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REGULATORY LIMITS ON CLAIMS HANDLING

Timing for Responses and Determinations

Article 26 of New York's Insurance Law governs what would be considered "unfair" claim settlement practices. Under § 2601, a practice is considered unfair if an insurer, without just cause, and with such frequency as to indicate a general business practice, fails "to acknowledge with reasonable promptness pertinent communications as to claims arising under its policies." Insurance Law § 2601(a)(2) (emphasis added). Insurance companies must have "reasonable standards" by which to promptly investigate claims. § 2601(a)(3) . Where liability has become reasonably clear, an insurance company must be "prompt, fair and equitable" in effectuating settlements. § 2601(a)(4).

The timeframe is further explained in the New York Code of Rules and Regulations ("NYCRR") at 11 NYCRR 216.0, et seq. 11 NYCRR 216.4 provides:

- Every insurer, upon notification of a claim, shall, within 15 business days, acknowledge the receipt of such notice. Such acknowledgment may be in writing. If an acknowledgment is made by other means, an appropriate notation shall be made in the claim file of the insurer.

In addition, 11 NYCRR 216.5 provides:

- Every insurer shall establish procedures to commence an investigation of any claim filed by a claimant, or by a claimant's authorized representative, within 15 business days of receipt of notice of claim. An insurer shall furnish to every claimant, or claimant's authorized representative, a notification of all items, statements and forms, if any, which the insurer reasonably believes will be required of the claimant, within 15 business days of receiving notice of the claim.

There is no private right of action under these statutes and regulations. *See, e.g.*, *Rocanova v. Equitable Life Assur. Soc. Of U.S.*, 83 N.Y.2d 603, 614 (1994) ("the law of this State does not currently recognize a private cause of action under Insurance Law § 2601"); *Maimonides Med. Ctr. v. First United Am. Life Ins. Co.*, 116 A.D.3d 207, 218 (2d Dept. 2014) ("Insurance Law § 2601 concerns general business practices, and is enforceable only by the Superintendent [of Insurance]"); *Blanar v. State Farm Ins. Cos.*, 34 A.D.3d 1333 (4th Dept. 2006) (no private cause of action exists for an alleged violation of the insurance regulation regarding the standards for prompt, fair and equitable settlements, and an insurer's failure to comply with the regulation does not estop the insurer from relying on the limitations period in the insurance policy) (citing 11 NYCRR 216.6); *Nick's Garage, Inc. v. Progressive Cas. Ins. Co.*, 875 F.3d 107, 126 (2d Cir. 2017) ("Although Section 2601 makes the covered acts illegal, it does not allow for a private cause of action based on those acts"); *Garnes v. Hartford Ins. Co.*, No. 2022 WL 3576739, at *3 (E.D.N.Y. Aug. 19, 2022) ("Because New York Insurance Law

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contains a detailed enforcement scheme, the statute does not also contain an implied private right of action for individuals”). However, an insurer’s failure to comply with these provisions may signify improper claims handling.

Also applicable in this context is New York Insurance Law §3420(d)(2), under which:

> If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.

An insurer’s failure to disclaim in a timely manner can estop the insurer from being able to disclaim coverage with respect to policy conditions and exclusions. *Firemen's Fund Ins. Co. of Newark v. Hopkins*, 88 N.Y.2d 836, 837 (1996) (“An unexplained delay of two months in disclaiming liability for late notice has been held unreasonable as a matter of law”); *Markevics v. Liberty Mut. Ins. Co.,* 97 N.Y.2d 646, 648–49, (2001) (“a timely disclaimer pursuant to Insurance Law § 3420(d) is required when a claim falls within the coverage terms but is denied based on a policy exclusion”); *Mapfre Ins. Co. of New York v. Ferrall*, No. 2020-04686, 2023 WL 2290523, at *4 (2d Dept. Mar. 1, 2023) (“a timely disclaimer is required when a claim falls within the coverage terms but is denied based on a policy exclusion”).

In New York, the requirement of a timely disclaimer of coverage has been interpreted as “an unconditional rule.” *Allstate Ins. Co. v. Gross,* 27 N.Y.2d 263 (1970). The timely disclaimer statute only applies to cases involving bodily injury claims arising out of a New York accident. *KeySpan Gas East Corp. v. Munich Reins. Am., Inc.* 23 N.Y.3d 583 (2014). The statute may even apply to claims under policies issued outside New York if the insured has a substantial business presence in New York, the policy covers New York risks, and contains New York endorsements. See Carlson v American Int’l Group, Inc., 30 N.Y.3d 288 (2017); Vista Eng'g Corp. v. Everest Indem. Ins. Co., 190 A.D.3d 508, 509 (1st Dept. 2021).

The New York courts have generally held that relatively short delays in disclaiming are untimely as a matter of law, and the insurer is estopped to deny coverage, particularly with regard to late notice disclaimers. See *AIU Ins. Co. v. Veras*, 94 A.D.3d 642 (1st Dept. 2012) (29-days untimely); *West 16th St. Tenant Corp. v. Public Serv. Mut. Ins. Co.*, 290 A.D.2d 278 (1st Dept. 2002) (30-day delay held untimely); *Erie Painting and Maintenance, Inc. v. Illinois Union Ins. Co*, 876 F. Supp. 2d 222 (W.D.N.Y. 2012) (29-day delay held issue of fact); *cf*. *Tower Ins. Co. of New York v. United Founders Ltd.*, 126 A.D.3d 467, 468 (1st Dept. 2015) (“Here, timeliness was not readily apparent from the face of the insured's notice, and thus, a two week delay for management review, editing, and mailing, was not unreasonable as a matter of law”).

The test is not the number of days that have elapsed, but rather whether the insurer’s explanation for a delay is reasonable. *See Skanska USA Bldg. Inc. v. Harleysville Ins. Co. of New York*, 2023 WL 2875504, at *1 (1st Dept. Apr. 11, 2023) (“defendants raised issues of fact regarding the necessity of an investigation and the reasonableness of the delay in denying coverage”); *City Univ. of New York v. Utica First Ins. Co.*, 211 A.D.3d 600, 601 (1st Dept. 2022) (“In opposition to plaintiffs’ motion, Utica submitted evidence sufficient to raise factual issues as to the reasonableness of its delay in denying coverage“); *Vecchiarelli v. Continental Ins. Co.*, 277 A.D.2d 992 (4th Dept. 2000); *Stables v. Aetna Life Ins. Co.*, 226 A.D.2d 138 (1st Dept. 1996).

The insurer has the burden of justifying any delay in issuing a disclaimer, and the reasonableness of the delay is to be determined from the time at which the insurer is aware of sufficient facts upon which to base a disclaimer. *See Hunter Roberts Const. Grp., LLC v. Arch Ins. Co.,* 75 A.D.3d 404, 409 (1st Dept. 2010) (“The insurer bears the burden to explain the reasonableness of any delay in disclaiming coverage”); *First Fin. Ins. Co. v. Jetco Contracting Corp.,* 1 N.Y.3d 64, 68–69 (2003) (“timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer"); *Golden Ins. Co. v. Ingrid House LLC,* 2022 WL 2165252, at *2 (2d Cir. June 14, 2022) ("Golden Insurance waited *two years* after learning of the underlying lawsuit to disclaim coverage for damages arising out of the accident, even though the record reflects that "the basis for the disclaimer was, or should have been, readily apparent" by January 2018 – if not earlier"); *Campos v. Sarro*, 309 A.D.2d 888 (2d Dept. 2003); *Mohawk Minden Ins. Co. v. Ferry*; 251 A.D.2d 846 (3d Dept. 1998).

The statute does not permit an insurer to delay issuing a disclaimer on a ground that the insurer believes to be valid, while investigating other possible grounds for denying coverage. *See*

Endurance Am. Specialty Ins. Co. v. Utica First Ins. Co., 132 A.D.3d 434 (1st Dept. 2015); *George Campbell Painting v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 92 A.D.3d 104 (1st Dept. 2012). The insurer's issuance of a reservation of rights will not preclude the application of Insurance Law § 3420(d) if the insurer has sufficient information to disclaim coverage because a reservation of rights does not constitute an effective disclaimer under the statute. *Hartford Ins. Co. v. Nassau Cnty.*, 46 N.Y.2d 1028, 1029 (1979) ("A reservation of rights letter has no relevance to the question whether the insurer has timely sent a notice of disclaimer of liability or denial of coverage"); *Philadelphia Indem. Ins. Co. v. Intrepid Grp., LLC*, 2018 WL 1517199, at *6 (S.D.N.Y. Mar. 26, 2018) ("A reservation of rights letter is not a satisfactory notice of disclaimer under section 3420(d)(2)").

While violation of the statute bars reliance on policy exclusions or conditions, the statute does not apply where a claim does not fall within the coverage of a policy in the first instance. *Zappone v. Home Ins. Co.*, 55 N.Y.2d 131, 135–36 (1982) ("the Legislature did not intend . . . to bring within the policy a liability incurred neither by the person insured nor in the vehicle insured, for to do so would be to impose liability upon the carrier for which no premium had ever been received by it"); *Markevics v. Liberty Mut. Ins. Co.,* 97 N.Y.2d 646, 648–49, (2001); *see also York Restoration Corp. v. Solty's Const., Inc.,* 79 A.D.3d 861 (2nd Dept. 2010); *NGM Ins. Co. v. Blakely Pumping, Inc.,* 593 F.3d 150 (2d Cir. 2010). The statute also does not apply to requests for contribution or indemnity as between insurance companies. *See Vista Eng'g Corp. v. Everest Indem. Ins. Co.,* 190 A.D.3d 508, 509 (1st Dept. 2021); *JT Magen v. Hartford Fire Ins. Co.*, 64 A.D.3d 266 (1st Dept. 2009); *Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co.*, 27 A.D.3d 84 (1st Dept. 2005).

Standards for Determination and Settlements

There is no specific set of standards for settlements in New York, although as noted above, New York does have protections against unfair claim settlement practices under § 2601.

The requirements of New York Insurance Law § 2601 are further detailed by 11 NYCRR 216.0, *et. seq.* In its preamble, 11 NYCRR 216.0(e) prescribes certain claims handling procedures to be followed by insurers, including the following:

- Have as your basic goal the prompt and fair settlement of all claims.
- Assist the claimant in the processing of a claim.
- Do not demand verification of facts unless there are good reasons to do so. When verification of facts is necessary, it should be done as expeditiously as possible.
- Clearly inform the claimant of the insurer's position regarding any disputed matter.
- Respond promptly, when response is indicated, to all communications from insureds, claimants, attorneys and any other interested persons.
- Every insurer shall distribute copies of this regulation to every person directly responsible for the supervision, handling and settlement of claims subject to this regulation, and every insurer shall satisfy

itself that all such personnel are thoroughly conversant with, and are complying with, this regulation.

As discussed above, violation of these claim handling procedures does not give rise to a private right of action. However, in one case, a court granted leave to amend a complaint to plead a carrier's violation of §§ 216.0, 216.3 and 216.6. *Riordan v. Nationwide Mut. Fire Ins. Co.,* 756 F. Supp. 732 (S.D.N.Y. 1990), *aff'd in part, question certified*, 977 F.2d 47 (2nd Cir. 1992), *certified question withdrawn*, 984 F.2d 69 (2nd Cir. 1993).

A number of New York cases have held that where custom and practice in the insurance industry would require an insurance company to keep its insureds abreast of settlement negotiations, the failure to do so may be evidence of insurance bad faith. *See Smith v. General Accid. Ins. Co.,* 91 N.Y.2d 648, 654 (1998); *Transcare New York, Inc. v. Finkelstein, Levine & Gittlesohn & Partners*, 23 A.D.3d 250 (1st Dept. 2005); *Raquet v. Travelers Cas. and Sur. Cos.,* 2 A.D.3d 1310 (4th Dept. 2003); *Taveras v. Am. Transit Ins. Co.,* 33 Misc. 3d 1210(A), 939 N.Y.S.2d 744 (Kings County Sup. Ct. 2011); *Gov't Emps. Ins. Co. v. Saco,* 2022 WL 103670, at *3 (E.D.N.Y. Jan. 11, 2022).

PRINCIPLES OF CONTRACT INTERPRETATION

Where the terms of an insurance policy are clear and unambiguous, interpretation of such terms is a question of law for the court. *White v. Cont'l Cas. Co.,* 9 N.Y.3d 264, 267 (2007) (the interpretation of unambiguous provisions in an insurance policy is a question of law for the court [citations omitted]"); *See Town of Harrison v. National Union Fire Ins. Co. of Pittsburgh, Pa.,* 89 N.Y.2d 308 (1996); *Richner Communications, Inc. v. Tower Ins. Co. of New York,* 72 A.D.3d 670 (2d Dept. 2010). "Insurance contracts must be interpreted according to common speech and consistent with the reasonable expectations of the average insured." *Dean v. Tower Ins. Co. of New York,* 19 N.Y.3d 704, 708 (2012); *Lend Lease (U.S.) Const. LMB Inc. v. Zurich Am. Ins. Co.,* 136 A.D.3d 52, 56 (1st Dept. 2015), *aff'd on other grounds sub nom*. *Lend Lease (US) Const. LMB Inc. v. Zurich Am. Ins. Co.*, 28 N.Y.3d 675 (2017); *Mallek v. Allstate Indem. Co*., 2020 WL 6873434, at *2 (E.D.N.Y. Nov. 23, 2020).

