432. *Carrier*, 187 A.D.3d at 1621, N.Y.S.3d at 703 (quoting *Viking Pump*, 27 N.Y.3d at 264, 33 N.Y.S.3d at 130, 52 N.E.3d at 1156) (citing *Liquidation of Midland Ins. Co.*, 171 A.D.3d at 565, 98 N.Y.S.3d at 196).

433. *See* 189 A.D.3d 931, 932–33, 133 N.Y.S.3d 494, 495 (2d Dep't 2020) (quoting Pavia v. State Farm Mut. Auto. Ins., 82 N.Y.2d 445, 453, 626 N.E.2d 24, 27, 605 N.Y.S.2d 208, 210 (1993)).

434. *See id.* at 931, 133 N.Y.S.3d at 494.

435. *Id.*

436. *Id.* at 931–32, 133 N.Y.S.3d at 494.

437. *Id.* at 932, 133 N.Y.S.3d at 494.

438. *See Waters*, 189 A.D.3d at 932, 133 NY.S.3d at 494.

439. *Id.*

In June 2017, Waters sued Geico and Russo for an alleged breach of the implied covenant of good faith and fair dealing.[440] Specifically, Waters alleged that the carrier and assigned counsel engaged in bad faith by not settling the underlying action for the policy limit.[441]

Finding for Geico and Russo, the Second Department noted that "[i]mplicit in every contract is a covenant of good faith and fair dealing which encompasses any promise that a reasonable promisee would understand to be included."[442] Citing well established New York Court of Appeals precedent, the court provided:

> To establish a prima facie case of bad faith refusal to settle, a plaintiff must demonstrate that the insurer's conduct constituted a gross disregard of the insured's interests, that is a deliberate or reckless failure to place the interests of the insured on an equal footing with the insurer's own interests when considering a settlement offer.[443]

However, Geico and Russo established the absence of conduct constituting a "gross disregard" of Waters' interests.[444]

However, claims for the breach of the implied covenant of good faith and fair dealing are not always so easily dispelled. For example, in *25 Bay Terrace Associates, L.P. v. Public Service Mutual Insurance Co.*, an insured's bad faith cause of action against its carrier survived summary judgment where the court was able to distinguish it from a routine claim for breach of contract.[445]

25 Bay Terrace Associates, L.P. ("Bay Terrace") commenced this action seeking damages for breach of contract and bad faith related to its insurer's handling of a Hurricane Irene insurance claim.[446] Public Service Mutual Insurance Company ("Public Service") had issued a commercial insurance policy for the multi-story property located in

440. *Id.*

441. *Id.*

442. *Id.* at 932, 133 N.Y.S.3d at 495 (first citing New York Univ. v. Cont'l Ins. Co., 87 N.Y.2d 308, 318, 662 N.E.2d 763, 769, 639 N.Y.S.2d 283, 289 (1995); and then citing Gutierrez v. Gov't Emps. Ins. Co., 136 A.D.3d 975, 976, 25 N.Y.S.3d 625, 627 (2d Dep't 2016)).

443. *Waters*, 189 A.D.3d at 932, 133 NY.S.3d at 495 (first citing Pavia v. State Farm Mut. Auto. Ins. Co., 82 N.Y.2d 445, 453, 626 N.E.2d 24, 27, 605 N.Y.S.2d 208, 211 (1993); and then citing Lavaud v. Country-Wide Ins. Co., 29 A.D.3d 745, 746, 815 N.Y.S.2d 680, 681 (2d Dep't 2006)).

444. *Id.* (citing *Pavia*, 82 N.Y.2d at 453–54, 626 N.E.2d at 27–28, 605 N.Y.S.2d at 211–12).

445. *See* 194 A.D.3d 668, 672, 148 N.Y.S.3d 484, 490 (2d Dep't 2021).

446. *Id.* at 669, 148 N.Y.S.3d at 487–88.

Staten Island, New York.[447] Bay Terrace claimed that the hurricane caused damage to the roof fascia and support structures of the property.[448] However, Public Service disclaimed coverage, asserting that the damage was instead attributable to normal wear and tear or prior maintenance work.[449]

The court denied both parties' motions for summary judgment motion on the breach of contract claim, as each party raised triable issues of fact.[450] Although Public Service raised questions as to whether the damage was caused long before Hurricane Irene's landfall in 2011 and was instead attributable to wear and tear or prior maintenance work, Plaintiff countered with proof that strong winds loosened and tore fascia from the roof, which caused water infiltration.[451]

Relatedly, the Second Department also found that Public Service failed to establish entitlement to summary judgment on Bay Terrace's bad faith claim.[452] Noting that a cause of action for bad faith is not necessarily duplicative of a breach of contract claim, the court reasoned that the unresolved issues regarding the cause of damage were issues "central to both causes of action," such that dismissal would be premature at this juncture.[453]

447. *Id.*

448. *Id.*

449. *See id.* at 671, 148 N.Y.S.3d at 489.

