INSURANCE LAW

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INTRODUCTION

Unlike many areas of the law, which are under the thumb of federal regulation, insurance law remains largely regulated by the several states, both by tradition and because of the 1945 McCarren-Ferguson Act, 15 U.S.C. §§ 1011–1015. For over a dozen years, we have reflected on how New York State has moved and changed with the times, often, but not always, in step with courts around the country dealing with similar issues. This year we do so again, as we choose from among the 600 plus appellate decisions from the New York courts, so that we can identify recurring themes and modifications.

I. DEPARTMENT OF FINANCIAL SERVICES REGULATION AND COERCION

It is not every Survey period that we confront a United States Supreme Court decision that touches upon New York insurance law or regulation, but this year was the exception. In *National Rifle Association of America v. Vullo*, a unanimous Supreme Court ruled that the National Rifle Association of America (the NRA) had plausibly alleged a First Amendment violation by New York's Department of Financial Services (DFS).[1]

The NRA sued former DFS Superintendent, Maria Vullo, alleging that Vullo violated the First Amendment by coercing DFS-regulated parties to punish or suppress the NRA's gun-promotion advocacy.[2] While the District Court denied Vullo's motion to dismiss the NRA's First Amendment claim, the Second Circuit held that Vullo's alleged actions constituted permissible government speech and legitimate law enforcement, requiring dismissal of the NRA's claim.[3] The United States Supreme Court granted certiorari on the First Amendment issue.[4]

In the lawsuit, the NRA allegedly contracted with DFS-regulated entities to administer insurance policies offered by the NRA as a benefit to its members, which were underwritten by Chubb Limited (Chubb) and Lloyd's of London (Lloyd's).[5] In 2017, DFS began

1. Nat'l Rifle Ass'n of Am. v. Vullo, 602 U.S. 175, 180–81 (2024).
2. *Id.* at 185.
3. *Id.* at 185, 186.
4. *Id.* at 186.
5. *Id.* at 181.

investigating one such insurance policy, Carry Guard, following a tip from a gun-control advocacy group.[6] The investigation revealed that Carry Guard impermissibly insured intentional criminal acts and was promoted by the NRA without a required insurance producer license.[7] Thereafter, Lockton and Chubb suspended Carry Guard,[8] but DFS expanded its investigation to other insurance programs.

Thereafter, Vullo met with leadership at Lloyd's, expressing her views in favor of gun control and advising "that DFS was less interested in pursuing" infractions unrelated to the NRA "so long as Lloyd's ceased providing insurance to gun groups, especially the NRA."[9] Striking a deal, Lloyd's agreed that it "would instruct its syndicates to cease underwriting firearm-related policies and would scale back its NRA-related business," and "in exchange, DFS would focus its forthcoming affinity-insurance enforcement action solely on those syndicates which served the NRA."[10]

Subsequently, DFS issued its "Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations" (Guidance Letters), wherein DFS "encourage[d]" DFS-regulated entities to:

> (1) "continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations"; (2) "review any relationships they have with the NRA or similar gun promotion organizations"; and (3) "take prompt actions to manage these risks and promote public health and safety."[11]

Additionally, along with Governor Cuomo, DFS issued a joint press release "urg[ing] all insurance companies and banks doing business in New York" to join those "that have already discontinued their arrangements with the NRA."[12]

Ultimately, DFS entered into consent decrees with Lockton, Chubb, and Lloyd's, with the insurers admitting violations of New York's insurance law, foregoing any NRA-endorsed insurance programs (even if lawful), and paying multimillion dollar fines.[13]

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6. *Nat'l Rifle Ass'n*, 602 U.S. 175 at 181–82.
7. *Id.* at 182.
8. *Id.*
9. *Id.* at 175.
10. *Id*.
11. *Nat'l Rifle Ass'n*, 602 U.S. 175 at 176.
12. *Id.*
13. *Id.*

Justice Sotomayor delivered the opinion of the Court.[14] Therein, SCOTUS reaffirmed what had previously been established in Bantam Books, Inc. v. Sullivan: "Government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors."[15] In sum, SCOTUS found that the NRA plausibly alleged that "[a]s superintendent of [DFS], Vullo allegedly pressured regulated entities to help her stifle the NRA's pro-gun advocacy by threatening enforcement actions against those entities that refused to disassociate from the NRA and other gun-promotion advocacy groups," in violation of the First Amendment.[16]

While "Vullo was free to criticize the NRA and pursue the conceded violations of New York insurance law[,] [s]he could not wield her power, however, to threaten enforcement actions against DFS-regulated entities in order to punish or suppress the NRA's gun-promotion advocacy."[17] The allegations plausibly alleged this was the case, in a manner sufficient to withstand a threshold motion to dismiss.[18]

Justice Sotomayor also laid bare a procedural nuance involved. Specifically, DFS's regulatory authority rested over the NRA's business partners, rather than the NRA itself.[19] Still, "[t]he NRA's allegations, if true, highlight the constitutional concerns with the kind of intermediary strategy that Vullo purportedly adopted to target the NRA's advocacy," which would "allow[] government officials to 'expand their regulatory jurisdiction to suppress the speech of organizations that they have no direct control over.'"[20] Such a strategy "allows government officials to be more effective in their speech-suppression efforts '[b]ecause intermediaries will often be less invested in the speaker's message and thus less likely to risk the regulator's ire.'"[21] While "the NRA was not even the directly regulated party … Vullo allegedly used the power of her office to target gun promotion by going after the NRA's business partners," and the "[i]nsurers in turn followed Vullo's lead, fearing regulatory hostility."[22]

14. *Id.* at 179.
15. *Id.* at 180 (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67 (1962)).
16. *Nat'l Rifle Ass'n of Am.*, 602 U.S. 175 at 180–81.
17. *Id.* at 187.
18. *Id.*
19. *Id.* at 177.
20. *Id.* at 197–98.
21. *Nat'l Rifle Ass'n of Am.*, 602 U.S. 175 at 198.
22. *Id.*

Firmly stating the "critical takeaway," Justice Sotomayor closed by stating "that the First Amendment prohibits government officials from wielding their power selectively to punish or suppress speech, directly or (as alleged here) through private intermediaries," such as DFS-regulated insurance companies.[23]

II. RESIDENCY

Whether or not an insured resides at a particular premises is a frequent conundrum encountered by New York courts, and this *Survey* period had several examples. In the homeowners context, this usually takes the form of determining whether a certain property constitutes either an "insured location" or "residence premises" as defined in the policy.

For example, the First Department found in *Downie v. Jiles* that an Allstate insured was not entitled to coverage under a homeowners insurance policy where the named insured "did not reside at the subject premises."[24] While Kareem Jiles may or may not have qualified as an insured person under the policy, the court found that this question was ultimately irrelevant.[25] Rather,

> The policy defines "Insured premises" to include the "residence premises," which includes the "dwelling," which includes the "structure[] identified as the insured property on the Policy Declarations[] where you reside." "You" refers to "the person named **…** as the insured," and Kareem Jiles is not a named insured. The "Insured premises" also includes "any premises used by an insured person in connection with the residence

23. *Id.* New York does have a long-standing public policy against providing insurance for intentional conduct and any insurance product running afoul of that public policy is problematic. For starters, insurance is meant for fortuitous loss, which an intentional loss is not. Here, however, DFS had not only identified this issue in the gun context, but other regulatory issues as well, and that Lloyd's "could avoid liability for infractions relating to other, similarly situated insurance policies, so long as it aided DFS's campaign against gun groups." *Id.* at 183. Interestingly, in a footnote, SCOTUS outlined that "other affinity organizations offered similar insurance policies, including the New York State Bar Association, the New York City Bar, and the New York State Psychological Association, among others," which DFS was presumably willing to look past in exchange for Lloyd's assistance in "DFS's campaign against gun groups" specifically. *Id.* at 183 n.1.

24. Downie v. Jiles, 211 N.Y.S.3d 374, 374 (App. Div. 1st Dep't 2024) (quoting State Farm & Cas. Co. v. Guzman, 28 N.Y.S.3d 310 (App. Div.1st Dep't 2016)).

25. *See id.*

> premises," but the property was not used in connection with the "residence premises" in this case.[26]

In similar fashion during this *Survey* period, the Second Department, Appellate Division found in *Landau v. IDS Property Casualty Insurance Co.* that despite the existence of an insurance policy that was meant to provide coverage for fire damage to a particular premises, absent the insured's residency at the premises, there was no coverage.[27]

A slightly different spin on the "residence premises" question involves whether a particular location itself qualifies for reasons other than an insured's residency. Specifically, in *Multani v. Castlepoint Insurance Co.*, New York's Second Department, Appellate Division found that the multi-family configuration of an insured premises was not a "residence premises" as defined in an insurance policy, resulting in non-coverage. [28]

In that case, Manjit Multani sustained fire damage to a premises she owned, and immediately filed a claim with his homeowners insurer, Castlepoint Insurance Company.[29] Castlepoint, however, disclaimed coverage upon determining that the premises had been renovated to provide up to five separate individual residences.[30] At the time of the fire, there were three active residences at the location.[31] Castlepoint pointed to the fact that the policy coverage only extended to the "residence premises," defined as a one or two family dwelling.[32] Here, given the configuration exceeded two families, the premises did not qualify as a residence premises and thus was outside the scope of coverage.[33]

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26. *Id.* (distinguishing from McLaughlin v. Midrox Ins. Co., 894 N.Y.S.2d 648 (App Div. 4th Dep't 2010)). The ultimate difference between *McLaughlin* and *Downie* was that the court in *McLaughlin* was able to find one or more applicable definitions for what constituted an "insured premises" on the issues before them, while the court in *Downie* was not. While application of merely one in several definitions would suffice, the latter court determined that there was no applicable definition, and thus no coverage under the policy.

27. *See* Landau v. IDS Prop. Cas. Ins. Co., 214 N.Y.S.3d 67, 67 (App. Div. 2d Dep't 2024); *see also* Fritz v. Edward A. Kurmel Brokerage, 196 N.Y.S.3d 537, 538 (App. Div. 2d Dep't 2023) (denying coverage on the basis that the premises was not "owner-occupied").

28. Multani v. Castlepoint Ins. Co., 200 N.Y.S.3d 54, 56 (App. Div. 2d Dep't 2023).

29. *See id.* at 55.

30. *Id.*

31. *See id.* at 56.

32. *Id.*

33. *See Multani*, 200 N.Y.S.3d at 55.

Residency also comes up in the auto insurance context. Take, for example, *United States Automobile Association v. Mickens*, where the First Department found, in the context of a petition to stay a Supplementary Uninsured/Underinsured Motorist Coverage (SUM) arbitration, that a determination as to the claimant's residency required a framed issue hearing, as it was dispositive of whether coverage was owed.[34]

Tevin Mickens was riding home on a "Citi Bike" in Manhattan when he was struck head on by a car.[35] Following the accident, Mickens submitted a New York no-fault application to his mother's insurer, United States Automobile Association ("USAA"), which was ultimately denied.[36] USAA took the position that Mickens did not reside with his mother, who was USAA's policyholder, at the time of loss.[37] Mickens subsequently made a demand for arbitration and USAA petitioned to stay.[38]

The First Department found an issue of fact as to whether respondent "reside[d] primarily" with his mother.[39] Specifically, outlining the countervailing factual scenario

> While USAA submitted hospital billing records and respondent's no-fault benefits application listing a New York address as respondent's residence, the police accident report it submitted reflected the mother's Pennsylvania address as respondent's home address. Respondent produced, among other things, his driver's license, voter registration card, and recent tax documents showing the Pennsylvania address as his residence. Respondent averred in an affidavit that he leased his New York City apartment eight months before the accident in anticipation of his employer reopening its New York office after the COVID-19 pandemic and moved in two months later, but that he continued to work remotely from his family's home in

34. U.S. Auto. Ass'n v. Mickens, 196 N.Y.S.3d 432, 433 (App. Div. 1st Dep't 2023). Your authors wish to note that any insurance coverage defense that requires an insurer to establish an insured's residency poses a factual scenario ripe with potential issues of fact for trial.

35. *See id.*

36. *See id.*

37. *See id.*

38. *See id.*

39. *Mickens*, 196 N.Y.S.3d at 433.

> Pennsylvania and was in New York approximately 40% of the time.[40]

Accordingly, a framed issue hearing was required to resolve the outstanding factual dispute.[41]

III. AUTO INSURANCE

As you can see, the issue of residency spans homeowners and auto insurance alike. This *Survey* period also saw decisions, however, that were unique to the auto insurance context. For example, an interesting issue that arises exclusively in the auto insurance context is whether an operator of the vehicle did so with permission, as permissive users of covered automobiles are considered insureds under New York's mandatory minimum financial responsibility requirements.[42] New York's Vehicle and Traffic Law Section 1210(a), which indicates that

> (a) No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key from the vehicle, and effectively setting the brake thereon and, when standing upon any grade, turning the front wheels to the curb or side of the highway, provided, however, the provision for removing the key from the vehicle shall not require the removal of keys hidden from sight about the vehicle for convenience or emergency.[43]

In *Government Employees Insurance Co. v. Goines*, the First Department reminded insurers recently that under Section 1210(a), a vehicle left unattended with the keys in the ignition that is subsequently "stolen," is actually considered permissively used for purposes of insurance coverage.[44]

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40. *Id.*

41. *Id.*

42. *See* 11 N.Y.C.R.R. § 60-1.1(c)(2) (McKinney 2021) (requiring an "owners policy of liability insurance" to name as an insured "any other person using the motor vehicle with the permission of the named insured or such spouse provided his or her actual operation or (if he or she is not operating) his or her other actual use thereof is within the scope of such permission.").

43. N.Y. VEH. & TRAF. LAW § 1210(a) (McKinney 2024).

44. Gov't Emps. Ins. Co. v. Goines, 211 N.Y.S.3d 76, 77 (App. Div. 1st Dep't 2024) (invalidating Liberty Mutual Insurance Company's disclaimer of coverage for non-permissive use because VEH.& TRAF. § 1210(a) was violated and Liberty provided coverage "for those with the owner's permission to operate the vehicle") (citing Alvarez v. Bivens, 980 N.Y.S.2d 425, 426 (App. Div. 1st Dep't 2014)).