Unambiguous provisions should be given their "plain and ordinary meaning." *Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Marine Ins. Co.,* 31 N.Y.3d 131, 135 (2018) and "courts should refrain from rewriting the agreement." *Dean, supra; Chef's Warehouse, Inc. v. Liberty Mut. Ins. Co.,* 2022 WL 3097093, at *5 (S.D.N.Y. May 2, 2022). New York's approach to the interpretation of insurance contracts "is to give effect to the intent of the parties as expressed in the clear language of the contract." *Dish Network Corp. v. Ace Am. Ins. Co.*, 21 F.4th 207, 211 (2d Cir. 2021); *Liberty Ins. Corp. v. New York Marine & Gen. Ins. Co.*, 2023 WL 2597053, at *7 (S.D.N.Y. Mar. 22, 2023). It is common practice for the courts to refer to dictionary definitions to determine the plain and ordinary meaning of the terms of an insurance policy. *See Dish Network Corp., supra; BF Advance, LLC v. Sentinel Ins. Co., Ltd.,* 2018 WL 4210209, at *11 (E.D.N.Y. Mar. 20, 2018). Where a policy is unambiguous, extrinsic evidence may not be considered. *See Donohue v. Cuomo*, 38 N.Y.3d 1, 13 (2022); *Continental Cas. Co. v. Rapid-American Corp.,* 80 N.Y.2d 642 (1993); *Daileader, v. Certain Underwriters at Lloyds et al.,* 2023 WL 3026597, at *9 (S.D.N.Y. Apr. 20, 2023); *Liberty Mut. Ins. Co. v. Fairbanks Co.,* 170 F. Supp. 3d 634, 643 (S.D.N.Y. 2016).

If a policy is unambiguous, "a court is not free to alter the contract to reflect its personal notions of fairness and equity." *Jacobson Family Investments, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.,* 102 A.D.3d 223 (1st Dept. 2012); *Travelers Prop. Cas. Co. of Am. v. Netherlands Ins. Co.,* 2023 WL 2339898, at *11 (S.D.N.Y. Mar. 1, 2023). "If the plain language of the policy is determinative," the courts "cannot rewrite the agreement by disregarding that language." *Fieldston Property Owners Ass'n, Inc. v. Hermitage Ins. Co., Inc.,* 16 N.Y.3d 257 (2011); *Jimenez v. Occidental Fire & Cas. Co. of N. Carolina*, 2023 WL 1818923, at *6 (E.D.N.Y. Feb. 8, 2023). A policy should be read as a whole to give full meaning and effect to all of the applicable policy provisions. *See Excess Ins. Co., Ltd. V. Factory Mut. Ins.,* 3 N.Y.3d 577 (2004); *Nat. Cas. Co. v. Starr Indem. & Liability Co.*, 2023 WL 2330284, at *2 (N.Y. Sup. Ct. Mar. 01, 2023).

An insurance contract should not be read so that some provisions are rendered meaningless. *Burlington Ins. Co. v. NYC Transit Auth.*, 29 N.Y.3d 313, 322 (2017); *County of Columbia v. Continental Ins. Co.,* 83 N.Y.2d 618 (1994). In construing an endorsement to an insurance policy, "the endorsement and the policy should be read together, and the words of the policy remain in full force and effect except as altered by the words of the endorsement." *Id.; Richner Communications, Inc. v. Tower Ins. Co. of New York,* 72 A.D.3d 670, 898 N.Y.S.2d 615 (2d Dept. 2010); *United States Underwriters Ins. Co. v. Image By J&K, LLC*, 335 F. Supp. 3d 321 (E.D.N.Y. 2018).

The test for ambiguity is whether there is a "reasonable basis for a difference of opinion" as to the meaning of the policy. *Federal Ins. Co. v. International Business Machines Corp.,* 18 N.Y.3d 642 (2012); *Donohue v. Cuomo*, 38 N.Y.3d 1, 13 (2022) ("Ambiguity in a contract arises when the contract, read as a whole, fails to disclose its purpose and the parties' intent, or when specific language is susceptible of two reasonable interpretations"); *Meyers & Sons Corp. v. Zurich American Ins. Corp.,* 74 N.Y. 298 (1989). The focus of the test "is on the reasonable expectations of the average insured upon reading the policy." *Universal Am. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,* 25 N.Y.3d 675, 680 (2015); *Mostow v. State Farm Ins. Companies,* 88 N.Y.2d 321 (1996); *Heartland Brewery, Inc. v. Nova Cas. Co.,* 149 A.D.3d 522, 523, (1st Dept. 2017); *Century Indem. Co. v. Brooklyn Union Gas Co.,* 74 Misc. 3d 1208(A), 159 N.Y.S.3d 830 (N.Y. County Sup. Ct. 2022). An insurance policy is not ambiguous merely because the parties interpret the language differently. *See Bank of N.Y. Mellon v. WMC Mortg., LLC*, 136 A.D.3d 1, 9 (1st Dept. 2015), *aff'd sub nom. Bank of New York Mellon v. WMC Mortg.*, LLC, 28 N.Y.3d 1039 (2016); *Commercial Union Ins. Co. v. Liberty Mut. Ins. Co.,* 36 A.D.3d 645, 828 N.Y.S.2d 479 (2d Dept. 2007); *iSentium, LLC v. Bloomberg Fin. L.P.*, 2020 WL 248939, at *6 (S.D.N.Y. Jan. 16, 2020). Nor should the court find an ambiguity on the basis of an interpretation which "would strain the contract beyond its reasonable and ordinary meaning." *See Albert Frassetto Enterprises v. Hartford Fire Ins. Co.,* 144 A.D.3d 1556, 1558 (4th Dept. 2016); *Federal Ins. Co. v. American Home Assur. Co.,* 639 F.3d 557 (2d Cir. 2011).

If the language of the policy is deemed to be ambiguous, the parties may submit extrinsic evidence as an aid in construction. *See Essex Ins. Co. v. Laruccia Const., Inc.,* 71 A.D.3d 818, 898 N.Y.S.2d 558 (2d Dept. 2010); *State v. Home Indem. Co.,* 66 N.Y.2d 669, 671 (1985). Only when "the tendered extrinsic evidence ... will not resolve the equivocality of the language of the contract," does the issue of contract interpretation revert to being a question of law, as to which the *court* should apply contra proferentem, interpreting the ambiguity against the insurer which drafted the policy, and in favor of coverage. *MIC Gen. Ins. Corp. v. Qadri*, 2023 WL 2667043, at *7 (E.D.N.Y. Mar. 28, 2023); *Catlin Speciality Ins. Co. v. QA3 Fin. Corp.,* 36 F. Supp. 3d 336, 341 (S.D.N.Y. 2014), *aff'd sub nom. Catlin Specialty Ins. Co. v. QA3 Fin. Corp.,* 629 F. App'x 127 (2d Cir. 2015); *Kenavan v. Empire Blue Cross & Blue Shield*, 248 A.D.2d 42, 47 (1st Dept. 1998) ("when the insurer fails to submit extrinsic evidence that resolves the ambiguity, the proper interpretation is an issue of law for the court and the ambiguity must be resolved against the drafter of the contract, the insurer"); *M. Fortunoff of Westbury Corp. v. Peerless Ins. Co.* 432 F.3d 127, 142 (2d Cir. 2005) ("courts should not resort to *contra proferentum* until after consideration of extrinsic evidence" to determine the parties' intent"); *See generally Federal Ins. Co. v. International Business Machine Corp.,* 18 N.Y.3d 642 (2012) (discussing contra proferentem). However, where an insurance policy is the product of negotiation between sophisticated parties, contra proferentum does not apply. *W. & S. Life Ins. Co. v. U.S. Bank Nat'l Ass'n*, 209 A.D.3d 6, 14, (2022); *Westchester Fire Ins. Co. v. MCI Commc'ns Corp.*, 74 A.D.3d 551 (1st Dept. 2010); *Catlin, supra*. *See also Donohue v. Cuomo*, 38 N.Y.3d 1, 12 (2022) ("[W]here a contract was negotiated between sophisticated, counseled business people negotiating at arm's length, courts should be especially reluctant to interpret an agreement as impliedly stating something which the parties" specifically did not include"). Also, one court has observed that contra proferentem does not apply to where both parties are insurers. *See Rodless Properties, L.P. v. Westchester Fire Ins. Co.,* 40 A.D.3d 253 (1st Dept. 2007).

An insurance company asserting an exclusion has the burden of establishing that the exclusion contains "clear and unmistakable language," that the exclusion applies in the particular case, and that it is subject to no other reasonable interpretation. *See Pioneer Tower Owners Ass'n v. State Farm Fire & Cas. Co.,* 12 N.Y.3d 302 (2009); *Valley Forge Ins. Co. v. ACE American Ins. Co.*, 160 A.D.3d 905, 74 N.Y.S.3d 596 (2nd Dept. 2018); *Knox v. Ironshore Indem. Inc.,* 2022 WL 2236951, at *2 (2d Cir. June 22, 2022). Exclusions are "not to be extended by interpretation or implication." *Pioneer Tower, supra; New Hampshire Ins. Co. v. MF Glob. Fin. USA Inc.,* 204 A.D.3d 141, 152 (1st Dept. 2022). "Policy exclusions are given strict and narrow construction." *Belt Painting Corp. v. TIG Ins. Co.,* 100 N.Y.2d 377 (2003); *MF Global, supra*; *Seabury FXOne LLC v. U.S. Specialty Ins. Co.,* 2023 WL 2214893, at *8 (S.D.N.Y. Feb. 24, 2023).

Where the existence of coverage depends upon an exception to an exclusion, the insured has the burden of demonstrating that the exception has been satisfied. *Northville Indus. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,* 89 N.Y.2d 621 (1997); *Ewald v. Erie Ins. Co. of New York*, 214 A.D.3d 1382 (4th Dept. 2023); *Pro's Choice Beauty Care, Inc. v. Great N. Ins. Co.,* 190 A.D.3d 868 (2d Dept. 2021); *Ment Bros. Iron Works Co. v. Interstate Fire & Cas. Co.,* 702 F.3d 118, 122 (2d Cir. 2012). However, if the exception to the exclusion is itself ambiguous and extrinsic evidence does not resolve the ambiguity, contra proferentem will apply to construe the exception to the exclusion against the insurer. *Nick's Brick Oven Pizza, Inc. v. Excelsior Ins. Co.,* 61 A.D.3d 655, 657, 877 N.Y.S.2d 359, 362 (2d Dept. 2009); *Ment Bros. Iron Works Co. v. Interstate Fire & Cas. Co.,* 702 F.3d 118, 124 (2d Cir. 2012); *MIC Gen. Ins. Corp. v. Qadri,* 2023 WL 2667043, at *10 n. 8 (E.D.N.Y. Mar. 28, 2023). *See Redding-Hunter Inc. v. Aetna Cas. and Sur. Co.,* 206 A.D.2d 805, 615 N.Y.S.2d 133 (3rd Dept. 1994).

"Exclusions in policies of insurance must be read seriatim, not cumulatively, and if any one exclusion applies there can be no coverage since no one exclusion can be regarded as inconsistent with another." *See 385 Third Ave. Associates, L.P. v. Metropolitan Metals Corp.,* 81 A.D.3d 475 (1st Dept. 2011); *Atl. Cas. Ins. Co. v. Stone & Tile Inc.,* 2021 WL 8316280, at *1 (E.D.N.Y. Aug. 26, 2021).

CHOICE OF LAW

For contract disputes, the New York courts apply "the law of the place which has the most significant contacts with the matter in dispute." *RLI Ins. Co. v. AST Eng'g Corp.,* 2022 WL 107599, at *2 (2d Cir. Jan. 12, 2022); *John Gore Org., Inc. v. Fed. Ins. Co.,* 2022 WL 873422, at *10 n. 4 (S.D.N.Y. Mar. 23, 2022); *Maryland Cas. Co. v. Continental Cas. Co.,* 332 F.3d 145 (2d Cir. 2003). Under this "grouping of contacts" inquiry, the courts look to the following factors identified in § 188 of the Restatement (Second) of Conflict of Law: The place of contracting, the places of negotiation and performance of the contract, the location of the subject matter, and the domicile or place of business of the contracting parties. *Pac. Life Ins. Co. v. US Bank Nat'l Ass'n*, 2022 WL 11305628, at *49 (S.D.N.Y. Oct. 19, 2022) (quoting *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.,* 84 N.Y.2d 309 (1994)); *Olin Corp. v. Ins. Co. of North America,* 929 F.2d 62 (2d Cir. 1991). Where liability insurance is concerned, the most important factor is "the local law of the state which the parties understood was to be the principal location of the insured risk…unless with respect to the particular issue, some other state has a more signification relationship...to the transaction and the parties." *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc., supra, Unitrin Direct/Warner Ins. Co. v. Brand*, 120 A.D.3d 698, 700 (2d Dept. 2014); *Arch Specialty Ins. Co. v. Better Energy Serv. Inc.*, 2022 WL 5434218, at *3 (E.D.N.Y. Aug. 26, 2022), *report and recommendation adopted as modified*, 2022 WL 4551379 (E.D.N.Y. Sept. 29, 2022).

