

Who's on the Hook?

Part 3: Litigation and Insurance
Issues in Premises Liability Cases

MATERIALS BY
Andrew Smiley, Esq.
Rosa Feeney, Esq.

—New York State—
ACADEMY
OF TRIAL LAWYERS

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MICHAEL B. TITOWSKY, ESQ.

Hearing Officer, New York County

Michael B. Titowsky, Esq. is a highly experienced attorney who has represented thousands of clients in court litigation and private mediation throughout the New York Metropolitan area for more than 40 years. As both an attorney in private practice and as a Hearing Officer for NAM, Mr. Titowsky has successfully resolved personal injury cases, some of which resulted in catastrophic injury, including labor law, slip and fall, premises liability, and automobile accidents.

Over the course of his career, Mr. Titowsky has represented clients in both private and court-ordered mediations and has served as a court-appointed mediator in the New York State Supreme Court. A strong advocate of Alternative Dispute Resolution, his years of mediation experience have enhanced his understanding and sensitivity to the physical and emotional hardships present in personal injury cases. Mr. Titowsky is respected in the legal community for his integrity, legal acumen, and reputation for being fair-minded and compassionate.

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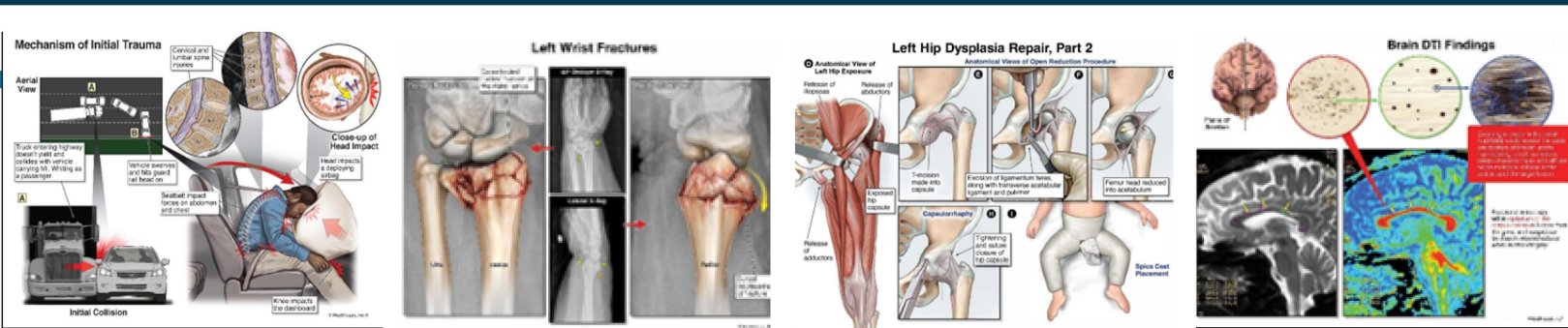
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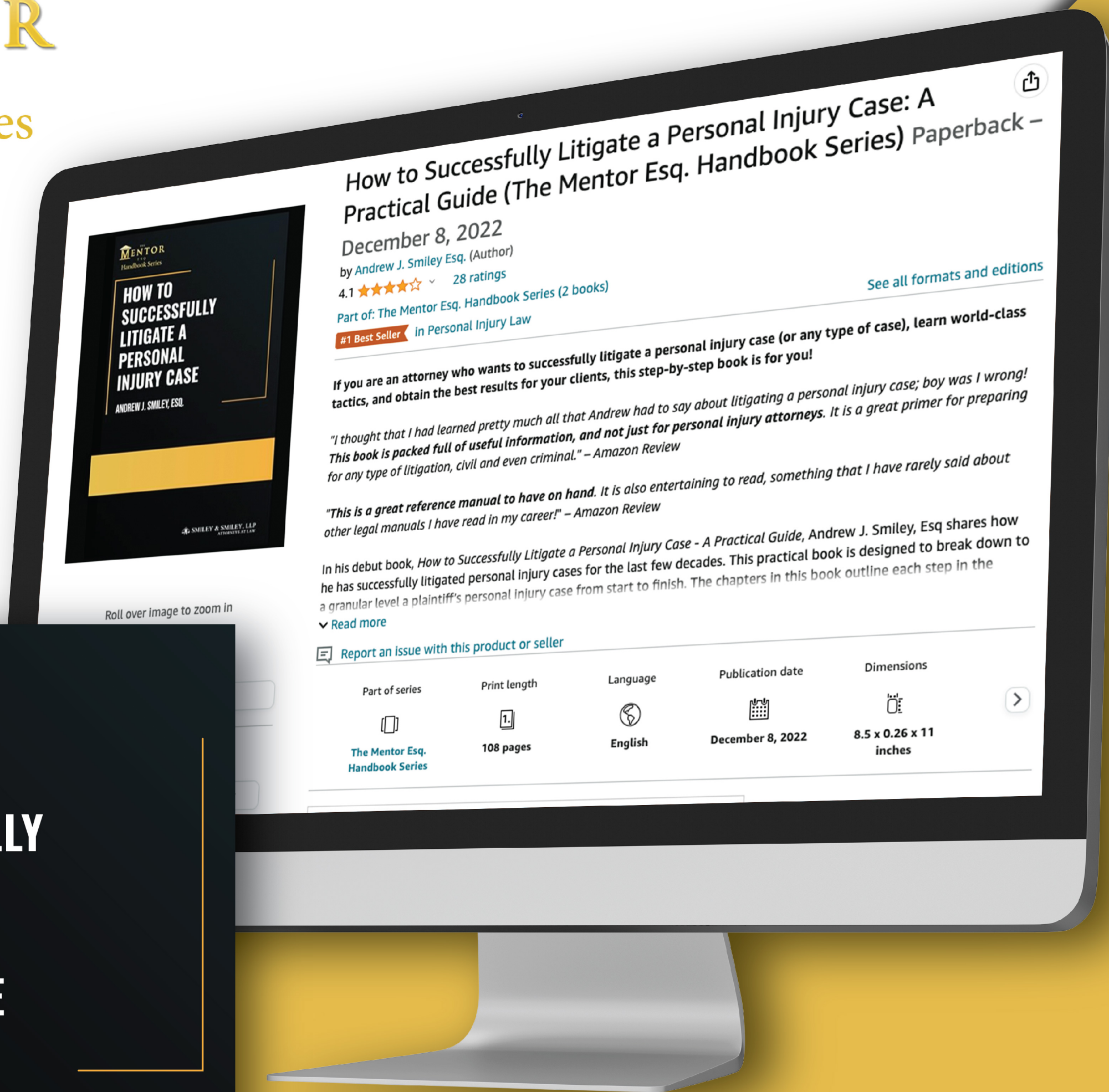
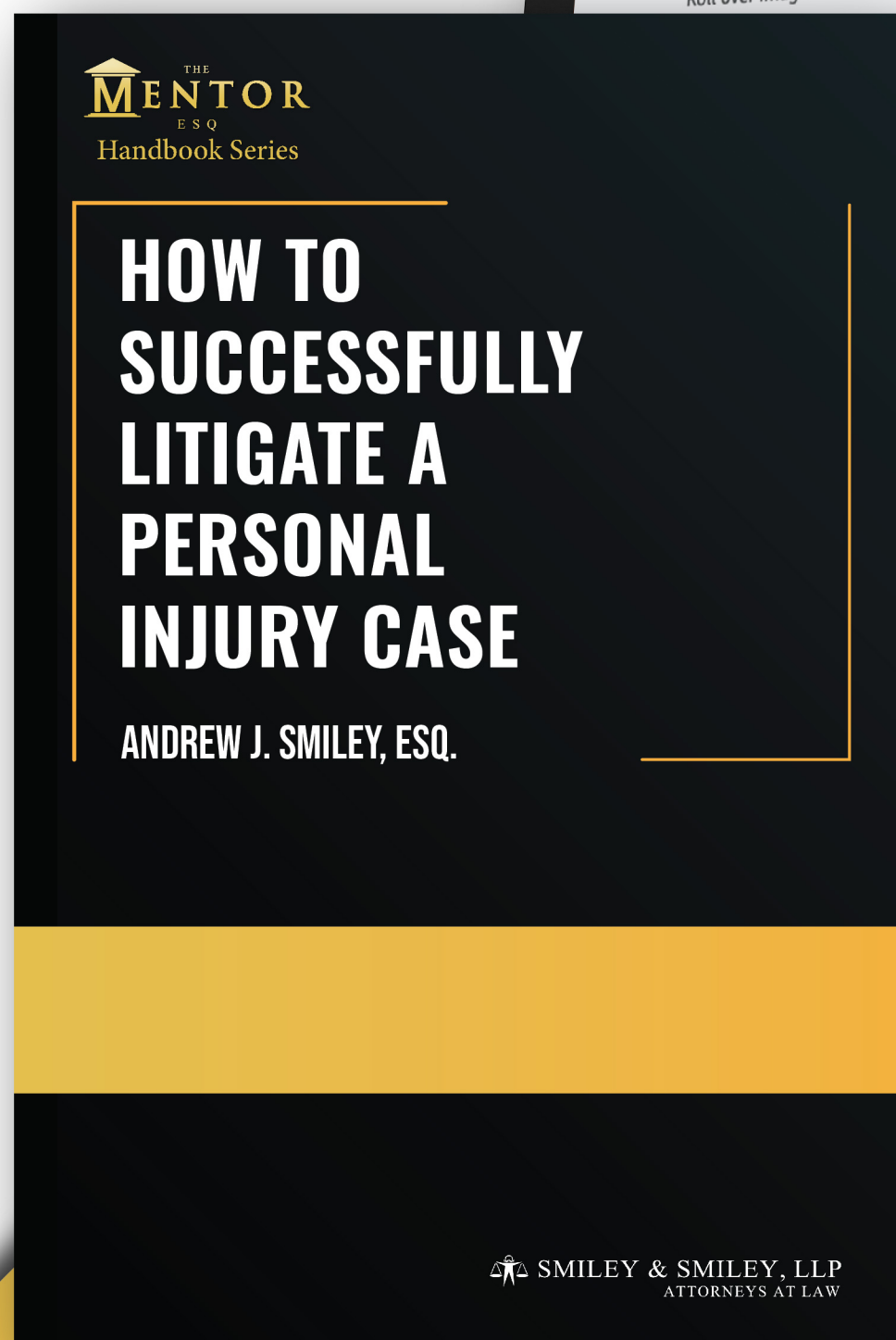
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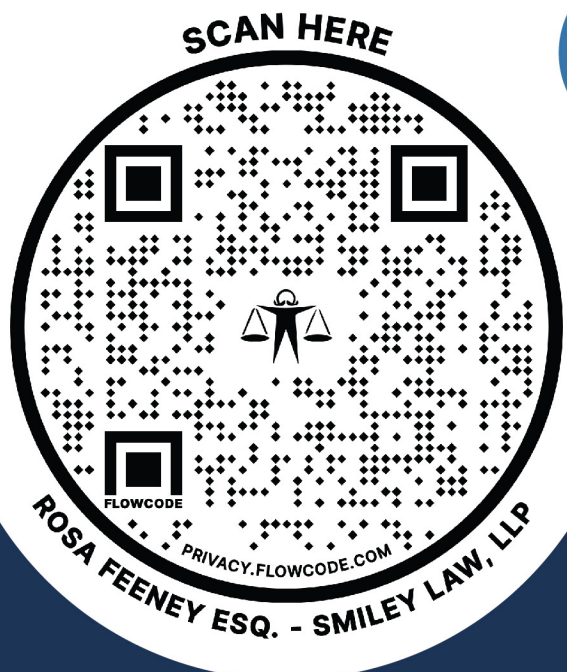
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SMILEY & SMILEY, LLP
ATTORNEYS AT LAW



