INSURANCE LAW

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The authors wish to specially thank Mr. Evan Gestwick Esq., a recent graduate of University at Buffalo School of Law, JD Class of 2022, for his dedication and assistance on this survey.

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INTRODUCTION

We are delighted to once again share with you our insights on what transpired over the landscape of New York insurance law during the latest *Survey* period. We witnessed various impacts to the practice of insurance law in this state from both legislation and litigation and lived to tell the tale.

I. COMPREHENSIVE INSURANCE DISCLOSURE ACT

One of the most significant impacts on insurance laws during the *Survey* period does not actually impose obligations upon insurance companies themselves.[1]

In June 2021, a day prior to the close of the legislative session, both houses of the New York State Legislature saw bills introduced and summarily passed (A08041 and S07052), which sought to implement a new "Comprehensive Insurance Disclosure Act" (CIDA).[2] CIDA was delivered to the Governor's Office on December 20, 2021, and on December 31, 2021, Governor Hochul signed CIDA into law (Chapter 832 of Laws of 2021).[3] The passage of CIDA resulted in significant amendments to CPLR section 3101(f) and the addition of a new section, CPLR section 3122-b, which are statutory provisions governing the required disclosure of insurance information during litigation.[4]

The purported goal of CIDA was to require that all parties provide notice and proof of the existence and contents of any insurance

1. Of course, as you will see, the obligations imposed require cooperation from insurance companies by default.

2. *See* N.Y. C.P.L.R. 3101(f) (McKinney 2022); *see also* N.Y. C.P.L.R. 3122-b (McKinney 2022); *see also* N.Y. STATE ASSEMB., A08041 SUMMARY (2021), https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A08041&term=2021&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y&LFIN=Y&Chamber%26nbspVideo%2FTranscript=Y.

3. *See* Act of Dec. 31, 2021, 2021 McKinney's Sess. Laws of N.Y., ch. 832, at 7052 (codified at N.Y. C.P.L.R. 3101(f)); N.Y. C.P.L.R. 3122-b).

4. *See id.*

agreement, including coverage amounts, under which any person or entity may be liable to satisfy part or all of a judgment within sixty days of serving an answer in an action.[5] In order to accomplish this goal, the CIDA proposed significant amendments to CPLR section 3101(f) and the addition of a new CPLR section 3122-b.

According to the Sponsor Memorandum, the following served as justification for passage of this law:

> In personal injury cases, disclosure of complete and accurate information about the nature and extent of insurance coverage is often delayed. There is a confusing and often conflicting array of case law regarding what must be disclosed and when. Not only do these delays clog our overburdened courts, they force injured New Yorkers to wait for the justice they deserve. This can be solved by simply clarifying the nature, extent, and timeliness of mandated disclosure of insurance policies in statute.
>
> This amendment will reduce the use of delaying tactics by explicitly compelling disclosure of the complete primary, excess, and umbrella policies implicated by the claim, as well as directing disclosure of other claims, contracts, or agreements that may deplete the available coverage, along with current residual limits of policies that have been eroded by other payments. The information is required to be provided within sixty days after a defendant files his or her answer.[6]

Governor Hochul signed the bill after an agreement was reached to amend the law, following significant pushback on its passage.[7] The amended version of the New York Comprehensive Insurance Act (CIDA) was signed into law, as Chapter 136 of the Laws of 2022 and as Chapter 832 of the Laws of 2021.[8] While the amendments removed some of CIDA's more onerous requirements, as first adopted, it still

5. *See* N.Y. SPONSORS MEMORANDUM, 2021 S.B. 7052 *reprinted in* 2021 McKinney's Sess. Laws of N.Y., ch. 832, at 7052 ("This bill would require defendants to provide plaintiffs with complete information for any insurance agreement through which a judgment could be satisfied within sixty days after serving an answer.").

6. *Id.*

7. *See* Governor's Approval Memorandum No. 169 of 2021 ("I agree with the intent of the bill and have reached an agreement with the Legislature to ensure that the scope of the insurance coverage information that parties must provide is properly tailored for the intended purpose, which is to insure that parties in a litigation are correctly informed about the limits of potential insurance coverage.").

8. *See* Act of Feb. 24, 2022, 2022 McKinney's Sess. Laws of N.Y., ch. 136, at 7882-A (codified at N.Y. C.P.L.R. 3101(f); N.Y. C.P.L.R. 3122-b).

maintained some significant obligations for defense counsel, with the participation of liability insurers.[9]

The statute requires production of liability policies, primary and excess, that may provide coverage for an insured along with specified certifications and scheduled updates about erosion of available policy limits, without the requirement of a discovery demand.[10] Among the major components of CIDA includes that disclosure of policies are required to be made within ninety days of answer.[11] That disclosure includes production of all policies, primary and excess, unless written agreement is made to permit declarations pages to be produced in lieu of policies.[12] These disclosures must include a description of the total limits of liability available under a policy, meaning the actual funds, after taking into account erosion and any other offsets, that can be used to satisfy a judgment or reimburse the payments made to satisfy a judgment.[13] Prior to CIDA, there was no such requirement to disclose policy erosion.

Indeed, insureds must make "reasonable efforts" to ensure that the information provided is accurate and complete. Included in the statute is a direction for counsel and the insured, to provide necessary updates due at the time of filing of the note of issue; when entering into formal settlement negotiations; at voluntary mediation; when the case is called for trial; and for sixty-days after any settlement or entry of final judgment, inclusive of appeals.[14] These reasonable efforts must be certified by the insured and its counsel, stating that the information is "accurate and complete, and that reasonable efforts have been undertaken, and in accordance with [CPLR 3101(f)(2)] will be undertaken, to ensure that this information remains accurate and complete."[15]

Interestingly, as of this writing, the courts have not issued a single reported decision discussing, interpreting, or enforcing the Comprehensive Insurance Disclosure Act. Stay tuned.

9. *See id.*
10. N.Y. C.P.L.R. 3101(f)(1)(i).
11. N.Y. C.P.L.R. 3101(f)(1).
12. N.Y. C.P.L.R. 3101(f)(1)(i).
13. N.Y. C.P.L.R. 3101(f)(1)(iv).
14. N.Y. C.P.L.R. 3101(f)(2).
15. N.Y. C.P.L.R. 3122-b. This particular provision is troubling as it requires certification as to the accuracy and completeness of information that is necessarily obtained from others—i.e., insurance companies. These required certifications from defense counsel and the insured involve, in many if not most cases, verification of information that these individuals likely have no direct knowledge of.

II. COVID-19 BUSINESS INTERRUPTION

Another hot topic in the insurance world recently has been claims made by various businesses across the country for losses sustained during COVID-19 slowdowns while quarantined. As these cases have maneuvered through various state and federal courts, appellate courts have begun to weigh in—and New York was no exception.

On April 7, 2022, the First Department rendered the first New York intermediate appellate court decision in the well-publicized COVID-19 business interruption context, *Consolidated Restaurant Operations, Inc. v. Westport Insurance Corp.*, holding that

> [W]here a policy specifically states that coverage is triggered only where there is "direct physical loss or damage" to the insured property, the policy holder's inability to fully use its premise as intended because of COVID-19, without any actual, discernable, quantifiable change constituting "physical" difference to the property from what it was before exposure to the virus, fails to state a cause of action for a covered loss.[16]

That decision is consistent with the vast majority of other judicial pronouncements, both in state and federal courts, throughout the nation.

Beginning in early February into March 2020, Consolidated Restaurant Operations, Inc., the owner of numerous restaurants, "took initial steps to protect its customers [from the newly emergent risk of COVID-19], by implementing enhanced cleaning procedures, and by installing hand sanitizer stations and physical partitions."[17] "By mid-March, however, plaintiff was forced to suspend its indoor dining operations" due to various governmental closure orders.[18]

Plaintiff filed an insurance claim with Westport Insurance Corporation in April 2020, claiming that it had suffered "direct physical loss or damage to its property because the actual or threatened presence of the virus in and on its property . . . eliminated the functionality of the restaurants for their intended purpose."[19] Westport denied coverage in July 2020, finding no physical loss or damage to the

16. Consol. Rest. Operations, Inc. v. Westport Ins. Corp., 167 N.Y.S.3d 15, 18 (App. Div. 1st Dep't 2022).
17. *Id.*
18. *Id.*
19. *See id.* at 19.

property.[20] Plaintiff filed a lawsuit against Westport, and Westport moved to dismiss.[21]

Relying on *Roundabout Theatre Co. v Continental Casualty Co.*, the First Department reasoned that "direct physical loss or damage to property" requires that "property must be changed, damage or affected in some tangible way, making it different from what it was before the claimed event occurred."[22] Thus, where a complaint fails to "identify any physical (tangible) difference in the property, then the complaint fails to state a cause of action."[23] By "accept[ing] that an economic loss, for purposes of the all-risk policy . . . without any attendant physical, tangible, damage to the property . . . would render the term 'physical' in the policy meaningless. [T]he impaired function or use of its property for its intended purpose, is not enough."[24]

The First Department rejected Consolidated Restaurant's argument that "its property was physically altered by the coronavirus," finding this allegation conclusory by failing to "identify any physical change, transformation, or difference in any of its property."[25]

Although *Consolidated Restaurant* became the first New York State Appellate Division decision in this space, the Second Circuit Court of Appeals had, by that time, already left its mark on litigation.[26]

20. *See id.*

21. *See Consol. Rest. Operations*, 167 N.Y.S.3d at 19.

22. *Id.* at 21 (citing Roundabout Theatre Co. v. Cont'l Cas. Co., 751 N.Y.S.2d 4, 8 (App. Div. 1st Dep't 2002)).

23. *Id.*

24. *Id.* (citing Cnty. of Columbia v. Cont'l Ins. Co., 634 N.E.2d 946, 950 (1994)).

25. *Id.* at 18–24.

26. *See* Deer Mountain Inn LLC v. Union Ins. Co., No. 21-1513, 2022 U.S. App. LEXIS 5355, at *3–4 (2d Cir. Mar. 1, 2022) ("It is a longstanding rule of our Circuit that a three-judge panel is bound by a prior panel's decision until it is overruled either by this Court sitting *en banc* or by the Supreme Court" (quoting Dale v. Barr, 967 F.3d 133, 142 (2d Cir. 2020)) (declining to "question the rulings made in the *10012 Holdings* line of cases"); *see also* Kim-Chee LLC v. Phila. Indem. Ins. Co., No. 21-1082-cv, 2022 U.S. App. LEXIS 2655, at *3–4 (2d Cir. Jan. 28, 2022) (rejecting the argument that closure due to the risk of human viral infection qualifies as a risk of direct physical loss); *see also* Rye Ridge Corp. v. Cincinnati Ins. Co., No. 21-1323-cv, 2022 U.S. App. LEXIS 1009, at *2 (2d Cir. Jan. 13, 2022) (rejecting the argument that delis experienced "direct physical loss" within the meaning of their insurance policy when executive orders limited the use of the premises for dine-in service); *see also* 10012 Holdings, Inc. v. Sentinel Ins. Co., 21 F.4th 216, 224–25 (2d Cir. 2021) ("many cases raising the same issue are percolating through the . . . intermediate courts of appeals. . . . In the meantime, following what the lower New York courts have uniformly done is justified").

In *10012 Holdings, Inc. v. Sentinel Insurance Co.*, the Second Circuit led the way by concluding that

> [U]nder New York law the terms "direct physical loss" and "physical damage" . . . do not extend to mere loss of use of a premises, where there has been no physical damage to such premises; those terms instead require actual physical loss of or damage to the insured's property.[27]

Continuing, the Second Circuit noted that no recovery exists where an insured "allege[d] only that it lost access to its property as a result of COVID-19 and the governmental shutdown orders, and not that it suspended operations because of physical damage to its property."[28]

After *Consolidated Restaurant*, the trend in the Second Circuit Court of Appeals following *10012 Holdings, Inc.* only continued to build.[29] In all likelihood, the trend will continue.

III. ADDITIONAL INSURED COVERAGE

A major factor when contracting with another individual or entity is who will be responsible for paying when something goes wrong, or someone is injured. Where many think immediately of contractual indemnity and hold harmless provisions, which allow for non-negligent parties to shift blame to the active culprit, insurance procurement provisions are also highly effective in limiting exposure under a contract, specifically by requiring a trade-contract, usually with inferior bargaining power to name a more powerful contracting party as an additional insured on its insurance policy. In exchange for hiring a general contractor, for example, a property owner can compel that business partner to provide the owner with additional insured protection, while the general contractor requires its subcontractors to insure both the general contractor and the owner.

In *City of New York v. Travelers Property Casualty Company*, New York's First Department held that Travelers owed a duty to

27. *10012 Holdings*, 21 F.4th at 222.

28. *Id.* at 223.

29. *See* BR Rest. Corp. v. Nationwide Mut. Ins. Co., No. 21-2100-cv, 2022 U.S. App. LEXIS 9460, at *2–4; (2d Cir. April 8, 2022) (Summary Order) ("BR contends that these provisions also cover the loss of business income sustained because of New York's restrictions on on-premises dining. We disagree. '[U]nder New York law the terms 'direct physical loss' and 'physical damage' . . . do not extend to mere loss of use of a premises, where there has been no physical damage to such premises'" (quoting *10012 Holdings*, 21 F.4th at 222)).

defend an additional insured where a pedestrian was injured in a city park as a result of alleged negligent acts or omission in the maintenance and inspection of a tree.[30]

In an underlying personal injury action, an individual claimed he was injured by a falling tree branch in Central Park.[31] The injuries were alleged to have been proximately caused by the negligent acts or omissions of the City, its agencies and the Central Park Conservancy, Inc. (CPC), or its subcontractors in the maintenance and inspection of the tree.[32] By contract, CPC agreed with the City to maintain Central Park, but CPC separately subcontracted with nonparty Bartlett for tree-servicing.[33] As the subcontract required, Bartlett procured an insurance policy from Travelers naming CPC and the City as additional insureds.[34] The policy provided additional insured coverage to these entities for liability arising out of Bartlett's operations under the subcontract, except that a "person or organization does not qualify as an additional insured with respect to independent acts or omissions of such person or organization."[35] Under the subcontract, Bartlett assumed full control over tree maintenance, including the relevant tree.[36]

Given the allegations in the underlying complaint, supported by Bartlett's subcontract and business records memorializing Bartlett's work on the park's trees, the court held that "there [was] a reasonable possibility that the City will recover under the policy's additional insured provision, which affords coverage premised on the City's vicarious liability for the acts or omissions of [Travelers'] named insured, Bartlett," requiring Travelers to defend the City.[37] Recognizing that "the City might ultimately be found liable solely for its own independent negligent acts and/or omissions, which would not be covered under the additional insured provision," the court was careful to note that this possibility "does not negate defendant's duty to defend it."[38]

Another additional insured decision out of the First Department, *Wilcox Development Corp. v. HDI Global Insurance Company*,

30. *See* N.Y.C. v. Travelers Prop. Cas. Co. of Am., 151 N.Y.S.3d 384, 384–85 (App. Div. 1st Dep't 2021).