In a more, dare we say controversial decision, the Second Department found in *Progressive Drive Insurance v. Malone* that a motor vehicle accident had occurred when a passenger disembarking from an automobile slipped and fell on ice while in that process.[45]

Therein, Amanda Malone was injured after removing her daughter from the inside of a vehicle operated by Anthony Caperna.[46] Specifically, "Malone picked up her daughter, turned without closing the vehicle door, walked two steps toward the door of a residence … and fell on a patch of snow and ice on the front lawn."[47] Malone sued the property owners, as well as Anthony Caperna and his father, Arthur Caperna, Jr. ("the Capernas"), the insured owner of the vehicle, for "failing to properly position the vehicle for passengers disembarking by parking on a slippery and dangerous area."[48]

The vehicle was insured by Progressive.[49] Progressive denied coverage on the ground that the accident was not a motor vehicle accident that involved the use, operation, or maintenance of a covered vehicle, and this action ensued.[50]

Addressing the appropriate standard, the Second Department noted that

> "Generally, the determination of whether an accident has resulted from the use or operation of a covered vehicle requires consideration of whether, inter alia, the accident arose out of the inherent nature of the vehicle and whether the vehicle itself produced the injury." "Negligence in the use of the vehicle must be shown, and that negligence must be a cause of the injury." However, "[n]ot every injury occurring in or near a motor vehicle is covered by the phrase 'use or operation.' The accident must be connected with the use of an automobile qua automobile." "Use of an automobile encompasses more than simply driving it, and includes all necessary incidental activities such as entering and leaving its confines." While a claim that an accident occurred during unloading "does not require a showing that the vehicle itself produced the injury, it is insufficient to show merely that the accident

45. Progressive Drive Ins. v. Malone, 213 N.Y.S.3d 387, 390 (App. Div. 2d Dep't 2024).

46. *Id.*

47. *Id.*

48. *Id.*

49. *See id*.

50. *Progressive Drive Ins.*, 213 N.Y.S.3d at 390–91.

> occurred during the period of loading or unloading. Rather, the accident must be the result of some act or omission related to the use of the vehicle."[51]

Finding that a defense obligation was owed, the Second Department noted that given what was alleged, including that "Anthony parked his vehicle in a negligent manner on a slippery surface and that such negligence was a proximate cause of her accident," it followed that there were triable issues "as to whether Malone had completed unloading the vehicle."[52]

IV. "MOTOR VEHICLE" EXCLUSIONS

Now that we have discussed a few issues confronted in the auto insurance context, it is important to note how other types of coverages interact with the intended scope of auto insurance policies.[53] An

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51. *Id.* at 391 (first quoting Empire Ins. Co. v. Schliessman, 763 N.Y.S.2d 65, 66 (App. Div. 2d Dep't 2003); then quoting Olin v. Moore, 577 N.Y.S.2d 446, 447 (App. Div. 2d Dep't 1991); and then quoting Allstate Ins. Co. v. Reyes, 970 N.Y.S.2d 560, 562 (App. Div. 2d Dep't 2013); and then quoting Eagle Ins. Co. v. Butts, 707 N.Y.S.2d 115, 117 (App. Div. 2d Dep't 2000)).

52. *Id.* at 391–92. There was a dissenting judge on this one, but that is not why we believe the decision is controversial. Your authors are reminded of *Cividanes v. City of New York*, 981 N.E.2d 281, 281 (N.Y. 2012), wherein the New York Court of Appeals found the opposite of the Second Department's holding, here in the context of a passenger exiting a bus into a hole in the ground:

> Plaintiff Kendra Cividanes testified . . . that she injured her left ankle when she "stepped off the last step into a hole and fell" as she exited the rear of a bus . . . . The Appellate Division properly held that . . . plaintiff's injury did not arise out of the "use or operation" of a motor vehicle. The "use or operation" of the bus was neither a "proximate cause" nor an "instrumentality" that produced plaintiff's injury. *Manuel v. New York City Tr. Auth.* (82 AD3d 1059, 918 NYS2d 787 [2d Dept. 2011]), which held on similar facts that the No–Fault Insurance Law's restrictions on tort liability were applicable, should not be followed.

Cividanes, 981 N.E.2d at 281. In other words, the Court of Appeals has been disagreeing with the Second Department's findings relative to these types of issues for more than a decade. *Id.* (distinguishing from *Manuel*, 918 N.Y.S.2d 787). These two cases are in apparent conflict with one another—a conflict the Court of Appeals should win.

53. In a way, the *Malone* court seemingly touched upon this type of issue, since the underlying action therein involved lawsuits filed against the property owner—presumably insured by a homeowners' policy—and the Capernas, who were pursued for automobile liability. *See Progressive*, 213 N.Y.S.3d at 390. Factoring into the court's calculus was likely the idea that while the property owners were clearly potentially liable for an icy condition on their property (i.e., a risk that homeowners' insurance is meant to cover), it followed that any liability assessed against the Capernas was necessarily an automobile risk associated with the condition of the driver's chosen drop-off point. Given the existence of a motor vehicle exclusion in

important concept to consider when assessing these coverage issues is the potential gap that might exist between the two. A classic example of that involves the use and operation of motor vehicles or other motorized contraptions of all shapes and sizes. For example, in *Fornino v. New York Central Mutual Fire Co*., New York**'**s Appellate Division, Fourth Department, was required to assess whether a skid steer was a "motor vehicle" excluded from coverage under a homeowners insurance policy.[54]

Michael Fornino was insured under a homeowners policy issued by New York Central Mutual Fire Insurance Company (NYCM).[55] After NYCM declined to defend and indemnify plaintiff in a personal injury action arising from the off-premises use of a skid steer owned by plaintiff, he sued NYCM.[56] NYCM disclaimed based on the insurance policy's motor vehicle liability exclusion.

The Fourth Department noted that the homeowners' insurance policy did not provide personal liability coverage if a motor vehicle was being used somewhere other than the insured location.[57] There was no dispute that the occurrence at issue took place away from the insured location, and accordingly, the question before the court was whether the skid steer that was involved in the occurrence was a "motor vehicle" as defined.[58] The Fourth Department found that it was.[59]

Simply enough, the insurance policy defined a "motor vehicle" as "[a] self-propelled land or amphibious vehicle."[60] The court found that the definition "is reasonably susceptible of only one meaning," because the relevant dictionary definition of "vehicle" is "a means of carrying or transporting something."[61] Contrary to Fornino's contention, the fact that the New York Vehicle and Traffic Law may

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the homeowners' policy, we believe the more plausible reading should have been to rule out automobile liability entirely. However, as you know, we are merely authors and not judges.

54. Fornino v. N.Y. Cent. Mut. Fire Ins. Co., 193 N.Y.S.3d 504, 507 (App. Div. 4th Dep't 2023).

55. *See id.* at 506.

56. *See id.* This matter also involved claims made against Fornino's insurance agent for failure to secure the proper insurance coverage.

57. *See id.* at 507.

58. *Id.*

59. *Fornino,* 193 N.Y.S.3d at 507.

60. *Id.*

61. *Id.* (quoting White v. Continental Cas. Co., 878 N.E.2d 1019, 1021 (N.Y. 2007)) (citing *Vehicle*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/vehicle (last visited Feb. 14, 2025)).

define "motor vehicle" differently is irrelevant where the contract itself provides a definition.[62]

A similar issue in the commercial general liability context was addressed in *Rock Group NY Corp. v. Certain Underwriters at Lloyd's, London*, where New York's First Department Appellate Division found that injuries occurring during the unloading of a vehicle were precluded from coverage under an auto exclusion in the insurance policy.[63]

Certain Underwriters at Lloyd's, London had issued commercial general liability insurance policies to Rock Group NY Corp., which were in place at the time of two claims made under New York's Labor Law.[64] There, the court found that the claimant was injured while unloading a beam from a flatbed truck.[65] It was undisputed that "[a]s the claimant was handing the beam to his coworker above him, the beam slipped from his coworker's hands and landed on him, causing him to fall on top of the truck."[66] Accordingly, "the general nature of the operation of unloading" led to the injuries sustained by the underlying claimant, and thus the policy's auto exclusion.[67]

V. DIRECTORS AND OFFICERS LIABILITY INSURANCE

In the realm of directors and officers liability insurance, New York saw a few appellate decisions worth a look during the *Survey* period. In *Xerox Corp. v. Travelers Casualty & Surety Co. of America*, New York's First Department, Appellate Division grappled with a Prior Acts Exclusion, ultimately concluding that it was inapplicable to the claims at issue.[68]

Xerox had entered into sales talks with Fujifilm in March 2017, but was sued by several of its largest shareholders, seeking to block

62. *Id.* at 508 (citing Malican v. Blue Shield of W. N.Y., 383 N.Y.S.2d 719, 720 (App. Div. 4th Dep't 1976)). We are seeing this issue more and more in the context of electric scooters and pedal assist electric bicycles. The question under most homeowners' policies is whether such a device constitutes a "self-propelled land vehicle" as that is the definition under many such policies.

63. Rock Grp. NY Corp. v. Certain Underwriters at Lloyd's, London, 209 N.Y.S.3d 37, 38 (App. Div. 1st Dept. 2024).

64. *See id.* at 37.

65. *See id.* at 38.

66. *Id.*

67. *Id.* (quoting Zurich Am. Ins. Co. v. ACE Am. Ins. Co., 86 N.Y.S.3d 468, 469 (App. Div. 1st Dep't 2018)).

68. Xerox Corp. v. Travelers Cas. & Sur. Co. of Am., 205 N.Y.S.3d 387, 390 (App. Div. 1st Dep't 2024).

the sale.[69] Xerox allegedly breached its fiduciary duty in undervaluing the company, failing to follow an open bidding process, and maintaining a joint venture with Fuji in secret, which ceded valuable rights to Fuji.[70]

The suits were specifically tendered to a 2018–19 program that Travelers Casualty & Surety Company of America managed, but not to a run off policy it had issued.[71] However, as the court noted, the suit notices contained a catch-all: "[t]his matter is reported under any and all applicable policies whether or not cited."[72] When Xerox settled the suits, the first and second layers of the 2018-19 program paid; however, Travelers resisted, claiming that the allegations that Xerox concealed its joint venture with Fuji was an allegation of Wrongful Acts committed prior to January 1, 2017, and, therefore, subject to the policy's Prior Acts Exclusion.[73] Travelers did not consider the potential for coverage under a runoff policy.[74]

Xerox sued Travelers for breach of contract.[75] Xerox also alleged bad faith and negligent misrepresentation for the insurer's delay in raising the prior acts exclusion until eight months post-settlement and going back on its "intimations" that it would rely in the primary carrier's coverage analysis.[76] Both parties moved for summary judgment and the motions were universally denied.

Reversing the trial court, the First Department held that Travelers owes Xerox coverage for the defense and settlement of several related lawsuits under its 2018–19 D&O tower but not under a runoff tower.[77] In both programs, Travelers was in an excess position, with follow form policies to the primary coverage. The programs contained contrapositive exclusions: the runoff insurance precluded coverage for any claim arising from a Wrongful Act committed after January 1, 2017, and the 2018–19 program for acts committed prior to January 1, 2017.

The First Department found that

> the primary acts that gave rise to liability in this case are the negotiation and approval of the allegedly

69. *Id.* at 388.
70. *Id.* at 388–89.
71. *Id.* at 389.
72. *Id.*
73. *Xerox Corp.*, 205 N.Y.S.3d at 389.
74. *See id.*
75. *See id.*
76. *Id.*
77. *Id.*

> disadvantageous sale to Fuji beginning in early 2017, and the decision in 2017-2018 not to extend the period for board nominations. All of these acts occurred after January 1, 2017. Therefore, Travelers' run off policy under the first tower is not applicable to the loss.[78]

For the same reason, the court held that coverage was owed under the 2018–19 program.[79] In evaluating the 2018–19 program's Prior Acts Exclusion, the court applied a but-for test to the suit allegations.[80] As the exclusion contained "arising out of" language, it was Travelers' burden to establish that the shareholder suits would not have existed "but for" the pre-January 1, 2017, Wrongful Acts.[81] According to the court, Travelers fell short.[82]

> The acts giving rise to liability in the underlying cases consisted of the 2017-2018 negotiation and approval of an allegedly disadvantageous transaction with Fuji and Xerox's 2018 denial of a request for a waiver of a deadline for advance notice of director nominations. The complaints in the two Deason actions allege that Xerox's former CEO and certain directors breached fiduciary duties by agreeing to a rushed and unfavorable transaction in their own self-interest. These causes of action could be viable even if Xerox had not previously entered into the joint venture with Fuji.[83]

This outcome comports with the basic goal of claims made insurance, in that the coverage was limited to a single policy period. While Travelers sought to deny coverage notwithstanding the insured's continuum of end-to-end policies and Xerox sought to access both programs, the court appropriately looked to the "primary acts" in order to determine under which policy period coverage was triggered.[84]

There were also a pair of Second Circuit Court of Appeals cases rendered in the directors and officers liability context this year. In *Paraco Gas Corp. v. Ironshore Indemnity, Inc.*, the Second Circuit

78. *Xerox Corp.*, 205 N.Y.S.3d at 390.

79. *See id.*

80. *See id.*

81. *Id.*

82. *See id.*

83. *Xerox Corp.*, 205 N.Y.S.3d at 390 (citing Mount Vernon Fire Ins. Co. v. Creative Hous., 668 N.E.2d 404, 405 (N.Y. 1996); McGraw-Hill Educ., Inc. v. Ill. Nat'l Ins. Co., 116 N.Y.S.3d 16, 16 (App. Div. 1st Dep't 2019)).