Where a liability insurance policy covers risks in multiple states, "the state of the insured's domicile should be regarded as a proxy for the principal location of the insured risk." *See In re Liquidation of Midland Ins. Co.*, 16 N.Y.3d 536 (2011); *Berkshire Hathaway Specialty Ins. Co. v. H.I.G. Cap., LLC*, 172 A.D.3d 570, 572 (1st Dept. 2019); *Berkley Specialty Ins. Co. v. Midwest Welding, LLC*, 2022 WL 17418848, at *2 (E.D.N.Y. Sept. 30, 2022). This approach "promotes certainty, predictability and uniformity of result." *RLI Ins. Co. v. AST Eng'g Corp.,* 2019 WL

7114986, at *4 (S.D.N.Y. Dec. 20, 2019), *aff'd*, 2022 WL 107599 (2d Cir. Jan. 12, 2022) (quoting *In re Liquidation of Midland Ins. Co., supra*). The courts look to the state of the first named insured's principal place of business at the time the policy was issued as a "controlling factor" in determining the applicable law. *Certain Underwriters at Lloyd's, London v. Foster Wheeler Corp.,* 36 A.D.3d 17 (1st Dept. 2006), *aff'd*, 9 N.Y.3d 928 (2007); *National Union Fire Insurance Company of Pittsburgh, PA. v. Titeflex Corporation*, 2008 WL 2304843 (S.D.N.Y. March 31, 2008); *FC Bruckner Associates, L.P. v. Fireman's Fund Ins. Co.,* 95 A.D.3d 556, (1st Dept. 2012) (look to first named insured's domicile); *Travelers Cas. and Sur. Co. v. Honeywell Intern., Inc.,* 63 A.D.3d 451, 880 N.Y.S.2d 66 (1st Dept. 2009); *Wausau Business Ins. Co. v. Horizon Administrative Services, LLC,* 803 F.Supp.2d 209 (E.D.N.Y. 2011) (dominant factor is domicile of first named insured).

For an automobile liability policy, the principal location of the insured risk is the place where the vehicle is principally garaged and registered. *See Unitrin Direct/Warner Ins. Co. v. Brand,* 120 A.D.3d 698, 700 (2d Dept. 2014) (quoting *Eagle Ins. Co. v. Singletary,* 279 A.D.2d 56 (2d Dept. 2000)); *Parisien v. Omni Indem. Co.,* 63 Misc. 3d 1214(A), 114 N.Y.S.3d 588 (N.Y. Civ. Ct. 2019).

DUTIES IMPOSED BY STATE LAW

Duty to Defend

1. Standard for Determining Duty to Defend

The duty to defend is broader than the duty to indemnify. *Auto. Ins. Co. of Hartford v. Cook*, 7 N.Y.3d 131, 137 (2006); *Fitzpatrick v. American Honda Motor Co.,* 78 N.Y.2d 61, 65 (1991); *Gem-Quality Corp. v. Colony Ins. Co.,* 209 A.D.3d 986, 989 (2d Dept. 2022). An insurer's duty to defend arises whenever the complaint in the underlying action alleges facts which fall within the policy's coverage, even if those allegations are false or groundless. *Frontier Insurance Co. v. State of New York*, 87 N.Y.2d 864 (1995); *American Western Home Ins. Co. v. Gjonaj Realty & Management Co.*, 192 A.D.3d. 28 (2nd Dept. 2020). Concomitantly, a court must find in favor of an insured if the allegations in the underlying complaint suggest a reasonable possibility of coverage. *Automobile Ins. Co. of Hartford, supra*; *Colon v. Aetna Life & Casualty Ins. Co.,* 66 N.Y.2d 6 (1985); *GMM Realty, LLC v. St. Paul Fire & Marine Ins. Co.*, 129 A.D.3d 909, 909 (2d Dep't 2015); *Ohio Cas. Ins. Co. v. Am. Empire Surplus Lines Ins. Co.*, 2021 WL 7908052, at *5 (E.D.N.Y. Apr. 14, 2021).

Where a policy represents that it will provide the insured with a defense, courts have said that it actually constitutes "litigation insurance" in addition to liability coverage. *See BP Air Conditioning Corp. v. One Beacon Insurance Group*, 8 N.Y.3d 708, 714 (2007) ("An insured's right to representation and the insurer's correlative duty to defend suits, however groundless, false or fraudulent, are in a sense 'litigation insurance' expressly provided by the insurance contract"); *JMG Improvements Inc. v. Arch Specialty Ins. Co.,* 2022 WL 16700086, at *6 (S.D.N.Y. Nov. 3, 2022). Litigation insurance is regarded as an integral part of the insured's bargain, even where an eventual judgment against the insured may not be within the scope of coverage. *See BP Air,* 8 N.Y.3d at 714 ("an insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course"); *Great Am. Ins. Co. v. AIG Specialty Ins. Co.,* 2022 WL 17587851, at *1 (2d Cir. Dec. 13, 2022).

An insurer can avoid its defense obligation only where it can demonstrate *as a matter of law* that there is no possible factual or legal basis on which it will be obligated to indemnify the insured. *Servidone Constr. Corp. v. Security Insurance Co.,* 64 N.Y.2d 419, 488 N.Y.S.2d 139 (1985); *Durant v. State*, 195 A.D.3d 796 (2d Dept. 2021). Insurers must provide a defense to the entire complaint if any one of the causes of action may fall within the scope of the coverage, even if other causes of action fall outside the coverage. *Town of Massena v. Healthcare Underwriters Mut. Ins. Co.,* 98 N.Y.2d 435, 443 (2002); *Sport Rock Int'l, Inc. v. Am. Cas. Co. of Reading, PA,* 65 A.D.3d 12, 17 (1st Dept. 2009); *Metro. Prop. & Cas. Ins. Co. v. Sarris*, 2017 WL 3252812, at *6 (N.D.N.Y. July 28, 2017); *Mount Vernon Fire Ins. Co. v. Munoz Trucking Corp.*, 213 F. Supp. 3d 594, 601 (S.D.N.Y. 2016). A defense must be provided even if the insured is ultimately found not to be liable. *See City of New York v. Consolidated Edison Co. of N.Y., Inc.,* 238 A.D.2d 119, 655 N.Y.S.2d 496 (1st Dept. 1997).

The four-corners-of-the-complaint rule has been broadened only to support a duty to defend. An insurer is required to provide a defense when it has actual knowledge of facts establishing a reasonable possibility of coverage. *Fitzpatrick v. American Honda Motor Co., Inc.,* 78 N.Y.2d 61, 571 N.Y.S.2d 672 (1991); *Firemen's Insurance Co. of Washington, D.C. v. 860 West Tower, Inc.,* 246 A.D.2d 401, 667 N.Y.S.2d 718 (1st Dept. 1998); *U.S. Underwriters Ins. Co. v. Kenfa Madison, LLC*, 2023 WL 2710879, at *5 (E.D.N.Y. Mar. 30, 2023). The insurer cannot ignore credible extrinsic information provided by the insured that would create a duty to defend. *Staten Island Molesi Soc. Club, Inc. v. Nautilus Ins. Co.,* 39 A.D.3d 843, 845 (2d Dept. 2007); *Almar, Inc. v. Utica Mut. Ins. Co.,* 280 A.D.2d 624 (2nd Dept. 2001). On the other hand, the insurer may not use extrinsic facts to show that there is no coverage under the policy. *Fitzpatrick v. American Honda Motor Co., Inc., supra; Petr-All Petroleum Corp. v. Firemen's Insurance Co. of Newark, NJ*, 188 A.D.2d 139, 593 N.Y.S.2d 693 (4th Dept. 1993). *Ohio Cas. Ins. Co. v. Am. Empire Surplus Lines Ins. Co.*, 2021 WL 7908052, at *4 (E.D.N.Y. Apr. 14, 2021) ("An insurer seeking to avoid a duty to defend is precluded from relying on facts outside of the underlying pleadings"); *Turner Const. Co. v. Harleysville Ins. Co. of New York*, 2021 WL 4868412, at *16 (N.Y. Sup. Ct. Oct. 19, 2021); *but see Charter Oak Fire Ins. Co. v. New York Marine & Gen. Ins. Co.,* 559 F. Supp. 3d 244, 250 (S.D.N.Y. 2021) ("[a] narrow, but widely recognized exception to the rule allows an insurer to refuse or withdraw a defense if evidence extrinsic to those sources and unrelated to the merits of plaintiff's action[,] plainly take the case outside the policy coverage"). "For this exception to apply, 'the extrinsic evidence relied upon may not overlap with the facts at issue in the underlying case.'" *Travelers Indem. Co. v. Harleysville Ins. Co. of N.Y.*, 2020 WL 1304085, at *4 (S.D.N.Y. Mar. 19, 2020) (quoting *United States Underwriters Ins. Co. v. Image By J & K, LLC*, 335 F. Supp. 3d 321, 331 (E.D.N.Y. 2018)).

When the insurer seeks to rely upon a policy exclusion to deny coverage, it bears the burden of demonstrating that the allegations cast the pleading solely and entirely within the policy exclusion and that allegations are subject to no other interpretation. *Automobile Ins. Co. of Hartford v. Cook*, 7 N.Y.3d 131, 818 N.Y.S.2d 176 (2006); *Dormitory Auth. v. RLI Ins. Co.*, 191 A.D.3d 592 (1st Dept. 2021); *PriMed Pharms. LLC v. Starr Indem. & Liab. Co.,* 2023 WL 2537849, at *8 (S.D.N.Y. Mar. 16, 2023).

Once the duty to defend attaches, an insurer cannot withdraw from the defense absent a judicial declaration that there is no coverage. *See McDonald v. Shore*, 100 A.D.3d 602, 603, 953 N.Y.S.2d 650, 652 (2d Dept. 2012); *Holloman v. Manginelli Realty Co.*, 81 A.D.3d 413 (1st Dept. 2011); *Jessamy v. Doran Grp.,* 36 Misc. 3d 1220(A), 959 N.Y.S.2d 89 (Westchester County Sup. Ct. 2012).

Policies providing umbrella or excess coverage are not required to defend where the primary carrier is required to defend. *See Labatt Brewing Co., Ltd. v. Zurich Ins. Co.,* 281 A.D.2d 363, 723 N.Y.S.2d 17 (1st Dept. 2001); *Travelers Indem. Co. v. Northrop Grumman Corp.,* 2022 WL 4448502, at *6 (S.D.N.Y. Sept. 23, 2022). Where the insured's potential liability could reach into the excess insurer's layer, a declaratory judgment action is the appropriate means of establishing the excess insurer's coverage obligations. *See Long Island Lighting Co. v. Allianz Underwriters Ins. Co.,* 826 N.Y.S.2d 55 (1st Dept. 2006); *Danaher Corp. v. Travelers Indem. Co.,* 414 F. Supp. 3d 436, 470 (S.D.N.Y. 2019).

2. Issues with Reserving Rights

Given the broad duty to defend, an insurer may, by timely notice to the insured, reserve its right to claim that the policy does not cover the loss at issue, while still defending the action. *See Merchants Mut. Ins. Co. v. Allcity Ins. Co.,* 245 A.D.2d 590 (3rd Dept. 1997); *William M. Moore Const. Co. v. U.S. Fidelity & Guarantee Co.,* 293 N.Y. 119, 125 (1944); *Frank Knauss, Inc. v. Indemnity Ins. Co. of North America*, 270 N.Y. 211, 215 (1936); *Jewtraw v. Hartford Accident & Indemnity Co.,* 280 A.D. 150, 154 (3rd Dept. 1952); *National Indem. Co. v. Ryder Truck Rental, Inc.,* 165 Misc. 2d 848 (N.Y. Sup., Queens Cty. 1995).

Generally, if the insurer elects to defend under a reservation of rights, there is a potential for conflict of interest and the insured is entitled to counsel of its choice. *Federated Dept. Stores, Inc. v. Twin City Fire Ins. Co.,* 28 A.D.3d 32 (1st Dept. 2006); *Nat'l Hockey League v. TIG Ins. Co.,* 76 Misc. 3d 427, 432 (N.Y. County Sup. Ct. 2022).
A conflict of interest generally exists where coverage for one or more causes of action depends upon how the facts develop or are presented by defense counsel. *See U.S. Underwriters Ins. Co. v. TNP Trucking, Inc.*, 44 F. Supp. 2d 489 (E.D.N.Y. 1999); *McLaughlin v. Advanced Commc'ns, Inc*., 2010 WL 11626960, at *4 (E.D.N.Y. Mar. 25, 2010), *report and recommendation adopted*, 2010 WL 11626963 (E.D.N.Y. Apr. 15, 2010). Once an insurer has decided to defend an insured, the case should be evaluated for any potential conflicts of interest. Ordinarily, an insurance company has the right to control the litigation and to select the defense counsel that it wants to handle the insured's defense. However, where a conflict arises, the insured has the right to select independent counsel at the insurer's expense. *See Ottaviano v. Genex Co-op., Inc.,* 15 A.D.3d 924, 790 N.Y.S.2d 791 (4th Dept. 2005); *69th Street and 2nd Ave. Garage Associates, L.P. v. Ticar Title Guaranty Co.,* 207 A.D.2d 225, 622 N.Y.S.2d 13 (1st Dept. 1995); *Great Am. Ins. Co. v. Houlihan Lawrence, Inc.,* 449 F. Supp. 3d 354, 373 (S.D.N.Y. 2020).

A conflict of interest may exist where, among other things:

- Defense attorney's duty to the insured is to defeat all potential bases of coverage but the duty to the insurer requires that he or she defeat only those bases that would invoke coverage. *Public Service Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 442 N.Y.S.2d 522 (1981); *Great Am. Ins. Co. v. Houlihan Lawrence, Inc., supra*; *Exec. Risk Indem. Inc. v. Icon Title Agency, LLC,* 739 F. Supp. 2d 446, 450 (S.D.N.Y. 2010).
- An insurer provides coverage to two or more insureds in the same case whose positions may be conflicting or adverse. *Rimar v. Continental Cas. Co.,* 50 A.D.2d 169, 376 N.Y.S.2d 309 (4th Dept. 1975); *Liberty Mut. Fire Ins. Co. v. Hamilton Ins. Co.,* 356 F. Supp. 3d 326, 339 (S.D.N.Y. 2018).