Andrew J. Smiley, Esq.
Smiley & Smiley, LLP
28 Liberty Street, NYC 10005
212.986.2022
asmiley@smileylaw.com
www.smileylaw.com
www.thementoresq.com

CURRICULUM VITAE

Education:

· Brooklyn Law School - Juris Doctorate 1996

Moot Court Honor Society - Vice President/Executive Board (Chair of Trial Division)
Moot Court Honor Society - Competitor - National Appellate Trademark Competition
Moot Court Honor Society – Coach, National Trial Team – Regional Champions
CALI Excellence For The Future Award - Advanced Legal Research
Judge Edward and Doris A. Thompson Award for Excellence in Trial Advocacy

· Tulane University, New Orleans, LA - Bachelor of Arts (Honors, Psychology) 1993

Professional:

· *Smiley & Smiley, LLP*

Managing Partner & Senior Trial Attorney, January 2001 - present

Associate, June 1996 - December 2000

Law Clerk, September 1993 - June 1996

Major verdicts and settlements in plaintiffs' personal injury, medical malpractice and wrongful death litigation

Andrew J. Smiley, Esq. Curriculum Vitae, Page 2

- *Adjunct Clinical Instructor of Law - Brooklyn Law School, Trial Advocacy Program (1998-2004)*
- *The Mentor Esq. Podcast – A Podcast for Lawyers*
 - Founder & Host (2019 – Present)
- *New York “Super Lawyer”*
2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024

Bar Admissions:

- The United States Supreme Court
- New York State Courts
- United States Eastern District, Southern District & Northern District of New York
- United States District Court of Vermont

Organizations/Affiliations:

- New York State Academy of Trial Lawyers
 - Immediate Past President (May 2018- May 2019)
 - President (May 2017 – May 2018)
 - President-Elect – (April 2016- May 2017)
 - Vice President – 1st Dept. (July 2013-May 2016)
 - Executive Committee (May 2019 – present)
 - Board of Directors (2013- present)
 - Judicial Screening Committee (2013- present)
 - Master CLE Instructor (2020 – present)
 - CLE Instructor (2013 – present)
- New York City Trial Lawyers Alliance
 - Chairman of Board of Governors (July 2017 – July 2019)
 - President (July 2015 – July 2017)
 - Vice President (June 2013 – July 2015)
 - Treasurer (June 2011 – June 2013)
 - Secretary (June 2009- June 2011)
 - Board of Directors (2000-present)
- Judicial Screening Committee, Kings County Democratic Party (2013)
- New York State Bar Association
- Brooklyn Bar Association
 - Medical Malpractice Committee
 - Supreme Courts Committee
- American Bar Association
- The American Association for Justice

Andrew J. Smiley, Esq. Curriculum Vitae, Page 3

- Brooklyn Law School Alumni Association
- National Order of Barristers
- Lime Rock Drivers Club
- Porsche Club of America (Connecticut Valley Region)
- Porsche Sim Racing League
- Sports Car Driving Association (SCDA)
- Just Hands Racing Foundation – Board of Directors & Legal Counsel

Authored Books

Smiley, Andrew J. *How to Successfully Litigate a Personal Injury Case – A Practical Guide*, 2022, The Mentor Esq. Handbook Series – Amazon Best Seller in Personal Injury Law

Smiley, Andrew J. *Successful Trial Skills – A Practical Guide to Jury Selection, Opening Statements, Direct & Cross Examinations and Closing Arguments*, 2024, The Mentor Esq. Handbook Series – Amazon #1 New Release in Trial Practice

Continuing Legal Education (CLE) Presentations:

(75) *Introducing Evidence and Impeaching Witnesses*, Office of The New York State Attorney General – Legal Education and Professional Development, September 26, 2024

(74) *Walking the Line: Settlement Negotiation Skills & Ethics*, New York State Academy of Trial Lawyers, July 9, 2024

(73) *Novel Negligence Cases – Part 2: How to Successfully Litigate Dram Shop Cases*, New York State Academy of Trial Lawyers, June 5, 2024

(72) *Working with Experts*, Office of The New York State Attorney General – Legal Education and Professional Development, April 2, 2024

(71) *Novel Negligence Cases – Part 3: How to Successfully Litigate Ski Accident Cases*, New York State Academy of Trial Lawyers, March 6, 2024

(70) *Novel Negligence Cases – Part 1: How to Successfully Litigate Personal Trainer and Gym Negligence Cases*, New York State Academy of Trial Lawyers, January 3, 2024

(69) *Litigation Back to Basics – Part 3: Introducing Evidence and Impeaching Witnesses*, New York State Academy of Trial Lawyers, December 6, 2023

(68) *Litigation Back to Basics – Part 2: Working With Experts*, New York State Academy of Trial Lawyers, November 1, 2023

(67) *Construction Site Injury Litigation: Pursuing or Defending Claims Against Site Owners, Contractors, and Other Third Parties*, Strafford CLE/BarBri, October 17, 2023

Andrew J. Smiley, Esq. Curriculum Vitae, Page 4

(66) *Litigation Back to Basics – Part 1: Preparing and Conducting Depositions*, New York State Academy of Trial Lawyers, October 4, 2023

(65) *Depositions*, Office of The New York State Attorney General – Legal Education and Professional Development, September 28, 2023

(64) *How to Litigate a Medical Malpractice Case – Part 6: The Trial*, New York State Academy of Trial Lawyers, June 7, 2023