84. *Id.*

held in a Summary Order that but-for incurring liability pursuant to a shareholder agreement, a board member from Paraco Gas Corp. would not have faced liability for a claim, which was thus excluded on that basis.[85]

Paraco distributes propane and fuel equipment.[86] It procured a directors and officers liability policy ("D&O Policy") from Ironshore.[87] A suit was brought against two of Paraco's officers, Joe and Christina Armentano, alleging that they transferred shares in violation of Paraco's Shareholder agreements. [88] Paraco and the Armentanos sought coverage from Ironshore under the D&O Policy.[89] Ironshore declined on the basis of the following exclusion:

> **Section III.** The Insurer shall not be liable to make any payment for Loss in connection with any Claim made against any Insured: … **N.** alleging, arising out of, based upon or attributable to any actual or alleged contractual liability or obligation of the Company or an Insured Person under any contract, agreement, employment contract or employment agreement to pay money, wages or any employee benefits of any kind.[90]

Thereafter, Paraco filed a lawsuit. [91]

Paraco argued that the exclusion did not apply as the claim "was based on the Board's corporate powers and fiduciary duties," rather than the Shareholder Agreements themselves, and further that the claim related to the Board's abdication of its duties and "would exist regardless of [the] obligations under the Shareholder Agreements … ."[92] Ultimately, the district court dismissed the matter on the basis of the above exclusion, and the Second Circuit affirmed.[93]

Focusing on the "arising out of" language, the court noted that Paraco conceded that nine of the ten claims arose out of breaches of Paraco's Shareholder Agreements, which fall within Section III.N's exclusion.[94] Narrowing down to the remaining claim, the court looked

85. Paraco Gas Corp. v. Ironshore Indem., Inc., No. 23-1069-cv, 2024 U.S. App. LEXIS 14628, at *9 (2d Cir. June 17, 2024).
86. *Id.* at *1.
87. *See id.*
88. *See id.* at *2.
89. *See id.*
90. *Paraco Gas Corp.*, 2024 U.S. App. LEXIS 14628, at *3–4.
91. *See id.* at *1–2.
92. *Id.* at *5.
93. *See id.* at *9.
94. *See id.* at *4.

at whether it also involved Paraco's contractual liability.[95] The remaining claim alleged the Class A Shareholder Agreement remained valid and Joe Armentano's purported termination of the Class A Shareholder Agreement was invalid.[96]

With a quick citation to *Mount Vernon Fire Ins. Co. v. Creative Housing Ltd.*, the Second Circuit agreed with Ironshore.[97] It reasoned that not only were violations of the contract alleged, but the contract was relied upon for the theory of harm.[98] Thus, no claim would exist but for the alleged violation of the Shareholder Agreements.[99] Although the claim was not for breach of contract *per se*, it was firmly based on violations of the agreements.[100]

Finally, in an interesting spin on your standard directors and officers decision, the Second Circuit in *Daileader v. Certain Underwriters at Lloyd's London Syndicate 1861* denied an application for an injunction to force an excess insurer to pick up the defense of a claim following exhaustion of a primary policy.[101]

Timothy Daileader was the director manager of Oaktree, and Daileader individually wound up in legal troubles for allegedly breaching his fiduciary duties.[102] Certain Underwriters at Lloyds London Syndicate 1861, along with others, provided Oaktree with excess directors and officers insurance.[103] Although Daileader was initially defended by Landmark American Insurance Company under a primary D&O policy, Landmark's $1,000,000 limit of liability was exhausted and Daileader found himself paying out of pocket thereafter.[104] This led Daileader to sue Lloyd's for his defense, following its denial of coverage to him, and that suit sought a

95. *See Paraco Gas Corp.*, 2024 U.S. App. LEXIS 14628 at *4–5.

96. *See id.* at *5.

97. *Id.* at *6 (citing Mount Vernon Fire Ins. Co. v. Creative Hous., 668 N.E.2d 404, 405 (N.Y. 1996)). The Court of Appeals in *Mount Vernon* addressed a broad assault and battery exclusion, finding ultimately that all claims arising out of what it referred to as the "operative act" are excluded from coverage, rather than simply liability for the "operative act" itself.

98. *Id.*

99. *See id.* at *7.

100. *See Paraco Gas Corp.*, 2024 U.S. App. LEXIS 14628, at *7.

101. Daileader v. Certain Underwriters at Lloyds London Syndicate 1861, 96 F.4th 351, 351, 362 (2d Cir. 2024).

102. *See id.* at 351.

103. *See id.*

104. *See id.*

preliminary injunction to enforce Lloyd's duty to defend. The district court denied Daileader's motion, and the Second Circuit affirmed.[105]

The Second Circuit noted that whether to issue an injunction is a matter of federal law, requiring that a party "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."[106] Here, Daileader was unable to surpass the first two elements.

For purposes of a breach of contract, disputes arise around maintenance of the "status quo *ante*" that exists between the contracting parties.[107] That was the case here, since Daileader "argues that the [Lloyd's] refusal to continue paying under its own policy upset the status quo of ongoing payments," which ceased upon exhaustion of the primary policy, while Lloyd's "contends that being compelled to pay Daileader's defense costs would alter that status quo," because it had denied coverage from the beginning, never incurring any defense costs whatsoever.[108]

The Second Circuit found that the status quo actually favored Lloyds, since the "actual" status quo was one of non-payment and, accordingly, the relief sought was "mandatory" rather than "prohibitory," requiring a more stringent standard for injunctive relief.[109] Although Landmark had paid for Daileader's defense, this did not bind the excess insurer, Lloyd's, and Lloyd's never agreed to provide such costs.[110] "Injunctions to enforce such contested duties will very often involve 'commanding some positive act' and therefore will be mandatory, not prohibitory."[111] This was not a scenario where, for example, the insurer sought to void its policy, ab initio due to alleged fraud, which might disrupt the status quo—i.e. a contractual obligation—entirely.[112]

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105. *See id.* at 355.

106. *Daileader*, 96 F.4th at 356 (quoting JTH Tax, LLC v. Agnant, 62 F.4th 658, 667 (2d Cir. 2023)).

107. *Id.* (citing N. Am. Soccer League, LLC v. U.S. Soccer Fe''n, Inc., 883 F.3d 32, 36 (2d Cir. 2018) (defining "status quo *ante*" as "the last actual, peaceable[,] uncontested status which preceded the pending controversy.")).

108. *Id.* at 357.

109. *See id*.

110. *See id.*

111. *Daileader*, 96 F.4th at 357 (quoting Tom Doherty Assocs., Inc. v. Saban Ent., Inc., 60 F.3d 27, 34 (2d Cir. 1995)).

112. *Id.* (citing *In re* WorldCom, Inc. Sec. Litig., 354 F. Supp. 2d 455, 466–67 (S.D.N.Y. 2005)).

Applying the more stringent standard, the Second Circuit found Daileader failed to establish either an irreparable harm or clear/substantial likelihood of success.[113] The existence of a monetary award that provides adequate compensation establishes that Daileader's injury is not "irreparable."[114] Although Daileader would like those funds now, it is "adequate" that he would be reimbursed his expenses were he successful in litigation against Lloyd's.[115]

As far as his likelihood of success is concerned, Daileader failed to establish that Lloyd's was likely incorrect in its coverage position.[116] The Second Circuit noted that Lloyd's had better arguments relative to the potential application of its Bankruptcy/Insolvency Exclusion it had raised, in that it likely did apply to the adversary proceedings facing Daileader, and that the exclusion was likely not violative of the Bankruptcy Code.[117] Although certainly Daileader may eventually be successful on the merits, a question left to the district court following further proceedings, he failed to establish a substantial likelihood of success on the merits at this juncture.[118]

Accordingly, the Second Circuit found no error, much less an abuse of discretion by the district court in denying Daileader's motion for a preliminary injunction. [119]

VI. WORKERS' COMPENSATION

While not always the most glamorous topic for discussion, there were a few interesting decisions in the Workers' Compensation context during this *Survey* period. In February 2024, the Second Department, Appellate Division found in a case captioned *State Farm Mutual Automobile Insurance Co. v. Amtrust North America, Inc.* that neither courts, nor arbitrators held jurisdiction over a coverage dispute involving a work-related automobile accident touching upon New York's Workers' Compensation system.[120]

Following a July 2018 motor vehicle accident, State Farm provided no-fault benefits to occupants of its insured vehicle (the

113. *See id.* at 358.
114. *See id.*
115. *See id.*
116. *Daileader,* 96 F.4th at 359–60.
117. *See id.* at 360.
118. *See id.* at 362.
119. *See id.*
120. State Farm Mut. Auto. Ins. Co. v. Amtrust N. Am., Inc., 205 N.Y.S.3d 135, 136 (App. Div. 2d Dep't 2024).

"subrogors").[121] State Farm subsequently learned that the subrogors were receiving Workers' Compensation benefits for necessary medical treatments following injuries supposedly sustained in the motor vehicle accident.[122] State Farm filed suit, attempting to recover no-fault benefits it had paid due to unjust enrichment, contending that the workers' compensation insurer, Amtrust North America, Inc., was liable for the amounts paid by State Farm. [123] Amtrust moved to dismiss, arguing that the Workers' Compensation Board has sole jurisdiction over the issues, and the lower court granted the motion. However, the Second Department reversed. [124]

Specifically, the Second Department found that the Supreme Court, Queens County, should have referred the matter to the Workers' Compensation Board to determine "the extent to which the medical expenses incurred by the plaintiff's subrogors are causally related to the subject accident and compensable under the Workers' Compensation Law."[125] While State Farm argued that it lacked recourse before the Workers' Compensation Board, the Second Department found that State Farm had yet to seek review or reopening of the workers' compensation hearing on this issue.[126]

While the *State Farm* case above is interesting, the issues involved therein pale in comparison to the gravity of those in *Timperio v. Bronx-Lebanon Hospital*, where the New York Court of Appeals found that a death connected to a workplace shooting was subject to Workers' Compensation Benefits, and exclusivity protections under Section 11 of the New York Workers' Compensation Law.[127]

In *Timperio*, a first-year resident at Bronx-Lebanon Hospital was shot and injured by a former hospital employee.[128] The victim was working on a nonpublic floor of the hospital in June 2017 when he was

121. *See id.*
122. *See id.*
123. *See id.*
124. *See id.*
125. *State Farm Mut. Auto. Ins. Co.*, 205 N.Y.S.3d at 136–37 (citing Brennan v. Vill. of Johnson City, 183 N.Y.S.3d 618, 619 (App. Div. 3d Dep't 2023); Bland v. Gellman, 58 N.Y.S.3d 225, 229 (App. Div. 3d Dep't 2017)).
126. *See id.* at 137 (citing N.Y. WORKERS' COMP. LAW § 142(7) (McKinney 2023); N.Y. COMP. CODES R. & REGS. tit. 12, § 300.13 (a) (4) (2021); N.Y. COMP. CODES R. & REGS. tit. 12, § 300.13 (b) (2) (iv) (2021); N.Y. COMP. CODES R. & REGS. tit. 12, § 300.14 (a) (2021); *In re* Lutheran Med. Ctr. v. Hereford Ins. Co., 842 N.Y.S.2d 498, 499–500 (App. Div. 2d Dep't 2007)).
127. *See* Timperio v. Bronx-Lebanon Hosp., 245 N.E.3d 1103, 1104 (N.Y. 2024); *see also* N.Y. WORKERS' COMP. LAW § 21(1) (McKinney 2024).
128. *See Timperio*, 245 N.E.3d at 1104.

shot by Henry Bello, a former Hospital employee, who carried out a workplace shooting using an AR-15 rifle.[129] A claim for Workers' Compensation benefits was filed on behalf of plaintiff.[130] In the meantime, plaintiff filed a negligence lawsuit against the Hospital to recover for his injuries.[131]

In 2022, the Appellate Division, Third Department reversed a finding by the Workers' Compensation Board that plaintiff was eligible for Workers' Compensation benefits, which meant that the exclusivity provisions of the Workers' Compensation Law would not apply thereby permitting plaintiff to sue his employer, the Hospital.[132] However, the Court of Appeals granted leave to appeal and, after argument on the issues, reversed the Appellate Division, reinstating the Workers' Compensation Board's determination.[133]

Specifically, the Court of Appeals held that plaintiff was eligible for Workers' Compensation benefits thus barring his claims against the Hospital.[134] The Court of Appeals found support in a prior decision it had rendered, *Matter of Rosen v. First Manhattan Bank*, wherein it determined that "an assault which arose in the course of employment is presumed to have arisen out of the employment, absent substantial evidence that the assault was motivated by purely personal animosity."[135] It found that because it was "undisputed that the assault occurred in the course of Mr. Timperio's employment," it followed that the presumption that an injury arose out of employment under New York Workers' Compensation Law Section 21(1) was met.[136] While this presumption can be overcome by substantial evidence, no such evidence was present on the record before the court.[137]

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129. *See id.*

130. *See id.*

131. *Id.*

132. *See id.*

133. *See Timperio*, 245 N.E.3d at 1105 (citing Timperio v. Bronx-Lebanon Hosp., 163 N.Y.S.3d 302, 307 (App. Div. 3d Dep't 2022)).

134. *See id.* (citing *Timperio*, 163 N.Y.S.3d at 307).

135. *Id.* at 1106 (quoting Rosen v. First Manhattan Bank, 641 N.E.2d 1073, 1074 (N.Y. 1994)).

136. *Id*.