Where a conflict exists, the Appellate Division, Third Department, views a carrier's failure to advise an insured of its right to select independent counsel as potentially giving rise to a deceptive business practice. *See Elacqua v. Physicians' Reciprocal Insurers*, 52 A.D.3d 886, 888, (3rd Dept. 2008) (holding that physicians and physicians' medical partnership were harmed as result of medical malpractice insurer failing to inform them that, once conflict arose, they had a right to select independent counsel of their choosing at insurer's expense, as would support claim for deceptive business practices). *But see Tower Ins. Co. of N.Y. v. Sanita Constr. Co., Inc.*, 129

A.D.3d 430 (1st Dept. 2015) (no duty to affirmatively advise the insured of the right to independent counsel); *Sumo Container Station, Inc. v. Evans, Orr, Pacelli, Norton & Laffan, P.C.,* 278 A.D.2d 169 (1st Dept. 2000); *SW Marine & Gen. Ins. Co. v. Preferred Contractors Ins. Co*., 54 Misc. 3d 1205(A), 50 N.Y.S.3d 28 (NY County Sup. Ct. Dec. 20, 2016); cf. *Peleus Ins. Co. v. Atl. State Dev. Corp.,* 587 F. Supp. 3d 7, 23 n.8 (S.D.N.Y. 2022) ("it is unclear whether New York law even requires an insurer to advise an insured of a right to independent counsel"); *Exec. Risk Indem. Inc. v. Icon Title Agency, LLC,* 739 F. Supp. 2d 446, 451 (S.D.N.Y. 2010) (acknowledging split in authority).

Not every reservation of rights requires the appointment of independent counsel. *See Public Service Mut. Ins. Co. v. Goldfarb, supra*. If, for example, the covered and uncovered theories of liability are distinct (such as uncovered property damage and covered bodily injury), defense counsel could not possibly steer the case in favor of the insurance company. <u>See</u> *Prudential Property & Cas. Ins. Co. v. Godfrey*, 169 A.D.2d 1035, 1036 (3rd Dept. 1991) ("Inasmuch as plaintiff's interest in disproving negligent entrustment of the ATV does not conflict with defendants' interest in defeating both the negligence and negligent entrustment claims, there is no need for independent counsel"); *LePatner & Assocs., LLP v. RSUI Grp., Inc.,* 2022 WL 769614, at *14 (S.D.N.Y. Mar. 14, 2022) ("Unlike in the cases cited by plaintiff, here, RSUI's coverage position did not create a conflict of interest between RSUI and L&A simply because RSUI stated that it denied coverage for non-covered claims against a non-insured entity, LPS. . . . Accordingly, there was no conflict of interest in 2017 to trigger any right of L&A to independent counsel or to require retention of separate counsel at that time. See Great Am. Ins. Co., 449 F. Supp. 3d at 373; Liberty Mut. Fire Ins. Co., 356 F. Supp. 3d at 337").

"Generally, New York law provides that where coverage is disputed and a liability policy includes the payment of defense costs, 'insurers are required to make contemporaneous interim advances of defense expenses . . . , subject to recoupment in the event it is ultimately determined no coverage was afforded.'" *Axis Reinsurance Co. v. Bennett*, 2008 U.S. Dist. LEXIS 53921, *7 (S.D.N.Y. June 27, 2008).

Several cases have held that reimbursement or recoupment of defense costs may be allowed if the insurer explicitly advises the named insured that it is reserving its right to seek reimbursement in the event it is determined the insurer had no defense obligation, and if the insured does not object to the reservation. *See, e.g., Century Sur. Co. v. Franchise Contrs.,* LLC, 2016 U.S. Dist. LEXIS 31271, *13-14, 2016 WL 1030134 (S.D.N.Y. Mar. 10, 2016); *Am. Home Assurance Co. v. Port Auth. of New York & New Jersey*, 166 A.D.3d 464, 465 (1st Dept. 2018) ("as plaintiff reserved its right to recoup expenses it incurred that are not covered by the policies, Supreme Court correctly declined to dismiss its recoupment reclaim"). *But see Am. W. Home Ins. Co. v. Gjonaj Realty & Mgmt. Co.*, 192 A.D.3d 28, 38 (2d Dept. 2020); *Crescent Beach Club LLC v. Indian Harbor Ins. Co.*, 468 F. Supp. 3d 515, 554 (E.D.N.Y. 2020) ("Where, as here, the Policy provides a duty to defend, but has no express contractual provision allowing for recoupment of defense costs, and the insurer provided a defense in compliance with its contractual duty to defend, recoupment of past defense costs is inappropriate").

State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

insurance company cannot disclose medical information concerning insurance applicants unless it complies with the requirements of Insurance Law §321(a), which provides:

Whenever any insurance company (which is a member of a medical information exchange center or which otherwise may transmit medical information in whatever manner to any other similar facility including but not limited to an electronic data facility used by two or more insurance companies to determine or aid in determining the insurability of applicants) requests medical information from any applicant for personal insurance, it shall not transmit, nor be considered to have obtained the applicant's informed consent to transmit, the information to any such facility unless such company furnishes such applicant with a clear and conspicuous notice disclosing:

- a description of such facility and its operations, including its name, address and telephone number where it may be contacted to request disclosure of any medical information transmitted to it;
- the circumstances under which such facility may release such medical information to other persons; and
- such applicant's rights to request such facility to arrange disclosure of the nature and substance of any information in its files pertaining to him, and to seek correction of any inaccuracies or incompleteness of such information.

Pursuant to Insurance Law §321(b), the requisite notice must be tendered to all applicants upon completion of any application for personal insurance.

EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

Bad Faith Claim Handling/Bad Faith Failure to Settle Within Limits

1. First Party

In New York, there is no private cause of action for bad faith in a first party claim. *See Ripka v. Safeco Ins.,* 2015 WL 3397961 (N.D.N.Y. 2015); *US Alliance Fed. Credit Union v. CUMIS Ins. Soc., Inc.*, 346 F.Supp.2d 468 (S.D.N.Y. 2004); *see also, New York University v. Continental Ins. Co.,* 87 N.Y.2d 308, 639 N.Y.S.2d 283, 662 N.E.2d 763 (1995); *Sichel v. Unum Provident Corp.,* 230 F.Supp.2d 325 (S.D.N.Y. 2002). However, in *Acquista v. New York Life Ins. Co.,* 285 A.D.2d 73, 730 N.Y.S.2d 272 (1st Dept. 2001), the plaintiff doctor sued his disability insurance providers after they rejected his claims for benefits, alleging, inter alia, breach of contract, bad faith, unfair practices, and fraud. The bad faith claim was predicated on the insurance company's repeated and willful delays in processing the claim. *Acquista*, 285 A.D.2d at 77, 730 N.Y.S.2d at 275. The appellate court reversed the trial court's dismissal of plaintiff's bad faith claim and held that where "the insurer's denial of the claim was deliberately made in bad faith, with knowledge of the lack of a reasonable basis for the denial," consequential damages may be awarded. *See id.*

However, as explained by *Sichel v. UNUM Provident Corp.*, 230 F. Supp.2d 325 (S.D.N.Y. 2002), *Acquista* holds only that a plaintiff may be awarded consequential damages for losses stemming from a deliberate delay in processing claims. *See R&R Third Properties, LLC v Federal Ins. Co.*, 191 A.D.3d 444, 142 N.Y.S.3d 4 (1st Dept. 2021) (insurer's delay in repairing insured's medical scanner could support claim for consequently damages). New York's Court of Appeals held in 2008 that a plaintiff can recover consequential damages arising from a breach of the covenant of good faith and fair dealing as long as plaintiff can show that such consequential damages were contemplated by the parties as a probable result of that breach. *PanAsia Estates v. Hudson Insurance Co.,* 10 N.Y.3d 200, 856 N.Y.S.2d 513, 886 N.E.2d 135 (2008); *Bi-Economy Market Inc. v. Harleysville Insurance Company of New York*, 10 N.Y.3d 187, 194, 886 N.E.2d 127, 856 N.Y.S.2d 505 (2008); *see also, Goldmark Inc. v. Catlin Syndicate Ltd.,* 2011 W.L. 743568 (E.D.N.Y. February 24, 2011). Additionally, such consequential damages would not be limited to the policy limits. *Id.* The attorney's fees incurred by the insured to seek affirmative recovery from the insurer are not recoverable. *See Santoro v. Geico*, 117 A.D.3d 1026, 986 N.Y.S. 2d 572 (2d Dept. 2014).

In New York, an insured may sue for bad faith and obtain punitive damages where necessary to vindicate a public right. *See New York Univ. v. Continental Ins. Co.,* 87 N.Y.2d 308, 639 N.Y.S.2d 283 (1995); *see also Rocanova v. Equitable Life Assur. Soc. of U.S.,* 83 N.Y.2d 603, 612 N.Y.S.2d 339 (1994) (private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of pattern of similar conduct directed at public generally); *Alexander v. Geico Ins. Co.,* 35 A.D.3d 989, 826 N.Y.S.2d 777 (3rd Dept. 2006) (insured could not recover punitive damages from automobile insurer for failure to provide continued no-fault benefits following accident when there was no showing that insurer, in dealing with general public, "engaged in egregious or fraudulent conduct evincing such wanton dishonesty as to imply criminal indifference to civil obligations"). *Brown v Government Employees Ins. Co.,* 156 A.D.3d 1087, 66 N.Y.S.3d 733 (3rd Dept. 2017) ("punitive damages may be recovered … where the [insurer's] conduct was (1) actionable as an independent tort, 2) egregious, 3) directed toward the [insured] and 4) part of a pattern directed at the public").

2. Third-Party

The rule that a private cause of action for bad faith in a first-party claim will not lie has been extended to situations where a third party is bringing a claim against the insurer. In *Cosmopolitan Mut. Ins. Co. v. Nassau Ins. Co.,* 99 Misc.2d 1018, 417 N.Y.S.2d 835 (N.Y. Sup. 1979) the defendant insurer was being sued by other insurers who were the subrogees of the insurer's claimants. The court noted that the statutory scheme empowers the Superintendent of Insurance to punish, including through an award of punitive damages, insurers for engaging in unfair claims settlement practices and, therefore, obviated the need to permit private third-party causes of action under these circumstances. *Cosmopolitan Mut. Ins.,* 99 Misc.2d at 1019, 417 N.Y.S.2d at 835-36; *see also Roldan v. Allstate Ins. Co.,* 149 A.D.2d 20, 43, 544 N.Y.S.2d 359, 374 (2nd Dept. 1989) ("The availability of punitive damages in private lawsuits premised on unfair claim practices has been preempted by the administrative remedies available to the Superintendent of Insurance pursuant to Insurance Law §2601. Accordingly, the plaintiff's demand for punitive damages in the present case is stricken.").

"Because an insurance company has exclusive control over a claim against its insured once it assumes defense of the suit, it has a duty under New York law to act in 'good faith' when deciding whether to settle such a claim, and it may be held liable for breach of that duty." *Pinto v. Allstate Ins. Co., 221* F. 3d 394, 398 (2nd Cir. 2000). Among the factors to be considered in determining whether an insurer has failed to settle a claim in bad faith are: whether liability is clear, whether the potential damages far exceed the limits of the primary coverage, whether the claim was properly investigated, the financial burden to which each party may be exposed, the information available to the insurer when the demand for settlement was made, and any other evidence which tends to establish or negate the insurer's bad faith in refusing to settle. *Redcross v. Aetna Cas. & Sur. Co.,* 260 A.D.2d 908, 688 N.Y.S.2d 817 (3rd Dept. 1999); *Pinto v. Allstate Ins. Co., supra.* In weighing the factors, "the touchstone inquiry" is whether the insured "would be subject to personal liability because of the primary insurer's actions, and whether an excess verdict reasonably could have been predicted". *See Ohio Cas. Ins. Co. v Twin City Fire Ins. Co.*, 2019 WL 258227 (E.D. N.Y. June 24, 2019).

The plaintiff in a bad faith action must demonstrate a causal connection between the primary insurer's acts or omissions and the damages sustained by the insured/excess insurer. The plaintiff must show that "the insured lost an actual opportunity to settle the claim." *Pavia, supra.*

Where coverage is denied, bad faith cannot be established as long as the insurer has an arguable basis for denying coverage. See *Liang v. Progressive Cas. Ins. Co.*, 172 A.D.3d 696, 99 N.Y.S.3d 449 (2d Dept. 2019); *Bennion v. Allstate Ins. Co.,* 284 A.D.2d 924, 727 N.Y.S.2d 222 (4th Dept. 2001); *Redcross, supra; S Bros. Inc. v Leading Ins. Servs., Inc.,* 124 A.D.3d 498, 998 N.Y.S.2d 623 (1st Dept. 2015).

Fraud

In New York, the elements of actual fraud are (1) that the defendant made a representation, (2) as to a material fact, (3) which was false, (4) and known to be false by the defendant, (5) that the representation was made for the purpose of inducing the other party to rely upon it, (6) that the other party rightfully did so rely, (7) in ignorance of its falsity (8) to his injury. *Amer. Home Assur. Co. v. Gemma Const. Co., Inc.*, 275 A.D.2d 616, 713 N.Y.S.2d 48 (1st Dept. 2000); *Brown v. Lockwood*, 76 A.D.2d 721, 432 N.Y.S.2d 186 (2nd Dept. 1980); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Robert Christopher Associates*, 257 A.D.2d 1, 691 N.Y.S.2d 35 (1st Dept. 1999).