31. *Id.* at 384.

32. *Id.*

33. *Id.*

34. *Id.* at 384–85.

35. *Travelers*, 151 N.Y.S.3d at 385.

36. *Id.*

37. *Id.* (citing Fitzpatrick v. Am. Honda Motor Co., 575 N.E.2d 90, 91–92 (N.Y. 1991)).

38. *Id.* (citing *Fitzpatrick*, 575 N.E.2d at 92).

reached a similar conclusion, albeit in less detail.[39] Notably, however, the *Wilcox* decision concerned an additional insured endorsement requiring coverage for "liability arising out of operations conducted by or for" the insurance company's named insured under its elevator service contract.[40] Although we will not go into detail, we merely flag that this decision stands, in part, for the proposition that "arising out of" language contained within an additional insured endorsement will be construed broadly to require "only that there be some causal relationship between the injury and the risk for which coverage is provided."[41]

The *Wilcox* decision was not the only decision to address additional insured coverage in the elevator service context. In *Long Island Rail Road v. New York Marine & General Insurance Co.*, New York's Second Department found that the pleadings and bill of particulars from an underlying lawsuit supported a claim for additional insured coverage under an insurance policy.[42]

Long Island Rail Road Company (LIRR) retained Nouveau Elevator Industries, Inc. (Nouveau) for escalator maintenance at various LIRR facilities under a written contract.[43] New York Marine and General Insurance Company (NY Marine) served as Nouveau's liability insurer.[44] In an underlying personal injury action, a woman alleged she was injured by an escalator at the LIRR Babylon Station.[45] Subsequently, LIRR filed suit against Nouveau and NY Marine, seeking, *inter alia*, additional insured coverage for the underlying action.[46]

39. *See* Wilcox Dev. Corp. v. HDI Glob. Ins. Co., 152 N.Y.S.3d 896, 896 (App. Div. 1st Dep't 2021) (citing BP A.C. Corp. v. One Beacon Ins. Grp., 871 N.E.2d 1128, 1131–32 (N.Y. 2007)).

40. Wilcox Dev. Corp. v. HDI Glob. Ins. Co., No. 651979/2017, 2021 N.Y. Misc. LEXIS 941, at *7 (Sup. Ct. N.Y. Cnty. March 8, 2021), aff'd *Wilcox*, 152 N.Y.S.3d at 896.

41. *See id.* at 23. (citing Hunter Roberts Constr. Grp., LLC v. Arch Ins. Co., 904 N.Y.S.2d 52, 56 (App. Div. 1st Dep't 2010)); *see also* Burlington Ins. Co. v. N.Y.C. Transit Auth., 79 N.E.3d 477, 485 (N.Y. 2017) (distinguishing between the causal nexus required of additional insured endorsements that include the phrase "arising out of" versus "caused, in whole or in part, by" under New York law).

42. Long Island R.R. Co. v. N.Y. Marine & Gen. Ins. Co., 55 N.Y.S.3d 214, 216 (App. Div. 2d Dep't 2021).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

In Nouveau's insurance policy, an endorsement provided that additional insureds included "[a]ny person or organization for whom [Nouveau was] performing operations when [Nouveau] and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on [the] policy."[47] The endorsement further provided that such additional insured coverage was only with respect to "liability for 'bodily injury' or 'property damage' caused, in whole or in part, by [Nouveau] at the location designated."[48] This language required LIRR to establish that Nouveau proximately caused the relevant injuries.[49]

LIRR established its entitlement to additional insured coverage from NY Marine by submitting the LIRR request for proposal, the notice of award to Nouveau, its notice to proceed, and a certificate of insurance including LIRR as an additional insured under Nouveau's insurance policy, along with "the amended complaint and the bill of particulars in the underlying action which allege, among other things, that the injuries sustained by the plaintiff in that action were caused by a defective escalator at an LIRR facility."[50] That amended complaint and the bill of particulars also alleged negligent operation and maintenance of the escalator.[51] In opposition, "NY Marine failed to show that there were no triable issues of fact as to whether any acts or omissions by Nouveau were the proximate cause of the alleged injuries in the underlying action."[52]

"The complaint in the underlying action alleged that the plaintiff was injured by a defect or dangerous condition at a construction project at property owned by 370 Seventh Avenue, and that various parties, including defendant Premier Electric, Inc., were responsible for the conditions that caused his accident."[53]

Exemplifying the importance of reading an insurance policy carefully, to ensure compliance with any contractual insurance procurement requirements, the First Department in *ACC Construction Corp. v. Merchants Mutual Insurance Co.* found additional insured coverage

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47. *Long Island R.R. Co.*, 55 N.Y.S.3d at 217.

48. *Id.* at 218.

49. *See id.* at 217 (citing Burlington Ins. Co. v. N.Y.C. Transit. Auth., 79 N.E.3d 477, 479 (N.Y. 2017)).

50. *Id.* at 218.

51. *Id.*

52. *Long Island R.R. Co.*, 55 N.Y.S.3d at 218.

53. ACC Constr. Corp. v. Merchs. Mut. Ins. Co., 161 N.Y.S.3d 10, 11 (App. Div. 1st Dep't 2021).

for a party that maintained contractual privity, while denying same for a party who was not in privity with the named insured.[54]

Comscore, Inc. leased a portion of a property owned by 370 Seventh Avenue.[55] Comscore retained ACC Construction Corporation as general contractor for a construction project, who, in turn, retained Premier Electric, Inc. as a subcontractor.[56] The subcontract between ACC and Premier required Premier to procure insurance coverage naming ACC, 370 Seventh Avenue, and Comscore as additional insureds on that policy.[57] Premier procured a commercial general liability policy from Merchants.[58]

During the construction project, an individual was injured, alleging that such injuries were caused "by a defect or dangerous condition" at the property and that 370 Seventh Avenue, ACC, and Premier were responsible.[59] Coverage was tendered to Merchants on behalf of ACC and 370 Seventh Avenue, but Merchants denied the tender and this action ensued.[60]

The First Department found coverage for ACC as an additional insured "because there is a reasonable possibility, based on the allegations in the underlying complaint, that the injury to the underlying plaintiff was caused by the acts or omissions of Premier, to which the policy was issued in connection with its ongoing operations."[61] However, since 370 Seventh Avenue and Comscore did not have a direct contractual agreement with Premier, they were not entitled to additional insured coverage under the terms of the Merchants policy, which specifically required contractual privity for a party to enjoy additional insured status.[62]

54. *See id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *ACC Constr. Corp.*, 161 N.Y.S.3d at 11.
59. *Id*.
60. *See id.*
61. *Id.* (citing Allied World Assurance Co. v. Aspen Specialty Ins. Co., 139 N.Y.S.3d 816, 816, (App. Div. 1st Dep't 2021)).
62. *Id.* (citing AB Green Gansevoort, LLC v. Peter Scalamandre & Sons, Inc., 961 N.Y.S.2d 3, 4–5 (App. Div. 1st Dep't 2013)). The lesson here is to read and understand your additional insured endorsements to ensure that the requirements of coverage under your trade contract are met. Here, Premier was required to name each entity as additional insureds, but failed to do so as the contract Premier entered into was directly with ACC. Premier should have requested alternative language

The lesson from this case is critical; insurance policies are not fungible documents. Parties and courts must pay particular attention to specific policy terms when analyzing the breadth and depth of insurance coverage.

During the *Survey* period, there were a number of decisions involving landlord-tenant additional insured issues.

For example, in *71 Lafayette Avenue, LLC v. New York Marine and General Insurance Co.*, New York's First Department found that a landlord was an additional insured on a tenant's policy where an injured party had fallen through a cellar door used by a tenant at the leased premises**.**[63] The tenant had secured insurance through New York Marine and General Insurance Company, which included an additional insured providing the tenant's landlord, Lafayette Avenue LLC, with coverage for claims of bodily injury "arising out of the ownership, maintenance or use of that part of the premises leased to" the tenant.[64] Lafayette, as landlord, was entitled to additional coverage because the accident involved an outside staircase that was used by the tenant for access in and out of its space.[65] By implication, this staircase was part of the premises leased to the tenant.[66] Additionally, the accident "arose out of the tenant's 'use' of the leased premises, as the injured person was traversing the staircase door to deliver items for the tenant's business when the accident occurred."[67]

Similarly, in *Alexander's Rego Shopping Center, Inc. v. Safety National Casualty Corp.*, the Second Department found that an employee's injuries arising out of Bed Bath & Beyond's use of a freight elevator at a leased premises triggered additional insured coverage for its landlord.[68]

Bed Bath & Beyond leased third-floor retail and office space at a shopping center in Queens.[69] In April 2012, Ruben Sanchez, an employee of Bed Bath & Beyond, allegedly was injured while using a

providing additional insured coverage for each entity that Premier is required to name as an additional insured under any written contract or agreement.

63. 71 Lafayette Ave. LLC v. N.Y. Marine & Gen. Ins. Co., 154 N.Y.S.3d 759, 759 (App. Div. 1st Dep't. 2021).

64. *Id*. at 759–60.

65. *Id.* at 760.

66. *Id.* (citing ZKZ Assoc. v. CNA Ins. Co., 679 N.E.2d 629, 630 (N.Y. 1997)).

67. *Id.* (citing *ZKZ Assoc*., 679 N.E.2d at 630).

68. Alexander's Rego Shopping Ctr., Inc. v. Safety Nat'l Cas. Corp., 158 N.Y.S.3d 839, 840–41 (App. Div. 2d Dep't 2022) (citing Isidore Margel Tr. Mitzi Zank Tr. v. Mt. Hawley Ins. Co., 63 N.Y.S.3d 476, 477 (App. Div. 2d Dep't 2017)).

69. *Id.* at 840.

third-floor freight elevator during the course of his employment.[70] Sanchez sued the shopping center, Alexander's, and Alexander's commenced this action against Bed Bath & Beyond and its insurer, Safety National Casualty Corporation (Safety).[71] Safety had issued a commercial general liability insurance policy to Bed Bath & Beyond that provided additional insured coverage to Alexander's, as landlord, for liability arising out of the ownership, maintenance, or use of the leased premises.[72] Finding additional insured coverage for Alexander's, the Second Department found that Bed Bath & Beyond's use of the leased premises "included the elevator in question, which was used by Bed Bath & Beyond in the course of its business to provide it with access."[73]

The courts often wrestle with the coverage required for the tenant's use of the "demised premises." If a commercial tenant, for example, leases an office within a commercial building and is required to provide the landlord with insurance protection of accidents that occurs within that demised premises, will the policy also provide protection to the landlord if the accident takes place in the parking lot, or on the sidewalk, or on the walkway towards the building or in the foyer outside the rented unit.

The Fourth Department had an opportunity to address a claim for additional insured coverage by a landlord for injuries arising out of a tenant's use of leased premises in *Technology Insurance Co. v. Main Street America Assurance Co.*[74]

Technology Insurance Company (TIC) issued an insurance policy to Robert Aumick covering certain property Aumick owned.[75] Main Street America Assurance Company (Main Street) insured Aumick's tenant, Krispie Kuts, a barbershop operated on the premises.[76] The Main Street policy named Aumick as an additional insured.[77]

In February 2014, a Krispie Kuts patron tripped on a snow-covered hole in the driveway while leaving and commenced a lawsuit

70. *Id.*
71. *Id.*
72. *Id.*
73. *Alexander's Rego Shopping Ctr.*, 158 N.Y.S.3d at 840–41 (citing *Isidore Margel Tr.*, 145 N.Y.S.3d at 817).
74. Tech. Ins. Co., Inc. v. Main St. Am. Assurance Co., 162 N.Y.S.3d 638, 639 (App. Div. 4th Dep't 2022).
75. *Id.*
76. *Id.*
77. *Id.*

against Krispie Kuts and Aumick.[78] Main Street declined Aumick's tender for additional insured coverage and this action ensued.[79]

Main Street's additional insured endorsement provided coverage to Aumick as an additional insured "with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to [Krispie Kuts]."[80] Under the lease agreement between Aumick and Krispie Kuts, the barbershop was responsible for snow removal.[81] The snow covered driveway "was necessarily used for access in and out of [the barbershop] and was thus, by implication, 'part of the . . . premises' that [Krispie Kuts] was licensed to use under the parties' [lease]."[82] Accordingly, the use of the driveway was included in the scope of the leased premises.[83] Since there was a causal relationship between the injury and this use of the driveway, Aumick was entitled to coverage as an additional insured.[84]

Where the courts in *71 Lafayette*, *Technology*, and *Alexander's* found injury arose out of a tenant's use of accessways, the First Department found a fall on a sidewalk abutting a leased premises "arose out of" a tenant's maintenance of such sidewalk in *Wesco Insurance Co. v. Rutgers Casualty Insurance Co.* when confronting substantially similar language.[85] There, the court found that Rutgers' insured "had an express duty to maintain the sidewalk outside its leased premises, and to indemnify the landlord, [*Wesco*'s] insured, in connection with that duty."[86] Accordingly, by inference, the court found that the "underlying alleged accident on that sidewalk 'arose out of' the maintenance of the sidewalk," entitling the landlord to coverage.[87]

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78. *Id.*

79. *See Tech. Ins. Co.*, 162 N.Y.S.3d at 639.

80. *Id.*

81. *Id.* at 640.