(63) *How to Litigate a Medical Malpractice Case – Part 5: Pre-Trial Preparation*, New York State Academy of Trial Lawyers, May 3, 2023

(62) *How to Litigate a Medical Malpractice Case – Part 4: Discovery & Depositions*, New York State Academy of Trial Lawyers, April 4, 2023

(61) *How to Litigate a Medical Malpractice Case – Part 3: Commencing the Action*, New York State Academy of Trial Lawyers, February 28, 2023

(60) *How to Litigate a Medical Malpractice Case – Part 2: Expert Selection*, New York State Academy of Trial Lawyers, February 1, 2023

(59) *How to Litigate a Medical Malpractice Case – Part 1: The Initial Screening*, New York State Academy of Trial Lawyers, January 4, 2023

(58) *How to Litigate a Construction Accident Case – Part 4: Motion Practice*, New York State Academy of Trial Lawyers, December 7, 2022

(57) *Preparing for Depositions: Best Practices for Asking and Answering Questions*, Office of The New York State Attorney General, 2022 Legislature Program, December 6, 2022

(56) *How to Litigate a Construction Accident Case – Part 3: Depositions*, New York State Academy of Trial Lawyers, November 2, 2022

(55) *How to Litigate a Construction Accident Case – Part 2: Commencing The Action*, New York State Academy of Trial Lawyers, October 3, 2022

(54) *Trial Series: Part 2 - Opening Statement Webinar*, Queens County Bar Association, September 22, 2022

(53) *How to Litigate a Construction Accident Case – Part 1: An Overview of New York Labor Law*, New York State Academy of Trial Lawyers, September 7, 2022

(52) *How to Litigate a Catastrophic Automobile Accident Case – Part 6: The Trial*, New York State Academy of Trial Lawyers, July 6, 2022

(51) *How to Litigate a Catastrophic Automobile Accident Case – Part 5: Mediation and Settlement*, New York State Academy of Trial Lawyers, June 2, 2022

(50) *How to Litigate a Catastrophic Automobile Accident Case – Part 4: Expert Depositions*, New York State Academy of Trial Lawyers, May 4, 2022

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Continuing Legal Education (CLE) Presentations Continued:

(49) *How to Litigate a Catastrophic Automobile Accident Case – Part 3: Liability and Damages Experts*, New York State Academy of Trial Lawyers, April 6, 2022

(48) *How to Litigate a Catastrophic Automobile Accident Case – Part 2: Commencing the Action*, New York State Academy of Trial Lawyers, March 2, 2022

(47) *How to Litigate a Catastrophic Automobile Accident Case – Part 1: The Investigation*, New York State Academy of Trial Lawyers, February 4, 2022

(46) *Anatomy of a Trial, a Trial Skills Series – Part 5: Summations*, New York State Academy of Trial Lawyers, January 5, 2022

(45) *Anatomy of a Trial, a Trial Skills Series – Part 4: Cross-Examination*, New York State Academy of Trial Lawyers, December 1, 2021

(44) *Anatomy of a Trial, a Trial Skills Series – Part 3: Direct Examination*, New York State Academy of Trial Lawyers, November 3, 2021

(43) *Anatomy of a Trial, a Trial Skills Series – Part 2: Opening Statements*, New York State Academy of Trial Lawyers, October 6, 2021

(42) *Anatomy of a Trial, a Trial Skills Series – Part 1: Jury Selection*, New York State Academy of Trial Lawyers, September 10, 2021

(41) *How to Successfully Litigate a Personal Injury Case Series - Part 7: It's a Wrap!*, New York State Academy of Trial Lawyers, July 7, 2021

(40) *How to Successfully Litigate a Personal Injury Case Series - Part 6: The Trial*, New York State Academy of Trial Lawyers, June 2, 2021

(39) *How to Successfully Litigate a Personal Injury Case Series - Part 5: Pre-Trial Disclosures and Gearing up for Trial*, New York State Academy of Trial Lawyers, May 5, 2021

(38) *How to Successfully Litigate a Personal Injury Case Series - Part 4: Depositions*, New York State Academy of Trial Lawyers, April 7, 2021

(37) *How to Successfully Litigate a Personal Injury Case Series - Part 3: Your Adversary, the Preliminary Conference and Initial Discovery*, New York State Academy of Trial Lawyers, March 3, 2021

(36) *How to Successfully Litigate a Personal Injury Case Series - Part 2: Early Settlement, Jurisdiction, Venue & Commencing The Lawsuit*, New York State Academy of Trial Lawyers, February 3, 2021

(35) *How to Successfully Litigate a Personal Injury Case Series - Part 1: Getting the Case, Investigation and Ready to File*, New York State Academy of Trial Lawyers, January 6, 2021

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Continuing Legal Education (CLE) Presentations Continued:

(34) *Brick by Brick: Building a Personal Injury Practice*, New York State Academy of Trial Lawyers, December 10, 2020

(33) *Working with Experts to Build Your Case*, New York State Academy of Trial Lawyers, October 8, 2020

(32) *Fitness Industry Liability: Gyms, Trainers and Waivers*, The Mentor Esq. Podcast, September 8, 2020

(31) *Let's Make a Federal Case Out of It: Litigating Personal Injury Cases in Federal Court*, New York State Academy of Trial Lawyers, June 9, 2020

(30) *Crisis Management - The Corona Virus Pandemic*, The Mentor Esq. Podcast, April 9, 2020

(29) *Do You Have a Federal Tort Claims Act Case in Your Office*, New York State Academy of Trial Lawyers, December 10, 2019

(28) *Auto and Truck Claims, Accidents and Litigation 2019 – Evaluating Damages and Use of Experts*, New York State Bar Association, September 9, 2019