New York law "preclude[s] fraud actions where the 'only fraud charged relates to a breach of contract.'" *Alredo Productions, Inc. v. Sandra Carter Productions, Inc.*, 2006 WL 453248 (S.D.N.Y. 2006); *Lomaglio Assoc., Inc., v. LBK Mktg. Corp.*, 892 F. Supp. 89, 94 (S.D.N.Y. 1995) *(*quoting *Miller v. Volk & Huxley, Inc.*, 44 A.D.2d 810, 355 N.Y.S.2d 605 (1st Dept. 1974)); *Appian Estates, Inc. v. Mastroddi*, 274 A.D.2d 366, 710 N.Y.S.2d 119 (2nd Dept. 2000). A contract action cannot be converted to one for fraud merely by alleging that the contracting party did not intend to meet its contractual obligations. *Rocanova v. Equitable Life Assurance Soc. of U.S.,* 83 N.Y.2d 603, 614, 612 N.Y.S.2d 339 (1994); *see also Wilson v. Hochberg*, 245 A.D.2d 116, 665 N.Y.S.2d 653 (1st Dept. 1997). *But see Sheth v. New York Life Ins. Co.*, 273 A.D.2d 72, 709 N.Y.S.2d 74 (1st Dept. 2000), where life insurance agents successfully maintained an action for fraudulent concealment, inasmuch as the insurer's alleged failure to disclose its "assertedly clandestine practice of applying unacknowledged production quotas to its agents" constituted sufficient support to establish fraud.

One court has noted that there could be a "tort cause of action against an insurer who unjustifiably denies a valid claim" and that "[s]uch a tort claim should be available regardless of whether the plaintiff can successfully demonstrate the elements of fraud." Batas v. Prudential Ins. Co. of America, 281 A.D.2d 260, 275, 724 N.Y.S.2d 3 (1st Dept. 2001); *See also Kraatz v. USAA Cas. Inc. Co.,* 2017 W.L.876187 (W.D.N.Y.2017) (allegation that insurer fraudulently dissuaded insured from filing a claim).

To plead a constructive fraud, a plaintiff must demonstrate "a breach of a duty which, irrespective of moral guilt and intent, the law declares fraudulent because of its tendency to deceive, to violate a confidence or to injure public or private interests which the law deems worthy of special protection." *Brown, supra*, 76 A.D.2d at 730-31, 432 N.Y.S.2d at 193. The only difference between actual and constructive fraud, therefore, is that, in the latter, scienter upon the part of the defendant is replaced by a requirement that the plaintiff prove the "existence of a fiduciary or confidential relationship warranting the trusting party to repose his confidence in the defendant and therefore to relax the care and vigilance he would ordinarily exercise in the circumstances." *Id.*

Intentional or Negligent Infliction of Emotional Distress

There are four elements to the tort of intentional infliction of emotional distress in New York as adopted from the

Restatement Second of Torts: (1) extreme conduct, (2) intent to cause or disregard the probability of causing severe emotional distress, (3) causal connection between the conduct and injury and (4) severe emotional distress. *Howard v. New York Post Company, Inc.,* 81 N.Y.2d 115, 596 N.Y.S.2d 350 (1993); *Mitchell v. Giambruno*, 35 A.D.3d 1040, 826 N.Y.S.2d 788 (3rd Dept. 2006).

Since most suits against insurers are based on breach of contract, the insurer's conduct rarely meets the outrageousness required to substantiate a claim for intentional infliction of emotional distress. *See Cunningham v. Security Mut. Ins. Co.,* 260 A.D.2d 983, 689 N.Y.S.2d 290 (3rd Dept. 1999) (insured's allegations that her property insurer failed to timely compensate her for a house fire, leaving her homeless and without adequate possessions or funds for living expenses for over a year, and accused her of committing arson and submitting false statements under oath did not constitute the prima facie tort of intentional infliction of emotional distress); *see also McGee v. Paul Revere Life Insurance Co.*, 954 F. Supp. 582 (E.D.N.Y. 1997); *Trachman v. Empire Blue Cross and Blue Shield*, 251 A.D.2d 322, 673 N.Y.S.2d 726 (2nd Dept. 1988).

State Consumer Protection Laws, Rules and Regulations

New York's Consumer Protection Act is grounded in General Business Law §349. This law prohibits deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any services in this state. General Business Law §349 declares as unlawful "[d]eceptive acts and practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." (*See* NY Gen. Bus. L. §349[a]). "'Deceptive practices' are acts which are dishonest or misleading in a material respect," and "'deceptive acts' are defined objectively as acts likely to mislead a reasonable consumer acting reasonably under the circumstances." *See Spagnola v. Chubb Corp.,* 574 F.3d 64, 774 (2nd Cir. 2009). To state a prima facie case under §349, plaintiff must show: "first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act." *See Vitolo v. Mentor H/S, Inc.,* 426 F. Supp.2d 28 (E.D.N.Y 2006), citing *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 731 N.E.2d 608 (2000). Private contract disputes regarding insurance policy coverage, and the processing of a claim that is unique to the parties, do not fall within the ambit of provision of General Business Law. See *Cooper v. New York Cert. Mut. Fire Ins. Co.,* 72 A.D.3d 1556, 900 N.Y.S.2d 545 (4th Dept. 2010); *Fekete v. GA Ins. Co. of New York*, 279 A.D.2d 300, 719 N.Y.S.2d 52 (1st Dept. 2001). An insurer's general practices which have a "broad impact on consumers at large" may state a cause of action under Section 349. *Wilner v. Allstate Ins. Co.,* 71 A.D.3d 155, 893 N.Y.S.2d 208 (2d Dept. 2010); *see Ural v. Encompass Ins. Co. of America,* 97 A.D.3d 562, 948 N.Y.S.2d 621 (2d Dept. 2012).

Intent to defraud or mislead is not required under this statute. *People ex rel. Spitzer v. General Electric Co., Inc.,* 302 A.D.2d 314, 756 N.Y.S.2d 520 (1st Dept. 2003). Nor is justifiable reliance an element of a statutory claim under §349. *See Small v. Lorillard Tobacco Co., Inc.,* 252 A.D.2d 1, 679 N.Y.S.2d 593 (1st Dept. 1998), aff'd, 94 N.Y.2d 43, 698 N.Y.S.2d 615 (1999). Plaintiff must demonstrate that the conduct has a broader impact on consumers at large as opposed to affecting a private contract dispute. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank N.A.*, 85 N.Y.2d 20, 647 N.E.2d 741, 623 N.Y.S.2d 529 (1995); *North State Autobahn, Inc. v. Progressive Ins. Group, Co.*, 102 A.D.3d 5, 953 N.Y.S.2d 96 (2d Dept. 2012). Additionally, the transaction complained of must occur in New York. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 774 N.E.2d 1190, 746 N.Y.S.2d 858 (2002).

Plaintiff must also show that defendant is engaging in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof. Batas, 281 A.D.2d 260, 724 N.Y.S.2d 3 (1st Dept. 2001) (holding that insureds' allegations that health insurer did not conduct utilization review procedures promised in contract stated cause of action for breach of contract, fraud, and violations of deceptive trade practices law and false advertising law; although insureds sustained no out-of-pocket costs, insureds sufficiently alleged actual injury as non-receipt of promised health care for which restitution of premiums paid could be an appropriate remedy).

The court may award treble damages up to $1,000 (General Business Law §349 [h]). The court has discretion to award attorney's fees. *Wilner v. Allstate Ins. Co.,* 71 A.D.3d 155, 893 N.Y.S.2d 208 (2nd Dept. 2010).

A plaintiff seeking compensatory damages must show that defendant engaged in a materially deceptive act or practice that caused actual, although not necessarily pecuniary, harm. *See Newman v. RCN Telecom Services, Inc.,* 238 F.R.D 57 (S.D.N.Y. 2006).

DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

Discoverability of Claims Files Generally

As a general rule, material prepared for litigation in a case other than the one in which disclosure is sought is not immunized. *See Firemen's Ins. Co. of Newark, N. J. v. Gray*, 41 A.D.2d 863, 342 N.Y.S.2d 501 (3rd Dept. 1973); *Woodson v. American Transit Ins. Co.,* 280 A.D.2d 328, 720 N.Y.S.2d 467 (1st Dept. 2001). The documents compiled in a claim file used to defend an insured against legal action are not prepared for legal action as against the insurer itself, and hence underwriting and claim files of defendant insurers are subject to discovery in a declaratory judgment action seeking to determine whether defendant insurers were entitled to disclaim coverage and thereby require another insurer to provide coverage. *See Firemen's Ins., supra*.

Reports prepared by insurance investigators, adjusters or attorneys before the decision is made to pay or reject a claim are not privileged and are thus discoverable. *See 148 Magnolia, LLC v. Merrimack Mut. Fire Ins. Co.,* 62 A.D.3d 486, 878 N.Y.S.2d 727 (1st Dept. 2009); *Bombard v. Amica Mut. Ins. Co.,* 11 A.D.3d 647, 783 N.Y.S.2d 85 (2nd Dept. 2004). Once a claim is rejected a party must meet its burden under CPLR 3101(d)(2). See *McClier Corp. v. U.S. Rebar, Inc.,* 66 A.D.3d 416, 885 N.Y.S.2d 599 (1st Dept. 2009); *Friendship Inc. v. W*, 166 Misc.2d 352, 633 N.Y.S.2d 743 (Civ. Ct. 1995).

An insurer waives the claim that writings in the file prepared after commencement of the action had been prepared in anticipation of litigation where insurer's representative reviewed entire file before testifying at deposition. *Stern v. Aetna Cas. & Sur. Co.*, 159 A.D.2d 1013, 552 N.Y.S.2d 730 (4th Dept. 1990).

Where it is alleged that the insurer has breached a duty of good faith to its insured, the insurer may not use the attorney-client or work-product privilege to shield from disclosure material relevant to the insured's bad faith action. *See Diamond State Ins. Co. v. Utica First Ins. Co.,* 37 A.D.3d 160, 829 N.Y.S.2d 465 (1st Dept. 2007); *Woodson v. American Transit Ins. Co.*, 280 A.D.2d 328, 720 N.Y.S.2d 467 (1st Dept. 2001); *Zurich Ins. Co. v. State Farm Mut. Auto. Ins. Co.,* 137 A.D.2d 401, 524 N.Y.S.2d 202 (1st Dept. 1998).

Discoverability of Reserves

Depending on the reason for the creation of a "reserve", it may be discoverable in New York. In *Bovis Lend Lease, LMB, Inc. v. Seasons Contracting Corp.,* 2002 WL 31729693 (S.D.N.Y., Dec. 5, 2002), a declaratory judgment action brought against a demolition contractor by an insurer seeking contribution for defense and settlement of an underlying action, a letter from insurer to insured's insurance broker summarizing the amount of indemnity reserves, with assessments as to whether such reserves were adequate for claims against the insured arising out of the construction project, was not subject to the attorney-client or work-product privilege under New York law because the document was created at the request of a broker, who, as a matter of routine, asked for status reports on all claims. *See also National Union Fire Ins. Co. of Pittsburgh, PA v. H&R Block, Inc.,* 2014 WL 4377845 (S.D.N.Y. 2014) (permitting discovery of reserve information in bad faith action); *American Med. Alert Corp. v Evanston Ins. Co.,* 2018 NY Slip Op 30479(U), 1, 2018 N.Y. Misc. LEXIS 961, *1 (Sup. Ct., N.Y. Cty. Mar. 23, 2018) (same). *But see 40 Rector Holdings, LLC v. Travelers Indemnity Co.,* 40 A.D.3d 482, 836 N.Y.S.2d 173 (1st Dept. 2007) (denying discovery of reserve information); *Mt. McKinley Ins. Co. v. Corning*, 2010 WL 6334283 (Sup. Ct. N.Y. Cty. 2010) (denying discovery of reserve information absent bad faith allegations); *Fox Paine & Co., LLC v Houston Cas. Co.*, 51 Misc.3d 1212(A), 37 N.Y.S.3d 207 (West. Cty. Sup. Ct. 2016) (denying discovery of reserve information in bad faith case as irrelevant to coverage issues).

In *J.R. Stevenson Corp. v. Dormitory Authority of State of N.Y.,* 112 A.D.2d 113, 492 N.Y.S.2d 385 (1st Dept. 1985), an action involving a construction contract, one party sought accounting reports prepared for an insurer as a review of operations and expenditures of the corporation for which the insurer acted as a surety. *Id.* Their purpose in seeking this discovery was to determine whether the insurer had adequate reserves pursuant to the insurance law's requirements and to verify the corporation's figures and establish the propriety of the corporation's expenditures. *Id.* The court held that these were independent verifications by the insurer of the obligor's claims, and thus, were prepared in the ordinary course of business and were not protected from discovery as material prepared for litigation under McKinney's CPLR 3101(d), nor did they qualify as attorney's work product. *Id.*

Discoverability of Existence of Reinsurance and Communications with Reinsurers

The New York courts are split on whether the existence of reinsurance is discoverable in New York. *See Certain Underwriters at Lloyd's v National Railroad Passenger Corp*., 2016 WL 2858815 (E.D. N.Y. May 16, 2016) (denying discovery of reinsurer communications); *Fireman's Fund Ins. Co. v Great American Ins. Co. of New York*, 284 F.R.D. 132 (S.D. N.Y. 2012) (allowing discovery of reinsurer communications). In *Anderson v. House of Good Samaritan Hosp.,* 767 N.Y.S.2d 330, 331 (4th Dept. 2003), the court held that the Supreme Court erred in denying that part of plaintiff's motion with respect to defendants' insurance and reinsurance policies. The court found that CPLR 3101(f), entitled, "Contents of insurance agreement," provides that a "party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment." Id., citing CPLR 3101(f). *See also Suffolk Federal Credit Union v. Cumis Ins. Society, Inc.,* 270 F.R.D. 141 (E.D.N.Y. 2010), but *see Karta Indus., Inc. v. Ins. Co. of Pa.,* 256 A.D.2d 375, 685 N.Y.S.2d 685 (1st Dept. 1999).