82. *Id.*

83. *Id.* (citing Pixley Dev. Corp. v. Erie Ins. Co., 108 N.Y.S.3d 76, 78 (App. Div. 4th Dep't 2019)).

84. *Tech. Ins. Co.*, 162 N.Y.S.3d at 640.

85. Wesco Ins. Co. v. Rutgers Cas. Ins. Co., 158 N.Y.S.3d 573, 574 (App. Div. 1st Dep't 2022).

86. *Id.* (citing Maroney v. N.Y. Cent. Mut. Fire Ins. Co., 839 N.E.2d 886, 889 (N.Y. 2005)).

87. *Id.* at 573 (first citing *Maroney*, 839 N.E.2d at 889). We note that in finding coverage, the First Department upheld an underlying decision requiring Rutgers to "reimburse [Wesco] for all costs reasonably incurred in defending and indemnifying [the landlord] in the underlying action." *Id.* at 573. There is no mention of any findings of fact in the underlying lawsuit that injuries arose from the poor maintenance

Of all the appellate decisions rendered in this landlord-tenant additional insured context during the *Survey* period,[88] the First Department's *3650 White Plains Corp. v. Mama G. African Kitchen Inc.* was the only decision releasing an insurer from any obligation to defend a landlord seeking coverage as an additional insured.[89]

3650 White Plains Corp. owned a building and leased the corner retail space to Mama G. African Kitchen Inc. pursuant to a lease.[90] Utica First Insurance Company insured Mama G. and the insurance policy included an endorsement naming White Plains as an additional insured with respect to liability for bodily injury for which Mama G. was legally liable, but only to the extent that such liability was "caused, in whole or in part, by [Mama G.'s] acts or omissions or the acts or omissions of those acting on [Mama G.'s] behalf in connection with that part of the premises."[91]

In an underlying lawsuit, an infant was allegedly injured when he tripped and fell on a defective sidewalk outside of Mama G.'s.[92] Subsequently, this declaratory judgment action was filed seeking a declaration that Utica First owed a duty to defend White Plains in the underlying lawsuit as an additional insured.[93]

The First Department found that a reasonable possibility that coverage for White Plains, under the Utica First policy, was implicated by the underlying personal injury action had not been established.[94] New York's Court of Appeals provides that coverage under the additional insured language at issue here requires "injury proximately caused by the named insured," Mama G., since such an endorsement "intended

of the sidewalk, and the authors believe that a finding of indemnity is peculiar at this juncture, absent such a finding.

88. There was at least one additional appellate decision finding that an insurer owed coverage to a landlord where its liability was vicarious to that of a tenant who owed a contractual duty to maintain a sidewalk outside of a leased property. *See* Liberty Mut. Fire Ins. Co. v. Old Republic Gen. Ins. Co., 162 N.Y.S.3d 731, 731 (App. Div. 1st Dep't 2022).

89. *See* 3650 White Plains Corp. v. Mama G. Afr. Kitchen, 167 N.Y.S.3d 94, 97 (App. Div. 1st Dep't 2022). We note that this seeming outlier may likely be ascribed to the fact that unlike the landlord-tenant cases discussed above, this matter involved language that was not specific to landlords and tenants.

90. *Id.* at 95.

91. *Id.* at 96.

92. *Id.* at 95. A "bill of particulars specified that the infant 'was caused to trip and fall due to a defective, raised, cracked sidewalk located at the premises.'" *Id.*

93. *3650 White Plains Corp.*, 167 N.Y.S.3d at 95.

94. *See id.* at 96.

to provide coverage for an additional insured's vicarious or contributory negligence, and to prevent coverage for the additional insured's sole negligence."[95]

Here, the underlying lawsuit did not implicate Mama G.'s acts or omissions as the proximate cause of the child's injuries.[96] Mama G.'s lease with White Plains left responsibility for repair of a structurally defective sidewalk with the landlord.[97] Accordingly, Utica First did not owe coverage to White Plains as an additional insured.[98]

We would expect that the Court of Appeals will eventually weigh in on this issue. The question for consideration is a simple one. If a tenant leases space in a building and is permitted to use, for example, a public sidewalk or parking lot appurtenant to the leased space, and the insurer names the property owner as an additional insured for liability arising out of the use of the leased space, will an accident that occurs outside of the leased space result in additional insured coverage owed to the landlord, simply because that appurtenance was the situs of an accident. Alternatively, we hope that the Court of Appeals might soon consider under what circumstances an accident arises out of a named insured's use of leased space.

IV. PRIORITY OF COVERAGE

After our discussion of additional insured coverage, the next logical step is to assess recent decisions involving the priority of coverage. In other words, once we know which carrier(s) owe(s) coverage, the next question is when (and how much)?

Picking up right where we left off in the landlord-tenant context, New York's Fourth Department in *Jones Memorial Hospital v. Main Street America Assurance Co.* found that a hospital-landlord was

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95. *Id.* (quoting Burlington Ins. Co. v. N.Y.C. Transit Auth., 79 N.E.3d 477, 478 (N.Y. 2017)).

96. *Id.*

97. *Id.* at 96. (first citing N.Y.C. Admin. Code § 7-210 (2023); then citing Xiang Fu He v. Troon Mgmt., Inc., 137 N.E.3d 469, 473 (N.Y. 2019)). Although

> Section 16 of the lease does limit the tenant's duty with regard to the sidewalk, namely to 'maintain in good condition, and keep clean and free from dirt, rubbish, litter, snow, ice and other obstructions or encumbrances, the sidewalk and gutter of the Leased Premises at its own cost and expense,'" it did "not require the tenant to make structural repairs to the sidewalk.

3650 White Plains Corp., 167 N.Y.S.3d at 96.

98. *Id.* at 97.

entitled to primary and non-contributory coverage from a doctor-tenant's policy following a fall on a sidewalk.[99]

As with the previous section, Main Street America Assurance Company was found to owe additional insured coverage to Jones Memorial Hospital, who had leased medical office space to Main Street's named insured, Dr. Zahi N. Kassas, following a fall that occurred on an uneven sidewalk leading to the doctor's entryway.[100] Jones Memorial was itself insured by MLMIC Insurance Company.[101]

In determining the primacy of coverage—i.e., who pays first—the Fourth Department analyzed the respective "other insurance" clauses in the MLMIC and Main Street policies.[102] The MLMIC policy issued to Jones Memorial qualified its coverage as excess "over any other primary insurance available to [Jones Memorial] covering liability for damages arising out of the premises or operations . . . for which you have been added as an additional insured."[103] This excess provision in MLMIC's policy was found applicable on account of the court's finding of additional insured coverage on the Main Street policy.[104] In contrast however, the Main Street policy's relevant "other insurance" clause provided that "coverage is excess over any other primary insurance available to" Dr. Kassas, the named insured, "covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement," which is inapplicable to the Hospital plaintiffs, as it "did not state that its coverage was excess to other primary insurance available to the Hospital plaintiffs, an additional insured."[105]

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99. Jones Mem'l Hosp. v. Main St. Am. Assurance Co., 159 N.Y.S.3d 311, 312–13 (App. Div. 4th Dep't. 2021).

100. *See id.;* The relevant additional insured endorsement in the Main Street policy provided coverage to the "lessor of premises to whom you are obligated by virtue of a written 'Insured Contract' to provide insurance such as afforded by this policy, but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you." *Id.*

101. *See id.*

102. *See id*. at 314.

103. *Jones Mem'l Hosp.*, 159 N.Y.S.3d at 314.

104. *See id.*

105. *Id.* at 315. Main Street's primary contention on this primacy of coverage issue was that alternative language applied, indicating that its coverage was "excess over '[a]ny other insurance that insures for direct physical loss or damage.'" *Id.* Jones Memorial successfully argued, however, that "the phrase 'direct physical loss or damage'" is applicable only to first-party property coverage under Section I of the policy, since "[t]hat phrase is not used in Section II, entitled Liability" *Id.* Thus, "[c]onstruing the policy as a whole," this alternative "other insurance" provision

V. CERTIFICATE OF INSURANCE

It is fairly common under a trade contract to require a subcontractor hired to perform work to produce a certificate of insurance evincing procurement of insurance required under a contract. Notably, however, certificates of insurance are no replacement for the actual procurement of the requisite coverage from an insurance company agreeing to underwrite the risk. The First Department's decision in *Pawlicki v. 200 Park, L.P.* provides a great example of this important concept.[106]

Jaroslaw Pawlicki, a carpenter employed by Humboldt Woodworking Installations, Inc., was injured when he stepped on an unsecured grille covering a hole in the floor.[107] Pawlicki sued Structure Tone, who served as the general contractor on the construction project.[108] Structure Tone, in turn, cross-claimed against co-defendant, Four Daughters LLC and Four Daughters NY, LLC (collectively, Four Daughters), alleging, among other things, breach of contract for failure to procure insurance.[109]

In reversing the trial court's decision dismissing Structure Tone's crossclaim against Four Daughters for failure to procure insurance, the First Department notes that "a certificate of insurance is merely evidence of a contract, rather than conclusive proof that coverage was procured."[110]

Another limitation in this context involves the requirements of the trade contract itself. Specifically, at issue for the Fourth Department in *Corter-Longwell v. Juliano* was whether a trade contract requiring a certificate of insurance indicating additional insured coverage is the same thing as requiring an entity to actually procure additional insured coverage under that contract.[111]

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only applies to "coverage for property damage, not liability coverage for bodily injury." *Jones Mem'l Hosp.*, 159 N.Y.S.3d at 315.

106. *See* Pawlicki v. 200 Park, L.P., 157 N.Y.S.3d 427, 430 (App. Div. 1st Dep't 2021).

107. *See id.* at 429.

108. *See id.*

109. *See id.*

110. *See id.* at 430 (citing Prevost v. One City Block LLC, 65 N.Y.S.3d 172, 178 (App. Div. 1st Dep't 2017); Rudnitsky v. Macy's Real Est., LLC, 137 N.Y.S.3d 27, 29 (App. Div. 1st Dep't 2020)).

111. *See* Corter-Longwell v. Juliano, 161 N.Y.S.3d 525, 530–31 (App. Div. 4th Dep't 2021).

Seneca Meadows, Inc. (Seneca) operated a landfill to which Pocono Logistic, Inc. (Pocono) transported trailers of waste pursuant to a written agreement with Seneca's parent company.[112] James L. Corter, an employee of Seneca, was killed when Robert S. Juliano, employed by another subcontractor, backed a trailer onto Corter's landfill equipment.[113]

Corter's estate sued Pocono and Pocono sued Seneca.[114] Seneca counterclaimed for contractual indemnification.[115] Seneca argued that Pocono breached a duty to Seneca as a third-party beneficiary under the agreement to procure specified insurance coverage naming Seneca as an additional insured.[116] Despite this allegation, however

> [T]he specific insurance procurement paragraphs in Section 14 of the agreement—i.e., (a) (i), (a) (ii), (a) (iii), and the standalone excess coverage paragraph—do not mention any obligation for Pocono to name Seneca as an additional insured. Indeed, the paragraphs requiring Pocono and its subcontractors to obtain employers' liability and workers' compensation insurance, as well as an excess policy, make no reference to additional insureds. The paragraphs requiring Pocono and its subcontractors to obtain comprehensive commercial general liability and automobile liability insurance specify only that Seneca's parent company, not Seneca the subsidiary . . . must be added as an additional insured on those policies pursuant to specified forms.[117]

Creatively, recognizing the limitation of the language outlined above, Seneca notes that another section "provides that Pocono and its subcontractors 'shall provide certificates of insurance naming [Seneca's parent company] and Seneca . . . as an [sic] additional insured prior to the performance of any of its obligations under' the agreement."[118]

Pocono argued that providing a certificate of insurance is not the same as procuring that insurance (since Certificates of Insurance do not create coverage).[119] However, the Fourth Department rejected this

112. *See id.* at 527.
113. *See id.* at 527–28.
114. *See id.*
115. *See id.* at 528.
116. *See Corter-Longwell*, 161 N.Y.S.3d at 528.
117. *Id.* at 530 (citing Conn. Gen. Life Ins. Co. v. Superintendent of Ins., 176 N.E.2d 63, 66 (N.Y. 1961)).
118. *Id.*
119. *See id.* at 531.

argument, which would render the reference to certificates of insurance in the agreement meaningless.[120]

The appellate court concluded that the inclusion of such language raises an issue of fact and represents an unresolved ambiguity regarding intent because, "[a]lthough [i]t is well established that a certificate of insurance, by itself, does not confer insurance coverage, such a certificate is evidence of a carrier's intent to provide coverage."[121]

> [B]y agreeing to language in the agreement that it would provide certificates of insurance to Seneca's parent company and Seneca naming both of those entities as additional insureds prior to the performance of any obligations under the agreement, Pocono at minimum indicated its intent to have insurance coverage provided to Seneca.[122]

VI. POLICY INTERPRETATION

Insurance policies are interpreted in a manner that provides force and effect to all its terms, and courts accomplish this by construing the policy as a whole, rather than looking at terms in isolation.

In *Mulle v. Lexington Insurance Co.*, the Second Department considered whether an endorsement granting a particularly limited extension of coverage could be read to potentially limit other grants of coverage.[123] Finding in the negative, the court was unwilling to rewrite the policy to provide limitations that were not expressed therein.[124]

There, property owned by Joseph Mulle was damaged when heating oil leaked onto their lawn.[125] It was later determined that the oil came from a tank that was located on a neighbor's premises, but Superstorm Sandy carried it onto Mulle's property.[126] Having sustained damage, Mulle naturally submitted a claim with his insurer, Lexington Insurance Company.[127]

Denying Mulle's claim, Lexington raised a pollution exclusion.[128] The policy also contained an endorsement extending coverage

120. *See id*.

121. *Corter-Longwell*, 161 N.Y.S.3d at 531 (quoting Hunt v. Ciminelli-Cowper Co., 939 N.Y.S.2d 781, 785 (App. Div. 4th Dep't 2012).

122. *Id.*

123. *See* Mulle v. Lexington Ins. Co., 157 N.Y.S.3d 29, 31 (App. Div. 2d Dep't 2021).

124. *Id*. at 32–33.

125. *Id.* at 31.

126. *Id*.