(27) *Thoughts and Strategies in the Ever-Evolving Product Liability Litigation – The Plaintiff's Perspective*, The Defense Association of New York, March 12, 2019

(26) *Trial Techniques: Lessons on Dealing with Millennial Jurors; Summations; Requests to Charge and Post-Trial Motions*, The Defense Association of New York, January 31, 2019

(25) *Trial Techniques: Interactive Lessons from the Plaintiff and Defense Perspectives*, The Defense Association of New York, September 17, 2018

(24) *Punitive Damages – What to Plead, What to Prove: Medical Malpractice*, New York State Academy of Trial Lawyers, June 8, 2017 & June 21, 2017

(23) *Presenter on Evidence, 2016 Annual Update, Precedents & Statutes for Personal Injury Litigators*, New York State Academy of Trial Lawyers, September 30, 2016

(22) *Medical Malpractice in New York: A View from All Sides: The Bench, The Bar and OCA*, New York State Bar Association, October 11, 2015

(21) *Effectively Using Experts in Personal Injury Cases*, Lawline, October 8, 2015

(20) *Killer Cross Examination Strategies*, Clear Law Institute, April 21, 2015

(19) *Powerful Opening Statements*, Clear Law Institute, January 13, 2015

(18) *The Dram Shop Law: New York Liquor Liability*, Lawline.com, November 20, 2014

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Continuing Legal Education (CLE) Presentations Continued:

- (17) *Killer Cross Examination Strategies*, Lawline.com, November 20, 2014
- (16) *Trial Techniques: Tricks of the Trade Update*, Lawline.com, October 14, 2014
- (15) *Personal Trainer Negligence Update*, Lawline.com, October 14, 2014
- (14) *Trial Techniques – Part 2: Cross- Examination & Closing Arguments*, Brooklyn Bar Association, May 15, 2014
- (13) *Trial Techniques – Part 1: Jury Selection, Opening Statements & Direct Examination*, Brooklyn Bar Association, May 7, 2014
- (12) *Health, Fitness & Adventure Sports Liability*, New York State Bar Association, August 1, 2013
- (11) *Direct Exams: How To Make Your Witnesses Shine*, New York State Academy of Trial Lawyers, May 6, 2013
- (10) *Opening Statements: A Recipe for Success*, Lawline.com, August 7, 2012
- (9) *“You Had Me at Hello”: Delivering an Effective and Powerful Opening Statement*, New York State Academy of Trial Lawyers, April 1, 2012
- (8) *Preparing the Construction Accident Case*, New York County Lawyers Association, March 26, 2012
- (7) *The Nuts and Bolts of a Trial*, New York State Academy of Trial Lawyers, October 24, 2011
- (6) *Personal Trainer Negligence*, Lawline.com, March 22, 2011
- (5) *Trial Effectively Using Experts in Personal Injury Cases*, Lawline.com, May 4, 2011
Techniques: The Tricks of the Trade, Lawline.com, February 16, 2011
- (4) *Practice Makes Perfect: Learn to Practice Like a Pro*, Lawline.com, January 18, 2011
- (3) *Jury Selection 101*, New York State Academy of Trial Lawyers, December 14, 2010
- (2) *Practical Guidelines for Getting Items into Evidence*, Lawline.com, March, 2010
- (1) *Winning Your Case: Trial Skills that Count*, Lawline.com, August 21, 2009

Television Appearances

Fox News Channel

- The O'Reilly Factor
- What's Happening Now with Martha McCallum

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- America's News Room
- Fox & Friends
- Fox Business Channel
- Neil Cavuto
- Money with Melissa Francis

CNN -Anderson Cooper 360

ET – Entertainment Tonight

Bloomberg TV

Headline News

Tru TV

Court TV

The Morning Show with Mike and Juliet

Interests, Hobbies:

High-Performance Driving Events, Lime Rock Drivers Club, Porsche Enthusiast, Sim Racing, Tennis, Lego, Cooking, Yoga





Rosa M. Feeney, Esq.
SMILEY & SMILEY, LLP
28 Liberty Street, 6TH Floor
New York, New York 10005
www.smileylaw.com
212-986-2022 X 105

ABOUT

ROSA M. FEENEY

Rosa M. Feeney, Esq., a Partner and Chair of the Insurance and Risk Division at Smiley & Smiley, LLP has been in private practice for over 30 years with a focus on policyholder and plaintiff insurance coverage matters. She serves as an insurance coverage consultant to insurance policyholder's, plaintiffs and attorneys who face insurance issues in personal injury and property damage cases.

Ms. Feeney has successfully handled a multitude of cases from inception and provides end-to-end services, from pre-litigation consultancy, to review, analysis, negotiation, litigation, arbitration and mediation to resolve disputes. She has also litigated numerous Construction, Labor Law, Business owners, Automobile, Homeowner, Life and Disability Insurance cases and serves as lead counsel on several New York State litigations in the State and Federal Courts. Having worked on behalf of insurance carriers for over 20 years and now concentrating on policyholder and plaintiff's insurance coverage matters, she brings a unique perspective and insight to insurance coverage disputes. She has facilitated countless settlements and mediation involving injury claims where insurance issues are involved.

Ms. Feeney is a frequent lecturer on a variety of topics for the NYS Trial Academy as well as other esteemed institutions.

Her areas of Specialization in Insurance Coverage Litigation including:

Construction and Labor Law

Commercial Insurance Coverage issues

Motor Vehicle Insurance Coverage Issues

including general liability, property damage (1st & 3rd party)

Rideshare Insurance Issues

Uninsured/Underinsured coverage;

Homeowner Insurance coverage issues,

Life Insurance issues

Personal Injury

Disability Insurance

Ms. Feeney, through the Mentor Program at Smiley & Smiley, LLP offers free one-on-one's with other attorneys, insurance broker, property owners, construction industry professionals and many more.