137. *See id.* While left unsaid in the opinion, the practical implication of the Court of Appeals decision was to eliminate the plaintiff's ability to pursue a lawsuit against his employer altogether, in favor of Workers' Compensation exclusivity under Section 11 of the New York Workers' Compensation Law. *Id.* at 1106; *see also* N.Y. WORKERS' COMP. LAW § 11(1) (McKinney 2024) ("The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his or her personal representatives, spouse, parents, dependents, distributees, or any person otherwise entitled to recover

VII. COVID-19 BUSINESS INTERRUPTION CLAIMS

As with prior *Survey* periods, this year saw more of the same relative to New York courts rejecting COVID-19 business interruption insurance claims due to the absence of "direct physical loss of or damage to property," which is a necessary component of such a claim.[138] As your authors had predicted for quite some time, in *Consolidated Restaurant Operations, Inc. v. Westport Insurance Corporation*, New York's high court finally agreed in a decision that should add finality to these claims in New York State.[139]

Consolidated Restaurant Operations, Inc. operated dozens of restaurants which were covered under a Commercial Property Policy issued by Westport, which included business interruption coverage caused by "direct physical loss or damage" to the otherwise insured property.[140] In the aftermath of the tumult of the spring of 2020, Consolidated made a claim for business interruption losses sustained by its various locations due to COVID-19 restrictions and/or simply the slowdown in human beings eating at restaurants.[141]

In short, Consolidated argued that it sustained a significant reduction in revenue due to suspended or curtailed operations caused by concerns over coronavirus transmission and government related

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damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom . . . .") It is "the purpose of the Workers' Compensation Law, . . . to '"protect[ ] work[ers] and their dependents from want in case of injury" on the job' [by] establish[ing] a 'broad scheme of compensation' intended to ensure a 'swift and sure source of benefits to injured employees,' including in circumstances where an employee might not be able to obtain relief through a common-law tort action." *Timperio*, 245 N.E.3d at 1106 (first quoting Johannesen v. Dep't of Hous. Pres. & Dev., 638 N.E.2d 981, 983 (N.Y. 1994); then quoting Crosby v. State, Workers Comp. Bd., 442 N.E.2d 1191, 1195 (N.Y. 1982)). By finding the victim entitled to a presumption under N.Y. WORKERS' COMP. LAW § 21(1) (McKinney 2024), it follows that Workers' Compensation was the victim's exclusive remedy as against his employer.

138. *See, e.g.*, Century 21 Dep't Stores, LLC v. Starr Surplus Lines Ins. Co., 207 N.Y.S.3d 510, 511 (App. Div. 1st Dep't 2024); Carrols Rest. Group, Inc. v. Am. Guar. & Liab. Ins. Co., 206 N.Y.S.3d 848, 848 (App. Div. 4th Dep't 2024); 87 Uptown Rd., LLC v. Country Mut. Ins. Co., 207 N.Y.S.3d 241, 243 (App. Div. 3d Dep't 2024); Crescent Land Dev. Ass'n LLC v. Ill. Union Ins. Co., 198 N.Y.S.3d 700, 701–02 (App. Div. 1st Dep't 2023); *see also* Stetson Real Estate, LLC v. Sentinel Ins. Co., No. 22-1748, 2023 U.S. App. LEXIS 26819, at *1–2 (2d Cir. Oct. 10, 2023); Mario Badescu Skin Care, Inc. v. Sentinel Ins. Co., No. 22-0380-cv, 2023 U.S. App. LEXIS 26818, at *1 (2d Cir. Oct. 10, 2023).

139. *See* Consol. Rest. Operations, Inc. v. Westport Ins. Corp., 235 N.E.3d 332, 334 (N.Y. 2024).

140. *Id.*

141. *See id.*

restrictions on business activity.[142] Westport denied the claim on the basis that while the pandemic era restrictions were a major source of economic loss, the policy in question only triggered where there was property damage which precipitated the economic loss.[143]

Westport immediately moved to dismiss and the trial court granted the application, finding that the premises had not been rendered "uninhabitable" or, at least, in need of repair/replacement of tangible portions of the property.[144] Absent allegations of any actual damage, it followed that Consolidated had not properly pleaded a cause of action for loss resulting from physical loss or damage to insured property.[145]

The Appellate Division, First Department affirmed the trial court's ruling.[146] The First Department ruled that business interruption coverage did not trigger absent "a direct physical loss of property, not simply the inability to use it."[147] That required some "tangible alteration of the property."[148] Because Consolidated made no allegation of "physical change, transformation or difference in any of its property" it failed to plead a viable cause of action.[149]

Consolidated sought review by the Court of Appeals on two grounds.[150] First, it challenged the Appellate Division's determination that a viable claim required "tangible, ascertainable damage, change or alteration to the property."[151] Second, it argued that even were tangible alteration required, its Complaint properly alleged same.[152]

In affirming, the Court of Appeals read the "phrase 'direct physical loss or damage' to mean 'direct physical loss' or 'direct physical damage.'"[153] Thus, "physical damage" required "a material physical alteration to the property—one that is perceptible, even if not

142. *See id.*

143. *See id.*

144. *Consol. Rest. Operations, Inc.*, 235 N.E.3d at 334–35.

145. *See id.*

146. *See id.* at 335 (citing Consol. Rest. Operations, Inc. v. Westport Ins. Corp., 167 N.Y.S.3d 15, 22 (App. Div. 1st Dep't 2022)).

147. *Id.* (quoting *Consol. Rest. Operations, Inc.*, 167 N.Y.S.3d at 22).

148. *Id.* (quoting *Consol. Rest. Operations, Inc.*, 167 N.Y.S.3d at 22).

149. *Consol. Rest. Operations, Inc.*, 235 N.E.3d at 335 (quoting *Consol. Rest. Operations Inc.*, 167 N.Y.S.3d at 23).

150. *See id.* at 336.

151. *Id.*

152. *Id.*

153. *Id* at 337 (citing Starr Surplus Lines Ins. Co. v. Eighth Jud. Dist. Ct., 535 P3d 254, 261 (Nev. 2023)).

visible to the naked eye."[154] Simply stated, the Court did not believe Consolidated pleaded, nor could prove, that its properties sustained a material physical alteration.[155] The Court found that the complaint "fails to identify a single item that it had to replace, anything that changed, or that was actually damaged at any of its properties."[156] Further, it recognized that there was no support for the argument that coronavirus droplets harmed structures or surfaces, rather than individuals.[157]

The bulk of the Court of Appeals time was spent deconstructing Consolidated's argument that "direct physical loss" should include impaired functionality or partial loss of use.[158] However, had the policy been intended to cover loss for loss of use of property it would have so stated.[159] Here, however, the only construction was that a loss required "actual, complete dispossession" of property.[160] While Consolidated relied upon cases allowing property damage recovery where the property was rendered uninhabitable due to infiltration of chemicals, fumes and other dangerous substances, the Court of Appeals rejected that comparison.[161] Instead, relative to Consolidated's claims that contamination by coronavirus particulates rendered the restaurants uninhabitable, the Court noted that in every instance, the properties remained open for take-out and delivery services.[162] Further, for those restaurants that actually were closed, there was no proof that the closures were caused by contamination which rendered them uninhabitable.[163] The Court concluded its opinion by directly stating that Consolidated's policy provisions only "cover economic losses to the extent they are caused by 'direct physical loss or damage.'"[164] The mere presence of coronavirus at an insured premises is, insufficient by itself, to establish actual damage to property.[165]

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154. *Consol. Rest. Operations*, 235 N.E.3d at 337 (citing Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co., 287 A.3d 515, 527–28 (Vt. 2022)).

155. *See id.*

156. *Id.* at 342.

157. *See id*. at 341–42.

158. *Id*. at 338.

159. *See Consol. Rest. Operations, Inc.*, 235 N.E.3d at 338.

160. *Id*.

161. *See id*. at 339.

162. *See id*. at 340.

163. *See id*.

164. *Consol. Rest. Operations*, 235 N.E.3d at 342.

165. *See id*.

VIII. CHILD VICTIM'S ACT AND ADULT SURVIVOR'S ACT

Juxtaposed with the dying breed that are COVID-19 Business Interruption claims, another hot button topic is only heating up, as such claims approach potential dispositive motion stages of litigation. Among the more critical issues facing the New York's insurance market today involves the handling of claims made under the Child Victim's Act of 2019 (the "CVA") and the Adult Survivors Act of 2022.[166] These claims pose many challenging questions relative to late notice and decades old policies that have gone missing. The First Department Appellate Division touched this space—specifically the CVA—in *Century Indemnity Company v. The Archdiocese of New York*, reinstating a declaratory judgment action that had been dismissed due to a purported failure to state a claim.[167]

Between 1956 and 2003, Century Indemnity Company (and its predecessors) insured the Archdiocese of New York and its affiliates (the "Archdiocese").[168] The Archdiocese has faced more than 1,500 actions alleging sexual abuse by clergy and other employees, which Century has defended under a reservation of rights.[169] However, Century filed this declaratory judgment action to confirm that it has no duty to indemnify or defend the Archdiocese in these underlying lawsuits.[170]

Despite the above, the New York Supreme Court found on a motion to dismiss that Century's action was premature and further that it only raised bare legal conclusions.[171] On appeal, the First Department reversed.[172] It found that

> The complaint alleges that issues surrounding child sexual abuse in the Archdiocese "reached the Church's highest levels" and that "senior Church officials had known for decades that members of the clergy had and were committing sexual abuse," as reflected in newly public sources. The allegations are drafted with

166. N.Y. C.P.L.R. § 214-g (McKinney 2020); N.Y. C.P.L.R. § 214-j (McKinney 2022).

167. *See* Century Indem. Co. v. Archdiocese of N.Y., 209 N.Y.S.3d 383, 384 (App. Div. 1st Dep't 2024).

168. *See id*.

169. *See id*.

170. *See id*. at 385.

171. *See id*.

172. *Century Indem. Co.*, 209 N.Y.S.3d at 385 (citing Gen. Ins. v. Piquion, 182 N.Y.S.3d 49, 51 (App. Div. 1st Dep't 2022)).

> "sufficient precision to enable the court to control the case and the opponent to prepare."[173]

While the lower court had found it was "obvious that these policies cover the underlying CVA claims," which asserted negligence counts, the lower court had impermissibly "discounted the [] complaint's allegations concerning the Archdiocese's longstanding awareness of sexual abuse as 'non-specific, common knowledge type allegations against the Catholic Church.'"[174] The First Department found that "[t]he complaint sufficiently alleges that recovery would fall outside the scope of plaintiffs' duties to defend and indemnify if the Archdiocese had knowledge of Its employees' conduct or propensities."[175] The First Department also found that regardless of the ultimate burden of proof on any noncooperation defense, that burden is not dispositive at the threshold motion to dismiss stage.[176]

IX. ASSIGNMENT OF RIGHTS

Fundamentally speaking, in order to obtain coverage under an insurance policy, it must be established that an entity holds the right to same. In *Town of Brookhaven v. New York Municipal Insurance Reciprocal*, the Second Department tackled an interesting issue regarding whether, and to what extent, an entity other than an insured can exercise the right to recovery under an insurance policy.[177]

NYMIR issued a policy to the Incorporated Village of Mastic Beach (the "Village"). [178] However, sometime thereafter, the Town of Brookhaven (the "Town") sued NYMIR claiming that NYMIR was obligated to defend and indemnify the Town for a personal injury claim originally made against the Village but subsequently asserted against the Town due to the Village's dissolution.[179] The Town argued that upon the Village's dissolution, the Town assumed the Village's

173. *Id*. (quoting Foley v. D'Agostino, 248 N.Y.S.2d 121, 125 (App. Div. 1st Dep't 1964)).

174. *Id*.

175. *Id*.

176. *Id*. at 385–86 (citing Nat'l Union Fire Ins. Co. of Pittsburgh v. Xerox Corp., 807 N.Y.S.2d 344, 345 (App. Div. 1st Dep't 2006)). The First Department did uphold dismissal of Century's claims based upon the known loss doctrine as non-viable because Century "fail[ed] to rebut [the Archdiocese's] argument that there was no loss, as opposed to a risk of loss."

177. *See* Town of Brookhaven v. N.Y. Mun. Ins. Reciprocal, 214 N.Y.S.3d 80, 82 (App. Div. 2d Dep't 2024).

178. *See id*.

179. *See id*.

debts, liabilities, and obligations.[180] Taking it one step further, the Town argued that it also became entitled to various rights held by the Village, including entitlement to insurance coverage owed by NYMIR to the Village.[181]

Finding that the Town was not entitled to coverage, the Second Department noted that the party seeking coverage bears the burden of proving entitlement, and normally, a party is not entitled to coverage absent qualifying as an insured or additional insured.[182] And while a third party may permissibly seek the benefit of coverage, the terms of the policy must clearly evince such intent.[183] Here, however, the insurance policy required written permission from NYMIR to transfer any such rights under the policy.[184]

It was undisputed that the Town lacked insured or additional insured status, and that NYMIR's written consent to transfer the rights under the policy was never obtained.[185] Further, contrary to the Town's position, it did not automatically obtain the rights under the policy pursuant to General Municipal Law Section 790.[186]

X. ADDITIONAL INSURED AND OTHER INSURED STATUS ISSUES

Traditionally, only those that qualify as an insured are entitled to the right to coverage under an insurance policy, making this issue among the more prevalent in New York insurance litigation circles. A subset of this issue involves whether an entity qualifies as an additional insured, which requires a close look at the relevant additional insured provision within the insurance policy.

Take the First Department's decision in *River Park Bronx Apartments, Inc. v. Harleysville Insurance Co.*, where it determined that "[t]he language of the Harleysville additional insured endorsement does not require direct privity of contract."[187] While the

180. *See id*.

181. *See id*.

182. *Town of Brookhaven*, 214 N.Y.S.3d at 82, 83 (citing N.Y. State Thruway Auth. v. Ketco, Inc., 990 N.Y.S.2d 72, 74 (App. Div. 2d Dep't 2014)).

183. *Id.* at 82–83 (citing Arch Specialty Ins. Co. v. RLI Ins. Co., 175 N.Y.S.3d 739, 741 (App. Div. 2d Dep't 2022)).

184. *Id.* at 83.

185. *See id.*

186. *Id.*; *see* N.Y. GEN. MUN. LAW § 790 (McKinney 2010).