127. *Id.*

128. *See Mulle*, 157 N.Y.S.3d at 31–32.

for the " . . . escape of liquid fuel from a fuel system on property owned by an insured" (the ELF endorsement).[129] Lexington concluded that since the fuel originated from a neighboring premises, it was not "from a fuel system located on property owned by an insured," precluding coverage under the ELF endorsement.[130]

On summary judgment, Lexington argued that the mere existence of the ELF endorsement suggested that coverage was unavailable elsewhere within the policy for fuel leaks, or else the ELF endorsement would be rendered superfluous.[131] However, the Second Department rejected this argument.[132] The mere existence of the ELF endorsement did not invalidate other coverages that may answer for such a risk.[133] The ELF endorsement was not itself an exclusion applicable to other coverages, but rather, a grant of coverage available in limited circumstances.[134]

VII. PREMIUMS

An insurance policy is a contract that is entered into between an insured and the insurance company, with the insured paying premiums in exchange for protection from what might never occur. Where a breach of contract remains the standard cause of action for a policyholder to bring against its carrier, an unjust enrichment claim remains out of reach. That was the case in *ASG & C, Inc. v. Arch Specialty Insurance Co.*, where the Second Circuit barred a policyholder from suing its carrier for unjust enrichment as a result of the insurer's alleged breach of the policy.[135]

ASG & C, Inc., was insured for commercial general liability with Arch Specialty Insurance Company.[136] Upon expiration of the policy, ASG & C sought an audit to determine the appropriate rate to charge as a premium for a policy renewal.[137] Notably, although the policy permitted this procedure, it also explained that Arch could invoice ASG & C for the expenses incurred during such an audit.[138] Arch, in

129. *Id*. at 31.
130. *Id*.
131. *See id.* at 32.
132. *See id*.
133. *See Mulle*, 157 N.Y.S.3d at 32.
134. *See id*.
135. *See* ASG & C, Inc. v. Arch Specialty Ins. Co., No. 21-1761-cv, 2022 WL 839805, at *1 (2d Cir. March 22, 2022).
136. *Id*.
137. *Id*.
138. *See id*.

reliance upon this invoicing provision, invoiced the policyholder $24,313.62 for "Audit Premium."[139] ASG & C subsequently filed suit, seeking a declaration that they were not obligated to pay for this, since allowing the carrier to retain this money would result in unjust enrichment.[140]

In finding for Arch, the Second Circuit held that unjust enrichment is an equitable remedy, and is only available absent the existence of a formal written contract, such as an insurance policy.[141] Thus, given that the insurance policy is a contract, like any other, between the policyholder and the carrier, the existence of the formal insurance contract precluded a cause of action sounding in unjust enrichment.[142] Continuing, the court explained that the existence of a valid and enforceable written contract precludes recovery for events arising out of the same subject matter.[143]

VIII. CANCELLATION

Under New York law, cancellation of certain types of insurance policies requires careful adherence to the strictures of New York Insurance Law Section 3425.[144] The Second Department's decision in *Garcia v. Shah* demonstrates the consequences to an insurer for failing to comply with these strict cancellation requirements, including the obligation that the notice of cancellation be mailed to *all* of the named insureds in order to be effective.[145]

Husband and wife, Darshan and Ranjana Shah were sued by Imelda Garcia for a slip and fall occurring at the Shahs' home.[146] The Shahs then asked their homeowners insurance company, Occidental Fire & Casualty Co. of North Carolina (Occidental), to defend them in the lawsuit.[147] Occidental disclaimed coverage, claiming that the homeowners policy at issue was cancelled prior to the accident due to non-payment of premium.[148] As a result of Occidental's disclaimer, the Shah's implead Occidental in a third-party action.[149]

139. *Id*.
140. *See ASG & C, Inc*., 2022 WL 839805, at *1.
141. *Id.*
142. *Id.*
143. *Id.*
144. N.Y. INS. LAW § 3425 (McKinney 2023).
145. Garcia v. Shah, 170 N.Y.S.3d 117, 122 (App. Div. 2d Dep't 2022).
146. *Id*. at 120.
147. *Id.*
148. *Id.*
149. *Id.*

The Second Department noted that the initial burden of demonstrating a valid cancellation rests with the insurance company.[150] Although Occidental was correct that it was entitled to cancel the relevant policy for non-payment under the statute,[151] it failed to abide by the requirements of issuing such cancellation, rendering the cancellation void.[152] Specifically, Occidental supplied proof that it had mailed the notice of cancellation to Mr. Shah, alone, but had neglected to address anything regarding cancellation to Mrs. Shah.[153] Since New York Insurance Law section 3425(c)(2)(A) requires that proof of mailing establish that cancellation was mailed "to the named insured at the address shown in the policy," where there are multiple named insureds, the notice of cancellation must be mailed to all of them, even if they are husband and wife and reside at the same address.[154]

IX. FRAUD

Fraud costs the insurance industry and its policyholders money. Identifying fraud and adjusting claims that later are determined to be fraudulent, requires a proportional increase in the amount of premium dollars collected for similar accidents in the future. Accordingly, regulators and insurers alike have shared interest in putting resources towards combatting fraud, such as staged accidents, to keep costs and premiums in check.

One such example from this *Survey* period was *State Farm Mutual Automobile Insurance Co. v. Anikeyeva.* Prior to this insurance coverage action, the defendants, all of whom were professional corporations purportedly formed under New York law, had initiated a string of no-fault insurance collection efforts.[155] In response, State Farm brought this action seeking a declaration that the defendants were not

150. *Garcia*, 170 N.Y.S.3d at 122 (citing Unitrin Direct Ins. Co. v. Barrow, 128 N.Y.S.3d 638, 639 (App. Div. 2d Dep't 2020)).

151. *See* N.Y. INS. LAW § 3425(c)(2) (McKinney 2022).

152. *Garcia*, 170 N.Y.S. at 120.

153. *Id.*

154. *Id.* at 122 (citing INS. LAW § 3425(c)(2)(A)). Although this result seems harsh, it is well grounded in New York public policy protecting the rights of injured victims to recovery for their injuries, since it is meant to ensure that the insured receives notice of cancellation and can obtain replacement coverage as soon as possible.

155. State Farm Mut. Auto. Ins. Co. v. Anikeyeva, 149 N.Y.S.3d 910, 910 (App. Div. 2d Dep't 2021).

entitled to such benefits as they were in fact unlawfully formed under the laws of New York.[156]

Approximately three years after the action was brought, one of the defendants named in the lawsuit, Andrey Anikeyeva, pleaded guilty to charges involving health care fraud and mail fraud arising out of his role in operating acupuncture clinics that were not owned and controlled by a licensed acupuncturist as required by New York law.[157] Four years after this guilty plea and resulting imprisonment, one of the clinics involved in the scheme, New Era Acupuncture, P.C., attempted to enforce against State Farm a judgment it won before the guilty plea.[158] In response, State Farm moved for an injunction to prevent recovery on any no-fault judgments obtained in any underlying no-fault action, in light of the guilty plea.[159]

Agreeing with State Farm, the Second Department noted that, although generally a vacatur of the judgment is the sole remedy available to a party who lost a judgment due to fraud or false testimony by the opposing party, the losing party may move for a preliminary injunction if it can prove that the opposing party's fraud was part of a larger scheme.[160] Here, the court held that State Farm had met its burden of proving that the defendant's fraud, which allows it to originally obtain the no-fault judgment against State Farm, was indeed part of a larger scheme.[161] As such, the court allowed State Farm to make a collateral attack on the judgment in this instance, instead of leaving it to the usual device of a motion to vacate.[162]

X. DISCLOSURE OF UNDERWRITING MATERIALS

Underwriting files are regularly sought in lawsuits having nothing to do with policy underwriting. These files contain policy applications, rating information and other documents used by the insurer in issuing a policy. They may be important in certain cases, where ambiguity exists, where misrepresentations may be important in a

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 911.

160. *State Farm Mut. Auto. Ins. Co*., 149 N.Y.S.3d at 911 (citing Newin Corp. v. Hartford Accident & Indem. Co., 333 N.E.2d 163, 166 (N.Y. 1975)).

161. *Id.* (citing Specialized Indus. Servs. Corp. v. Carter, 890 N.Y.S.2d 90, 92 (App. Div. 2d Dep't 2009)); *see* McMahan v. Belowich, 84 N.Y.S.3d 220, 222 (App. Div. 2d Dep't 2018).

162. *State Farm Mut. Auto. Ins. Co*., 149 N.Y.S.3d at 911.

rescission action, or where the intention or actions of the parties in creating the contract are at issue. Otherwise, they provide little if any value in coverage litigation. In *Berkshire Hathaway Specialty Insurance Co. v. H.I.G. Capital, LLC*, the First Department found an underwriting file was not discoverable in a declaratory judgment action because the insurer was only seeking to enforce a policy exclusion, rather than a rescission.[163]

Starr Indemnity & Liability Company asked its soon to be insured, H.I.G. Capital, LLC, to execute a "Warranty and Representation Letter," which asked H.I.G. Capital whether there were any pending claims, suits, actions, or investigations against any of the proposed insureds, and whether any of the proposed insureds had any knowledge of any act, error, or omission that may give rise to such a claim.[164] In its responses to this application, H.I.G. Capital represented that it was unaware of any such claims, and agreed that if any such claim existed, all coverage would be precluded.[165] However, H.I.G. Capital had received warnings from the United Kingdom's Pension Regulator in December 2014, alleging that it took improper actions relating to pensions and threatening to seek contribution from the insured.[166] Upon receipt of these warnings, H.I.G. Capital notified the insurer, Starr.[167] Upon receipt of this notice, Starr issued a disclaimer of coverage, which in turn resulted in this declaratory judgment action.[168]

During discovery, H.I.G. Capital sought Starr's underwriting file for the policy.[169] Starr objected, and a motion to compel ensued.[170] Ultimately, agreeing with Starr, the First Department drew a dichotomy between attempting to rescind an entire policy based upon material misrepresentation, which would be grounds for the disclosure of the underwriting file, and the mere enforcement of a policy exclusion

163. Berkshire Hathaway Specialty Ins. Co. v. H.I.G. Cap., LLC, 163 N.Y.S.3d 64, 65 (App. Div. 1st Dep't 2022).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Berkshire Hathaway*, 163 N.Y.S.3d at 65.

169. Berkshire Hathaway Specialty Ins. Co. v. H.I.G. Cap., LLC, No. 652750/2017, 2020 N.Y. Slip Op. 31674(U), at *9 (Sup. Ct. N.Y. Cnty. May 27, 2020).

170. *Id.* at *14.

to preclude coverage.[171] Since Starr was trying to enforce a policy exclusion based on the Warranty and Representation Letter, and was not trying to rescind the policy, the court held that the disclosure of the full underwriting file was unnecessary to allow H.I.G. Capital to defend against the declaratory judgment action.[172]

Similarly, in *Allied World Insurance Co. v. National Union Fire Insurance Co.*, the First Department found that the deposition of an insurance underwriter was unnecessary.[173] In precluding such a deposition, the court reasoned that the policy language was unambiguous.[174] In enforcing unambiguous policy language as written, there is simply nothing left to ask anyone from the underwriting department.[175]

XI. AUTOMOBILE INSURANCE

Without fail, automobile insurance coverage issues clog the courts, year after year. And it makes sense, given the necessity of automobile insurance under New York law[176] and the predisposition of this generation of drivers to distraction, always. We have outlined a few decisions below that raised interesting points during the *Survey* period.

In *Milligan v. GEICO General Insurance Co.*, the United States Court of Appeals for the Second Circuit found that when a new car is totaled, an insurer must pay the "reasonable purchase price" for a "new identical vehicle" under New York regulations.[177]

Milligan had purchased a brand new 2015 Lexus for $51,400 and proceeded to insure it under an auto policy issued by GEICO General Insurance Company (GEICO).[178] Just two months after purchasing the

171. *Berkshire Hathaway*, 163 N.Y.S.3d at 65.

172. *Id.* The First Department points out that "as [it] previously noted, the representation in that letter 'was a condition precedent to coverage, [and] defined the scope of coverage that was bound.'" *Id.* (quoting Berkshire Hathaway Specialty Ins. Co. v. H.I.G. Cap., LLC, 142 N.Y.S.3d 806, 807 (App. Div. 1st Dept. 2021)).

173. Allied World Ins. Co. v. Nat'l Union Fire Ins. Co., 164 N.Y.S.3d 811, 811 (App. Div. 1st Dep't 2022).

174. *Id.*

175. *Id.*

176. *See* N.Y. INS. LAW § 1113(a)(12), (19) (McKinney 2022); *see also* INS. LAW § 5103(a).