To book your appointment visit:

<https://calendly.com/rosa-feeney-esq-availability>



WHO'S ON THE HOOK?

PART 3

PREMISES LIABILITY

by

Andrew J. Smiley, Esq

Rosa M. Feeney, Esq.

Smiley & Smiley, LLP

December 2024

SMILEY & SMILEY, LLP

28 Liberty Street, 6th Floor

New York, NY 10005

www.smileylaw.com

O: 212.986.2022 | F: 212.697.4689

Elements Of A Premises Liability Case

To prove a premises liability claim, you must first establish the following elements:

- That a dangerous condition caused the fall;
- That the property owner either created that dangerous condition, or that they knew/should have known that it existed and did nothing to make it safe.

Evidence Needed to Prove Negligence or Breach of Duty in a Premises Liability Claim

- Photos and videos of the accident scene
- CCTV or security camera footage
- Records of complaints made by other people in the past about the defect or hazard that caused your accident
- Records of complaints made by other people in the past about other defects or hazards on the same property
- Public case records (if the owner had been sued for negligence by other parties in the past)
- Statements or testimonies from people who witnessed the accident
- Medical records

Liability Depends on where the accident occurs and the owner's Responsibility:

- I. Is the property owned by a municipality- Notice of Claim
- II. Who is responsible for the areas of the Accident- Landlord v Tenant
- III. Did the Accident Occur at a Construction Accident Site.
- IV. Did the Accident occur on private property, such as a home or land.
- V. Gym Accidents
- VI. Absentee Landlord Issues

Insurance Coverage Issues in Premises Liability Cases

Which coverage applies in a premises liability case will depend upon the location of the accident and type of accident.

Construction Accidents- Construction accidents differ from general Premises Liability cases in that New York Labor Laws govern construction accident cases. – See Anatomy of a Labor Law Case Chart.

General Premises Liability- The Owner, will typically have its own General Liability Insurance (But not Always)- See Anatomy of Premises Liability Case Chart.

Generally, what happens in a non-Labor Law, Premises Liability case where you have a landlord and tenant is that the tender letters are issued and in a perfect world the landlord would get coverage under the tenants insurance policy and have the coverage available under its own CGL or UMB policies.

Issues that frequently arise:

- I. Does the Landlord have its own Coverage?
- II. Does the Lease require the Tenant to Carry Insurance naming the LL as an additional insured and to what extent?
- III. What kind of coverage did the Tenant actually procure?

Some common scenarios:

1. Landlord does not have coverage at all- Relied on tenant to carry the insurance.
2. Long Term Leases- The old leases did not have insurance procurement provisions, or the leases are so old that the limits of insurance are insufficient; or that the insurance policies have evolved over the years and contain exclusions that were never originally contemplated.
3. Multi-Family residences and injury to other family members

Duty To Defend v. Duty To Indemnify

Duty To Defend-

4 Corners of the Complaint Rule – If there possible coverage under the Complaint there is a duty to defend. –

Example Complaint based upon an Assault- Intentional Acts and Negligence.

Commercial Property slip and fall- Sued tenant and the landlord- The landlord has a lease with indemnification and insurance procurement provisions.

Complaint alleges negligence of tenant and separately negligence of Landlord.

Carrier Can Only Look To Extrinsic Facts Outside The Complaint To Grant Coverage, Not To Take It Away.

What is a Reservation of Rights?

A Reservation of Rights acts to advise the insured that there may be an issue regarding coverage under the insurance policy and serves to advise the insured or other claimant that the carrier is investigating the claim and analyzing whether coverage exists under the policy. “The purpose of a reservation of rights is to prevent a ... detrimental reliance on the defense provided by the insurer.” *Federated Dept. Stores, Inc. v. Twin City Fire Ins. Co.*, 28 AD3d 32; 807 NYS2d 62 (1st Dept. 2006) Unlike disclaimers of coverage under Insurance Law §3420, Reservations of Rights have no statutory basis.

When is the Reservation of Rights Necessary?

A Reservation of rights is necessary when the insurer has knowledge of facts which may ultimately effect the coverage under the policy. If the insurer assumes the defense of its insured with knowledge of facts constituting a defense to the coverage without a reservation of rights, it will thereafter be estopped from asserting that the policy does not cover the claim. *Federated Dept. Stores, Inc. v. Twin City Fire Ins. Co.*, 28 AD3d 32; 807 NYS2d 62 (1st Dept. 2006).

What is the effect of a Reservation of Rights?

A Reservations of Rights is effective only against the defense of waiver. “[C]ourts find waiver where there is direct or circumstantial proof that the insurer intended to abandon [a] defense”

Does not serve to act as a Disclaimer

Content of the Reservation of Rights

There are no statutory guidelines on what must be in the reservation of rights, it is certainly recommended that the reservation of rights include specific reference to policy provisions under which the insurance carrier is reserving its rights, as well as an explanation of the grounds for the reservation of rights.

SPECIFICITY – policy language and factual basis- NO STATUTORY BASIS all decisional Law

Defending under a Reservation of Rights

When the insurer undertakes the defense of its insured under a Reservation of Rights, it must carefully monitor the litigation and constantly evaluate its coverage position. If the insurer assumes the defense and facts are elicited which support a denial of coverage, the carrier’s failure to thereafter timely disclaim coverage will invalidate an otherwise viable denial.

In *General Accident Fire & Life Assurance Corp. v. Blersch*, 18 N.Y.2d 633 (1966), General Accident had been defending its insured and during the insured's examination before trial or examination under oath, the insured refused to cooperate. Four months later General Accident disclaimed any obligations under the policy with respect to defendant Blersch. The Court found that Blersch's breach of the cooperation clause occurred at his examination before trial and plaintiff had a right to disclaim as of that date; that it could have reserved its rights or given a tentative indication as to the possibility of disclaimer but did not do so, and that its postponement of a decision to disclaim until some four months after the examination before trial resulted in a waiver of the right to disclaim.