450. *See 25 Bay Terrace Assoc.*, 194 A.D.3d at 671, 148 N.Y.S.3d at 489 (first citing *Pilgrim v. Vishwanathan*, 151 A.D.3d 769, 771, 56 N.Y.S.3d 268, 269 (2d Dep't 2017); Milkins v. New York City Tr. Auth., 140 A.D.3d 936, 937, 33 N.Y.S.3d 454, 456 (2d Dep't 2016); and then citing *Gonzalez v. City of New Rochelle*, 132 A.D.3d 724, 725, 18 N.Y.S.3d 98, 99 (2d Dep't 2015)).

451. *See id.*

452. *Id.* at 672, 148 N.Y.S.3d at 490.

453. *Id.* (first citing Gitlin v. Chirinkin, 98 A.D.3d 561, 562, 949 N.Y.S.2d 712, 714 (2d Dep't 2012); and then citing Ptasznik v. Schultz, 223 A.D.2d 695, 696, 637 N.Y.S.2d 469, 470 (2d Dep't 1996). In fact, citing its prior decision in the same action, the court had already concluded in 2016 that it would not dismiss the action on duplicity grounds. *See* 25 Bay Terrace Assocs., L.P. v. Public Serv. Mut. Ins. Co., 144 A.D.3d 665, 667–68, 40 N.Y.S.3d 469, 471 (2d Dep't 2016). Specifically citing alleged conduct of Public Service during its investigation of the loss, the court found that Bay Terrace had adequately pled the two causes of action separately:

> [T]he plaintiff submitted affidavits from, among others, its property manager, one of its tenants, and its roofing contractor, all of whom stated that the defendant's adjustor who inspected the property on two occasions prior to the defendant's denial of the majority of the claim verbally assured them that water had infiltrated the building as a result of the hurricane and that the loss was completely covered under the policy. The affidavits submitted by the

In *R&R Third Properties, LLC v. Federal Insurance Company*, the First Department found that a carrier failed to establish that its insured was not entitled to consequential damages in a bad faith claim.[454]

Federal Insurance Company ("Federal") issued an insurance policy to Rosenbaum, Rosenfeld & Sonnenblick, LLP ("RRS") that provide coverage for, *inter alia*, a medical scanner used in RRS' practice for diagnosing and treating patients.[455] Although Federal argued that RRS failed to expressly assert claims for consequential damages stemming from Federal's purported bad faith conduct in investigating flood damage to the machine, the First Department noted that their allegations *in toto* were sufficient to support such a claim.[456] Further, such express claims were made within RRS' supplemental response to interrogatories, which is permitted under New York civil procedure.[457]

In fact, the court found that "the record [was] replete with issues of fact as to whether plaintiffs' scanner could be repaired, obviating the need for replacement, which calls into question Federal's good faith in investigating their insurance claim."[458] Even in the absence of bad faith, Federal was unable to establish that RRS' claimed consequential damages were not "within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting."[459] Rather,

> It [was] undisputed that the scanner was the focal point of plaintiffs' practice diagnosing and treating patients and that the loss of the scanner caused extensive harm to plaintiffs. Thus,

plaintiff also alleged that, subsequent to that representation, the defendant sent an engineer to inspect the building for the sole purpose of preparing a report, which was factually inaccurate, to support its denial of the entire claim. *Id.*

454. *See* 191 A.D.3d 444, 444–45, 142 N.Y.S.3d 4, 6 (1st Dep't 2021).

455. *Id.* at 445, 142 N.Y.S.3d at 6; *see* R&R Third Properties, LLC v. Greater New York Mut. Ins. Co., No. 651377/2013, 2019 N.Y. slip op. 32692(U), at 2–4 (Sup. Ct. N.Y. Cnty. Sept. 9, 2019) (providing an extensive review of the facts).

456. *See R&R Third Props.*, 191 A.D.3d at 444, 142 N.Y.S.3d at 6 (first citing Acquista v. New York Life Ins. Co., 285 A.D.2d 73, 82, 730 N.Y.S.2d 272, 278–79 (1st Dept. 2001); and then citing Castor Petroleum, Ltd. v. Petroterminal de Panama, S.A., 90 A.D.3d 424, 424, 933 N.Y.S.2d 662, 663 (1st Dept. 2011)).