177. Milligan v. GEICO Gen. Ins. Co., No. 20-3726-cv, 2022 U.S. App. 2022 WL 433289, at *2 (2d Cir. Feb. 14, 2022).

178. *Id.*

Lexus, it was totaled in a roll-over accident.[179] At trial, representatives of GEICO testified that it was their customary practice to outsource to a third-party company the task of valuing totaled vehicles to allow them to ascertain how much to pay out.[180] The company used by GEICO, CCC Intelligent Solutions, Inc., prepared a "market valuation report," or MVR for short.[181] This MVR compared the replacement price of the Lexus to three other similar vehicles from other dealers that were either currently available or had been recently sold in the same geographical marketplace.[182] In this case, the MVR came back at $45,924, which is what GEICO paid to Milligan.[183]

Milligan, unhappy with the several thousand-dollar difference between the purchase price and the MVR price, sued GEICO, alleging, in part, that it failed to comply with a New York regulation.[184] The regulation at issue requires insurers to pay, for insured private passenger automobile that are of the current model year, the "reasonable purchase price . . . of a new identical vehicle."[185] Here, it was undisputed that the Lexus was indeed "of the current model year;" thus, the two questions that remained were how to define the phrases "reasonable purchase price" and "new identical vehicle."[186]

In holding that "reasonable purchase price" should be defined as that price upon which a reasonable buyer and a reasonable seller would agree in the relevant geographic market, the Second Circuit reasoned that the only other possible way to define this term is simply by the sticker price.[187] However, as the court reasoned, if the legislature had intended for this term to be defined that way, the statute would say that, and it does not.[188] Thus, the court concluded that the term must mean the price a reasonable consumer and a reasonable seller would agree on in the same geographic market.[189]

The court went on to describe how the "reasonable purchase price" can be honestly ascertained.[190] One way is for the insurer to

179. *Id.*
180. *See id.* at *3.
181. *Id.*
182. *Milligan,* 2022 WL 433289, at *3.
183. *Id.*
184. *Id.*
185. *Id.* at *6 (quoting 11 N.Y.C.R.R. § 216.7(c)(3) (2022)).
186. *Id.* at *7–9.
187. *Milligan,* 2022 WL 433289, at *10–11.
188. *Id.* at *8.
189. *Id.* at *8–9.
190. *Id.* at *11.

simply consult with local dealerships to identify identical new cars for sale, or those which have been recently sold.[191] If no identical cars are available, then nearly identical cars can be used to aid in this determination, with the aid of a professional appraiser. [192]

The second question was how to define the term "new identical vehicle."[193] The court noted that this term is subject to two possible definitions: either new to the buyer, or new to the world.[194] In adopting the latter definition, the court reasoned that, had New York regulators intended this term to take on the former definition, the word "new" in the regulation would serve no purpose, since, under such a definition, any car could be sufficient.[195] Since the regulators *did* include the word "new," however, the amount of money given to the insured must be sufficient to enable the insured to purchase a brand-new vehicle of the same make and model, with identical features, and almost no miles on the odometer.[196]

Given that this appeal was taken from a threshold pleading motion to dismiss, and construing the facts in favor of the plaintiff, her allegation that GEICO failed to comply with Regulation 64 was sufficient to warrant continued litigation on the issue.[197]

Fundamentally, automobile insurance provides coverage for covered automobiles, as those are defined under the policy. A decision out of New York's Second Department, *Ottey v. Maya Assurance Co.* should serve as a reminder of this most basic of principals.[198]

Ottey was injured when her livery cab suddenly sped away, while she was exiting.[199] The cab was owned by ABC Global Limo (ABC), which Ottey sued to recover for her injuries.[200] ABC defaulted, resulting in a default judgment for $75,000.[201]

Additionally, Ottey applied to Maya Assurance for no-fault benefits, claiming it insured the livery.[202] Initially, Maya paid benefits but

191. *Id.*
192. *Milligan*, 2022 WL 433289, at *11.
193. *Id.* at *10.
194. *Id.* at *9.
195. *Id.* at *9–10.
196. *Id.*
197. *Milligan*, 2022 WL 433289, at *12.
198. Ottey v. Maya Assurance Co., 166 N.Y.S.3d 907, 908 (App. Div. 2d Dep't 2022).
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*

subsequently advised payments were issued in error as the policy did not cover the cab.[203]

Maya argued that the cab was insured until August 14, 2009, at which time ABC had asked to take the vehicle off the policy and transfer coverage to a replacement vehicle.[204] Ottey argued in opposition that Maya should be estopped from denying coverage for failing to timely deny coverage, which prejudiced her by preventing her from timely filing a claim with the Motor Vehicle Accident Indemnification Corporation (MVAIC).[205]

The lower court found that Maya had no obligation to timely deny because the vehicle was not on the policy and there was no prejudice because she still had 180 days following the reversal of its decision to file a claim with MVAIC.[206] Unable to refute this fact on appeal, Ottey instead contended for the first time that Maya was equitably estopped from denying coverage because it was complicit in ABC Global's insurance fraud and that she was prejudiced by Maya's failure to issue a disclaimer and partial payment because the statutory maximum she could receive if she filed a claim with the MVAIC is $25,000, and, therefore, she could not recover the full $75,000 default judgment amount.[207] The court properly rejected those arguments as inappropriately raised on the first time on appeal.[208]

Another recurring issue in automobile claims is whether a vehicle was "furnished or available" for the regular use of an insured under a non-owned auto exclusion.[209]

Joseph Timpano, on behalf of the Estate of Yar, brought a declaratory judgment action seeking a determination that New York Central

203. *Ottey*, 166 N.Y.S.3d at 908.

204. *Id.*

205. *Id.* As described by the Second Department, Maya was alleged to have "lulled the plaintiff into sleeping on her rights" and that she had "been prejudiced thereby as she was now precluded from seeking alternative remedies, such as a claim with the [MVAIC]." *Id.*

206. *Id.* This decision is correct, as there is no obligation to issue a disclaimer letter for a vehicle that is not on the policy. *See* Zappone v. Home Ins. Co., 432 N.E.2d 783, 787 (N.Y. 1982). If the plaintiff had been prejudiced by the delay in realizing its mistake, and had lost a substantive right, then, and only then, would there have been an argument in favor of binding the carrier by estoppel. *See Ottey*, 166 N.Y.S.3d at 908.

207. *Ottey*, 166 N.Y.S.3d at 908.

208. *Id.* (citing *in re* Baig, 144 N.Y.S.3d 727, 729 (App. Div. 2d Dep't 2021)).

209. Timpano v. N.Y. Cent. Mut. Fire Ins. Co., 170 N.Y.S.3d 747, 749 (App. Div. 4th Dep't 2022).

Mutual (NYCM) owed coverage under an auto policy for an underlying lawsuit.[210] In that action, it was claimed that passengers in a car driven by Yar were injured in a collision with another vehicle.[211] At the time, Yar was driving his son's car and NYCM claimed that the vehicle was excluded under the policy, as a non-owned auto.[212]

Specifically, NYCM relied on an exclusion removing coverage for the use of any vehicle, other than the covered vehicle listed on the declarations page of the policy, which is "[f]urnished or available for [decedent's] regular use."[213]

The purpose of this provision is to recognize that individuals who have the right to use vehicles frequently, should see that those vehicles are sufficiently insured (rather than compelling their own insurers to provide coverage for those autos).[214]

The record on appeal contained a statement made by Yar's son indicating that Yar had used the vehicle in question two or three times before the day of the accident, that the keys were kept by the "key station" in their home, and that Yar could have used the car anytime it was in the driveway.[215] However, the son's deposition testimony, also contained in the record, indicated that he had purchased the vehicle approximately five to six months before the accident and that Yar had driven it only once.[216] He further testified that decedent could not use the vehicle without first asking for permission.[217]

In affirming denial of NYCM's motion for summary judgment, the Fourth Department recognized that a triable issue of fact exists as to whether the vehicle was actually "furnished or available for [Yar's] regular use."[218] When answering this question, courts consider the availability of the vehicle and frequency of its use by the insured, on account of the limited scope and purpose of coverage for non-owned vehicles.[219] The Fourth Department was unable to make such a determination as a matter of law.[220]

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210. *Id.* at 748.
211. *Id.*
212. *Id.*
213. *Id.* at 749.
214. *See Timpano*, 170 N.Y.S.3d at 749 (citing Newman v. N.Y. Cent. Mut. Fire Ins. Co., 778 N.Y.S.2d 827, 828 (App. Div. 4th Dep't 2004)).
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Timpano*, 170 N.Y.S.3d at 749 (citing *Newman*, 778 N.Y.S.2d at 828).
220. *See id.*

Shifting gears, a highly litigated issue in the automobile claims context is the act of "loading or unloading" and whether certain conduct suffices as the use of a vehicle for the purposes of an automobile exclusion in a commercial general liability policy. In *Tishman Construction Corp. v. Zurich American Insurance Co.*, the First Department found that not every act of "loading or unloading" is created equal.[221] That an accident occurs *during* the loading and unloading process does not necessarily mean that it *resulted* from loading and unloading.[222]

In an underlying lawsuit, Richard Rodriguez, an employee of a subcontractor, Port Morris Tile & Marble Corporation, was allegedly injured when he fell into a hole while at a premises owned by Riverside Center 5 Owner, LLC (Riverside) to make a delivery.[223] Insurance Company of the State of Pennsylvania's (ICSOP) insured Riverside for commercial general liability coverage but that insurance policy contained an exclusion for injury resulting from the "use" of an automobile.[224] ICSOP disclaimed coverage, contending that Rodriguez's injury resulted from the "use" of an automobile to make his delivery because "the process of unloading was not completed here because Rodriguez was injured while checking to ensure a clear exit path, raising the wind flap/curtain to exit, or ensuring that there was nothing loose at the back of the truck."[225]

> Finding coverage under the ICSOP policy, the First Department noted that
>
> While "use" of an automobile includes loading and unloading, an accident does not arise from the "use" of an automobile merely because it occurs during the loading or unloading process, but rather "must be the result of some act or omission related to the use of the vehicle."[226]
>
> * * *
>
> Even if Rodriguez's accident occurred during loading or unloading of the truck, it did not arise out of the "use" of the truck

221. *See* Tishman Constr. Corp. v. Zurich Am. Ins. Co., 166 N.Y.S.3d 635, 638 (App. Div. 1st Dep't 2022).

222. *See id.*

223. *See id.* at 637.

224. *Id.* at 638.

225. *Id.*

226. *Tishman*, 166 N.Y.S.3d at 638 (first quoting Paul M. Maint., Inc. v. Transcon. Ins. Co., 755 N.Y.S.2d 3, 5 (App. Div. 1st Dep't 2002); then quoting ABC, Inc. v. Countrywide Ins. Co., 764 N.Y.S.2d 244, 246 (App. Div. 1st Dep't 2003)).

> or its loading or unloading, because the injury was caused by a defective premises condition, rather than any act or omission related to the use of the automobile.[227]

XII. DISGORGEMENT TO SEC DEEMED COVERED LOSS

This *Survey* period included a decision from New York's high court, *J.P. Morgan Securities Inc. v. Vigilant Insurance Co.*, finding that in a liability policy providing coverage for "wrongful acts," no settlement falls into the definition of "penalties imposed by law," even where the settlement was with the Securities and Exchange Commission (SEC) who threatened to impose actual fines absent resolution.[228]

The Bear Stearns Companies were insured under a primary policy covering "wrongful acts" through Vigilant Insurance Company.[229] The Vigilant policy provided coverage for "loss" that Bear Stearns was liable to pay in connection with any civil proceeding or governmental investigation into violations of laws or regulations.[230] "Loss" was defined to include various types of damages—compensatory and punitive damages were covered, while fines and/or "penalties imposed by law" were not.[231]

Bear Stearns was under investigation by the SEC for facilitating late trade and deceptive market timing practices by its customers.[232] The SEC informed Bear Stearns that it intended to commence a civil action or administrative proceeding for violations of federal securities laws.[233] Before such a proceeding was brought by the SEC, Bear Stearns agreed to a settlement agreement.[234] Under that agreement, Bear Stearns agreed to be publicly censured, cease and desist from any future securities law violations, and to pay $160 million in compensatory damages for its disgorgement as well as a $90 million "civil money penalties" payment, akin to punitive damages.[235]

Bear Stearns then turned to its primary insurer, Vigilant, for indemnification on this settlement.[236] Vigilant argued that the settlement

227. *Id.* (citing *ABC, Inc.*, 764 N.Y.S.2d at 246).
228. J.P. Morgan Sec. Inc. v. Vigilant Ins. Co., 183 N.E.3d 443, 448 (N.Y. 2021).
229. *Id.* at 445.
230. *Id.*
231. *Id.*
232. *Id.*
233. *See J.P. Morgan Sec. Inc.*, 183 N.E.3d at 445.
234. *See id.*
235. *Id.* at 445–46.
236. *See id.* at 446.

was not covered as it flowed from "penalties imposed by law."[237] New York's high court disagreed, finding that Vigilant failed to establish that the $140 million disgorgement payment clearly and unambiguously fell within the policy exclusion for "penalties imposed by law."[238] The Court of Appeals reasoned that, although that phrase is not defined by the policy, it is commonly understood to mean a monetary sanction designed to address a public wrong that is sought for the purpose of deterrence and punishment, rather than to compensate an injured party for their loss.[239]

The court, in 1994, previously determined that, where a sanction has both compensatory and punitive components, it should not be characterized as punitive in the context of interpreting insurance policies.[240] With that in mind, the court held that since the disgorgement amount was determined by a calculation of harm caused by Bear Stearns, and the monies deposited into a victims' fund, the carriers did not meet their burden of proof that the payment was purely a penalty.[241]

Judge Rivera authored an impassioned and lengthy dissent.[242]

> The majority erroneously concludes that the disgorgement amount constitutes the SEC's estimate of harm, which it demanded to compensate victims and, therefore, cannot be a penalty imposed on Bear Stearns (majority op at 12-13). This analysis is belied by the record below, which makes clear that SEC disgorgement of ill-gotten gains is not a compensatory form of relief authorized by federal securities law and that the SEC's primary goal here was to prosecute Bear Stearns for a public wrong, not to make unknown shareholder victims whole. The majority's conclusion that the disgorged funds are recoverable from the insurers is contrary to the insurance policy language and undermines both federal regulation of illegal conduct in the securities market and the SEC's efforts to discourage future violations. I dissent.[243]

While well-reasoned, the dissent failed to persuade any other judge.

237. *Id.* at 448.
238. *J.P. Morgan Sec. Inc.*, 183 N.E.3d at 453.
239. *Id*. at 448–49.
240. *Id.* at 449 (citing Zurich Ins. Co. v Shearson Lehman Hutton, Inc., 642 N.E.2d 1065, 1068 (N.Y. 1994)).
241. *Id.* at 453.
242. *See id.* (Riviera, J., dissenting).
243. *See id.* at 453–54.