Right to Independent Counsel

When a defense is provided under a reservation of rights, the insured must be permitted to retain counsel of its choice and the insurer must pay the reasonable fees and expenses of the attorney selected. *Rimar v. Continental Casualty Company*, 50 AD2d 169, 376 NYS2s 309 (4th Dept. 1975); *Jaeger v. Travelers*, 53 AD2d 637, 384 NYS2d 848 (2nd Dept. 1976); *Allstate v. Long*, 85 AD2d 880, 446 NYS2d 742 (4th Dept. 1981); *Hall v. McNeil*, 125 AD2d 943, 510 NYS2d 341 (4th Dept. 1986).

"The New York Court of Appeals has held that 'independent counsel is only necessary in cases where the defense attorney's duty to the insured would require that he defeat liability on any ground and his duty to the insurer would require that he defeat liability only upon grounds which would render the insurer liable.'" *N.Y. Marine & Gen. Ins. Co. v. Lafarge N. Am.*, 599 F.3d 102, 124-25 (2d Cir. 2010) (citing *Pub. Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 401 n.*, 425 N.E.2d 810, 442 N.Y.S.2d 422 (1981)). Moreover, an insurer does not waive its right to control the insured's defense when it undertakes the duty to defend with a full reservation of rights. *See Liberty Mut. Fire Ins. Co. v. Hamilton Ins. Co.*, 356 F. Supp. 3d 326, 337 (S.D.N.Y. 2018) (citing *Law Offices of Zachary R. Greenhill P.C. v. Liberty Ins. Underwriters, Inc.*, 128 A.D.3d 556, 9 N.Y.S.3d 264, 267 (1st Dep't 2015)).

Reasonable Legal Fees- Prevailing Rate

To calculate a reasonable attorneys' fee award, "courts traditionally employ the 'lodestar' method." *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. S. Coal Corp.*, 17 Civ. 1329, 2017 WL 6507123, at *1 (S.D.N.Y. Dec. 19, 2017); see also, *Dimopoulou v. First Unum Life Ins. Co.*, 1:13-cv-7159, 2017 WL 464430, at *2 (S.D.N.Y. Feb. 3, 2017) ("lodestar creates a 'presumptively reasonable fee' that roughly approximates the fee that the prevailing attorney would have received from billing a paying client on an hourly basis in a comparable case").

Disclaimers v. Denials- Anatomy Of An Insurance Policy

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" caused during the policy period.

2. **Exclusions-** Separate clauses that serve to subtract from coverage rather than to expand.
3. **Conditions-** Conditions are things such as duty to timely provide a copy of suit papers and duty to cooperate.

Denials of Coverage

Denials of Coverage are when there is no coverage in the first place...For Example..outside the policy period or no Bodily Injury or Property damage.

The reason the distinction is important is because the time constraints of Insurance law 3420 only apply to Disclaimers and not Denials.

Timely Disclaimers of Coverage

The Statutory Basis for an Insurer's Obligation to Disclaim coverage is Section 3420 (d) of the New York State Insurance Law, which provides as follows:

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.

When Disclaimers Are Governed by Insurance Law §3420

A. Policies Issued or Delivered in New York State

Insurance Law §3420's direct action provisions and disclaimer requirements will be applied to policies issued by non-New York insurers to insureds headquartered outside of New York State, as long as the policy covers both insureds and risks located in New York State. An insured will be found to be located in New York if it has "a substantial business presence and creates risks in New York." Accordingly, an insurer that issues a liability policy to a business entity headquartered outside of New York State may still be subject to the disclaimer requirements of Insurance Law §3420(d)(2) when faced with a New York accident. *Carlson v Am. Intl. Group, Inc.*, 30 NY3d 288 (2017).

B. Accidents occurring within New York State

Only applies to coverage for accidents involving death or bodily injury within New York State.

C. Accidents Involving Death or Bodily Injury

Insurance Law § 3420 does not apply to claims for property damage. *Legum v Allstate Insurance Company*, 33 A.D.3d 670, 821 N.Y.S.2d 895 (2nd Dept. 2006); *Corcoran v. Abbott Sommers, Inc.* 143 A.D.2d 874, *, 533 N.Y.S.2d 511, (2nd Dept. 1998).

It has been held that emotional distress claims are considered “Bodily Injury,” for purposes of Insurance Law 3420. See *Jewish Cmty. Ctr. Of Staten Island v Trumbull Ins. Co.*, 957 FSupp2d 215 (EDNY 2013).

No duty under Insurance Law §3420 to give notice of disclaimer or denial of coverage with respect to causes of action based on defamation. *Iafallo v. Nationwide Mut. Fire Ins. Co.*, 299 A.D.2d 925, 750 N.Y.S.2d 386 (4th Dept. 2002).

D. Claims outside the scope of coverage Only Exclusion of Condition

Disclaimer pursuant to Insurance Law § 3420 (d) is unnecessary when a claim falls outside the scope of coverage afforded by the policy (see *Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185 (2000)). Where the policy does not include coverage in the first instance, requiring payment of a claim upon failure to timely disclaim would have the impermissible effect of creating coverage where it never existed.

An example of this is where the person seeking coverage does not qualify as an insured in the first place.

By contrast, “a disclaimer is necessary when the disclaimer is based on a policy exclusion without which the claim would be covered. Under those circumstances, a disclaimer is required because coverage under the policy is included absent application of the exclusion.”

The courts of New York State have repeatedly held that conformity with Insurance Law § 3420 (d) is necessary only where the policy would provide coverage, but for a policy defense or exclusion (see e.g. *Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646, 648 (2001)).

