ALTHOUGH THE TRUCK DRIVER WAS STEPPING OFF A RAMP ATTACHED TO THE BACK OF HIS TRACTOR TRAILER WHEN HE WAS STRUCK BY A VAN, THE DRIVER WAS OCCUPYING THE TRUCK WITHIN THE MEANING OF THE INSURER'S UNINSURED MOTORIST COVERAGE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the insurer's (Utica's) petition to permanently stay arbitration in this traffic accident case should not have been granted. A truck driver, Steward, was struck by a van when he was stepping down from a ramp attached to the back of the tractor trailer. Utica argued Steward was a pedestrian, not an occupant of the truck and therefore Steward was not covered:

> The minivan that hit Steward had minimal insurance coverage, and Steward filed a Request for SUM Arbitration seeking coverage under the New York Supplementary Uninsured/Underinsured Motorists ("SUM") Endorsement of his employer's Utica Mutual commercial automobile liability insurance policy ... .
>
> The SUM endorsement in the petitioner's policy, consistent with the statutory requirement, defines "occupying" as "in, upon, entering into, or exiting from a motor vehicle" (see Insurance Law § 3420[f][3]). In accordance with the liberal interpretation afforded the term "occupying" ... , we find, as a matter of law, that Steward was "upon" the tractor-trailer at the time of the accident such that he was "occupying" the tractor-trailer within the meaning of the SUM endorsement. Steward's testimony established that at the time of the accident, he had stepped upon the Moffet ramp which was attached to the tractor-trailer, and that he was struck by the minivan while his right leg was still on the ramp, and while he was stepping down with his left leg. Thus, although Steward had been away from the tractor-trailer during the work day, his testimony established that at the time of the accident, he was in physical contact with the vehicle, such that he was "occupying" it ... . Matter of Utica Mut. Assur. Co. v Steward, 2020 NY Slip Op 00285, Second Dept 1-17-20

DEFENDANTS' ATTORNEYS HAD APPARENT AUTHORITY TO BIND DEFENDANTS TO THE OPEN-COURT STIPULATED SETTLEMENT OF $8,875,000; IN ADDITION, DEFENDANTS RATIFIED THE STIPULATION BY FAILING TO TIMELY OBJECT TO IT (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Acosta, determined that defendants (the Infiniti defendants) were bound by an open-court stipulated settlement of $8,875,000 in this personal injury case. The attorneys had apparent authority to bind the defendants. And the defendants ratified the stipulation by failing to timely object to it:

> I write to highlight the fundamental principle that parties are bound by stipulations signed in open court by their attorneys. The issue arose in the context of a negligence case, where plaintiff was seriously injured when she was struck by a motor vehicle while standing on a sidewalk median in Brooklyn. The vehicle was owned by defendant Infiniti of Manhattan, Inc. and driven by defendant Massamba Seck (the Infiniti defendants). Plaintiff suffered serious injuries and required extensive hospitalization and multiple surgeries. At issue in this case is whether the Infiniti defendants are bound by a settlement agreement entered into by their attorneys. We find that the Infiniti defendants are bound, because their attorneys had apparent authority to bind them to the $8,875,000 judgment. Significantly, there is no affidavit or testimony by Infiniti stating that Infiniti, or any of its employees, was unaware of the settlement or that Infiniti did not authorize the settlement. The only ones making this claim are the lawyers from the firm that was hired by the insurance companies to defend the Infiniti defendants. The fact that one of the insurers is now unable to pay its intended $5 million portion does not inure to the Infiniti defendants' benefit. Rather, the Infiniti defendants are responsible for the portion of the agreed-upon amounts that the insurers do not pay. To accept their position would alter the way litigation is conducted in New York State. Courts would have to conduct colloquies in every case to make sure that the parties, notwithstanding their attorneys' actions in appearing for them on numerous occasions and signing stipulations, acquiesced in the terms of the stipulations. That is unacceptable, especially here, where the Infiniti defendants never objected to the stipulation until the filing of the instant order to show cause more than a year and six months after the stipulation was signed in open court. Pruss v Infiniti of Manhattan, Inc., 2020 NY Slip Op 00229, First Dept 1-9-20

THE CARRIER WHICH HAD ISSUED A BUSINESS AUTOMOBILE INSURANCE POLICY

COVERING THE INSURED'S FLATBED TRUCK WAS OBLIGATED TO DEFEND THIS ACTION STEMMING FROM AN INJURY INCURRED WHILE UNLOADING A TRACTOR FROM THE FLATBED TRUCK; UNLOADING A TRUCK IS CONSIDERED OPERATION OF THE TRUCK UNDER VEHICLE AND TRAFFIC LAW 388 (THIRD DEPT).