XIII. NO-FAULT EXAMINATIONS UNDER OATH

Every year, the New York appellate courts are confronted with a gallimaufry of decisions involving claims for no-fault benefits. This *Survey* period, we have chosen to focus on a few no-fault decisions involving examinations under oath (EUO) in this context. The first decision is *New York Wellness Medical, P.C. v. Nationwide Mutual Insurance Co*., in which the Second Department found that a no-fault insurer is not required to set forth objective reasons for requesting an EUO in order to establish its prima facie entitlement to disclaim for an insureds failure to appear.[244]

N.Y. Wellness Medical, P.C., a medical provider, filed suit against Nationwide Mutual Insurance Company to recover assigned first-party no-fault benefits.[245] Nationwide disclaimed coverage because the provider failed to appear for duly scheduled examinations under oath.[246] The underlying court denied Nationwide's motion for summary judgment on this issue, but implicitly found that Nationwide had timely and properly mailed EUO scheduling letters and a denial of claim form, following the provider's failure to appear.[247] The provider, however, maintained on appeal that Nationwide's EUO requests were unreasonable and thus void.[248]

To establish prima facie entitlement to summary judgment as to non-coverage following a provider's failure to appear at an EUO, Nationwide was required to demonstrate, as a matter of law, that it twice duly demanded an EUO from the provider, that the provider twice failed to appear, and that the insurer issued a timely denial of the claims.[249] This was already decided to be the case in the lower court and the provider did not challenge these points on appeal.[250] Rather, the provider argues that Nationwide's EUO requests were not based upon objective grounds.[251] Since Nationwide was not required to set forth objective reasons for requesting EUOs, the provider failed to

244. *See* N.Y. Wellness Med., P.C. v. Nationwide Mut. Ins. Co., 166 N.Y.S.3d 435, 435 (App. Div. 2d Dep't 2022).
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *See N.Y. Wellness Med., P.C.*, 166 N.Y.S.3d at 435.
250. *See id*.
251. *Id.*

raise a triable issue of fact, entitling Nationwide to summary judgment.[252]

In another failure to appear decision, *Unitrin Advantage Insurance Co. v. Dowd*, New York's First Department found that a failure to appear to an EUO permits an insurer to deny all claims retroactively to the date of loss, regardless of the timeliness of such denials.[253]

Unitrin Advantage Insurance Company requested an EUO of defendant, Andrew Dowd, M.D., following a claim for no-fault benefits for shoulder surgery performed after a motor vehicle accident.[254] Dowd failed to appear, and Unitrin subsequently denied all claims for benefits.[255]

Finding that Unitrin's denial was proper, the First Department noted that the insurer had sent Dowd a timely EUO request and that Dowd had failed to appear.[256] The court held that Dowd's failure to appear for a timely requested EUO was a breach of a condition precedent to coverage, voiding coverage on all claims retroactively to the date of loss, regardless of whether the denials were timely issued.[257]

Similarly, in *Island Life Chiropractic, PLLC v. 21st Century Insurance Co*., the Second Department found that the toll on no-fault's thirty-day pay or deny rule ended when the insured/assignor failed to show for a second EUO, rather than a third.[258]

Island Life Chiropractic Pain Care, PLLC sought to recover assigned first-party no-fault benefits from 21st Century Insurance Company for three separate claims.[259] Island Life alleged that a claim was mailed to defendant on November 26, 2014, and that two additional claims were mailed on February 13, 2015.[260] 21st Century scheduled EUOs of its insured (Island Life's patient-assignor) to be held on December 12, 2014, January 22, 2015, and February 17, 2015, but the

252. *Id.*

253. Unitrin Advantage Ins. Co. v. Dowd, 143 N.Y.S.3d 543, 543 (App. Div. 1st Dep't 2021).

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* (first citing Hertz Vehicles, LLC v. Alluri, 95 N.Y.S.3d 523, 523 (App. Div. 1st Dep't 2019); then citing Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, 918 N.Y.S.2d 473, 474 (App. Div. 1st Dep't 2011)).

258. Island Life Chiropractic Pain Care, PLLC v. 21st Century Ins. Co.,158 N.Y.S.3d 524, 525–26 (App. Div. 2d Dep't 2021) (citing Quality Health Supply Corp. v. Nationwide Ins., 131 N.Y.S.3d 782, 782 (App. Div. 2d Dep't 2020)).

259. *Id.* at 525.

260. *Id.*

insured did not appear.[261] Accordingly, the November 26, 2014, claim was denied on February 24, 2015 and the February 13, 2015 claims were denied on March 2, 2015.[262]

On appeal, Island Life contended that 21st Century "was required to deny all three claims within 30 days of plaintiff's assignor's failure to appear for the second scheduled EUO, on January 22, 2015, and therefore that defendant is precluded from raising this defense."[263]

Agreeing initially with Island Life, the court provides that 21st Century's denial of the November 26, 2014, claim on February 24, 2015, was untimely.[264] "A no-fault claim must be paid or denied 'within 30 calendar days after the insurer receives proof of claim.'"[265] While undisputed that defendant tolled its time to pay or deny the November claim by timely scheduling an EUO of the insured,[266] the toll ended upon the second EUO on January 22, 2015.[267] By failing to establish that its denial of the November claim was within thirty days of the end of the toll, 21st Century had not established that its EUO no-show defense was timely.[268] This, however, did not end the inquiry.

With regard to the February 13, 2015, 21st Century demonstrated that those claims were properly denied on March 2, 2015, within thirty days of their receipt, based upon the prior nonappearance.[269] Although Island Life argued that by failing to timely deny the November claim after the second non-appearance, 21st Century waived the ability to deny the February 24, 2015 claim due to untimeliness, this position was found without merit.[270] "Indeed, under [Island Life's] interpretation, an eligible injured person and his or her assignees could simply wait 30 days after failing to appear to submit any new claims, and the insurer would then be prohibited from denying those claims based

261. *Id.*

262. *Id.*

263. *Island Life Chiropractic*, 158 N.Y.S.3d at 525.

264. *See id.*

265. *Id.* (citing 11 N.Y.C.R.R. § 65-3.8(a)(1) (2021)).

266. *See id.* at 525. (citing 11 N.Y.C.R.R. § 65-3.8(a)(1) (2021)); *see also e.g.*, Sound Shore Med. Ctr. v. N.Y. Cent. Mut. Fire Ins. Co., 963 N.Y.S.2d 282, 286 (App. Div. 2d Dep't 2013); Longevity Med. Supply, Inc. v. IDS Prop. & Cas. Ins. Co., 999 N.Y.S.2d 797, 797 (App. Div. 2d Dep't 2014).

267. *Island Life Chiropractic*, 158 N.Y.S.3d at 525–26 (citing *Quality Health Supply Corp. v. Nationwide Ins.,* 131 N.Y.S.3d 782, 782 (App. Div. 2d Dep't 2020)).

268. *See id.* at 526.

269. *Id.* (first citing 11 N.Y.C.R.R. § 65-3.8(a)(1)); then citing ARCO Med. N.Y., P.C. v. Lancer Ins. Co., 946 N.Y.S.2d 65, 65 (App. Div. 2d Dep't 2011)).

270. *Id.*

upon the nonappearance."[271] 21st Century's "failure to timely deny the November 26, 2014 claim based on the January 22, 2015 nonappearance was not a waiver of defendant's right to timely deny, as it did, the February 13, 2015 claims based upon the same prior nonappearance," since "[e]ach such claim is treated on an individual basis."[272]

XIV. REINSURANCE

For decades, reinsurance companies have enjoyed special treatment in that they were not liable to pay defense costs incurred by their cedents in excess of the applicable policy limits—a marked difference from the rule applicable to everyday insurers, who often must pay beyond policy limits. But first, a bit of vocabulary is in order. A "reinsurer" is an insurance company that issues insurance policies to other insurance companies to spread their risk farther, enabling them to take on more insureds themselves.[273] A "cedent," then, is the insurance company insured by a reinsurance company—though formally defined as any party who passes the financial obligation for potential losses to an insurer, this term is generally reserved for holders of a reinsurance policy.[274]

Indeed, the longstanding rule, unique to reinsurers, established by *Bellefonte Reinsurance Co. v. Aetna Casualty & Surety Co.*,[275] and *Unigard Security Insurance Co. v. North River Insurance Co.*, was that, regardless of the demand made or the reasonableness of the costs incurred by the cedent, the reinsurer's obligation to their cedent would always be capped by the policy limit to which the parties agreed.[276]

However, everything changed during this *Survey* period following the Second Circuit's decision in *Global Reinsurance Corp. of America v. Century Indemnity Co.* on December 28, 2021.[277] In holding that the policy limits of a reinsurance policy are not inclusive of defense costs, meaning a reinsurer may be required to reimburse its cedent beyond the limits of the policy, the Second Circuit reasoned

271. *Id.*

272. *Island Life Chiropractic*, 158 N.Y.S.3d at 526–27 (citing *ARCO Med.,* 946 N.Y.S.2d at 65).

273. *See Reinsurer,* BLACK'S LAW DICTIONARY (11th ed. 2019).

274. *See id.*

275. Bellefonte Reinsurance Co. v. Aetna Cas. & Sur. Co., 903 F.2d 910, 914 (2d Cir. 1990).

276. Unigard Sec. Ins. Co. v. N. River Ins. Co., 4 F.3d 1049, 1071 (2d Cir. 1993).

277. *See* Glob. Reinsurance Corp. of Am. v. Century Indem. Co., 22 F.4th 83, 83 (2d Cir. 2021).

that the certificates of reinsurance did not specifically provide that the terms of the reinsurance policy were to differ from the terms of the policies issued by the cedent itself, Century Indemnity Company, with respect to defense costs, which routinely allow the payment of costs incurred in the course of providing a defense in excess of the policy limits.[278] The key to this decision, as the Second Circuit notes, is that the reinsurance certificates contained a "follow-form clause," which essentially incorporates the same terms and conditions that are found in the underlying policies (i.e., the one issued by the cedent, Century, to the cedent's own insured(s)) into the reinsurance contracts.[279]

XV. FIRST-PARTY PROPERTY INSURANCE

In the first-party, property insurance realm, a few interesting decisions came down during the *Survey* period that are worthy of report.

In *New York University v. Factory Mutual Insurance Co.*, U.S. Court of Appeals for the Second Circuit issued a summary order addressing whether a flood sublimit in an insurance policy applied only to the buildings specified by an "address clause," or whether such sublimit included all buildings.[280]

Although the Second Circuit concluded that the policy's "language unambiguously provided that additional coverages are subject to, not in addition to, the applicable limit of liability for loss or damage caused by flood," it found the policy to be ambiguous as to whether a flood sublimit applied included all buildings at New York University (NYU) Hospital Center and School of Medicine, or only specified ones.[281] However, after examining available extrinsic evidence to ascertain the meaning intended by the parties during the formation of the contract it determined the policy limit applied broadly.[282]

The insurance policy provided that the $40 million flood sublimit is for property located at specified addresses.[283] Certainly, in a literal reading of this "address clause," the flood sublimit applied exclusively to buildings with the specific street addresses.[284] However, the court noted that reading the "address clause" as referring to properties

278. *Id.* at 95.
279. *Id.* at 87.
280. N.Y. Univ. v. Factory Mut. Ins. Co., No. 20-1093-cv, 2021 U.S. App. LEXIS 22141, at *6 (2d Cir. July, 26, 2021).
281. *Id.* at *4, 6.
282. *See id.* at *6.
283. *Id.* at *4–5.
284. *See id.* at *5.

beyond the literal street addresses was the only way to reconcile the flood sublimit with the policy as a whole.[285]

More specifically, the Second Circuit noted that the policy's Schedule of Locations provided several addresses for one of the three properties at issue —some falling entirely inside or outside of the "address clause."[286] Because the flood sublimit could be understood as referencing all property located at the NYU Hospital Center and School of Medicine, the flood sublimit could not properly be characterized as "capable of only one reasonable interpretation" involving the literal street address of buildings.[287]

"[E]xtrinsic evidence indicates that the parties intended the flood sublimit in the 2011 Policy to operate the way it had in NYU's previous insurance policies with Factory Mutual—namely, to apply to properties identified by 'Index 21374.00' in the Schedule of Locations."[288] Although NYU claimed that "removal of the reference to Index 21374.00 in the 2011 Policy reflected the parties' mutual intent to remove the three disputed buildings from the $40 million flood sublimit (which would have the effect of increasing the flood limit of liability for those three buildings to $210 million), NYU adduced no evidence to this effect."[289] Rather, NYU's broker provided a chart that comparing the 2010 and 2011 limits of liability, identifying the flood sublimit as $40,000,000 for each, with express reference to Index 21374.00.[290] This was strongly indicative of the parties' intent that the flood sublimit continue to apply to a larger set of buildings.[291]

Another interesting first-party, property insurance case over the past year was the First Department's decision in *Tenth Avenue, LLC v. Aspen American Insurance Co.*, which found factual issues as to whether the motive of loss was covered vandalism or excluded theft.[292]

Tenth Avenue, LLC sustained loss to a rental property it owned and subsequently filed a claim with its insurer, Aspen American

285. *N.Y. Univ.*, 2021 U.S. App. LEXIS 22141, at *5.
286. *Id.*
287. *Id.*
288. *Id.* at *6.
289. *Id.* at *6–7.
290. *N.Y. Univ.*, 2021 U.S. App. LEXIS 22141, at *7.
291. *Id.*
292. Tenth Ave., LLC v. Aspen Am. Ins. Co., 157 N.Y.S.3d 724, 724 (App. Div. 1st Dep't 2022).

Insurance Company.[293] Aspen disclaimed coverage pursuant to an exclusion for "theft by any person to whom [Tenth Avenue] entrust[ed] the property."[294] Aspen reasoned that certain missing property was entrusted to the tenant and stolen by said tenant during the course of eviction proceedings.[295]

However, in opposition, Tenth Avenue contended that the property actually sustained damage to railings and fixtures, removing such loss from the scope of the theft exclusion in favor of characterizing it as vandalism—a covered peril under the policy.[296] This plausible argument created an issue of fact for trial.[297]

Finally, a word of caution to tenant-insureds. The First Department's decision in *CBG Janovic Management Corp. v. Massachusetts Bay Insurance Co.* found that the voluntary payment of rent during a business closure following a covered cause of loss was not, itself, a covered loss.[298]

After a collapse of the ceiling at CBG Janovic Management Corp.'s place of business, it was undisputed that CBG sustained a covered cause of loss under its insurance policy with Massachusetts Bay Insurance Company.[299] As such, Massachusetts Bay agreed to, and did, issue payment for the loss of business income during the period of restoration required to repair or replace the ceiling.[300]

Notably, however, CBG was not obligated to pay rent under the terms of the lease until the premises was once again habitable.[301] Despite this, monthly payments were made during ongoing repairs.[302] CBG's requests for reimbursement from Massachusetts Bay for paid rents was not a covered loss because the policy forbade coverage for rent while the business was shuttered.[303]

293. Tenth Ave., LLC v. Aspen Am. Ins. Co., No. 152935/2018, 2021 NY Slip Op 31010(U), at 3–4 (Sup. Ct. N.Y. Cnty. Mar. 31, 2021).