Where an attorney acts for two different parties having common interest, communications by either party to the attorney are not necessarily privileged in a subsequent controversy between the two parties; this is particularly the case where the insured and his insurer initially have common interests in defending the action against the former, and there is a possibility that those communications might play a role in the subsequent action between the insured and his insurer. *Goldberg v. American Home Assur. Co.,* 80 A.D.2d 409, 439 N.Y.S.2d 2 (1st Dept. 1981). An insurer cannot assert attorney-client privilege against its insured under New York law, in insurer's lawsuit against insured seeking a declaratory judgment as to whether it had a duty to defend, with respect to its communications with the attorney it appointed to represent the insured in underlying tort case. *Woodson*, 80 A.D.2d at 328; *Zurich*, 137 A.D.2d at 402.

Where it is alleged that the insurer has breached a duty to its insured, the insurer may not use the attorney-client or work-product privilege to shield from disclosure material relevant to the insured's bad faith action. *Diamond, supra; Woodson, supra; Zurich, supra.*

Attorney/Client Communications

Attorney-client communications are protected from disclosure by NY CPLR § 4503, which provides in part:

> Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof.

The scope of the privilege in New York is coextensive with well-known decisions such as *United States v. United Shoe Mach. Corp*., 89 F. Supp. 357, 358-59 (D. Mass. 1950)(Wyzanski, J.), and *Upjohn Co. v. United States*, 449 U.S. 383, 386, 101 S. Ct. 677, 681 (1981), in which the corporation's employees' information was protected by the attorney-client privilege where it was necessary to defend against potential litigation. *See generally, Rossi v. Blue Cross & Blue Shield*, 73 N.Y.2d 588, 542 N.Y.S.2d 508, 540 N.E.2d 703 (1989)(discussing *United Shoe* and *Upjohn*).

DEFENSES IN ACTIONS AGAINST INSURERS

Misrepresentations/Omissions: During Underwriting or During Claim

Misrepresentation, as a ground for rescission, is governed by §3105 of New York's Insurance Law, which states:

- A representation is a statement as to past or present fact, made to the insurer by, or by the authority of, the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof. A misrepresentation is a false representation, and the facts misrepresented are those facts which make the representation false.
- No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract.
- In determining the question of materiality, evidence of the practice of the insurer which made such contract with respect to the acceptance or rejection of similar risks shall be admissible.

In order for an insurer to establish its right to rescind an insurance policy, it must establish that there were misrepresentations in the application and that they were material to the risk it was being asked to insure. *See Republic Ins. Co. v. Masters, Mates and Pilots Pension Plan*, 77 F.3d 48 (2nd Cir. 1996). The right to rescind must be exercised promptly after the insurer learns of the misrepresentation. *See New York State Ins. Fund v. Mount Vernon Fire Ins. Co.,* 2010 WL 1292305 (2nd Cir. 2010).

The standard for determining whether a misrepresentation is material is whether knowledge of the misrepresented facts would have led to a refusal by the insurer to issue the policy. *See Philadelphia Indem. Ins. Co. v. Horowitz, Greener & Stengel, LLP, 379 F. Supp.2d 442 (S.D.N.Y. 2005); Friedman v. Prudential Life Ins. Co. of Am.*, 589 F.Supp. 1017 (S.D.N.Y. 1984); *Simon v. Government Employees Life Ins. Co. of N.Y.,* 79 A.D.2d 705, 434

N.Y.S.2d 447 (2nd Dept. 1980). *See, e.g., John Hancock Life Ins. Co. v. Perchikov*, 553 F. Supp.2d 229 (E.D.N.Y. 2008) (misrepresentation in life insurance application regarding existence of two million-dollar insurance policies in force at time of application was material since insurer would not have issued policy if it had known of applicant's other insurance).

If the insurer would not have issued the policy if it had known the true facts, the misrepresentation warrants rescission. *See Parmar v. hermitage Ins. Co.*, 21 A.D.3d 538, 800 N.Y.S.2d 726 (2d. Dept 2005); *Precision Auto Accessories, Inc. v. Utica First Ins. Co.,* 52 A.D.3d 1198, 859 N.Y.S.2d 799 (4th Dept. 2008); *Curanovic v. New York Cent. Mut. Fire Ins. Co.,* 307 A.D.2d 435, 437-38, 762 N.Y.S.2d 148 (3rd Dept. 2003); *Zilkha v. Mutual Life Ins. Co.,* 287 A.D.2d 713, 714, 732 N.Y.S.2d 51 (2nd Dept. 2001). A material misrepresentation does not have to be intentional or willful. *See Great American Ins. Co. v. Dorchester, LLC.*, 2016 WL 11757228 (S.D.N.Y. 2016); *Precision Auto Accessories, Inc. v. Utica First Ins. Co.,* 52 A.D.3d 1198, 859 N.Y.S.2d 799 (4th Dept. 2008). In order for an insurer to establish the materiality of a misrepresentation, it must come forward with evidentiary proof, such as the underwriting manual, guidelines, policies, rules or bulletins, demonstrating that it would have rejected the insurance application but for the misrepresentation. *See Shapiro v. Allstate Life Ins. Co. of New York*, 202 A.D.2d 659, 660, 609 N.Y.S.2d 323 (2nd Dept. 1994); *See also Carpinone v. Mutual of Omaha Ins. Co.,* 265 A.D.2d 752, 754, 697 N.Y.S.2d 381 (3rd Dept. 1999); *Cutrone v. Am. Gen. Life Ins. Co. of N.Y.,* 199 A.D.2d 1032, 1033, 606 N.Y.S.2d 491 (4th Dept. 1996); *see also Kiss Const. NY, Inc. v. Rutgers Cas. Ins. Co.,* 61 A.D.3d 412, 877 N.Y.S.2d 253 (1st Dept. 2009) (denials of similarly situated applicants). Conclusory statements by an insurer's employee are insufficient to establish materiality as a matter of law. See Parmar v. Hermitage Ins. Co., 21 A.D.3d 538, 800 N.Y.S.2d 726 (2nd Dept. 2005); Carpinone, 265 A.D.2d at 754-55; Cutrone, 199 A.D.2d at 1033. *Roudneva v. Bankers Life Ins. Co. of New York,* 35 A.D.3d 580, 827 N.Y.S.2d 213 (2nd Dept. 2006). Note that an insurer may waive the right to rescind by accepting premiums after learning of an event allowing for rescission. *See 5512 OEAAJB Corp. v Hamilton Ins. Co.*, 189 A.D.3d 1136, 138 N.Y.S.3d 355 (2d Dept. 2020); *See Security Mut. Life Ins. Co. of New York v. Rodriguez,* 65 A.D.3d 1, 880 N.Y.S.2d 619 (1st Dept. 2009).

As long as it is stated in the insurance contract, an insurance company may reserve the right to cancel a policy for whatever reason, or no reason, at its discretion. *See International Life Ins. & Trust Co. v. Franklin Fire Ins. & Trust Co.,* 66 N.Y. 119 (1876). Therefore, misrepresentations made in the presentation of a claim, which violate the standard insurance policy conditions prohibiting fraud and misrepresentation, may void the policy. This rule has been extended to situations involving misconduct by an insurer's agent. *See Cutrone, supra.*

Where an insurance policy contains a provision stating that the "entire policy shall be void if any insured has intentionally concealed or misrepresented any material fact or circumstance relating to this insurance" and the issue is whether the stated language encompasses allegation of fraudulent claims for loss, it has been held that, since the provision fails to include the words "whether before or after loss" or "in case of any fraud or false swearing by the insured relating thereto," the said provision is "ambiguous and should be construed to favor the insured." *Fiore v. State Farm Fire & Cas. Co.,* 135 A.D.2d 602, 603, 522 N.Y.S.2d 180 (2nd Dept. 1987).

Failure to Comply with Conditions

- Assistance and cooperation

General liability policies contain a requirement that the insured cooperate with the insurance company in its investigation, defense or settlement of claims against the insured.

An insured's failure to comply with policy conditions (including timely notice, cooperation, submission to an examination under the policy and document production) constitutes a complete defense to an action on the policy. *See Travelers Indem. Co. of Amer. V. Southern Gastronom, Corp.*, 2010 WL 1260202 (E.D.N.Y. 2010); *DiGuglielmo v. Travelers Property Cas.,* 6 A.D.3d 344, 776 N.Y.S.2d 542 (1st Dept. 2004); *Paramount Ins. Co. v. Rosedale Gardens, Inc.,* 293 A.D.2d 235, 239-40, 606 N.Y.S.2d 491 (1st Dept. 2002). The non-cooperation must be willful and extreme, resulting in substantial and material prejudice to the defense of the claim. *See Mistretta v. Hartford Acc. and Indem. Co.,* 275 A.D.2d 356, 712 N.Y.S.2d 167 (2nd Dept. 2000); *Thrasher v. U.S. Liability Ins. Co.,* 19 N.Y.2d 159, 278 N.Y.S.2d 793 (1967). The insurer must exercise due diligence to obtain the requested cooperation, often by multiple and continual attempts. *See State Farm and Cas. Co. v. Imeri*, 182 A.D.2d 683, 582 N.Y.S.2d 463 (2nd Dept. 1992).

The New York Court of Appeals has recognized that disclaiming coverage for non-cooperation can be a difficult, fact-intensive task. *See Continental Cas. Co. v. Stradford*, 11 N.Y.3d 443, 871 N.Y.S.2d 607 (2008) ("Fixing the time from which an insurer's obligation to disclaim runs is difficult. That period begins when an insurer first becomes aware of the ground for its disclaimer. But unlike cases involving late notice of claims or other clearly applicable coverage exclusions, an insured's non-cooperative attitude is often not readily apparent. Indeed, as here, such a position can be obscured by repeated pledges to cooperate and actual cooperation.") (citations omitted). Where the statute applies, a carrier's disclaimer for failure to cooperate must comply with the timely disclaimer requirements of Insurance Law 3420(d). *See Continental Cas. Co., supra* ("Even if an insurer possesses a valid basis to disclaim for non-cooperation, it must still issue its disclaimer within a reasonable time"). *See also County-Wide Ins. Co. v. Preferred Trucking Services Corp.,* 22 N.Y.3d 571, 983 N.Y.S.2d 460 (2014).

The insurer bears the burden of proof of proving the insured's failure or refusal to cooperate. *See Matter of Arbitration between Empire Mut. Ins. Co. and Shroud*, 36 N.Y.2d 719, 367 N.Y.S.2d 972 (1975); *Liberty Mutual Ins. Co. v. Roland-Staine,* 21 A.D.3d 771, 802 N.Y.S.2d 6 (1st Dept. 2005). The test is whether "the attitude of the insured, after his cooperation was sought, was one of willful and avowed obstruction." *See Commercial Union Ins. Co. v. Burr*, 226 A.D.2d 416, 641 N.Y.S.2d 69 (2nd Dept. 1996); *Liberty Mutual Ins. Co.,* Id.; *Baghaloo-White v. Allstate Ins. Co.*, 270 A.D.2d 296, 704 N.Y.S.2d 131 (2nd Dept. 2000). This is deemed to be a "very heavy burden." Id. Substantial compliance by the insured will suffice in satisfying the obligations under the policy. *See Baerga v. Transtate Ins. Co.*, 213 A.D.2d 217, 623 N.Y.S.2d 587 (1st Dept. 1995). Where the insured is a corporate entity the court's inquiry is "focused on the totality of the conduct of the insured's principals". *See Deluca v RLI Ins. Co.*, 187 A.D.3d 709, 712, 131 N.Y.S.3d 719, 721 (2d Dept. 2020). Failure to cooperate is subject to the timely disclaimer requirements of Insurance Law § 3420(d)(2). *20-35 86th St. Realty, LLC v Tower Ins. Co. of N.Y.,* 106 A.D.3d 478, 965 N.Y.S.2d 412 (1st Dept. 2013).

- Late notice

By statute, New York amended its law with respect to late notice. Under the prior standard, which still applies to policies issued before January 17, 2009, an insured must notify udefense of late notice. *See Security Mut. Ins. Co. of New York v. Acker-Fitzsimmons Corp.,* 31 N.Y.2d 436, 340 N.Y.S.2d 902 (1972); *See also Unigard Security Ins. Co., Inc. v. North River Ins. Co.,* 79 N.Y.2d 576, 584 N.Y.S.2d 290 (1992); *Axa Marine and Aviation Ins. (UK) Ltd. v. Seajet Industries Inc.,* 84 F.3d 622 (2nd Cir. 1996). However, the "no prejudice" rule does not apply to a failure to comply with the prompt notice requirement in a contract of reinsurance. *Unigard Sec. Ins. Co., Inc. v. North River Ins. Co.,* 79 N.Y.2d 576, 584 N.Y.S.2d 290 (1992). *See also Country-Wide Ins. Co. v. Preferred Trucking Services Corp.,* 22 N.Y.3d 571, 983 N.Y.S.2d 460 (2014).

In interpreting what constitutes timely notice, courts have held that relatively short periods of unexcused delay are unreasonable as a matter of law. *Travelers Indemn. Co. v. Northrup Grumman Corp.,* 2020 WL 1469550 (S.D.N.Y. 2020) (6-month delay unreasonable); *Po(wer Auth. of the State of New York v. Westinghouse Elec. Corp.,* 117 A.D.2d 336, 502 N.Y.S.2d 420 (1st Dept. 1986) (53 day delay unreasonable as a matter of law); *Herold v. East Coast Scaffolding, Inc.,* 208 A.D.2d 592, 616 N.Y.S.2d 97 (2nd Dept. 1994) (failure to notify insurer until three and a half months after accident was untimely); *Zadrima v. PSM Ins. Co.,* 208 A.D.2d 529, 616 N.Y.S.2d 817 (2nd Dept. 1994) (4-month delay unreasonable as a matter of law).