187. River Park Bronx Apartments, Inc. v. Harleysville Ins. Co., 201 N.Y.S.3d 50, 50 (App. Div. 1st Dep't 2023) (citing Travelers Prop. Cas. Co. of Am. v. Harleysville Worcester Ins. Co., 685 F. Supp. 3d 187, 205 (S.D.N.Y. 2023); Vargas v. City of New York, 71 N.Y.S.3d 415, 417 (App. Div. 1st Dep't 2018); Netherlands

court does not provide much detail, we note that the Harleysville Policy contained an endorsement, Form CG-7254, entitled "Additional Insured — Owners, Lessees or Contractors — Automatic Status When Required in Construction Agreement **With You**", which provided additional insured coverage to

> any person or organization for whom [Renewal is] performing operations only as specified under a written contract … that requires that such person or organization be added as an additional insured on [Renewal's] policy … with respect to liability caused, in whole or in part, by the acts or omissions of the [Renewal], or those acting on behalf of [Renewal], in the performance of the [Renewal]'s ongoing operations for the additional insured only as specified under the "written contract."[188]

While the title of the endorsement contained the words "with you," which surely sounds like a privity endorsement, that language was not carried into the policy language below it. Accordingly, the appellate court recognized that the only limitation applicable here was in the final sentence of the Harleysville additional insured endorsement, which provided that "'[a] person's or organization's status as an insured under this endorsement ends when your on-going operations for that insured are completed,' language that has been construed as affording coverage for occurrences occurring prior to the completion of the work contracted for, but not for those occurring after completion of the work."[189] The underlying plaintiff's accident occurred on October 25, 2014 and the record established that Renewal's work ended "sometime in 2015," leaving it ongoing at the time of the accident.[190]

Despite the *River Park* decision above, which declined to consider the title of the endorsement for purposes of determining whether privity of contract was required to create additional insured status, the Second Department in *New York City Housing Authority v.*

Ins. Co. v. Endurance Am. Specialty Ins. Co., 66 N.Y.S.3d 441, 441–42 (App. Div. 1st Dep't 2018)).

188. Brief for Defendant-Appellant at 6–7, River Park Bronx Apartments, Inc. v. Harleysville Ins. Co., 201 N.Y.S.3d 50 (App. Div. 1st Dep't 2023) (No. 2023-00270).

189. *River Park Bronx Apartments, Inc.*, 201 N.Y.S.3d at 50 (citing Liberty Mut. Fire Ins. Co. v. E.E. Cruz & Co., 475 F. Supp. 2d 400, 411 (S.D.N.Y. 2007); Perez v. N.Y.C. Hous. Auth., 754 N.Y.S.2d 635 (App. Div. 1st Dep't 2003)).

190. *Id.*

Harleysville Worcester Ins. went the opposite direction on that issue only a few months later while interpreting the same endorsement.[191]

Oceanhill, LLC contracted with the Blue Sea Construction Company, LLC ("general contractor"), to perform construction services.[192] The general contractor subsequently subcontracted with A & R Electrical Maintenance ("subcontractor"), and the subcontractor agreed to indemnify and hold harmless the general contractor and the owner of the premises for any claims arising from the negligence or omission of the subcontractor.[193] Additionally, the subcontractor was required to procure and maintain a commercial general liability insurance policy naming Oceanhill, the general contractor, and the defendant, PPD Partners, LLC, as additional insureds.[194]

An employee of the subcontractor was injured during the project.[195] The employee filed suit against the general contractor, Oceanhill, and other non-contractor entities.[196] The general contractor, Oceanhill, and other non-contractor entities sued Harleysville Worcester Insurance Company, seeking a declaration that Harleysville is obligated to defend and indemnify them as additional insureds under the subcontractor's commercial general liability policy of insurance.[197] Harleysville moved for summary judgment seeking dismissal of the action and a declaration that it was not required to defend and indemnify the plaintiffs as additional insureds.[198] That motion was denied and Harleysville successfully appealed.[199]

Harleysville established, as a matter of law, that it had no obligations owed to the non-contractor entity-plaintiffs as additional insureds in the underlying action.[200]

While they were not named insureds nor additional insureds by name, the policy included a blanket additional insured endorsement that provided:

> ADDITIONAL INSURED—OWNERS, LESSEES OR CONTRACTORS—AUTOMATIC STATUS

191. N.Y.C. Hous. Auth. v. Harleysville Worcester Ins. Co., 209 N.Y.S.3d 130, 133 (App. Div. 2d Dep't 2024).
192. *See id.* at 132.
193. *See id.*
194. *See id.*
195. *See id.*
196. *See Harleysville Worcester Ins. Co.*, 209 N.Y.S.3d at 132–33.
197. *See id.* at 133.
198. *See id.*
199. *See id.*
200. *Id.*

> WHEN REQUIRED IN CONSTRUCTION AGREEMENT **WITH YOU**—ONGOING OPERATIONS," which provides, in relevant part, that "Who Is An Insured is amended to include as an insured any person or organization for whom you are performing operations only as specified under a written contract that requires that such person or organization be added as an additional insured on your policy.[201]

This was interpreted to require privity of contract between the named insured and the party seeking additional insured status.[202] Since only the general contractor contracted directly with the named insured, i.e., the subcontractor, only the general contractor qualifies for additional insured status under the terms of the policy.[203]

Importantly, the court continues by discussing priority of coverage for the general contract as between the Harleysville Policy and the general contractor's own insurance issued by State National Insurance Company.[204] The Second Department recognized that coverage for additional insureds is "primary coverage unless unambiguously stated otherwise."[205] Harleysville's policy however, unambiguously provided that coverage for an additional insured is excess over other insurance available to that party, unless a written contract requires primary and noncontributory coverage.[206] Here, while the subcontract required additional insured coverage, there was no requirement that such coverage be primary and noncontributory.[207] Thus, the subcontractor's policy issued by Harleysville is excess to the general contractor's policy issued by State National and coverage would only be triggered if the liability limits of the State National policy issued to the general contractor were exhausted. [208]

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201. *Harleysville Worcester Ins. Co.*, 209 N.Y.S.3d at 133 (emphasis added).

202. *Id.* (citing Yonkers Lodging Partners, LLC v. Selective Ins. Co. of Am., 72 N.Y.S.3d 104, 107 (App. Div. 2d Dep't 2018); Kel-Mar Designs, Inc. v. Harleysville Ins. Co. of N.Y., 8 N.Y.S.3d 304 (App. Div. 1st Dep't 2015)).

203. *Id.* While the court does not address the issue, we believe that it was the "with you" language in the title of the endorsement that created the privity requirement found by the court. *See id.*

204. *Id.*

205. *Id.* at 134 (quoting Pecker Iron Works of N.Y. v Traveler's Ins. Co., 786 N.E.2d 863, 864 (N.Y. 2003)).

206. *Harleysville Worcester Ins. Co.*, 209 N.Y.S.3d at 134.

207. *Id.*

208. *Id.* (first citing Poalacin v. Mall Props., Inc., 64 N.Y.S.3d 310, 321 (App. Div. 2d Dep't 2017); DD 11th Ave., LLC v. Harleysville Ins. Co. of N.Y., 12 N.Y.S.3d 48 (App. Div. 1st Dep't 2015); then citing State Farm Fire & Cas. Co. v. LiMauro, 482 N.E.2d 13 (N.Y. 1985))

Even where privity of contract is definitely required to establish additional insured coverage, an actual contract may not need to be provided to an insurer in order to trigger coverage, as was the case in *Greater New York Mutual Insurance Co. v. The Burlington Ins. Co.*, which was decided by the United States Court of Appeals, Second Circuit.[209] For those on the wrong side of this decision, it certainly appeared to be a tough pill to swallow.

Greater New York Mutual Insurance Co. ("GNY") sued Scottsdale Insurance Co. ("Scottsdale") and The Burlington Insurance Co. ("Burlington"), seeking coverage for GNY's insured, Park City 3 and 4 Apartments, Inc. ("Park City"), in an underlying New York state court action.[210]

In the underlying negligence action against Park City and Scottsdale's insured, Phoenix Bridging, Inc. ("Bridging"), Park City cross-claimed against Bridging for failure to procure additional insured. But no party could produce the contract.[211] The state court found that the contract was non-existent and entered summary judgment against Park City. However, the contract was later discovered, resulting in this lawsuit.[212]

Despite the underlying decision that the contract did not exist, the district court determined that it was not bound by the state court's decision, granting GNY summary judgment as to a defense owed by Scottsdale.[213] This was because the contract between Park City and Bridging required Scottsdale to defend Park City as an additional insured.[214] Scottsdale appealed.

Scottsdale argued that GNY's claim was time-barred under New York's 6-year statute of limitations; GNY was collaterally estopped from relying upon a non-existent contract as it was found by the state court; and further that by ignoring the above, any defense obligation ran from the time at which the contract was provided to Scottsdale.[215]

The Second Circuit quickly dispelled Scottsdale's statute of limitations argument, noting that under New York law, an action for breach of the duty to defend does not accrue until the underlying action

209. Greater N.Y. Mut. Ins. Co. v. The Burlington Ins. Co., No. 23-892, 2024 WL 1827249, at *2 (2d Cir. April 26, 2024) (Summary Order).

210. *See id.* at *1.

211. *See id.*

212. *See id.*

213. See *id.*

214. *See Greater N.Y. Mut. Ins. Co.*, 2024 WL 1827249, at *1–2.

215. *See id.* at *1.

has concluded, which was not the case here. [216] Next, the Second Circuit declined to address Scottsdale's collateral estoppel argument on appeal because it was raised on appeal for the first time in reply and thus waived. [217]

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216. *See id.* (citing Ghaly v. First Am. Title Ins. Co. of N.Y., 644 N.Y.S.2d 770, 771 (App. Div. 2d Dep't 1996)).

217. *See id.* (first citing United States v. Gomez, 877 F.3d 76, 94–95 (2d Cir. 2017); then citing Pettaway v. Nat'l Recovery Sols., LLC, 955 F.3d 299, 305 n.2 (2d Cir. 2020)). This finding was rather unfortunate, as it does appear that collateral estoppel may have been a viable mechanism to defend the claim. A judicial finding that a contract does not exist as between two represented parties to an alleged contract seems important. And here, this is the type of thing that would mean the difference regarding a purported additional insured's ability to meet its burden of proof on that threshold issue. See Nat'l Abatement Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 824 N.Y.S.2d 230, 232 (App. Div. 1st Dep't 2006) ("The party claiming insurance coverage bears the burden of proving entitlement and is not entitled to coverage if not named as an insured or an additional insured on the face of the policy."). Had the argument been asserted earlier, the outcome may have been different.

Not to be lost, we note additionally that a mere allegation that a contract requiring additional insured status exists is not the same thing as being provided with the contract itself, especially when the scope of coverage available to a purported additional insured relies upon the contract and its terms. It is not a difficult ask for a purported insured to supply a contract confirming its status as such. An insurer cannot determine the scope of any obligations owed to a purported additional insured absent the ability to review the contract defining that scope. At a certain point, a carrier should be justified in taking the position that no such contract exists. Now, could Scottsdale have defended Park City and filed a declaratory judgment action as suggested by the Court of Appeals in Lang v. Hanover Insurance Co., 820 N.E.2d 855, 858–59 (N.Y. 2004) ("[A]n insurance company that disclaims in a situation where coverage may be arguable is well advised to seek a declaratory judgment concerning the duty to defend or indemnify the purported insured")? Certainly. But, in our opinion, it should not have to when the purported additional insured has not tendered sufficient information to trigger coverage in the first place.

Which brings us to our last point on this case. The Second Circuit may have stretched Fitzpatrick v. American Honda Motor Co., 572 N.E.2d 90, 93 (N.Y. 1991) too far. Fitzpatrick provides that "[a]n insurer's duty to defend is . . . [triggered] 'when it has actual knowledge of facts establishing a reasonable possibility of coverage.'" *Id.* To us, "actual knowledge of facts" means being actually supplied with the contract. Any defense obligation owed by Scottsdale under the circumstances presented here should extend from the point in time when that contract was actually supplied to Scottsdale. At that point in time, it could be said under Fitzpatrick that the tender of the actual contract converted an unreasonable possibility of coverage—based upon an invisible, mystical contract—into a reasonable possibility of coverage predicated upon an actual, physical contract document, complete with pages, words, terms, and conditions. Applying Fitzpatrick to this factual scenario is one step removed from requiring the defense for a purported additional insured that tendered a claim to every insurer in the yellow pages, where that tender provided broad enough allegations of a contractual relationship with their respective named insureds.

Unpersuaded, the Second Circuit found relative to GNY's third argument that because "[a]n insurer's duty to defend is triggered 'when it has actual knowledge of facts establishing a reasonable possibility of coverage,'" it follows that the "duty was triggered by GNY's November 26, 2013 letter to Park City, which disclosed the basis for the underlying action and stated that a contract existed between Park City and Bridging that made Park City an additional insured on Bridging's policy with Scottsdale." This was "true even though GNY did not produce the contract when it sent that letter."[218]

Those with privity of contract issues often try to get creative in their approach to additional insured tenders. The Second Department in *Hanover Insurance Company v. Catlin Specialty Insurance Co.* was asked to determine whether an underlying contract was ambiguous relative to who it required additional insured coverage on behalf of.[219]

Hanover filed suit against Catlin Specialty Insurance Company, seeking a declaration that it was required to defend and indemnify Hanover's named insured, nonparty Industria Superstudio Overseas ("Overseas"), in an underlying personal injury.[220] Catlin argued that Overseas was not entitled to additional insured coverage under its policy issued to a general contractor, Bulson Management LLC.[221]

The relevant contract identifies the parties bound by its terms are the "Owner," namely "Fabrizio Ferri," the principal of Overseas, and "the Contractor," Bulson.[222] It later specifies, "based on the premise that legal relationships on a construction project are comprised of two-party contractual arrangements," that the terms "Owner" and "Contractor" are "singular in nature," thus referring to exactly one person or entity. [223] The space provided for the parties to identify a representative for the Owner was left blank and the signatories were "Graham R. Bruwer, Principal," on behalf of Bulson, and "Fabrizio Ferri," the individual.[224]

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218. *Greater N.Y. Mut. Ins. Co.*, 2024 WL 1827249, at *2 (first citing *Fitzpatrick*, 572 N.E.2d at 93; then citing Federated Dep't Stores, Inc. v. Twin City Fire Ins. Co., 807 N.Y.S.2d 62, 66 (App. Div. 1st Dep't 2006)).