294. *Id.* at 2.

295. *Id.* The court actually notes that this fact cuts against application of the exclusion, as the subject of an eviction proceeding is potentially not "entrusted" with the property. *Tenth Ave., LLC*, 157 N.Y.S.3d at 724.

296. *Tenth Ave., LLC,* slip op. at 8.

297. *Id.* at 10.

298. CBG Janovic Mgmt. Corp. v. Mass. Bay Ins. Co., 162 N.Y.S.3d 704, 705 (App. Div. 1st Dep't 2022).

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *CBG Janovic Mgmt. Corp.*, 162 N.Y.S.3d at 705.

XVI. UNINSURED MOTORIST AND SUPPLEMENTARY UNINSURED/UNDERINSURED MOTORISTS INSURANCE

There were several uninsured/underinsured motorist coverage decisions rendered during the *Survey* period that should stand as important, fundamental practice pointers.

First, the Fourth Department decision in *Graves v. Motor Vehicle Accident Indemnification Corporation* reminds us that an uninsured/underinsured motorist claim under Insurance Law Article 52 cannot be brought against MVAIC until exhaustion of the limits of liability available to a known owner or operator of a vehicle allegedly responsible for an accident.[304] Where an action involves an accident that cannot be characterized as "one in which the identity of the owner and operator was unknown or not readily ascertainable through reasonable efforts," an action cannot be commenced against MVAIC.[305]

Second, *State Farm Insurance Co. v. Calvello* serves as an important reminder that an insurer has twenty days to move to stay a supplementary uninsured/underinsured motorist (SUM) arbitration, or else it cannot compel discovery or otherwise stay the arbitration from moving forward.[306]

Third, the Second Department reminds us in *Travelers Personal Insurance Co. v. Hanophy-Ryan* that an insured that wishes to settle an automobile accident claim with a tortfeasor must seek their SUM carrier's consent, as required by the New York SUM endorsement, or else lose the right to SUM Benefits under their insurance policy entirely.[307]

Finally, one additional reminder from the First Department's decision in *Nationwide Affinity Insurance Company v. Ortiz* is that the issuance of a general release may bar sum arbitration to the unwitting.[308] In *Ortiz*, it was found that a general release signed by the

304. Graves v. MVAIC, 150 N.Y.S.3d 646, 646 (App. Div. 4th Dep't 2021) (citing Acosta-Collado v. Motor Veh. Accident Indem. Corp., 962 N.Y.S.2d 149, 151 (App. Div. 2d Dep't 2013)).

305. *See id.* (quoting *Acosta-Collado*, 962 N.Y.S.2d at 151) (first citing N.Y. INS. LAW § 5218(b)(5) (McKinney 2022); then citing Yi Song He v. Motor Veh. Accident Indem. Corp., 9 N.Y.S.3d 53, 54 (App. Div. 1st Dep't 2015)).

306. State Farm Ins. Co. v. Calvello, 154 N.Y.S.3d 549, 550 (App. Div. 4th Dep't 2021) (citing N.Y. C.P.L.R. 7503(c) (McKinney 2022)).

307. Travelers Personal Ins. Co. v. Hanophy-Ryan, 154 N.Y.S.3d 862, 863 (App. Div. 2d Dep't 2021) (citing Travelers Home & Marine Ins. Co. v. Kanner, 962 N.Y.S.2d 153, 155 (App. Div. 2d Dep't 2013)).

308. Nationwide Affinity Ins. Co. of Am. v. Ortiz, 163 N.Y.S.3d 801, 801 (App. Div. 1st Dep't 2022).

insured applied to her demand for arbitration against the tortfeasor's insurer, Nationwide Affinity Insurance Company of America, where the release unambiguously and unequivocally waived Ortiz's claims to any further recovery, stating that "the release was in 'full satisfaction' and 'settlement' of a 'disputed claim,' and that Nationwide was 'forever discharge[d]' and 'release[d]' from any and all further claims."[309]

XVII. SUBROGATION

During the *Survey* period, we encountered two interesting appellate decisions involving the principals of subrogation.

The Fourth Department in *CHS, Inc. v. Land O'Lakes Purina Feed, LLC* found a property owner's claim for subrogation lacking where its claim for loss was for property owned by another entity entirely.[310]

CHS, Inc. owned a warehouse that was damaged by a fire.[311] CHS claimed losses associated with bulk fertilizer stored therein, as well as additional quantities of fertilizer owned by Mosaic Crop Nutrition, LLC.[312] CHS sued Land O'Lakes Purina Feed, LLC for its alleged responsibility for the fire and attempted to add Mosaic as an additional plaintiff.[313] Land O'Lakes opposed, arguing that CHS was without standing to add Mosaic, or sue for its losses, which had already been paid by CHS' insurer.[314]

Finding that CHS indeed lacked standing, the Fourth Department noted that a party does not have standing to pursue a claim where they have suffered no "injury in fact."[315] Here, CHS failed to establish that it suffered any loss with respect to Mosaic's destroyed fertilizer.[316] It had no direct ownership interest, and any losses paid to Mosaic were reimbursed by CHS' own insurer.[317]

309. *Id.* (alterations in original).

310. CHS, Inc. v. Land O'Lakes Purina Feed, LLC, 153 N.Y.S.3d 354, 357 (App. Div. 4th Dep't 2021).

311. *Id.* at 356.

312. *Id.*

313. *Id.*

314. *Id.*

315. *CHS, Inc.*, 153 N.Y.S.3d at 356 (citing Fritz v. Huntington Hosp., 348 N.E.2d 547, 553 (N.Y. 1976)).

316. *Id.* at 356–57.

317. *Id.* at 357.

Certainly, CHS could have obtained a subrogation receipt from Mosaic, which might have provided a basis for standing, but it did not.[318] Likewise, principles of equitable subrogation were inapplicable because, although plaintiff could sue in its own name to recover for its insurer, it could not bring the claims of another on behalf of its mutual insurer.[319]

Another circumstance where subrogation rights are unavailable is where such rights have been contractually waived. That was the case in *Aspen American Insurance as Subrogee of 2900 Ocean Condo. v. Newman*.[320]

2900 Ocean Condominium's building was damaged by a fire that originated in Philip Newman's condominium.[321] After paying 2900 Ocean's loss, Aspen American Insurance sought to subrogate its claim against Newman as the alleged negligent party.[322] However, the condominium agreement existing between 2900 Ocean and Newman provided a waiver of subrogation.[323] Since the Aspen policy issued to 2900 Ocean indicated that it would not seek subrogation where such right was waived in an underlying contract, it followed that Aspen's claim for subrogation was waived.[324]

XVIII. COVERAGE B – "PERSONAL & ADVERTISING INJURY"

A separate and distinct coverage involves claims for damages associated with "personal and advertising injury". The Commercial General Liability policy provides coverage for "bodily injury" and "property damages" under Coverage "A".[325] It provides coverage for "Personal and Advertising Injury" under Coverage "B".[326] The Second Circuit Court of Appeals in *DISH Network Corp. v. Ace American Insurance Co.* found occasion to assess the potential applicability of a

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318. *Id.*

319. *Id.* (comparing Henderson v. Aetna Cas. & Sur. Co., 434 N.E.2d 247, 247 (N.Y. 1982)).

320. *See* Aspen Am. Ins. v. Newman, 159 N.Y.S.3d 839, 840 (App. Div. 1st Dep't 2022).

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. *See* Dish Network Corp. v. Ace Am. Ins. Co., 21 F.4th 207, 210 (2d Cir. 2021).

326. *See id.*

media exclusion to a purported copyright infringement claim, under Coverage B.[327]

DISH Network Corp., a direct television satellite provider, was sued for alleged copyright infringement in separate lawsuits by the four major networks for breach of contract and copyright infringement in connection with DISH's "Hopper" product.[328] The product allowed users to record network shows and play them back, commercial-free.[329] The networks sought to enjoin DISH from continuing to market and distribute the product.[330] DISH sought coverage from its insurer, ACE American Insurance Company for the lawsuits, which were denied on account of a media exclusion in the policy.[331]

The policy included Coverage B for personal and advertising injury, which included injury arising out of "[i]nfringing upon another's copyright, trade dress or slogan in [an] 'advertisement.'"[332] However, the media exclusion precluded coverage for liability arising from "'[p]ersonal and advertising injury' committed by an insured whose business is . . . [a]dvertising, broadcasting, publishing, or telecasting."[333] Instead of examining the usual coverage questions surrounding claims for "personal and advertising injury," such as whether there was an advertisement, whether it was published, or broadcast, and the like, the court essentially addressed whether DISH was in the business of broadcasting.[334]

DISH, in support of its claim for reimbursement, contended that it was not a broadcasting company for several reasons, including that being in the business of broadcasting applied only to companies whose content is free and DISH charged a fee.[335] However, the court was quick to point out that broadcasting was essentially synonymous with communication, which is the simple act of transmitting and can take place regardless of whether a fee is charged.[336]

DISH further argued that its business was specifically excluded from the term "broadcasting" under telecommunications, dictionaries,

327. *Id.*
328. *Id.*
329. *See id.* at 210.
330. *Dish Network Corp.*, 21 F.4th at 210–11.
331. *See id.*
332. *Id.* at 210.
333. *Id.* (alterations in original).
334. *See id.* at 211.
335. *See Dish Network Corp.*, 21 F.4th at 214.
336. *See id.* at 214–15.

and FCC regulations.[337] The court did not disagree with DISH on this latter argument, but instead found that those definitions were technical and industry specific.[338] According to the Second Circuit, New York law is clear that it does not assign a "'narrow, technical definition' to a term in an insurance policy that does not indicate that the term is meant to have a specialized meaning."[339] Thus, given the broader interpretation of broadcasting, DISH qualified as a broadcaster within the meaning of the media exclusion, defeating coverage for DISH.[340]

XIX. SUIT LIMITATION CLAUSES

Routinely, insurance companies will include what is known as a suit limitation clause in an insurance policy, which contractually sets a time limitation on the period in which it can be challenged on its coverage position by an insured through litigation.[341] The Second Department's decision in *Van Der Velde v. New York Property Underwriting Ass'n* assessed a suit limitation clause during the *Survey* period and determined that a suit limitation clause is considered a statute of limitations defense.[342]

David Zvi Van Der Velde commenced this action after sustaining damage to a premises that he insured through New York Property Underwriting Association, which was caused by a frozen, and burst, pipe.[343] New York Property denied the claim.[344]

Van Der Velde's lawsuit was commenced more than two years after the loss and N.Y. Property moved to dismiss citing its suit limitations clause in the policy.[345] Interestingly, rather than characterizing its motion as based upon documentary evidence (i.e., the policy), N.Y. Property's motion was based upon statute of limitations

337. *Id.* at 215.

338. *Id.*

339. *Id.* (first quoting Michaels v. City of Buffalo, 651 N.E.2d 1272, 1273 (N.Y. 1995)) (citing Christodoulides v. First Unum Life Ins. Co., 946 N.Y.S.2d 773, 776 (App. Div. 4th Dep't 2012)).

340. *Dish Network Corp*., 21 F.4th at 215.

341. *See* 71 N.Y. JUR. 2D INSURANCE § 2571 (2022) ("Insurance policies sometimes contain provisions expressly prohibiting an action on the policy until after the expiration of a certain time or event.").

342. Van Der Velde v. N.Y. Prop. Underwriting Ass'n, 169 N.Y.S.3d 114, 117 (App. Div. 2d Dep't 2022).

343. *Id.* at 115.

344. *Id.*

345. *Id.*

grounds.[346] Essentially, N.Y. Property argued that the suit limitation resulted in a contractual limitation to the statute of limitations which expired prior to the commencement of this lawsuit.[347]

Plaintiff, likely stymied by the actual calculation of time, appears to have argued that while late, N.Y. Property waived the suit limitation clause when it denied coverage.[348] Plaintiff referenced case law which holds that an insured is not obligated to provide documents, sit for an EUO, or file a proof of loss if the insurer first denies coverage.[349] However, in rejecting plaintiff's argument, the appellate division noted that "the contractual limitations period here does not furnish a ground for the denial of a claim under the policy. Rather, the contractual limitations period operates as a defense to an action, and it thereby limits a party's right to enforce the policy."[350]

The Second Department then went on to discuss the traditional rule of waiver relative to suit limitation clauses which requires the insured to demonstrate "clear manifestation of intent."[351] In short, plaintiff needed to provide some evidence that N.Y. Property clearly intended to waive compliance with the suit limitation clause and where no such proof was offered, the matter was dismissed as untimely.[352]

XX. THIRD-PARTY ADMINISTRATORS

A common practice for insurance companies is to outsource their claims handling process to a third-party administrator (TPA), which stands in the shoes of the insurer for the purposes of claims handling and investigations. These TPAs serve an important, albeit limited role, as was recognized in *Innovative Risk Management., Inc. v. Morris Duffy Alonso & Faley*.[353]

Innovative Risk Management, Inc. (Innovative Risk) was a TPA for claims arising under an insurance policy issued by Arch Insurance

346. *See id.*

347. *Van Der Velde*, 169 N.Y.S.3d at 116.

348. *Id.*

349. *See id.* (citing State Farm Ins. Co. v. Domotor, 697 N.Y.S.2d 348 (App. Div. 2d Dep't 1999)).

350. *Id.* at 117 (first citing N.Y. C.P.L.R. 3211(a)(5); then citing John J. Kassner & Co. v. N.Y.C., 389 N.E.2d 99, 102–03 (N.Y. 1979)).

351. *Id.* (citing Gilbert Frank Corp. v. Fed. Ins. Co., 520 N.E.2d 512, 514 (N.Y. 1988)).

352. *See Van Der Velde*, 169 N.Y.S.3d at 117–18.

353. *See* Innovative Risk Mgmt., Inc. v. Morris Duffy Alonso & Faley, 164 N.Y.S.3d 814, 814–15 (App. Div. 1st Dep't 2022).