457. *See id.* (citing *Castor Petroleum*, 90 A.D.3d at 424, 933 N.Y.S.2d at 663); *see also* N.Y. C.P.L.R. § 3101(h) (McKinney 2021).

458. *See id.* at 444–45, 142 N.Y.S.3d at 6.

459. *Id.* (quoting Panasia Ests., Inc. v. Hudson Ins. Co., 68 A.D.3d 530, 530, 889 N.Y.S.2d 452, 452 (1st Dept. 2009)).

> Federal would have been on notice that plaintiffs would suffer business interruption losses if the scanner was not repaired or replaced.[460]

Accordingly, issues of fact remained as to whether, through claims of bad faith or otherwise, Federal may ultimately owe RRS coverage for consequential damages stemming from the loss of the medical scanner.[461]

In another related context, the Second Department in *Metropolitan Property and Casualty Insurance Co. v. GEICO General Insurance Co.* held that an excess insurer's contribution to "settlement of an underlying action" does not bar its claim for bad faith against the primary carrier.[462]

On October 23, 2006, John Colvin and Milagros Gomez were involved in an automobile accident.[463] GEICO General Insurance Company ("GEICO") provided Colvin with primary automobile insurance coverage limits of $100,000/$300,000.[464] Metropolitan Property and Casualty Insurance Company ("MetLife") provided Colvin with excess coverage limits of $1,000,000.[465]

In January 2011, Gomez commenced an action against Colvin stemming from the accident.[466] However, prior to the Gomez action, despite awareness of the MetLife excess policy issued to Colvin, GEICO failed to notify MetLife of the claim.[467] In December 2011, GEICO unsuccessfully tendered its policy limit of $100,000 to Gomez in an effort to resolve the matter.[468] On November 30, 2012, approximately six weeks before trial, Gomez's counsel provided MetLife its first notice of the pending action against Colvin.[469] Subsequently, on January 22, 2013, Gomez agreed to a $150,000 settlement, which included GEICO's primary $100,000 limit and a contribution of $50,000 from MetLife.[470]

MetLife sued GEICO to recover damages for alleged bad faith. GEICO moved for summary judgment, which was denied,

460. *Id.*
461. *See R&R Third Props.*, 191 A.D.3d at 445, 142 N.Y.S.3d at 6.
462. 186 A.D.3d 1513, 1514–15, 130 N.Y.S.3d 847, 849 (2d Dep't 2020).
463. *Id.* at 1514, 130 N.Y.S.3d at 848.
464. *Id.*
465. *Id.*
466. *Id.*
467. *See GEICO*, 186 A.D.3d at 1514, 130 N.Y.S.3d at 848.
468. *See id.*
469. *See id.*
470. *Id.*

resulting in this appeal.[471] Affirming the trial court, the Second Department noted that "a primary liability insurer owes an excess insurance carrier the same duty of good faith as the primary liability insurer owes its insureds."[472] The court concluded that the voluntary payment doctrine did not apply,[473] since it does not prohibit an excess insurance carrier contributing to a settlement from seeking contribution from a primary insurance carrier who acts in bad faith.[474] Instead, despite the decision to contribute to a settlement, an excess carrier may maintain an action against a primary carrier for bad faith in defending and settling claims within its exclusive control, provided the excess carrier reserved its rights to do so at the time of settlement.[475]

MetLife sufficiently alleged that GEICO's conduct constituted bad faith

> by failing to timely notify MetLife of the underlying personal injury action commenced against their mutual insured, Colvin, by failing to timely apprise MetLife of developments in the underlying personal injury action, by failing to apprise MetLife that GEICO's tender of its policy limit to Gomez in the underlying personal injury action had been rejected, and by failing to adequately and properly defend Colvin in the underlying personal injury action.[476]

XXV. NON-COOPERATION

When it comes to New York decisional authority in the insurance sphere, very few standards are more difficult to achieve than that required for a carrier to demonstrate "willful and avowed obstruction" by an insured who fails to cooperate. In *DeLuca v. RLI Insurance Co.*, the Second Department reinforced this dilemma for carriers.[477]

471. *See id.*

472. *GEICO*, 186 A.D.3d at 1515, 130 N.Y.S.3d at 849 (citing Hartford Accident & Indem. Co. v. Mich. Mut. Ins. Co., 61 N.Y.2d 569, 574, 463 N.E.2d 608, 610, 475 N.Y.S.2d 267, 269 (1984)).