In 2008, New York amended Insurance Law § 3420 to include a prejudice standard for late notice. The new prejudice provision is not retroactive and applies to policies issued on or after January 17, 2009. *See Briggs Avenue LLC v. Ins. Corp. of Hannover*, 11 N.Y.3d 377, 870 N.Y.S.2d 841 (2008). For policies covered by the new statute, the "failure to give any notice required by the policy … shall not invalidate any claim … unless the failure to provide timely notice has prejudiced the insurer." *See* §3420(a)(5). "The insurer's rights shall not be deemed prejudiced unless the failure to timely provide notice materially impairs the ability of the insurer to investigate or defend the claim." *See* §3420(C)(2)(c). The statute only applies to claims for bodily injury. See *Menlo Energy Florida, LLC v Certain Underwriters at Lloyds London*, 213 A.D.3d 494, 183 N.Y.S.3d 95 (1st Dept. 2023). The statute applies "an irrebuttable presumption of prejudice" if, "prior to notice, the insured's liability has been determined by a court of competent jurisdiction or by binding arbitration; or if the insured has resolved the claim or suit by settlement or other compromise." *See* §3420(C)(2)(b). The irrebuttable presumption applies where a default judgment has been entered against an insured prior to giving notice to its insurer. See *Villaviciencio v Erie Ins. Co*., 172 A.D.3d 1276, 101 N.Y.S.3d 361 (2nd Dept. 2019). The presumption also applies where the Court has granted plaintiff's motion for partial summary judgment on the issue of liability prior to notice to the insurer. See *Tower Ins. Co. of New York v Commissary Direct, Inc*., 63 Misc.3d 1229(A), 115 N.Y.S.3d 613 (Sup. Ct. N.Y. County 2019). The presumption does not apply where a default judgment against the insured has been vacated. See *Castillo v Prince Plaza, LLC*, 142 A.D.3d 1127, 38 N.Y.S.3d 74 (2nd Dept. 2016).

As a result of the new statute, New York courts will probably create a high hurdle for insurers to deny coverage based on late notice (except for circumstances governed by the "irrebuttable presumption of prejudice") because of the statutory reference to "materially impairs" the ability to investigate or defend the action, and the legislative intent to avoid disclaimers based on "technicalities." If the insured has settled prior to notice, that should fit within the "irrebuttable presumption." Also, if there is a default judgment against the insured is this a liability determination within the irrebuttable presumption, and again, must the insurer move to vacate the default? The cases around the country are split on the issue of whether a default judgment is prejudice by itself, or must the default be final.

As to prejudice, apart from the irrebuttable presumption, this is a fact-sensitive inquiry. As a practical matter, an insurer will rarely be able to prove material prejudice. The burden to prove the absence of prejudice shifts to the insured if the notice is more than two years late. *See e.g., United States Underwriters Ins. Co. v. ITG Development Group, LLC* 294 F.Supp.3d 18 (S.D.N.Y. 2018).

In *Atlantic Cas. Ins. Co. v. Value Waterproofing, Inc.,* 918 F.Supp.2d 243 (S.D.N.Y. 2013), aff'd 548 Fed. Appx. 716 (2d Cir. 2013) the court found that an insurer was prejudiced under the new statute by the insured's 6-month delay in providing notice to the insurer of an occurrence involving the collapse of a roof (where the injured had been working). The Court reasoned that the delay prevented the insurer from being able to investigate and ascertain the potential causes of roof collapse, where the property had been demolished during the delay. *Compare Wausau Underwriters Ins. Co. v. Old Republic Gen. Ins. Co.,* 122 F.Supp.3d 44 (S.D.N.Y. 2015) (conclusory allegations of prejudice insufficient); *Slocum v Progressive Northwestern Ins. Co.,* 137 A.D.3d 1634, 1636, 28 N.Y.S.3d 181, 183 (4th Dept. 2016).

Other jurisdictions have considered the following circumstances: (1) admissions of liability by the insured; (2) a significant change in the condition of the accident site; (3) the loss of key documents; (4) the death or unavailability of important witness(es); (5) the actual loss of an opportunity to settle; (6) the failure to hire experts or to conduct an independent medical examination (if the time has passed); or (7) the failure to conduct an investigation. *See generally,* 1 Windt, *Insurance Claims and Disputes,* §1:4; 13 Couch on Insurance (3rd ed.) §193:69. The stage of the litigation when notice was given (*i.e.,* after the discovery deadline or immediately prior to or during the trial) can be a factor in the prejudice determination. *See e.g., United States Underwriters Ins. Co. v. ITG Development Group, LLC* 294 F.Supp.3d 18 (S.D.N.Y. 2018) ("U.S. Underwriter's inability to photograph the Premises, however, was not the only prejudice suffered. ITG's late notice thwarted Plaintiff's ability to acquire any documentation related to the incident, or to speak with potential witnesses contemporaneous with the incident . . . if timely notice had been provided they could have obtained if not all, at least some, of the relevant documentation for the time in question. Perhaps even more significant, the lack of notice prevented Plaintiff from engaging in the Rath Action. Potentially, Plaintiff could have assigned ITG defense counsel, avoided default, and successfully impleaded any other potentially responsible parties to the action. Plaintiff's ability to take any of those steps in defense of the Rath Action has vanished."). New York courts may consider cases from other jurisdictions in making determinations about prejudice.

Challenging Stipulated Judgments: Consent and/or No-Action Clause

An unauthorized settlement by the insured may vitiate liability without any discussion of prejudice. *See Home and Marine Ins. Co. v. Kanner, 103 A.D.3d 736, 962 N.Y.S.2d 153 (2nd Dept. 2013); Royal Zenith Corp. v. New York Marine Managers, Inc.,* 192 A.D.2d 390, 596 N.Y.S.2d 65 (1st Dept. 1993); *State Farm Auto Ins. Co. v. Blanco*, 208 A.D.2d 933, 617 N.Y.S.2d 898 (2nd Dept. 1994). In *Royal Zenith Corp. v. New York Marine Managers, Inc., supra*, the Court found that the insurers were not liable under the policy of insurance "where the insured…had violated the policy terms and conditions by voluntarily assuming liability by stipulation of settlement without the defendant insurer's written consent." One New York court has ruled that a plaintiff insurer was "not required to demonstrate prejudice to assert a defense of non-compliance" where the policy required that consent be obtained prior to settlement. *See New York Central Mut. Fire Ins. Co. v. Danaher*, 290 A.D.2d 783, 785, 736 N.Y.S.2d 195, 197 (3rd Dept. 2002).

Under New York law, where an insurance policy requires the insurer's consent prior to a settlement, the insured must obtain such consent before settling a dispute, and the "failure of the insured to obtain such prior consent from the insurer constitutes a breach of a condition of the insurance contract and disqualifies the insured from availing himself of the pertinent benefits of the policy." ." *New York Cent. Mut'l Fire Ins. Co. v. Danaher*, 290 A.D.3d 783, 736 N.Y.S.2d 195 (3rd Dept. 2002); *In re New York Cent. Mut'l Fire Ins. Co. v. Cavanagh*, 265 A.D.2d 787, 788, 697 N.Y.S.2d 193 (3rd Dept. 1999); *see also Vigilant Ins. Co. v. Bear Stearns Cas., Inc.,* 10 N.Y.3d 170, 855 N.Y.S.2d 45 (2008) (insured breached consent provision of policy by entering into consent decree with SEC without insurer's consent); *Cont'l Cas. Co. v. Ace Arm. Ins. Co.,* 2009 WL 857594 (S.D.N.Y. 2009) ("consent-to-settle provisions are a condition precedent to coverage").

The limitation to this rule is as follows: "[W]here an insurer unjustifiably refuses to defend a suit, the insured may make a reasonable settlement or compromise of the injured party's claim, and is then entitled to reimbursement from the insurer, even though the policy purports to avoid liability for settlements made without the insurer's consent." Ansonia Associates Ltd. Partnership v. Public Service Mut'l Ins. Co., *257 A.D.2d 84, 692 N.Y.S.2d 5 (1st Dept. 1999), quoting* Isadore Rosen & Sons Inc. v. Security Mut'l Ins. Co. of New York*, 31 N.Y.2d 342, 347, 339 N.Y.S.2d 97 (1972). Courts in New York have also emphasized that:*

> the insurer's obligation to act in good faith for the insured's interests may be breached *in other ways than by refusing or neglecting to defend a suit. It may be breached by* neglect and failure to act protectively when the insured is compelled to make settlement at his peril; and unreasonable delay by

> the insurer, in dealing with a claim, may be one form of refusal to perform which could justify settlement by the insured.

Id. at 347.

An insurer's commencement of a declaratory judgment action against an insured, seeking a declaration of no coverage, relieves the insured of any obligation to obtain the insurer's consent before settling a claim. See *Century Indemnity Co. v Brooklyn Union Gas Co*., 170 A.D.3d 632, 97 N.Y.S.3d 72 (1st Dept. 2019).

Preexisting Illness or Disease Clauses

The burden is on the insured to show that his or her alleged illness did not precede issuance of the policy or within a stated time. *Goldman v. Nat'l Cas. Co*., 33 N.Y.S.2d 717 (App. Term, 2d Dept., 1941). See also *Balinsky v. Nat'l Cas. Co*., 33 N.Y.S.2d 737 (App. Term, 2d Dept., 1941)(error to impose on the defendant the burden of proving the exceptions to the policy).

However, the burden shifts to the insurer after plaintiff has set forth a prima facie case. *See Sachs v. American Central Ins. Co*., 34 Misc.2d 687, 695-696, 230 N.Y.S.2d 126, 135-136 (Sup. Ct., Kings Co., 1962), aff'd, 18 A.D.2d 841, 238 N.Y.S.2d 508 (2d Dept. 1963)(commenting on cases).

An intermediate appellate court has, in dicta, cited cases holding that an illness or condition is deemed to have first manifested itself whenever the insured experienced such symptoms as would cause an ordinarily prudent person to seek medical advice. Furthermore, the symptoms must be such that one learned in medicine could, with reasonable accuracy, diagnose the disease. *See Mannino v. Agway Inc. Group Trust*, 192 A.D.2d 131, 138-139, 600 N.Y.S.2d 723, 727 (2d Dept. 1993), cited in *Lawson ex rel. Lawson v. Fortis Ins. Co*., 301 F.3d 159, 164 (3d Cir. 2002)(Alito, J.)(collecting cases on pre-existing condition clauses in insurance policies).

Pre-existing condition provisions in accident and health policies are subject to New York's Insurance Law § 3232 which, among other things, contains a portability provision requiring insurers to credit the time a person previously was covered under a comparable plan when determining the applicability of a preexisting condition provision. The portability provision is designed to enable individuals to change jobs or change plans without fear of having to wait for coverage to take effect. Section 3232 prescribes a 12-month maximum time frame for preexisting condition provisions. A health insurer may only limit or preclude coverage for preexisting conditions during the first 12 months of coverage.

N.Y. Ins. L. § 3232 was amended with effect from Jan. 1, 2012 to conform to certain requirements of the federal Affordable Care Act, including those relating to coverage of individuals under age nineteen.

Statutes of Limitations and Repose

Pursuant to the general contract statute of limitations in New York, CPLR 213(2), a declaratory judgment or breach of insurance contract action must be commenced within six (6) years. *See* New York Civil Practice Law and Rule §213(b). An insured's claim for coverage begins to accrue upon the final termination of the underlying action. *See* See *Stoncor Group, Inc. v Peerless Ins. Co*., 573 F.Supp.3d 913 (S.D. N.Y. 2021); *Liberty Mut. Fire Ins. Co. v. Hamilton Ins. Co.,* 356 F.Supp.3d 326 (S.D.N.Y. 2018); *Bond v. Progressive Ins. Co.,* 82 A.D.3d 1318, 917 N.Y.S. 2d 756 (3d Dept. 2011); *Ghaly v. First American Title Ins. Co. of NY*, 228 A.D.2d 551, 644 N.Y.S.2d 770 (2d Dept. 1996). Pursuant to the Insurance Law, fire policies reduce the limitations period to 24 months from the inception of the loss. *See* New York Insurance Law § 3404(e); *see also Bergman v. Indemnity Ins. Co. of North*

America, 232 A.D.2d 271, 648 N.Y.S.2d 557 (1st Dept. 1996).

TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

Trigger of Coverage

In *Continental Cas. Co. v. Rapid-American Corp.,* 80 N.Y.2d 640, 593 N.Y.S.2d 966 (1993), the Court of Appeals adopted an "injury-in-fact" test, identified as "onset of disease, whether discovered or not." Similarly, in *American Home Products Corp. v. Liberty Mut. Ins. Co.,* 748 F.2d 760 (2nd Cir. 1984), the Second Circuit discussed the injury-in-fact test -- "a real but undiscovered injury, proved in retrospect to have existed at the relevant time, would establish coverage, irrespective of the time the injury became diagnosable." The Court added that in progressive injury cases, the New York Courts should look to whether there is measurable injury or damage, although unobserved, during the policy period. *See Danaher Corp. v .Travelers Indemn. Co.,* 414 F.Supp3d 436 (S.D.N.Y. 2019); *Stonewall Ins. Co. v. Asbestos Claims Management Corp.,* 73 F. 3d 1178 (2nd Cir. 1995) (policies will be triggered throughout the period between exposure and date of claim or death in which the evidence persuades the trier of fact that successive injuries are recurring); *U.S. Fidelity & Guaranty Co. v. Treadwell Corp.,* 58 F. Supp.2d 77 (S.D.N.Y. 1999) (bodily injury claimants "injured at all points in time from initial exposure through the date his claim is filed or he died"); *Continental Cas. Co. v. Employers Ins. Co. of Wausau,* 60 A.D.3d 128, 871 N.Y.S.2d 48 (1st Dept. 2008) (asbestos exposure triggered by injury-in-fact occurring during policy period); *Cortland Pump & Equipment, Inc. v. Firemen's Ins. Co. of Newark, N.J.,* 194 A.D.2d 117, 604 N.Y.S.2d 633 (3rd Dept. 1993) (date of injury in fact, as opposed to date of discovery, triggered comprehensive general liability coverage).