219. Hanover Ins. Co. v. Catlin Specialty Ins. Co., 192 N.Y.S.3d 680, 681 (App. Div. 2d Dep't 2023).

220. *See id.*

221. *See id.*

222. *See id.* at 682.

223. *See id.*

224. *See Hanover Ins. Co.*, 192 N.Y.S.3d at 682.

Rather unfortunately, Overseas was not mentioned in the contract.[225] Thus, this language unambiguously identifies Ferri as the only party contracting with Bulson.[226] While Hanover attempted to submit extrinsic evidence establishing that Overseas was the owner of the property, the contract was between Ferri and Bulson and the additional insured language of that agreement applied to them, not Overseas, without regard to any extrinsic evidence.[227]

As you can see, the question of who qualifies as an insured does often require a keen eye. Take for example, *Allied World Insurance Co. v. National Union Fire Insurance Co. of Pittsburgh*, where the First Department, Appellate Division of New York was required to tackle questions involving corporate structure and ownership.[228]

Sabra, a food company, is a joint venture between nonparties Frito-Lay, Inc., and Strauss Group, with each company owning 50% of Sabra.[229] Frito-Lay is a wholly owned subsidiary of PepsiCo, Inc.[230]

After discovery of listeria on its manufacturing equipment, Sabra voluntarily recalled certain products, and subsequently submitted claims to its insurers, including Allied World.[231] For the relevant coverage period, National Union had issued PepsiCo a contaminated products plus insurance policy, which provided that PepsiCo was the "named insured" and provided in an endorsement that the named insured included, "subsidiaries and joint ventures in which PepsiCo had a 50% or greater ownership."[232] After exhausting its policy limits, Allied sought a declaration that National Union's policy provides coverage for Sabra's losses associated with the recall.[233] However, Sabra was not covered under the National Union policy.[234] Sabra was neither a subsidiary, nor joint venture of PepsiCo.[235] Rather, Sabra was a joint venture of Frito-Lay and Strauss, and Frito-Lay is a subsidiary

225. *See id.*
226. *See id.*
227. *See id.* (citing State v. Home Indem. Co., 486 N.E.2d 827, 828 (N.Y. 1985); Concordia Gen. Contr. Co., Inc. v. Preferred Mut. Ins. Co., 46 N.Y.S.2d 146, 147–48 (App. Div. 2d Dep't 2017)).
228. *See* Allied World Ins. Co. v. Nat'l Union of Fire Ins. Co. of Pittsburgh, 199 N.Y.S.3d 54, 55 (App. Div. 1st Dep't 2023).
229. *See id.*
230. *See id.*
231. *See id.*
232. *Id.*
233. *See Allied World Ins. Co.*, 199 N.Y.S.3d at 55.
234. *See id.*
235. *See id.*

of PepsiCo.[236] It was not possible for Sabra to be a subsidiary of PepsiCo when Sabra was not even a subsidiary of Frito-Lay, itself a subsidiary PepsiCo.[237]

XI. RIGHT TO INDEPENDENT COUNSEL

Speaking of rights to coverage under an insurance policy, we note that another such right afforded to those entitled to coverage is an insured's right to independent counsel under certain circumstances.

As you know, legal pleadings are often funny things filled with contradictory allegations. The quintessential example is a scuffle that results in a lawsuit for both intentional assault and battery, as well as negligent infliction of injury. While insurance is unavailable for intentional assault and battery, negligently bumping someone down the stairs is a covered occurrence, if true. Insurers often must disclaim coverage for intentional acts while providing coverage for claims of negligence until one or the other is ruled out, but this leads to problems relative to an insurer's duty to defend.

Under such circumstances, an insured and their defense attorney must insist that any liability was negligent, while an insurer may favor intentional liability on the part of the insured. Since there is a conflict between the two, New York courts hold that the insured has a right to independent counsel, as a safeguard for the insured's interests in coverage.[238]

While New York courts unanimously recognize the right to independent counsel under the circumstances outlined above, there is a split as to whether an insurer has an affirmative duty to advise the insured of their right to independent counsel. In *State Farm Fire and Casualty Co. v. Russo*, the Second Department had an opportunity to remind the insurance community where it stands on that issue.[239]

In *Russo*, a child (through his guardian) sued Kim Eichle and others to following an incident that occurred at Eichle's residence, resulting in injuries.[240] It was alleged that the child was injured as a result of Eichle's negligence in serving alcoholic beverages to her houseguest, Jacob Russo, who assaulted the child. [241] However,

236. *See id.*

237. *See id.*

238. *See* Pub. Serv. Mut. Ins. Co. v. Goldfarb, 425 N.E.2d 810, 815 (N.Y. 1981).

239. *See* State Farm Fire & Cas. Co. v. Russo, 211 N.Y.S.3d 487, 489 (App. Div. 2d Dep't 2024).

240. *See id.* at 488.

241. *See id.*

alternatively, it was alleged that the child was injured as a result of Eichle's negligence in failing to properly maintain a sidewalk by keeping it free from snow and ice.[242] Eichle subsequently commenced a third-party action against Russo alleging, among other things, that any injuries allegedly sustained by child were solely the result of Russo's negligence or intentional assault.[243]

Russo was insured by State Farm.[244] State Farm initially agreed to defend Russo, but subsequently commenced this action seeking a declaration that it was not obligated to defend or indemnify Russo in the third-party action, on the ground that the injuries did not result from an "occurrence" (i.e., an "accident") and that Russo's conduct was also barred by exclusions in the subject policy.[245] Russo answered and asserted five counterclaims,[246] including breach of State Farm's duty to defend, breach of its duty to indemnify, "conflict of interest," and bad faith.[247] Both parties moved to dismiss.[248]

The Second Department, Appellate Division, found that State Farm failed to establish that the incident at issue was precluded from coverage as a matter of law.[249] For the same reason, the court also refused to dismiss Russo's first and second counterclaims, alleging breach of the duties to defend and to indemnify, respectively, "as well as the fifth counterclaim, seeking recovery of attorneys' fees incurred in defending against this action."[250]

Importantly for our purposes, however, the court held in favor of State Farm's motion for summary judgment, "dismissing Russo's third counterclaim, alleging conflict of interest predicated on State Farm's alleged affirmative obligation to advise Russo of his right to retain independent counsel," as well as Russo's fourth counterclaim, alleging bad faith.[251] "State Farm did not have an affirmative duty to advise Russo of the right to retain independent counsel."[252]

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242. *See id.*

243. *See id.*

244. *See State Farm Fire & Cas. Co.*, 211 N.Y.S.3d at 488.

245. *See id.*

246. *See id.*

247. *See id.*

248. *See id.* at 488–89.

249. *See State Farm Fire & Cas. Co.*, 211 N.Y.S.3d at 489 (citing N.Y. Cent. Mut. Fire Ins. Co. v. Steely, 815 N.Y.S.2d 724, 725 (App. Div. 2d Dep't 2006)).

250. *Id.* (citing Hershfeld v. JM Woodworth Risk Retention Grp., Inc., 181 N.Y.S.3d 667, 669 (App. Div. 2d Dep't 2023)).

251. *Id.*

252. *Id.* (citing Tower Ins. Co. of N.Y. v. Sanita Const. Co., Inc., 11 N.Y.S.3d 122, 123 (App. Div. 1st Dep't 2015)). Importantly, we note that the Second

XII. STATUTE OF LIMITATIONS

Another right held by an insured under an insurance policy is the right to challenge an insurer**'**s denial of a claim in court of law. As with any other right, however, there are certain limitations that must be followed in pursuit of such a right.

In what amounts to a straightforward application of the appropriate statute of limitations for declaratory judgment actions, the First Department in *Kent Avenue Property 3, LLC v. Allied World National Assurance Co.* found that while an action alleging an insurer "breached [a] contractual duty to indemnify or defend under the insurance policy" would apply a six-year statute of limitations under New York C.P.L.R. 213(2), a pure declaratory judgment action is different. [253] Here, the plaintiff did not assert any breach of contract claims—merely claims for declaratory relief relative to construction of the insurance policy language. [254] Accordingly, the lower court properly dismissed the complaint as time-barred, following an eight year delay after Allied**'**s disclaimer of insurance coverage.[255] The disclaimer in September 2013 provided plaintiffs with sufficient information to determine whether the disclaimer was untimely under Insurance Law Section 3420(d)(2), and thus, the statute of limitations began to run at that time.[256]

A related concept involves suit-limitation clauses, such as the one at issue in *Pavoist v. Kensington Insurance Company*, where the

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Department did not cite the leading cases on this issue for whatever reason. *See Tower Ins. Co. of N.Y.*, 11 N.Y.S.3d at 123; *see also* Sumo Container Station v. Evans, Orr, Pacelli, Norton & Laffan, P.C., 719 N.Y.S.2d 223 (App. Div. 1st Dep't 2000). However, as we mentioned previously, there is a split on authority in this area. *See* Elacqua v. Physicians' Reciprocal Insurers, 800 N.Y.S.2d 469, 473 (App. Div. 3d Dep't 2005) (declining to follow *Sumo Container* because "[i]f defendant was obligated to defend plaintiffs in the underlying action and . . . provide them independent counsel of their own choosing, it follows that defendant was required to advise them of that right").

253. *See* Kent Ave. Prop. 3, LLC v. Allied World Nat'l Assurance Co., 211 N.Y.S.3d 366, 367 (App. Div. 1st Dep't 2024) (distinguishing from Ghaly v. First Am. Title Ins. Co. of N.Y., 644 N.Y.S.2d 770, 770 (App. Div. 2d Dep't 1996) ("A cause of action based on an insurer's alleged breach of a contractual duty to defend accrues only when the underlying litigation brought against the insured has been finally terminated and the insurer can no longer defend the insured even if it chooses to do so . . . .")).

254. *See id.*

255. *See id.*

256. *See id.* (citing Quality Building Contractor, Inc. v. Ill. Union Ins. Co., No. 15 Civ. 6830, 2016 U.S. Dist. LEXIS 101925, at *5 (S.D.N.Y. July 28, 2016)).

Second Department upheld a two-year suit limitation clause in an insurance policy.[257]

Plaintiffs sustained damage to the foundation of their premises as a result of ongoing demolition activities.[258] Eventually, a claim was presented to Kensington which was denied.[259] Plaintiffs then commenced the instant suit more than two years after the incident giving rise to their claims of damage.[260]

The Kensington policy contained a two-year suit limitation clause, and Kensington promptly moved to dismiss it on the grounds that the claim was barred by the applicable statute of limitations.[261] Here, the Court recognized the long-standing rule that parties to a contract were free to limit the timeline for when a suit commenced, and here such timeframe was limited to two years.[262] Because the suit was filed untimely, it followed that dismissal was appropriate. [263]

XIII. AGENTS AND BROKERS LIABILITY

While insureds hold rights under an insurance policy, they must procure a policy first and often turn to insurance agents and brokers in order to do so. The duties owed between an insurance broker and their insured often involve, in simple terms, the precise request made by an insured for coverage, but there are many other issues that often creep into the fray, including whether a broker had a special relationship with a particular insured. An informative example during this *Survey* period was the First Department's decision in *Crosby v. AJA Turnpike Properties*.[264]

257. *See* Pavoist v. Kensington Ins. Co., 213 N.Y.S.3d 422, 424 (App. Div. 2d Dep't 2024).

258. *See id.* at 423.

259. *See id.* at 424.

260. *See id.*

261. *See id.* (citing N.Y. C.P.L.R. 3211(a)(5) (CONSOL. 2024)). We recognize that there is a line of authority consistent with this case, which treats a suit limitation clause as a statute of limitation. We, respectfully, disagree with that line of analysis. The suit limitation clause is a contractual provision, which, frankly, is a policy defense to any claim. From our perspective, the appropriate defense here is not statute of limitation, but rather the failure to state a cause of action. In essence, the existence of the suit limitation clause precludes relief under the policy, regardless of the statute of limitations.

262. *See Pavoist*, 213 N.Y.S.3d at 424 (citing Der Velde v. N.Y. Prop. Underwriting Ass'n, 169 N.Y.S.3d 114, 115 (App. Div. 2d Dep't 2022)).

263. *See id.*

264. *See* Crosby v. AJA Turnpike Props., 203 N.Y.S.3d 603 (App. Div. 1st Dep't 2024).

In *Crosby*, JMJ Residential Construction Inc. ("JMJ") entered into a subcontract with Cinos East Meadow LLC ("Cinos") and Conboy & Mannon Contracting, Inc. ("Conboy") to construct a fast-food restaurant.[265] JMJ was required to obtain additional insured coverage for Cinos and Conboy for claims arising from JMJ's operations.[266] JMJ contacted Joseph J. DiMonda Agency, LLC ("DiMonda") to secure appropriate coverage.[267] JMJ supplied a copy of the subcontract directly to DiMonda, and DiMonda then obtained a commercial general liability (CGL) policy for JMJ from Colony Insurance Company.[268]

During construction, Brian Crosby was injured and filed suit against Cinos and Conboy, who in turn brought a third-party action seeking indemnification from JMJ.[269] However, "[c]iting employee liability-based exclusions in the CGL policy, Colony denied coverage to JMJ … ."[270] JMJ sued DiMonda, "asserting causes of action for failure to obtain the proper insurance coverage, negligence, breach of the duty of care, and breach of fiduciary duty."[271]

The First Department found that DiMonda failed to establish entitlement to summary judgment, since the record included conflicting testimony as to their expectations regarding the appropriate insurance coverage.[272] Ultimately, it remained to be seen whether JMJ's request was specific in nature, or merely a general request for coverage that would not support such a claim.[273] While DiMonda contended that JMJ had failed to read and understand the CGL policy, the court noted that such an issue merely supports potential comparative negligence on the part of JMJ rather than a complete defense to liability.[274]

Sometimes, issues of insurance agent liability concern the lack of any available insurance to cover a loss rather than the procurement of

265. *See id.* at 604.
266. *See id.*
267. *See id.*
268. *See id.*
269. *See Crosby*, 203 N.Y.S.3d at 604.
270. *Id.*
271. *Id.*
272. *See id.* (citing Gibraltar Contracting Inc. v. P.F. Ne. Brokerage, Inc., 137 N.Y.S.3d 330, 331 (App. Div. 1st Dep't 2020)).
273. *See id.*
274. The court quickly dispelled any notion of a potential special relationship between the entities, as this was their first time working with one another. *See Crosby*, 203 N.Y.S.3d at 604 (citing Am. Bldg. Supply Co. v. Petrocelli Grp., Inc., 979 N.E.2d 1181, 1184 (N.Y. 2012)).

insufficient insurance for a particular purpose. That was the case in *Ewart v. Allstate Insurance Company*.[275]

There, James Ewart initially enlisted the help of Larry Darcey, an independent Allstate insurance agent, in order to obtain a landlord insurance policy to cover Ewart's property in Smithtown.[276] "Darcey subsequently provided quotes … and then left for vacation without binding coverage … ."[277]

Ewart neither selected a policy nor made a payment.[278] While Ewart knew that further actions were required, he believed that Darcey would complete them after his vacation.[279] "[B]efore Darcey returned, [however,] a fire damaged the property."[280] Ewart submitted a claim with Allstate, which disclaimed coverage because no policy was in force.[281] Ewart thereafter sued Allstate and Darcey for, among other things, failure to procure.