The Third Department determined plaintiff-insurer was obligated to defend and the insured in this personal injury case stemming from the unloading of a tractor from a flatbed truck owned by the insured. The tractor rolled over the insured's son as it was being unloaded. The son and his wife sued the insured and the insured's farm. Plaintiff carrier brought this action for a declaratory judgment that it was not obligated to defend or indemnify, apparently claiming the (insured's) truck was not being operated when the accident occurred:

> If anything within the "four corners of the complaint suggest[s] . . . a reasonable possibility of coverage," the insurer must defend, even though it may not ultimately be bound to pay because the insured may not be liable ... .
>
> Pursuant to the Vehicle and Traffic Law, "[e]very owner of a vehicle used or operated in this state shall be liable and responsible for . . . injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner" (Vehicle and Traffic Law § 388 [1]) ... . * * * "The policy of insurance issued must be as broad as the insured owner's liability for use of the vehicle by the owner or anyone using the vehicle with his [or her] permission" ... .
>
> Loading and unloading of a covered vehicle constitute "use or operation" pursuant to Vehicle and Traffic Law § 388 (1) ... , and a vehicle does not have to be in motion to be in "use or operation" ... . * * *
>
> George Henderson [the insured] loaded and secured the tractor on the flatbed truck, drove the flatbed truck to the farm, rolled the bed back and tilted it, and operated the winch that was supposed to be holding the tractor in place. He also regularly requested or allowed Charles Henderson [his son} and the other individual to unload machinery from the flatbed truck. Charles Henderson asserted that, due to George Henderson not paying attention, the winch cable went slack, causing it to release from the tractor and allow the tractor to roll. George Henderson is potentially both directly and vicariously liable for negligence in the personal injury action ... , and there is prima facie "reasonable possibility of coverage" ... . Thus, plaintiff is obliged to defend George Henderson and the farm in the underlying action. Farm Family Cas. Ins. Co. v Henderson, 2020 NY Slip Op 00021, Third Dept 1-2-20

INSURANCE REGULATION WHICH PROHIBITS TITLE INSURERS FROM PROVIDING VALUABLE INDUCEMENTS TO ATTRACT TITLE INSURANCE BUSINESS IS NOT UNCONSTITUTIONALLY VAGUE, SUPREME COURT REVERSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined Insurance Regulation 208 (11 NYCRR part 228), which prohibits title insurers from providing valuable inducements to attract title insurance business, is not unconstitutionally vague:

> Petitioners contend that section 228.2(c) is unconstitutionally vague in setting forth a non-exhaustive list of activities that are "permissible, provided[,]" among other things, that they are "reasonable and customary, and not lavish or excessive" ... . The court should have rejected this vagueness challenge, since section 228.2(c) "is sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden," and "the enactment provides officials with clear standards for enforcement so as to avoid resolution on an ad hoc and subjective basis" ... . [T}he words "lavish" and "excessive," standing in clear contrast with the word "reasonable," provide adequate notice of the type of behavior that is proscribed. The word "customary" also sets forth a standard that can be understood by an ordinary person ... .
>
> The provisions of section 228.2(c) generally permitting advertising, charitable contributions, and political contributions are consistent with the right to free speech under the First Amendment to the United States Constitution and article I, § 8 of the New York Constitution. ... The content-neutral provisions at issue in this case are narrowly tailored to the substantial government interest of clarifying a statute intended to "prevent consumers from being required to subsidize unscrupulous exchanges of valuable things for real estate professionals" ... , and that interest is "unrelated to the suppression of free expression" ... . Matter of New York State Land Tit. Assn., Inc. v New York State Dept. of Fin. Servs., 2019 NY Slip Op 09366, First Dept 12-26-19

THE BUILDING OWNER AND MANAGER WERE ADDITIONAL INSUREDS UNDER A POLICY ISSUED TO THE CONTRACTOR HIRED TO RENOVATE CONCRETE WALKWAYS; THE OWNER AND MANAGER ARE ENTITLED TO COVERAGE FOR A SLIP AND FALL ALLEGED TO HAVE BEEN CAUSED BY PAINTING THE WALKWAYS ALL THE SAME COLOR AND THEREBY DISGUISING A CHANGE IN ELEVATION (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Kapnick, determined plaintiffs are additional insureds under an insurance policy issued by defendant to nonparty Upgrade, the contractor hired to restore concrete catwalks. Plaintiffs, Windsor Apartments and Argo Real Estate, are entitled to coverage for a slip and fall in plaintiffs' building allegedly caused by painting the floor all the same color, thereby disguising a change in elevation:

> Defendant State National issued a commercial general liability (CGL) policy to Upgrade during the relevant time period. The policy contained a "Blanket Additional Insured" Endorsement that limited coverage to operations performed by or on behalf of Upgrade:
>
> > "It is agreed that this Policy shall include as additional Insureds any person or organization to whom the Named Insured [Upgrade] has agreed by written contract to provide coverage, but only with respect to operations performed by or on behalf of the Named Insured and only with respect to occurrences subsequent to the making of such written contract."
>
> The State National policy also stated that its coverage was primary, with exceptions not applicable here, for damages arising out of the premises or operations for which an entity is added as an additional insured.
>
> The policy issued by plaintiff Fireman's Fund Insurance Company (Fireman's) to Windsor and Argo provided that coverage was excess when its insureds, Windsor and Argo, have other primary insurance available to them covering liability for damages arising out of the premises or operations for which they have been added as an additional insured. * * *
>
> … [S]ince the injury to the plaintiff in the underlying action here "arose out of" Upgrade's operation of painting the walkways, plaintiffs are additional insureds under the State National policy and the policy is primary in connection with the underlying action. Fireman's Fund Ins. Co. v State Natl. Ins. Co., 2019 NY Slip Op 09399, First Dept 12-26-19

THE INSURER IN THIS PERSONAL INJURY CASE DID NOT MEET ITS HEAVY BURDEN TO DEMONSTRATE ITS INSURED'S NON-COOPERATION SUCH THAT THE INSURER WAS NOT OBLIGATED TO INDEMNIFY THE INSURED; CRITERIA EXPLAINED (SECOND DEPT).

The Second Department determined the defendant insurer, Utica. did not meet its heavy burden to demonstrate its insured's (J & R's) non-cooperation such that the insurer was entitled to a default judgment declaring that it is not obligated to indemnify J & R in the underlying personal injury action in which the injured plaintiff was awarded nearly $700,000. Despite numerous scheduled depositions, J & R's principal, Singh, never appeared to be deposed and his answer was ultimately stricken:

> "To effectively deny coverage based upon lack of cooperation, an insurance carrier must demonstrate (1) that it acted diligently in seeking to bring about the insured's cooperation, (2) that the efforts employed by the insured were reasonably calculated to obtain the insured's cooperation, and (3) that the attitude of the insured, after his or her cooperation was sought, was one of willful and avowed obstruction" … . " [M]ere efforts by the insurer and mere inaction on the part of the insured, without more, are insufficient to establish non-cooperation'" … .
>
> Here, Utica failed to meet its "heavy" burden of demonstrating J & R's non-cooperatin … . In support of its motion, Utica established that between January 2009 and April 2009, more than one year before J & R's answer was stricken, it made diligent efforts, through written correspondence, numerous telephone calls, and visits to Singh's home, that were reasonably calculated to bring about J & R's cooperation. Utica's submissions, however, failed to demonstrate that the conduct of J & R constituted "willful and avowed obstruction" … . Foddrell v Utica First Ins. Co., 2019 NY Slip Op 08991, Second Dept 12-18-19

THE INSURANCE LAW REQUIRED SUBMITTING THE DISPUTE BETWEEN TWO

CARRIERS TO ARBITRATION; THEREFORE SUPREME COURT DID NOT HAVE SUBJECT MATTER JURISDICTION OVER THE MATTER; THE LACK OF SUBJECT MATTER JURISDICTION CAN BE RAISED AT ANYTIME (SECOND DEPT).

The Second Department, reversing Supreme Court in this traffic accident case, determined the Insurance Law required that the matter involving a coverage dispute between two insurance carriers (Repwest and Hereford) be submitted to arbitration. Therefore Supreme Court did not have subject matter jurisdiction:

> The defendants … were passengers in the livery vehicle and no-fault benefits were paid on their behalf by Hereford. Repwest alleged that there is no coverage for the subject incident because it was not an accident, but rather the result of an intentional act/fraudulent scheme. Thereafter, Hereford interposed an answer to the complaint and asserted a counterclaim against Repwest, among others, for loss transfer pursuant to Insurance Law § 5105(a) … .
>
> Pursuant to Insurance Law § 5105(b), "[t]he sole remedy of any insurer or compensation provider to recover on a claim arising pursuant to subsection (a) hereof, shall be the submission of the controversy to mandatory arbitration pursuant to procedures promulgated or approved by the superintendent" … . Contrary to Hereford's contention, since its counterclaim is for loss transfer pursuant to section 5105(a), the counterclaim is subject to mandatory arbitration and the Supreme Court had no subject matter jurisdiction over the counterclaim … .
>
> Although Repwest did not seek dismissal of the counterclaim in the Supreme Court, "a court's lack of subject matter jurisdiction is not waivable, but may be [raised] at any stage of the action, and the court may, ex mero motu [on its own motion], at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action" … . Repwest Ins. Co. v Hanif, 2019 NY Slip Op 09047, Second Dept 12-18-19