Allocation Among Insurers

New York has rejected a joint and several approach, and adopted pro-rata allocation approach. *See Consolidated Edison Co. of New York v. Allstate Ins. Co.*, 98 N.Y.2d 208, 746 N.Y.S.2d 622 (2002). Under this methodology, liability for injury or damages is allocated among all triggered insurance policies, and to the insured for periods of self-insurance. *See Stonewall Ins. Co., supra.*; *Olin Corp. v. Ins. Co. of North America*, 221 F. 3d 307 (2nd Cir. 2000); *U.S. Fidelity & Guaranty Co.,* 5 F. Supp.2d 77 (S.D.N.Y. 1999) (allocation to insured to the extent it had no insurance – when "it had been uninsured, its insurance had been exhausted or an insurer was insolvent – during any portion of a particular claimant's injury"); *Fulton Boiler Works, Inc. v. American Motorists Ins. Co.,* 828 F.Supp.2d 481 (N.D.N.Y. 2011). *National Hockey League v TIG Ins. Co.*, 76 Misc.3d 427, 172 N.Y.S.3d 342 (Sup. Ct., N.Y. County 2022) (apportionment of defense costs to the insured for any years the insured went without insurance).Cf. *In Re Viking Pump,* 27 N.Y.3d 244, 33 N.Y.S.2d 118 (2016) (Court of Appeals recognized that differing policy language might compel an all sums allocation. All sums allocation was required because of the presence of non-cumulation and prior insurance/continuing coverage limiting language in the relevant policies).

CONTRIBUTION ACTIONS

New York law recognizes a cause of action for equitable contribution when a co-insurer pays more than its fair share for a loss covered by multiple insurers. *See National Union Fire Ins. Co. of Pittsburgh, PA v. Hartford Ins. Co. of Midwest*, 248 A.D.2d 78, 677 N.Y.S.2d 105 (1st Dept. 1998), *aff'd* 93 N.Y.2d 983, 695 N.Y.S.2d 740 (1999) ("where two or more insurers bind themselves to the same risk and one pays the whole loss, the paying insurer has a right of action against his coinsurers for a ratable portion of the amount period"); *International Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F3d 76 (2d Cir. 2002) ("an insurer has a right in equity to collect a ratable contribution from any other insurer who is also liable for the same loss"). Two policies are considered to be co-insurers, if the two policies are both required to pay for defense and/or indemnity at the same level of coverage (i.e., primary or excess) with respect to the same underlying lawsuit. *See National Cas. Co. v. Vigilant Ins. Co.,* 466 F. Supp.2d 533 (S.D.N.Y. 2006*); see also U.S. Fire Ins. Co. v. American Home Assur. Co.,* 19 A.D.3d 191, 796 N.Y.S.2d 603 (1st Dept. 2005); *Tops Markets Inc. v. Maryland Cas*., 267 A.D.2d 999, 700 N.Y.S.2d 325 (4th Dept. 1999). Coinsurers may involve concurrent insurance both covering an accident with a fixed single date of loss, or successive insurers where the damage implicates multiple policy periods. *See Arch Ins. Co. v. Harleysville Worcester Ins. Co*., 2014 WL 3377124 (S.D.N.Y. 2014). The equitable basis for contribution among coinsurers is whether one insurer is unjustly enriched at the expense of another. *See Maryland Cas. Co., v. W.R. Grace and Co.,* 218 F.3d 204 (2d Cir. 2000).

DUTY TO SETTLE

Under New York Law, insurance carriers owe a duty to their insureds to act in good faith when deciding whether to settle a claim and may be held liable for breach of that duty. *Pavia v. State Farm Mut. Auto. Ins. Co.*, 82 N.Y.2d 445, 605 N.Y.S.2d 208 (1993); *New England Ins. Co. v. Healthcare Underwriters Mut. Ins. Co.,* 295 F. 3d 232 (2nd Cir. 2002); *Pinto v. Allstate Ins. Co.,* 221 F. 3d 394 (2nd Cir. 2000). A primary insurer discharges its duty by giving as much consideration to its insured's interests as it does its own. The primary carrier also has a direct duty to the excess insurer, and the primary carrier is required to give as much consideration to the excess carrier's interests as it does its own. *See Federal Ins. Co. v. North American Specialty Ins. Co.,* 83 A.D.3d 401, 921 N.Y.S.2d 28 (1st Dept. 2011).

The United States Court of Appeals for the Second Circuit has ruled that bad faith can be established even if the settlement demand exceeds the primary limits -- "plaintiffs' willingness to settle for the policy limits is one way, but not the only way to show that an actual opportunity to settle existed." *New England Ins. Co. v. Healthcare Underwriters Mut. Ins. Co.,* 295 F. 3d 232, 247 (2nd Cir. 2002); *see also Borchstein v. Nationwide Mut. Ins. Co.,* 448 F. 2d 987 (2nd Cir. 1971). According to the New York Pattern Jury Instruction, "the duty to act in good faith applies even though claimant's settlement offer is in excess of the policy limit, if the insured is willing to contribute the excess." NY PJI 4:67. Under established precedent, ordinary negligence should not expose an insurer to a claim for a bad faith refusal to settle. *See Pavia, supra*, 82 N.Y.2d at 453, 605 N.Y.S.2d at 211; *see also In re Axis Reinsurance Co. v. REFCO Related Ins. Litigation,* 2010 WL 1375712 (S.D.N.Y. 2010) (no breach by an insurer's mistake in judgment).

To establish a liability insurer's bad faith in failing to settle a claim, the insured must show that the "insurer's conduct constituted a gross disregard of the insured's interests—that is, a deliberate or reckless failure to place on equal footing the interests of its insured with its own interests when considering a settlement offer," or, in other words, the plaintiff must establish that the insurer engaged in "a pattern of behavior evincing conscious or knowing indifference to the probability that the insured would be held personally accountable for a large judgment if a settlement offer within the policy limits were not accepted." *Pavia*, 82 N.Y.2d at 453, 605 N.Y.S.2d at 211-12; *see also Vecchione v. Amica Mut. Ins. Co.,* 274 A.D.2d 576, 711 N.Y.S.2d 186 (2nd Dept. 2000). To prevail, a plaintiff must establish that the insured "lost an actual opportunity to settle … at a time when all serious doubts about [the insured's] liability were removed"; *Kumar v. American Transit Ins. Co.,* 57 A.D.3d 1449, 869 N.Y.S.2d 715 (4th Dept. 2008). The primary insurer could not be held liable to the excess insurer for bad-faith failure to accept a settlement offer within policy limits absent a showing that it had recklessly or consciously disregarded the excess insurer's rights. *Indemnity Ins. Co. of North America v. Transcontinental Ins. Co.,* 24 A.D.3d 121, 804 N.Y.S.2d 737 (1st Dept. 2005). If there are significant issues relating to liability (whether negligence or causation) or damages, a claim for bad faith will likely not succeed. *Zurich American Ins. Co. v Ins. Co. of State of Pennsylvania*, 209 A.D.3d 557, 175

N.Y.S.3d 220 (1st Dept. 2022).

An insurer should, in good faith, communicate all settlement demands and offers to the insured, since the insured (or excess carrier) may be willing to make up the difference. *See Smith v. General Acc. Ins. Co.,* 91 N.Y.2d 648, 674 N.Y.S.2d 267 (1998).

LH&D BENEFICIARY ISSUES

Change of Beneficiary

As a general rule, the method prescribed by the insurance contract must be followed in order to effect a change of beneficiary. *Lincoln Life & Annuity Co. v. Caswell*; 31 A.D.3d 1, 813 N.Y.S.2d 385 (1st Dept. 2006); *McCarthy v. Aetna Life Ins. Co.,* 92 N.Y.2d 436, 440, 681 N.Y.S.2d 790, 793 (1998). Strict compliance with the rule is not always required; however, mere intent on the part of the insured is not enough; there must be some affirmative act on the part of the insured to accomplish the change. Id. See also *Lamarche v. Metropolitan Life Ins. Co.,* 236 F.Supp.2d 34 (D. Me. 2002)(applying New York law).

The policy provisions generally determine the effective date of the change. Otherwise, a change of beneficiary will be effective where there has been substantial compliance with the policy. *MetLife Life and Annuity Co. of Connecticut v. Sobie*, 326 F. Appx. 3 (2d Cir. 2009).

Effect of Divorce on Beneficiary Designation

The designation of a former spouse as beneficiary is enforceable if not affirmatively revoked or waived. *McCarthy v. Aetna Life Ins. Co.,* 92 N.Y.2d 436, 681 N.Y.S.2d 790, 793 (1998).

A statute (EPTL 13-3.2) provides that the designation of a beneficiary in a life insurance policy shall not be impaired or defeated by any statute or rule of law governing the transfer of property by will, gift or intestacy. *In Storozynski v. Storozynski*, 10 A.D.3d 419, 781 N.Y.S.2d 141 (2d Dept. 2004), a divorcee's claim as beneficiary of a life insurance policy was upheld because the decedent did not execute a change in beneficiary after the divorce, and the divorcee did not explicitly waive her interest in the policy.

Waivers must be explicit, voluntary, and in good faith. *Diversified Inv. Advisors, Inc. v. Baruch*, 793 F.Supp.2d 577 (E.D.N.Y. 2011).

INTERPLEADER ACTIONS

NY CPLR 1006(a) provides that a stakeholder may commence an action of interpleader against two or more claimants. *See, e.g., First American Title Insurance Company v. Cumberland Farms Inc.,* 62 Misc.3d 1205(A) (Supr. Ct., Kings County, 2019) (title insurer)*; Lincoln Life and Annuity Company of New York v. Caswell,* 31 A.D.3d 1, 813 N.Y.S.2d 385 (1st Dep't 2006) (life insurance); *Sun Life Insurance and Annuity Company of New York v. Braslow*, 38 A.D.3d 529, 831 N.Y.S.2d 497 (2d Dep't 2007) (annuity).

A defendant stakeholder may bring in a claimant who is not a party by filing a summons and interpleader complaint. NY CPLR 1006(b).

Service of process must be made within the state, except when the stakeholder has a basis for asserting long-arm jurisdiction over the claimants under CPLR 301 or 302. Under the interpleader compact which New York enacted in 1962, New York courts will treat personal service made in other contracting states (currently, Maine, New Hampshire, New Jersey, and Pennsylvania) as if it were made in New York. See Note following CPLR 1006.

Most of the traditional limitations on interpleader were abolished by NY CPLR 1006(d). The claims against the stakeholder need not be identical, and the stakeholder need not be completely indifferent. However, it remains the law in New York that a stakeholder must be exposed to multiple liability as the result of adverse claims in order to use the interpleader procedure.

An interpleader action is equitable in nature and is not triable by a jury unless the parties are asserting legal claims and defenses against each other. *See Solar Spectrum LLC v. AEC Yield Capital LLC,* 2019 *WL 5381798 (S.D.N.Y. 2019); Geddes v. Rosen*, 22 A.D.2d 394, 255 N.Y.S.2d 585 (1st Dep't), aff'd, 16 N.Y.2d 816, 263 N.Y.S.2d 10, 210 N.E.2d 362 (1965).

An interpleader action to adjudicate rights and obligations relating to a money debt, as opposed to a specific res, requires personal jurisdiction over all the parties. *Hanna v. Stedman*, 230 N.Y. 326, 130 N.E. 566 (1921).

CPLR 1006(g) provides that a stakeholder may move for an order permitting it to pay the disputed proceeds into court, and that sum of money shall be deemed a res within the state for jurisdictional purposes. However, it raises due process issues to the extent that it empowers the court to adjudicate the rights of an absent claimant without requiring in personam jurisdiction. *See Cordner v. Metropolitan Life Ins. Co.,* 234 F. Supp. 765, 770-71 (S.D.N.Y. 1964), citing *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518, 36 S.Ct. 613, 60 L.Ed. 1140 (1916).

Availability of Fee Recovery

The court has discretion to award the stakeholder reasonable attorneys' fees. *See Republic Nat'l Bank of New York v. Lupo*, 215 A.D.2d 467, 627 N.Y.S.2d 402 (2d Dep't 1995). Such an award is appropriate if the plaintiff is a neutral stakeholder forced to participate in the dispute between the claimants. *Sun Life Ins. & Annuity Co. of New York v. Braslow*, 38 A.D.3d 529, 831 N.Y.S.2d 497 (2007). However, courts expect the fees to be relatively modest. *See Charles Schwab & Co. v. Makowska,* No. 11-CV-03755 DRH AKT, 2015 WL 590237 (E.D.N.Y. Feb. 11, 2015).

Differences in State vs. Federal

Federal interpleader practice permits nationwide service of process, and may be more efficacious than New York practice in dealing with out-of-state claimants provided that the amount in controversy exceeds $500 and at least two of the claimants are of diverse citizenship. See 28 U.S.C. §§ 1335, 2361.

The federal district court does not have subject matter jurisdiction until adverse claimants of diverse citizenship are served. *See District Attorney of New York County v. Republic of the Philippines,* 307 F.Supp.3d 171 (S.D.N.Y. 2018); *Metropolitan Life Ins. Co. v. Dumpson*, 194 F. Supp. 9, 11 (S.D.N.Y. 1961).