The Second Department noted that insurance agents are without a continuing duty to advise, guide, or direct a client to obtain coverage.[282] That said, insurance agents

> may be held liable under theories of breach of contract or negligence for failing to procure insurance upon a showing by the insured that the agent or broker failed to discharge the duties imposed by the agreement to obtain insurance either by proof that it breached the agreement or because it failed to exercise due care in the transaction.[283]

However, no agreement was reached between Ewart and Darcey as they did not discuss the amount of coverage or the cost of a landlord insurance policy, among other things.[284] While an insurance agent has "a common-law duty to obtain requested coverage for a client within a reasonable amount of time or to inform the client of the inability to do so," Darcey communicated multiple quotes to Ewart and Ewart

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275. *See* Ewart v. Allstate Ins. Co., 199 N.Y.S.3d 688, 688 (App. Div. 2d Dep't 2023).

276. *See id.* at 689.

277. *Id.*

278. *See id.*

279. *See id.*

280. *Ewart*, 199 N.Y.S.3d at 689.

281. *See id.*

282. *See id.* (citing MAAD Constr., Inc. v. Cavallino Risk Mgmt., Inc., 115 N.Y.S.3d 385, 388 (App. Div. 2d Dep't 2019)).

283. *Id.* (quoting DaSilva v. Champ Constr. Corp., 128 N.Y.S.3d 582, 584 (App. Div. 2d Dep't 2020)).

284. *See id.*

failed to respond, showing a "lack of initiative or personal indifference" that resulted in a failure to obtain coverage.[285]

XIV. DISCLAIMERS AND INSURANCE LAW SECTION 3420(D)(2)

In an interesting case, the First Department in *Titan Industrial Services Corp. v. Navigators Insurance Co.*, discussed an emailed disclaimer of coverage under Insurance Law Section 3420(d)(2) and applied the same standard as one sent by traditional snail-mail.[286] No New York court, to date, has really fleshed out precisely how the statute might apply in the context of an emailed disclaimer, and this case strongly suggests that there is no material difference between mailed and emailed disclaimers in this context.

An insurance policy issued by Navigators Insurance Company contained an endorsement, entitled "Designated Person(s) or Entities Exclusion," which provided that "certain entities are 'excluded' from coverage."[287] While Navigators argued that the endorsement itself served as a limitation on the grant of coverage, the court disagreed on account of the express, exclusionary language contained therein.[288] As an exclusion, the strictures of Insurance Law Section 3420(d)(2) applied, requiring Navigators to provide written notice of a disclaimer on that basis as soon as reasonably possible following its receipt of a tender by Titan Industrial Service Corp. for additional insured coverage.[289]

Given that the ground for disclaimer was readily apparent on the face of Titan's tender—i.e., that Titan was designated an excluded entity under the endorsement—the First Department found that Navigators's unexplained seven-month delay in disclaiming coverage was unreasonable as a matter of law.[290] While an earlier email to

285. *Ewart*, 199 N.Y.S.3d at 689–90 (first quoting Verbert v. Garcia, 882 N.Y.S.2d 259, 260 (App. Div. 2d Dep't 2009); then quoting Murphy v. Kuhn, 682 N.E.2d 972, 974 (N.Y. 1997)).

286. *See* Titan Indus. Servs. Corp. v. Navigators Ins. Co., 203 N.Y.S.3d 267, 269 (App. Div. 1st Dep't 2024).

287. *Id.*

288. *See id.* This type of argument is not unheard of, as it was the topic of another First Department decision during the *Survey* period. *See* Wesco Ins. Co. v. SR Delco C.S.M. Inc., 210 N.Y.S.3d 392, 393 (App. Div. 1st Dep't 2024) (finding that a classification limitation "endorsement define[d] the scope of coverage in the first instance[] and [did] not operate as an exclusion" that would require an insurer's timely disclaimer under Insurance Law Section 3420(d)(2)).

289. *See Titan Indus. Servs. Corp*., 203 N.Y.S.3d at 269 (citing Markevics v. Liberty Mut. Ins. Co., 761 N.E.2d 557, 559–60 (N.Y. 2001)).

290. *See id.* (citing W. 16th St. Tenants Corp. v. Pub. Serv. Mut. Ins. Co., 736 N.Y.S.2d 34, 36 (App. Div. 1st Dep't 2002)).

Titan's insurance broker mentioned the exclusion, "it did not unequivocally state that Navigators was disclaiming coverage," nor "apprise Titan, with the high degree of specificity required, of the ground or grounds on which the disclaimer was predicated."[291]

Another First Department decision, *823 Second Avenue, LLC v. Utica First Insurance Co.*, provides an interesting discussion of an important limitation on the protection afforded by insurance law to insureds.[292]

In *823 Second Avenue*, P.R. Crepe Ltd. was a tenant in a building owned by 823 Second Avenue.[293] Following an underlying incident, 823 Second Avenue sought defense and indemnity from P.R. Crepe Ltd.'s insurer, Utica First Insurance Company, and Utica disclaimed coverage.[294] 823 Second Avenue filed suit against Utica to contest its disclaimer.[295]

Siding with Utica, the First Department noted that while 823 Second Avenue qualified as an insured under the policy issued to its tenant, P.R. Crepe Ltd., there was an operative exclusion that removed coverage, an employee exclusion.[296] There was an "incidental contract" exception to the exclusion, but it was up to 823 Second Avenue to establish that there was an "incidental contract" involved, and the insured failed to do so.[297]

Important for our purposes, the court found that "Utica did not waive its right to rely on the employee exclusion as to plaintiff," explaining that:

> Utica sent two different disclaimer letters to plaintiff on consecutive days. Although the second letter was also addressed to P.R. Crepe and stated it was

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291. *Id.* at 269–70 (citing Hartford Underwriting Ins. Co. v. Greenman-Pederson, Inc., 975 N.Y.S.2d 736, 737–38 (App. Div. 1st Dep't 2013)). While not expressly indicating so, we note that the court in this instance has applied New York's "high degree of specificity" requirement established by the Court of Appeals in *General Accident Insurance Group v. Cirucci*, 387 N.E.2d 223, 225 (N.Y. 1979), to a written email, rather than a formal disclaimer letter. It would appear that a written email asserting a denial of coverage with a high degree of specificity may have worked under the circumstances of this case.

292. *See* 823 Second Ave., LLC v. Utica First Ins. Co., 206 N.Y.S.3d 299 (App. Div. 1st Dep't 2024).

293. *See id.* at 300.

294. *See id.*

295. *See id.*

296. *See id.* (citing Sixty Sutton Corp. v. Ill. Union Ins. Co., 825 N.Y.S.2d 46, 48 (App. Div. 2d Dep't 2006)).

297. *823 Second Ave.*, 206 N.Y.S.3d at 301 (quoting Arthur Kill Power, LLC v. Am. Cas. Safety Ins. Co., 915 N.Y.S.2d 535, 537 (App. Div. 1st Dep't 2011)).

> disclaiming coverage to P.R. Crepe, plaintiff knew from the first letter that Utica was disclaiming coverage and plaintiff is not prejudiced "by a belated denial of coverage." Plaintiff received the November 12, 2020 letter raising the employee exclusion with a high degree of specificity and has failed to identify any prejudice from Utica's presentation of the two letters.[298]

The First Department's decision provided an important reminder that Section 3420(d)(2) "is not intended to be a technical trap that would allow interested parties to obtain more than the coverage contracted for under the policy," and thus Utica's conduct was in furtherance of the objectives of that provision.[299]

In yet another First Department decision, *New York City Housing Authority v. Admiral Insurance Company*, carriers were reminded that timeliness under Insurance Law Section 3420(d)(2) applies with equal force to excess policies.[300] This case serves as a cautionary tale for those carriers that issue package primary and excess policies; an excess insurer cannot delay issuance of a disclaimer on a known ground merely because it contends that its excess obligations only triggered "once there was a reasonable possibility that the excess coverage might be reached."[301] Such an insurer must raise its exclusions timely or not at all.

XV. LATE NOTICE

While we will not spend too much time on the topic of late notice disclaimers, we note that denial of any New York liability claims for bodily injury or death on the basis of late notice requires that an insurer have been prejudiced by the timing of such notice.[302] New York does, however, also provide a burden shifting analysis on the basis of the timing of eventual notice, placing the burden with the insurer if notice is provided within two-year, or the insured if notice is provided beyond two-years.[303] That said, Insurance Law Section 3420(c)(2)(B),

298. *Id.* at 206 N.Y.S.3d at 301 (citing Schlott v. Transcon. Ins. Co., Inc., 838 N.Y.S.2d 559, 559 (App. Div. 1st Dep't 2007)).

299. *Id.* (quoting Excelsior Ins. Co. v. Antretter Contracting Corp., 693 N.Y.S.2d 100, 104 (App. Div. 1st Dep't 1999)

300. *See generally* N.Y.C. Hous. Auth. v. Admiral Ins. Co., 211 N.Y.S.3d 26, 27 (App. Div. 1st Dep't 2024).

301. *Id.* (citing Kamyr, Inc. v. St. Paul Surplus Lines Ins. Co., 547 N.Y.S.2d 964, 966–67 (App. Div. 3d Dep't 1989)).

302. *See* N.Y. INS. LAW § 3420(a)(5) (McKinney 2024).

303. *See id.* § 3420(c)(2).

provides an irrebuttable presumption of prejudice where an insured's liability was decided prior to notice. In *American Empire Surplus Insurance Company v. Commerce & Industry Insurance Company*, the First Department reminds us that this irrebuttable presumption of prejudice applies as equally to a second-layer excess insurer as it does to a primary insurer with a defense obligation.[304]

XVI. RESCISSION

Not to be confused with a mere disclaimer of coverage, whether due to an exclusion or breach of a policy condition such as late notice, a whole different standard entirely is applied to circumstances involving rescission of an insurance policy *ab initio*, as if it never existed. In a case sure to be cited in the rescission context against insurers early and often, the First Department in *ZZZ Carpentry, Inc. v. Mt. Hawley Insurance Company* finds that rescission a mere 129 days after disclaimer of coverage is untimely.[305]

Therein, the court held that Mt. Hawley Insurance Company waived its right to rescind the policy by unreasonably delaying its assertion of a right to rescind.[306] While Mt. Hawley initially disclaimed coverage on June 28, 2016, resulting in the filing of this action by its insured, ZZZ Carpentry, Inc., Mt. Hawley did not counterclaim for rescission until November 4, 2016, 129 days later.[307]

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304. *See* Am. Empire Surplus Lines Ins. Co. v. Com. & Indus. Ins. Co., 199 N.Y.S.3d 486, 488 (App. Div. 1st Dep't 2023). Generally, in the context of timely disclaimer under N.Y. Insurance Law § 3420(d)(2), courts follow a 30-day rule of thumb for the reasonableness of any delay in disclaiming coverage. *See, e.g.*, Charles Bardylyn Enters., Inc. v. Rockingham Ins. Co., 214 N.Y.S.3d 403, 403 (App. Div. 2d Dep't 2024) (finding a thirty-four-day delay in disclaiming coverage on the basis of an exclusion untimely as a matter of law). Historically, in the context of late notice disclaimers, however, that window is narrowed because the ground for disclaimer is often apparent on the face of the notice. *See* First Fin. Ins. Co. v. Jetco Cont. Corp., 801 N.E.2d 835, 839 (N.Y. 2003) (noting that "an insurer's explanation [for its delay] is insufficient as a matter of law where the basis for denying coverage was or should have been readily apparent before the onset of the delay."). Here, however, the insurer's relevant claim handling occurred during the COVID-19 pandemic and a delay of twenty-eight-days was deemed reasonable due to inherent complications posed by that historic time. *Am. Empire Surplus*, 199 N.Y.S.3d at 488 ("Although a lengthy investigation was not necessary to determine that coverage should be disclaimed, the subject notice of claim was sent in April 2020—during the height of the Covid–19 pandemic; some leeway is appropriate given the disruptions caused thereby.").

305. *See* ZZZ Carpentry, Inc. v. Mt. Hawley Ins. Co., 207 N.Y.S.3d 479, 480 (App. Div. 1st Dep't 2024).

306. *See id.*

307. *See id.* (citing U.S. Life Ins. Co. in the City of N.Y. v. Blumenfeld, 938 N.Y.S.2d 84, 86 (App. Div. 1st Dep't 2012).