473. *See id.* at 1514, 130 N.Y.S.3d at 848.

474. *See id.* at 1514–15, 130 N.Y.S.3d at 849.

475. *See id.* at 1515, 130 N.Y.S.3d at 849 (first citing Fed. Ins. Co. v. N. Am. Specialty Ins. Co., 83 A.D.3d 401, 402, 921 N.Y.S.2d 28, 29 (1st Dep't 2011); and then citing Elm Ins. Co. v. GEICO Direct, 23 A.D.3d 219, 219, 805 N.Y.S.2d 34, 35 (1st Dep't 2005)).

476. *Id.*

477. *See* 187 A.D.3d 709, 710, 131 N.Y.S.3d 716, 719 (2d Dep't 2020). The Second Department also had occasion in *Jahangir v. Tri-State Consumer Ins. Co.* to

Jane DeLuca filed a direct action against RLI Insurance Company ("RLI") seeking satisfaction of a $292,250.30 judgment that she obtained against its insured, ML Specialty Construction, Inc. ("MLSC"), in an underlying action.[478]

RLI had denied coverage due to MLSC's lack of cooperation and contended that it was not obligated to satisfy the judgment in the underlying action due to MLSC's refusal to cooperate and RLI's proper disclaimer of coverage.[479]

The Second Department notes that, pursuant to Insurance Law section 3420(a)(2), "the burden shall be upon the insurer to prove such alleged failure or refusal to cooperate."[480] Under long standing New York Court of Appeals precedent:

> since the defense of lack of co-operation penalizes the [judgment creditor] for the action of the insured over whom he [or she] has no control, and since the defense frustrates the policy of this State that innocent victims . . . be recompensed for the injuries inflicted upon them, the courts have consistently held that the burden of proving the lack of co-operation is a heavy one indeed.[481]

assess an alleged lack of cooperation in the first-party, property insurance context. *See* 189 A.D.3d 1564, 1564–65, 135 N.Y.S.3d 292, 293 (2d Dep't 2020). Although that decision does not provide much context to the court's determination that an issue of fact existed, it does provide the standard for failure to cooperate in the first party context. *See id.* "In order to establish breach of a cooperation clause, the insurer must show that the insured engaged in an unreasonable and willful pattern of refusing to answer material and relevant questions or to supply material and relevant documents." *Id.* (quoting *Matter of* New York Cent. Mut. Fire. Ins. Co. v. Rafailov, 41 A.D.3d 603, 604, 840 N.Y.S.2d 358, 360 (2d Dep't 2007) (first citing James & Charles Dimino Wholesale Seafood v. Royal Ins. Co., 238 A.D.2d 379, 379, 656 N.Y.S.2d 325, 326 (2d Dep't 1997); and then citing Avarello v. State Farm Fire & Casualty Co., 208 A.D.2d 483, 483, 616 N.Y.S.2d 796, 797 (2d Dep't 1994)).

478. *See DeLuca*, 187 A.D.3d at 710, 131 N.Y.S.2d at 719. This was a "direct action" allowable by New York Insurance Law section 3420(a)(2) by a judgment creditor against a carrier after it had obtained a judgment against an insured and it remain unpaid. *See id.* at 711, 131 N.Y.S.2d at 720 (first citing Lang v. Hanover Ins. Co., 3 N.Y.3d 350, 354, 820 N.E.2d 855, 858, 787 N.Y.S.2d 211, 214 (2004); then citing N.Y. INS. LAW § 3420(a)(2) (McKinney 2021); and then citing Kleynshvag v. GAN Ins. Co., 21 A.D.3d 999, 1002, 801 N.Y.S.2d 383, 386 (2d Dep't 2005)).

479. *See id.*

480. *Id.* at 712, 131 N.Y.S.2d at 720 (citing § 3420).

481. *Id.* (first citing Thrasher v. U.S. Liab. Ins. Co., 19 N.Y.2d 159, 168, 225 N.E.2d 503, 508, 278 N.Y.S.2d 793, 800 (1967); then citing Cont'l Cas. Co. v. Stradford, 11 N.Y.3d 443, 450, 900 N.E.2d 144, 148, 871 N.Y.S.2d 607, 611 (2008);

To disclaim based upon a 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.[482]

With respect to the third prong, an insured's "refusal to answer questions and a referral of such questions to the insured's attorney do not, without more, 'reflect an attitude of willful and avowed obstruction.'"[483] However such an attitude "may be established by an insurer's showing that its insured 'engaged in an unreasonable and willful pattern of refusing to answer material and relevant questions or to supply material and relevant documents.'"[484]

Although RLI contended that MLSC's principal, Michael Stoicescu, refused to cooperate, it did not allege that any other individuals associated with MLSC followed suit.[485] Further, the Second Department noted that Stoicescu indisputably appeared for deposition and testified at length.[486] Moreover, RLI failed to identify any information or document that Stoicescu refused to disclose in connection with the underlying action.[487] Nor was RLI's contention

and then citing *Matter of* Liberty Mut. Ins. Co. v. Roland–Staine, 21 A.D.3d 771, 772–73, 802 N.Y.S.2d 6, 9 (1st Dep't 2005)).