Company.[354] Innovative Risk alleged that its retained defense counsel failed to timely serve expert disclosure in an underlying litigation.[355] As a result, Innovative Risk claimed that it was forced to pay more to both defend and settle the case than necessary.[356] Innovative Risk filed this action, alleging, among other things, legal malpractice.[357]

With regard to the legal malpractice claim, the First Department held that plaintiff was not an assignee of Arch's potential claims against defendant.[358] Further, Innovative Risk, acting alone, did not have standing to pursue a claim against defense counsel absent an "attorney-client relationship," nor was it in "near privity" with such defense counsel.[359] In this same vein, Innovative Risk's claim for recovery under equitable subrogation principles was misplaced because there was no evidence that the TPA was under any contractual obligation to pay the settlement.[360]

XXI. EXCLUSIONS

When attempting to rely upon an exclusion, an insurance company must establish that a claim falls entirely within the scope of the exclusionary language**.**[361] That can prove to be a challenge at times. Here are a few examples of cases assessing the application of exclusions during the *Survey* period.

In *Mountain Valley Indemnity Co. v. Hylton*, the First Department found that an "insured location" exclusion applied to preclude coverage.[362] Mountain Valley established that it properly disclaimed coverage for an underlying action by establishing that on the date of the loss, its insured, Petronia Hylton, did not live at the premises covered under

354. *Id.*

355. *Id.*

356. *See id.* at 815.

357. *Id.*

358. *Innovative Risk Mgmt., Inc*, 164 N.Y.S.3d at 815.

359. *Id.* (citing Fed. Ins. Co. v. N. Am. Specialty Ins. Co., 847 N.Y.S.2d 7, 12–13 (App. Div. 1st Dep't 2007)).

360. *See id.* (citing Allianz Underwriters Ins. Co. v. Landmark Ins. Co., 787 N.Y.S.2d 15, 17–18 (App. Div. 1st Dep't 2004)).

361. *See* 68A N.Y. JUR. 2D INSURANCE § 894 (2022).

362. Mountain Valley Indem. Co. v. Hylton, 154 N.Y.S.3d 763, 763 (App. Div. 1st Dep't 2021). This issue is frequently litigated in the homeowners' insurance context, as homeowners' insurance is designed to provide coverage for a premises that serves as the insured's residence.

the policy.[363] Although Hylton provided a sworn statement to Mountain Valley that she resided at the premises, she testified at a deposition in the underlying action that she lived elsewhere at the time which was corroborated by her driver's license.[364] As a result, the premises did not qualify as a "residence premises," or "insured location," under the policy.[365]

In another decision, *Madison Square Boys & Girls Club, Inc. v. Atlantic Specialty Insurance Co.*, the First Department found sexual abuse claims excluded under a "sexual misconduct and child abuse exclusion."[366]

In an underlying lawsuit, former members of Madison Square Boys & Girls Club, Inc. (MSBGC) alleged that a former volunteer and a former coach had sexually abused them as children.[367] MSBGC was allegedly required to exercise the degree of care that a prudent parent would in supervising those with access to children while in its custody, and that such duty was breached by failing to supervise the perpetrators, despite notice of their sexual propensities.[368]

Atlantic Specialty Insurance Company issued MSBGC a claims-made insurance policy.[369]

> The Atlantic policy covers 'Loss from any Third Party Claim . . . for a Third Party Wrongful Act', which is defined to include sexual harassment, 'including unwelcome sexual advances, requests for sexual favors or other conduct of a sexual nature, against a Third Party; provided, that 'Third Party Wrongful Act' shall not include any form of intentional sexual

363. *Id.*

364. *Id.*

365. *Id.* (citing MIC Gen. Ins. Corp. v. Campbell, 117 N.Y.S.3d 562, 562 (App. Div. 1st Dep't 2020)). Interestingly, Hylton "later asserted in an affidavit that she had committed perjury at the deposition because her attorney told her that lying would help her defense." *Id.* The perjury defense was too little, too late, as Hylton "offered no evidence to support her assertion of residence, and, particularly in light of the address on her driver's license, her affidavit is insufficient to defeat plaintiff's motion." *Mountain Valley Indem. Co.*, 154 N.Y.S.3d at 763 (citing Tower Ins. Co. of N.Y. v. Brown, 14 N.Y.S.3d 37, 38 (N.Y. App. Div. 1st Dep't 2015)).

366. Madison Square Boys & Girls Club, Inc. v. Atl. Specialty Ins. Co., 166 N.Y.S.3d 21, 22 (App. Div. 1st Dep't 2022).

367. *Id.* With New York's passage of the Child Victims Act, these types of lawsuits have become rather prevalent as of late, which raise interesting insurance questions including the application of various policy exclusions and limitations based upon who knew what, and when.

368. *Id.*

369. *Id.*

harassment, and shall include non-intentional or negligent sexual harassment or sexual harassment imputed through the doctrine of vicarious liability.'[370]

However, the policy also contained a sexual misconduct and child abuse exclusion, which removes coverage for any claim "based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any actual or alleged Sexual Misconduct or child abuse or neglect."[371]

Finding that Atlantic was without any coverage obligations, the First Department notes that the claims made in the underlying action are not covered because, regardless of how such claims are characterized, sexual harassment, like sexual abuse, is intentional.[372] Further, the court rejected MSBGC's argument that the claims made were for vicarious liability, since alleged claims of negligent supervision and emotional distress provide grounds for direct, not vicarious, liability against MSBGC.[373] Continuing its reasoning, the First Department noted that the sexual abuse exclusion contained in the Atlantic policy barred coverage for any claim arising out of, or in any way involving, sexual misconduct and child abuse, and claims for "negligent supervision claim [which] necessarily arise[] out of sexual misconduct as [they are] based on the allegations that the failure to supervise led to the sexual abuse of MSBGC's members when they were children."[374]

XXII. REASONABLE POSSIBILITY OF COVERAGE

New York case law establishes an overarching principal in its insurance law that where there exists no "reasonable possibility" of coverage, based strictly on the allegations contained in the pleadings of the underlying action, the insurer has no duty to defend or indemnify its insured in the underlying action.[375] That was the case in *Ruiz v. 829 Realty LLC*.[376]

370. *Id.*

371. *Madison Sq. Boys & Girls Club*, 166 N.Y.S.3d at 22.

372. *Id.* (citing Bd. of Educ. of E. Syracuse–Minoa Cent. Sch. Dist. v. Cont'l Ins. Co., 604 N.Y.S.2d 399, 400 (App. Div. 4th Dep't 1993)).

373. *Id.* at 22–23 (citing Engelman v. Rofe, 144 N.Y.S.3d 20, 26 (App. Div. 1st Dep't. 2021).

374. *Id.* at 23 (citing Essex Ins. Co. v. Young, 796 N.Y.S.2d 204, 205 (App. Div. 4th Dep't. 2005)).

375. *E.g.,* Stellar Mech. Servs. of N.Y. v. Merchs. Ins. of N.H., 903 N.Y.S.2d 471, 475–76 (N.Y. App. Div. 2d Dep't. 2010).

376. *See* Ruiz v. 829 Realty LLC, 152 N.Y.S.3d 904, 904 (App. Div. 1st Dep't 2021).

In *Ruiz*, the complaint in an underlying action clearly alleged that the injured party "'fell from a height' at [a] premises owned by 829 Realty, while working for defendant Arsh Gen Construction Corp., which was hired by 829 Realty."[377] Acceptance Indemnity Insurance Company insured 829 Realty, but disclaimed coverage for the underlying action due to a contractor's exclusion precluding coverage "for claims premised on personal injury sustained by an employee of an independent contractor while working on behalf of an insured, or on the job site but not working for an insured."[378]

Finding no coverage obligation was owed to 829 Realty, the First Department indicated that the underlying allegations "do not suggest a reasonable possibility of coverage in light of the relevant contractor's" exclusion.[379]

XXIII. SELF-INSURANCE

Self-insurance frequently raises interesting questions that add flavor to a standard insurance coverage dispute. For example, *Brown v. Shurgard Storage Centers LLC* serves as a recent example of the rule that where a contractual promisee is self-insured, the proper measure of damages for a promisor's breach of a contractual insurance procurement requirement is indemnity and defense costs.[380]

Shurgard Storage Centers, LLC had a lease with a company called Vertical.[381] Under the lease, Vertical was to procure insurance and name Shurgard as an additional insured thereunder, which it failed to do.[382] Shurgard, as an out-of-possession landlord was able to escape liability for an accident that occurred in the relevant parking lot.[383] Although Shurgard escaped liability for any judgment or settlement of the underlying plaintiff's claims, Shurgard, a self-insured entity, incurred defense costs due to Vertical's breach of the lease's insurance procurement provision.[384] Accordingly, Shurgard was entitled to

377. *Id.*
378. *Id.*
379. *Id.*
380. *See* Brown v. Shurgard Storage Ctrs., 164 N.Y.S.3d 585, 587 (App. Div. 1st Dep't 2022) (citing Spector v. Cushman & Wakefield, Inc., 955 N.Y.S.2d 302, 304 (App. Div. 1st Dep't 2012)).
381. *See id.*
382. *See id.*
383. *See id.*
384. *See id.*

recoup the defense costs it incurred in defending the action from Vertical.[385]

XXIV. REASONABLE ATTORNEY FEES

Insurance companies occasionally make mistakes when disclaiming coverage. When they do, an insured is entitled to recover reasonable attorney's fees incurred in defending an underlying lawsuit when the insurance company should have been.[386] But what is a reasonable fee? The Second Department had occasion to discuss that issue in *East Ramapo Central School District v. New York Schools Insurance Reciprocal*.[387]

New York Schools Insurance Reciprocal (NYSIR) issued a School Board Legal Liability Policy to East Ramapo CSD (the District).[388] A class action was filed against the District, alleging various constitutional violations.[389] NYSIR denied coverage under the policy.[390]

The District commenced a lawsuit seeking damages for breach of contract and breach of the implied covenant of fair dealing.[391] The District sought $1,710,118.27 in damages for the breach of contract action, which included attorneys' fees, and NYSIR argued the quoted fees were not reasonable.[392] The trial court awarded only $500,000 in attorneys' fees plus interest and disbursements.[393]

The appellate division vacated the lower court's ruling on attorneys' fees.[394] Where an insurer owes damages associated with a breach of the duty to defend, the "attorney's fees paid by the insured 'are presumed to be reasonable, and the burden shifts to the insurer to establish that the fees are unreasonable.'"[395] These damages for attorney's fees owed under an insurance policy should not be treated as if

385. *Brown*, 164 N.Y.S.3d at 587.

386. *See* Madison 96th Assocs., LLC v. 17 E. Owners Corp., 990 N.Y.S.2d 438, 438 (Sup. Ct. N.Y. Cnty. 2014).

387. *See* E. Ramapo Cent. Sch. Dist. v. N.Y. Schs. Ins. Reciprocal, 158 N.Y.S.3d 173, 179 (App. Div. 2d Dep't 2021).

388. *See id.* at 176.

389. *See id.*

390. *Id.*

391. *See id.*

392. *E. Ramapo Cent. Sch. Dist.*, 158 N.Y.S.3d at 180.

393. *Id.* at 176.

394. *Id.* at 181.

395. *Id.* at 179 (citing Columbus McKinnon Corp. v. Travelers Indem. Co., 367 F. Supp. 3d 123, 155 (S.D.N.Y. 2018)).

they were presented via an application for attorneys' fees as the lower court did when it reduced the fees sought by more than sixty-five percent.[396]

The Second Department concluded that the court below improperly reduced the hourly rates charged by the District's attorneys to $400 per hour.[397] The court noted that the law firms hired by the District were both "multinational firms that generally command very high billable rates," and they had "discounted" their ordinary rates for the defense of the underlying action.[398] The court also relied upon two federal court actions where it was determined that an hourly rate of $735 was reasonable for lead counsel for one of the law firms involved in the defense of the District.[399] Accordingly, the case was remitted to the trial court for a new determination on damages, among other remaining issues.[400]

CONCLUSION

Another year of insurance coverage litigation and legislation in the books. Predicting what is yet to come can be a challenge, but we anticipate a few things moving forward to next *Survey* period and beyond.

We have yet to see significant movement in terms of Child Victims Act case law involving insurance disputes, but know that it is coming soon and will likely involve various discovery disputes involving lost or missing policy forms and late notice disclaimers.[401]

We anticipate similar insurance coverage disputes involving claims under New York's Adult Survivors Act will follow soon after.

396. *See id.* at 180.

397. *E. Ramapo Cent. Sch. Dist.*, 158 N.Y.S.3d at 181 (App. Div. 2d Dep't 2021).

398. *Id.*

399. *Id.* (first citing Union of Orthodox Jewish Congregations of Am. v. Am. Food & Beverage Inc., 704 F. Supp. 2d 288, 293 (S.D.N.Y. 2010); then citing Union of Orthodox Jewish Congregations v. Royal Food Distrib. LLC, 665 F. Supp. 2d 434, 437 (S.D.N.Y. 2009)).

400. *Id.*

401. *See* A.M. v. Holy Resurrection Greek Orthodox Church of Brookville, 154 N.Y.S.3d 414, 414 (App. Div. 1st Dep't 2021) ("The liability in tort of the Church and Archdiocese, on the one hand, and whether their insurance carriers properly disclaimed coverage of Kehagias, on the other, are separate issues. . . . Moreover, the issue of insurance coverage is not yet ripe, since there has been no judgment entered against Kehagias, nor has there been a judicial determination regarding the propriety of the insurers' disclaimers of coverage.").

On May 24, 2022, Governor Kathy Hochul signed into law the Adult Survivors Act, which renews access to judicial relief for adult survivors of sexual assault.[402] In the State of New York, the statute of limitations for filing a civil suit for rape was twenty years, while some forms of forcible sexual contact held only a five-year statute of limitations.[403] The new law implements a one-year lookback window for individuals who were sexually assaulted as adults to file claims against their abusers, even if the statute of limitations has already expired.[404]

We look forward to living and learning our way through this next year of insurance litigation.

402. *See* Act of May 24, 2022, 2022 McKinney's Sess. Laws of N.Y., ch. 203, at 66-A (codified at N.Y. C.P.L.R. 214-j (McKinney 2022)).

403. *See* N.Y. C.P.L.R. 213-c (McKinney 2022).

404. *See* N.Y. C.P.L.R. 214-j.