POLICIES DID NOT REQUIRE THE INSURER TO DEFEND THE INSURED, BUT DID REQUIRE THE INSURER TO PAY THE INSURED'S DEFENSE COSTS (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Friedman, determined that the terms of the policies at issue did not obligate the insurer to defend the insured, but do require the insurer to pay the insured's defense costs. The opinion is too fact-specific and too comprehensive to fairly summarize here:

> In this insurance coverage action brought by a putative additional insured, the liability insurance policies at issue do not impose on the insurers a duty to defend the insured in a covered action. The policies do, however, require the insurers to reimburse the insured for defense costs incurred in an action "in which damages . . . to which this insurance applies are alleged." The ultimate factual determination in the underlying personal injury actions was that the loss was actually outside the scope of the additional insured coverage. This determination, while it means that the insurers have no duty to indemnify the putative additional insured for its liability to pay damages, is not conclusive of a different question posed to us, which is whether the putative additional insured is entitled reimbursement of its defense costs. * * *
>
> Under the terms of the … policy, the timing of the Port Authority's demand for reimbursement does not defeat its claim for reimbursement of its defense costs through the time its liability was adjudicated in the underlying actions. … [The] policy entitles the insured to coverage of the costs it incurred in defending "any . . . suit' to which this policy applies," and the policy defines the term "suit" to mean an action "in which damages because of bodily injury' . . . to which this insurance applies are alleged" … . … [U]ntil the jury rendered the verdict adverse to the Port Authority, each of the underlying actions remained a " suit' to which th[e] … policy applie[d]" … . Port Auth. of N.Y. & N.J. v Brickman Group Ltd., LLC, 2019 NY Slip Op 08958, First Dept 12-12-19

QUESTION OF FACT WHETHER THERE EXISTED A SPECIAL RELATIONSHIP BETWEEN PLAINTIFFS AND DEFENDANT INSURANCE BROKER SUCH THAT THE BROKER COULD BE LIABLE FOR THE FAILURE TO PROCURE ADEQUATE COVERAGE FOR A DEMOLITION PROJECT (FIRST DEPT).

The First Department, reversing Supreme Court, determined there is a question of fact whether a special relationship existed between plaintiffs and defendant insurance broker, thereby making the broker liable for the failure to procure adequate coverage for a demolition contract:

Issues of fact exist as to whether a special relationship arose between plaintiff STB Investments Corporation and its managing agent plaintiff 303 West 42nd Street Realty Co. (plaintiffs), on the one hand, and defendant insurance broker, on the other, that imposed on defendant a duty to advise plaintiffs as to insurance coverage that would have included the loss arising from plaintiffs' demolition project … . Plaintiffs contend that the special relationship arose from an interaction with defendant in which they relied on defendant's expertise as to coverage. There is evidence that plaintiffs' property manager, who allegedly had never before purchased insurance for a demolition project, requested that defendant obtain adequate coverage for that particular risk, and that defendant agreed to do so, reviewed the demolition contract as part of its efforts, and discussed with plaintiffs the demolition contractor's coverage in the larger context of determining the appropriate level of coverage to obtain for plaintiffs … . STB Invs. Corp. v Sterling & Sterling, Inc., 2019 NY Slip Op 08606, First Dept 12-3-19

SUPREME COURT PROPERLY DETERMINED THE COLLATERAL SUPPORTING A POSTED BAIL BOND WAS INSUFFICIENT TO ENSURE THE ACCUSED'S RETURN TO COURT, APPELLATE DIVISION REVERSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, reversing the Appellate Division, determined that Supreme Court did not abuse its discretion when it reviewed the collateral for a bail bond which had been posted by an insurer and found the collateral insufficient:

> "Following the posting of a bail bond," CPL 520.30 (1) permits a court to "conduct an inquiry for the purpose of determining," among other things, "the value and sufficiency of any security offered[] and whether any feature of the undertaking contravenes public policy." The statute also allows inquiry "into other matters appropriate to the determination, which include but are not limited to" six enumerated factors (CPL 520.30 [1]). For instance, the court has broad discretion to examine "[t]he background, character and reputation of any person who has indemnified or agreed to indemnify an obligor upon the bond" (CPL 520.30 [1] [d]) and the source of any property that will be used as indemnification as well as "whether any such money or property constitutes the fruits of criminal or unlawful conduct" … . * * *
>
> The insurance company … has a financial incentive in obtaining a defendant's release on bail so that it may retain its premium. This incentive is separate from the insurance company's interest in securing the defendant's return to court to avoid forfeiting its pledged security. The court, on the other hand, is concerned only with the defendant's continued appearances.
>
> Supreme Court … correctly interpreted the statute and did not abuse its discretion when it disapproved the insurance company bail bond package on public policy grounds, specifically that the limited collateral pledged failed to adequately ensure [the accused's] return to court … . People ex rel. Prieston v Nassau County Sheriff's Dept., 2019 NY Slip Op 08447, CtApp 11-21-19