482. *Id.* (first citing Allstate Ins. Co. v. United Int'l. Ins. Co., 16 A.D.3d 605, 606, 792 N.Y.S.2d 549, 550–51 (1st Dep't 2005); and then citing *Thrasher*, 19 N.Y.2d at 168–69, 225 N.E.2d at 508, 278 N.Y.S.2d at 800).

483. *DeLuca*, 187 A.D.3d at 713, 131 N.Y.S.2d at 721 (quoting *Matter of* N.Y. Cent. Mut. Fire Ins. Co. v. Bresil, 7 A.D.3d 716, 717, 777 N.Y.S.2d 174, 175 (2d Dep't 2004)).

484. *Id.* (first citing Avarello v. State Farm Fire & Casualty Co., 208 A.D.2d 483, 483, 616 N.Y.S.2d 796, 796 (2d Dep't 1994); then citing Coleman v. New Amsterdam Casualty Co., 247 N.Y. 271, 276, 160 N.E. 367, 369 (1928); and then citing James & Charles Dimino Wholesale Seafood v. Royal Ins. Co., 238 A.D.2d 379, 379, 656 N.Y.S.2d 325, 326 (2d Dep't 1997)). Although the court notes that "once an insurer has 'disclaimed liability under the policy the insured's duty to comply with the co-operation clause of the policy ceases,'" that does not appear to have been the case in this matter. *Id.* (quoting Coleman v. Nat'l Grange Mut. Ins. Co., 28 A.D.2d 1073, 1074 (4th Dep't 1967)).

485. *See id.*

486. *See id.*

487. *See id.*

that Stoicescu refused to respond to certain telephone calls and letters sufficient to show "an attitude of willful and avowed obstruction."[488]

Additionally, despite evidence showing "that, after years of litigation, Stoicescu had stated during one or more telephone calls that he would not attend a trial in the underlying action, any such statements were made before a date for the trial had even been set" and there was no assertion by RLI that Stoicescu actually failed to appear for any required court appearance.[489]

CONCLUSION: A LOOK TO THE FUTURE

In our last *Survey* article, we predicted that we would see a number of COVID-19 coverage decisions in this article and there are fewer than we anticipated.[490] We certainly would expect the next *Survey* period to showcase a few appellate decisions in this area. However, our prediction for next year's article focuses on Child Victims Act coverage cases. We can expect that the appellate courts will begin to grapple with the proof necessary to prove the terms on long-missing policies for claims against institutional defendants arising out of decades-old child abuse claims.[491]

Moreover, we can expect the courts to continue to grapple with the scope of additional insured protection, focusing the breadth of the duty to defend and the appropriate means and method to measure those obligations.

488. *DeLuca*, 187 A.D.3d at 713, 131 N.Y.S.2d at 721–22 (quoting *Bresil*, 7 A.D.3d at 717, 777 N.Y.S.2d at 175) (citing *Matter of* Country-Wide Ins. Co. v. Henderson, 50 A.D.3d 789, 790–91, 856 N.Y.S.2d 184, 186 (2d Dep't 2008)).

489. *Id.* at 713–14, 131 N.Y.S.2d at 722.

490. *See* Dan D. Kohane et al., *Insurance Law*, 70 SYRACUSE L. REV. 443, 500 (2020).

491. *Compare* Emons Indus. v. Liberty Mut. Fire Ins. Co., 545 F. Supp. 185, 188 (S.D.N.Y. 1982) (noting that "New York places upon plaintiff in action based on an insurance contract the burden of proof to establish the existence of the policy sued upon and the provisions upon which the suit is based.") *with* Gold Fields Am. Corp. v. Aetna Cas. & Sur. Co., 661 N.Y.S.2d 948, 950, 173 Misc. 2d 901, 903 (Sup. Ct. N.Y. Cnty. 1997) (stating that the court in *Emons Indus.* "did not specifically state which burden it was applying as the New York rule.").