The First Department declined to discuss the merits of any rescission on account of waiver.[308]

Despite our warning relative to the shortened timeframe presented in *ZZZ Carpentry*, New York courts found ample opportunity to uphold various rescissions on the basis of material representation made by insureds (while denying others, of course).[309]

XVII. POST-JUDGMENT INTEREST

We are often asked by insurers how they might avoid incurring post-judgment interest amounts following an early, underlying partial summary judgment on the issue of liability. Short of resolving the entire action, there is only one valid method of doing so—an unconditional offer of the policy limits. That, however, is easier said than done, and the First Department's decision in *Allied World*

308. *See id.* This decision is troubling for a few reasons. First, there was a single case cited in support of waiver under the circumstances presented, wherein the First Department found that a delay of "more than one year" had resulted in such a waiver. *Blumenfeld*, 938 N.Y.S.2d at 86. Without question, there is a lot of ground to be covered between the four-month delay in pursuing rescission in *ZZZ Carpentry*, and the delay of "more than one year" presented in *Blumenfeld*. Second, we note that ZZZ Carpentry, as respondent, did not submit a respondent's brief during Mt. Hawley's appeal and, in the briefing below, cited a single case on this issue, *Saitta v. New York City Transit Authority*, but even that case found a four month delay unreasonable to merely disclaim under Insurance Law Section 3420(d)(2), rather than rescind. Saitta v. N.Y.C. Transit Auth., 866 N.Y.S.2d 62, 63 (App. Div. 1st Dep't 2008) (citing *First Fin. Ins. Co.*, 801 N.E.2d at 839). Importantly, the timeliness requirements of Insurance Law Section 3420(d)(2) does not apply to rescissions, whatsoever. *See* N.Y. State Ins. Fund v. Mount Vernon Fire Ins. Co., 371 Fed. Appx. 207, 211 (2d Cir. 2010) (quoting Taradena v. Nationwide Mut. Ins. Co., 657 N.Y.S.2d 646, 647 (App. Div. 4th Dep't 1997) (noting that untimeliness under Insurance Law Section 3420(d)(2) does not preclude a claim for rescission)).

309. *See, e.g.*, Azad v. Kingstone Ins. Co., 212 N.Y.S.3d 716, 718 (App. Div. 2d Dep't 2024) (upholding rescission on basis of insured's inaccurate designation of the number of families in application); Certain Underwriters at Lloyds London v. Martin, 209 N.Y.S.3d 380, 381 (App. Div. 1st Dep't 2024) (upholding rescission on the basis of the insured's Medicare fraud for which he pled guilty); Barese v. Erie & Niagara Ins. Ass'n, 206 N.Y.S.3d 754, 759 (App. Div. 3d Dep't 2024) (upholding rescission on the basis of the insured's inaccurate designation of property ownership and occupancy); *but see*, Alexi Home Design, Inc. v. Union Mut. Fire Ins. Co., 203 N.Y.S.3d 57, 59–60 (App. Div. 1st Dep't 2024) (finding issue of fact as to rescission regarding number of apartment units, where underwriting guidelines spoke merely to issues regarding the amount of "living units"); Ruiz v. First Invs. Life Ins. Co., 200 N.Y.S.3d 463, 465 (App. Div. 2d Dep't 2023) (finding that insurer failed to establish materiality relative to certain misrepresentations regarding heart conditions).

Assurance Co. v. Greater New York Mutual Insurance Company outlines why.[310]

Greater New York Mutual Insurance Company (GNY) had issued primary insurance to its insured, while Allied World Assurance Company (U.S.) Inc. ("AWAC") served as excess insurer.[311] GNY's general liability policy included a supplementary payments provision (SPP) obligating GNY to pay, in addition to its defense dollars, an additional amount of court costs, prejudgment interest, and post-judgment interest.[312] While GNY had an ability to terminate its prejudgment interest obligation, the SPP provided that GNY must first make "an offer to pay the applicable limit of insurance … ."[313] "Similarly, with respect to GNY's ability to terminate its post-judgment interest obligation, the SPP provided that GNY would pay interest that accrued 'before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.'"[314]

Ultimately, the jury in the underlying action awarded $3.3 million in favor of the injured party.[315] Thereafter, GNY sent AWAC a letter stating that "in consideration of the verdict," it was tendering to AWAC $1,000,000, the GNY policy limit, with the tender to be construed as an "offer to settle under the terms of the policy."[316] Thereafter, AWAC entered into a post-judgment settlement and release for $3,150,000 and paid $2.15 million towards the settlement.

While GNY had thought that its letter to AWAC had absolved it of any obligation under the SPP, the First Department noted that GNY's letter

> failed to terminate its obligation under the SPP to pay accrued interest. An offer terminating an insurer's obligation to pay must be a "tender" of the policy limit, and an offer is not a tender if it is conditional. The offer in GNY's February 12 letter was manifestly conditional, stating that the tender was to be construed as an "offer to settle under the terms of the policy" and that it was "contingent upon" AWAC's written

310. *See* Allied World Assur. Co. Inc. v. Greater N.Y. Mut. Ins. Co., 202 N.Y.S.3d 108 (App. Div. 1st Dep't 2024).

311. *See id.* at 108.

312. *See id.*

313. *Id.*

314. *See id.*

315. *Allied*, 202 N.Y.S.3d at 108.

316. *Id.*

> agreement that GNY was not responsible for the postjudgment interest.[317]

Thus, had GNY merely tendered its limits to AWAC, it would have accomplished its purpose. However, requiring AWAC to agree in writing rendered what would have been a tender into an offer instead.

XVIII. RELEASE OF CLAIMS

In addition to an insurer's potential obligations for interest, another consideration at or around the time of settlement is the language contained within any release of claims. Following settlement, releases may, at times, seem like a mere formality. However, the language included therein may make a difference in the availability of further amounts for recovery. That is precisely what transpired in *Rafailova v. Leading Insurance Group Insurance Co., Ltd* before New York's Second Department, Appellate Division.[318]

Raisa Rafailova was allegedly injured following a fall in a building owned by 8610 Realty Corp. ("landlord"), and leased to GNL Pharmacy Corp ("tenant"), resulting in a lawsuit against both.[319] The landlord never appeared or interposed an answer in that action, and by order dated August 12, 2013, resulting in a default judgment against it. [320] Following the payment of $150,000 in 2015, the Rafailova signed a release discharging the tenant, as well as its insurer,

> Leading Insurance Group Insurance Co., Ltd., Leading Insurance Services, Inc., other entities, and their "servants, successors, heirs, executors, administrators, and all other persons, firms, corporations, associations or partnerships," from "all past, present and future claims, demands, damages, actions, third-party actions, causes of action or suits at law or in equity, including claims for contribution and or indemnity, of whatever nature and particularly on account of all injuries, known, both to person and property, which have resulted or may in the future develop from" the

317. *Id.* at 109 (citing Cohen v. Transcon. Ins. Co., 693 N.Y.S.2d 529, 530 (App. Div. 1st Dep't 1999)).

318. *See* Rafailova v. Leading Ins. Grp. Ins. Co., 196 N.Y.S.3d 91, 94 (App. Div. 2d Dep't. 2023).

319. *See id.* at 93.

320. *See id.*

> plaintiff's fall on June 16, 2012, at the subject property.[321]

Following settlement, Rafailova sought judgment against the landlord and, after an inquest, the Supreme Court entered a judgment against the landlord in the sum of $362,878.[322]

Following an unsuccessful attempt by the landlord to vacate the judgment, Rafailova (now a judgment creditor) commenced a direct action against Leading Insurance Services, Inc., and KB Insurance Company, Ltd., (hereinafter together the defendants) among others, seeking to recover the amount of the unsatisfied judgment.[323] The Second Department found, however, that Rafailova had released any such claims.[324]

Specifically, the release expressly discharged the relevant insurers from any liability for claims resulting from the accident.[325] Contrary to the Rafailova's contention that the release is silent relative to the landlord or Rafailova's ability to pursue remedies under Insurance Law Section 3420, this action fell squarely within "the broad set of 'all past, present, and future claims' against the insurers that are encompassed by the release."[326] Were the release intended to exclude certain claims, it could have stated so, but did not. [327]

XIX. SETTLEMENT AGREEMENTS

In addition to the language contained within any release of claims, it is also very important that you consider whether a written settlement agreement memorializes the agreement as you envisioned it; otherwise, you may miss out on opportunities for further recovery in the future.

If you were not already aware by now, the availability of insurance (or lack thereof) is a large driver of most tort litigation in the United States and abroad. Inevitably, most cases are resolved short of trial by way of insurance payments, with many involving alternative dispute resolution mechanisms such as mediation. While mediation is a tool to draw disputes to a close, it is not without its issues, as *Nash*

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321. *Id.*
322. *See id.*
323. *See Rafailova*, 196 N.Y.S.3d at 94.
324. *See id*.
325. *See id*.
326. *See id.*
327. *See id.* (citing *In re* Mercer, 35 N.Y.S.3d 692, 694 (App. Div. 2d Dep't 2016)).

v. Walker Memorial Baptist Church, Inc. showcased this *Survey* period.[328]

Curtis Nash filed a personal injury lawsuit against Walker Memorial Baptist Church, Inc. ("Walker"), a property owner, alleging that it negligently failed to maintain the premises.[329] Walker impleaded Rosalyn Yalow Charter School, the tenant and Nash's employer, seeking contractual indemnification based on the lease.[330]

During virtual mediation, the parties and their insurers reached an agreement in principle on a settlement.[331] Walker's insurance carrier, Philadelphia Indemnity Insurance Company (PIIC), reserved its rights against nonparty Munich Re Insurance, Rosalyn's excess liability carrier.[332] A post-mediation agreement was prepared, which specified that each party released the others from all claims or liability arising from the matter.[333] Soon thereafter, in response to an email from Munich Re's counsel, Walker's counsel confirmed that the settlement resolved all direct claims and third-party claims, without any reservation of rights.[334] Several other emails among the parties and the court concurred that the matter had been settled.[335] Ultimately, however, Walker attempted to enforce its initial reservation of rights against Munich Re, which the New York State Supreme Court rejected.[336]

The First Department affirmed, finding that a binding settlement existed between Walker and Rosalyn and that Walker released its third-party claim.[337] It was beyond dispute that Walker's counsel had authority to accept the settlement, and that the confirmation email he sent to Munich Re's counsel came from his email account.[338] That email did not set conditions on the settlement or explicitly reserve any specific claims and accordingly, the matter was fully and finally resolved.[339]

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328. *See* Nash v. Walker Mem'l Baptist Church, Inc., 198 N.Y.S.3d 338 (App. Div. 1st Dep't 2023).

329. *See id.* at 339.

330. *See id.*

331. *See id.*

332. *See id.*

333. *See Nash*, 198 N.Y.S.3d at 339.

334. *See id.*

335. *See id.*

336. *See id.* at 340.

337. *See id.* at 339.

338. *See Nash*, 198 N.Y.S.3d at 340.

339. *See id.* (citing Phila. Ins. Indem. Co. v. Kendall, 151 N.Y.S.3d 392, 396 (App. Div. 1st Dep't 2021)).

Unlike the binding settlement agreement in *Nash* above, not all settlement "agreements" are created equal. Take for example the settlement communications at issue in *Harleysville Insurance Co. v. Estate of Otmar Boser*.[340]

In February 2020, Harleysville commenced an action to enforce a purported settlement that arose from a 2017 wrongful death and bodily injury action filed by the Estate of Otmar Boser.[341] In 2018, Ruth Boser, Mr. Boser's wife, filed a demand for underinsurance arbitration and received an arbitration award of $950,000.[342] Instead of satisfying the arbitration award, Harleysville moved to enforce an alleged settlement agreement made by the parties in November 2019, rendering the arbitration award a nullity.[343] The New York State Supreme Court held in favor of the Estate, who had cross-moved to enforce the arbitration award and Harleysville appealed.[344]

Looking to CPLR 2104, the Second Department noted that "an agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or her or his or her attorney or reduced to the form of an order and entered."[345] Here, "[a]n email that merely confirms a purported settlement is not necessarily sufficient to bring the purported settlement into the scope of CPLR 2104."[346]

While Harleysville argued that an email exchange between the parties finalized a proposed settlement, the court found the email contained an additional item, "and thus, [did] not demonstrate a final written agreement of mutual accord."[347] Additionally, the court noted that

> any agreement was based upon an understanding that no arbitration award had been reported, and that counsel for the defendants intended to inform the arbitrator that no award was required—evidencing that

340. Harleysville Ins. Co./Nationwide Gen. Ins. Co. v. Estate of Boser, 194 N.Y.S.3d 106 (App. Div. 2d Dep't 2023).

341. *See id.*

342. *See id.*

343. *See id.*

344. *See id.*

345. *Harleysville Ins. Co.*, 194 N.Y.S.3d at 108 (quoting N.Y. C.P.L.R. 2104 (McKinney 2003)).

346. *Id.* (quoting Teixeira v Woodhaven Ctr. of Care, 103 N.Y.S.3d 120, 121 (App. Div. 2d Dep't 2019)).

347. *Id.* (citing Bonnette v. Long Island Coll. Hosp., 819 N.E.2d 206, 209 (N.Y. 2004); *Teixeira*, 103 N.Y.S.3d at 121).

> additional steps had to be taken to finalize the settlement.[348]

Based on these findings, the court held that the agreement failed to satisfy the requirements of CPLR 2104, and thus, did not constitute a final agreement between the parties.[349]

CONCLUSION

We can expect, over the next year or two, the appellate courts to continue to struggle with some areas of particular interest to the insurance coverage bar. The breadth and extent of additional insured coverage continues to be a struggle for the courts – can a party simply plead itself additional insured coverage and if so, what role do "facts" play in measuring the duty to defend? At some point, the court will struggle with the question of whether insurance carriers, that pick up the defense of a named insured after the refusal of an additional insured's carrier to do so, based on disclaimer ruled invalid under Insurance Law Section 3420(d)(2), and recoup its defense costs from the recalcitrant carrier. To some, these questions sound like the esoteric ramblings of insurance nerds, but for those who are in the arena, these are important policy questions that impact hundreds of thousands of dollars in costs and litigation throughout the state.

348. *Id.* (citing Velazquez v. St. Barnabas Hosp., 922 N.E.2d 872, 872 (N.Y. 2009)).

349. *See id.* (citing *Teixeira*, 103 N.Y.S.3d at 121).