E. Denials which are not governed by Insurance Law §3420

“Without statutory regulation, the timeliness of disclaimer is governed by equitable principles, and, in equity, prejudice is an essential element of an insured's claim of estoppel.” *Rodriguez v. Metropolitan Life Ins. Co.*, 251 A.D.2d 208, 208, 674 N.Y.S.2d 353 (1st Dep't 1998).

F. Disclaimer must be sent to the insured and the injured person or any other claimant.

There was a recent case out of the 3rd Dept, where the carrier send 2 separate letters and send a detailed disclaimer to the insured but then sent a separate letter to the injured plaintiff and just told them that coverage was denied and failed to cite to all of the pertinent policy provisions. The court held that was insufficient.

UNDERLYING CONCERN with PRIVACY for the Insured. But 3420 makes it mandatory

G. Reasonableness of Delay

Disclaimer: as soon as is reasonably possible

There is no "fixed yardstick against which to measure the reasonableness, or unreasonableness, of an insurer's delay ..." *First Fin. Ins. Co. v. Jetco Contr. Corp.*, 1 N.Y.3d 64, (2003). "[M]ost often the question whether a notice of disclaimer has been sent 'as soon as is reasonably possible' will be a question of fact, dependent on all of the circumstances of a case that make it reasonable, or unreasonable, for an insurer to investigate coverage." *Id.* The court should "measure the reasonableness of the delay 'from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage.'" *Bowers v Grier*, 185 AD3d 998, 128 NYS3d 279 (2nd Dept. 2020) (48 day delay in disclaiming coverage unreasonable)

In addition, "[i]t is settled law that the subdivision applies whether the policy is primary or excess." *Zappone v. Home Ins. Co.*, 55 N.Y.2d 131 (1982).

[T]he burden is upon the insurance carrier to establish that the delay . . . was reasonably related to its completion of a thorough and diligent investigation" *Schulman v Indian Harbor Ins. Co.*, 40 AD3d 957, 836 NYS2d 682 (2d Dept 2007)

Examples of Unreasonable Delay in Disclaiming Coverage:

Add Plumbing Inc V Burlington, 192 AD3d 496, 140 N.Y.S.3d 408 (1st Dept 2021)- This case involved a construction accident where the Plaintiff was injured when he fell from a scaffold. The Plaintiff was employed by Add Plumbing. Add's broker placed the carrier of notice of the accident in on September 5, 2014, the Broker sent a copy of the suit papers to the insurer. Add Plumbing was not a party to the suit yet and no demand was received from the School for additional insured coverage.

Carrier alleged it only received plaintiffs claim on December 16, 2014 when it received the tender letter from the school where the construction was occurring. The carrier disclaimed on December 24, 2014 based upon the employee exclusion. The appellate Division 1st Dept held that the carrier had prior knowledge about the underlying accident and commenced an investigation several months before it disclaimed two months after receiving notice of the suit.

Shell v. Fireman's Fund Ins. Co., 17 A.D.3d 444, *; 793 N.Y.S.2d 110 (2nd Dept 2005) Carrier disclaimed based upon failure to provide notice of a no-fault subrogation claim but did not disclaim based upon failure to provide notice of the liability claim.

Lancer Ins. Co. v. Phila. Indem. Ins. Co., 12 A.D.3d 641, 786 N.Y.S.2d 191 (2nd Dept. 2004) (A case involving a rental car and the renter gave permission for someone else to drive the vehicle. The insurance policy excluded coverage for a non-authorized driver. The Disclaimer failed to cite correct policy language and the disclaimer while addressing the basis for disclaimer to the driver, did not address a proper basis for disclaimer as to the renter.)

Pawley Interior Contr., Inc. v. Harleysville Ins. Cos., 11 A.D.3d 595, 782 N.Y.S.2d 660 (2nd Dept. 2004) (Carrier disclaimed on one ground, but not another...it failure to disclaim on the ground of late notice and therefore waived that defense).

Allstate Ins. Co. v. Frank, 44 N.Y.2d 897 (1978) (A proceeding for a stay of uninsured motorist arbitration, does not obviate the need for a timely disclaimer of coverage. This is true even if the insurance carrier previously issued a reservation of rights).

W. 16th St. Tenants Corp. v Pub. Serv. Mut. Ins. Co., 290 AD2d 278, 736 NYS2d 34 (1st Dept 2002) mot for leave denied- 30-day delay in disclaiming coverage on late notice when grounds for disclaimer was obvious from the face of the notice of the claim, was deemed untimely.

First Fin. Ins. Co. v. Jetco Contr. Corp., 1 N.Y.3d 64, (2003)- 48 days was unreasonable as a matter of law where the purpose of the delay is to investigate the existence of other, third-party sources of insurance.

Allstate Ins. Co. v Souffrant 221 A 2d 434, 633 NYS2d 575 (2d Dept 1995)-More than 2-month unexplained delay by insurer in giving insured notice of disclaimer of liability was unreasonable as matter of law. See also, *Hartford v County of Nassau*, 46 NY2d 1028 (1979)

Examples of Reasonable Delay in Disclaiming Coverage:

Norfolk & Dedham Mut. Fire Ins. Co. v Petrizzi, 121 AD2d 276, 503 NYS2d 51, (1st Dept. 1986) app den 68 NY2d 611 (1986) – “Notice of disclaimer of liability by insurer was made as soon as . . . reasonably possible” under Ins §3420 where it was made approximately 2 months after insurer received notice of claim, but delay was explained by fact that insurer postponed interviewing one insured because she had just given birth, and it was not unreasonable as matter of law for insurer to complete its investigation before deciding to disclaim liability.”

Can-Am Roofing v American States Ins. Co. 229 AD2d 973, 645 NYS2d 253 (4th Dept 1996)- “Insurance company acted, as soon as...reasonably possible” in denying coverage where (1) one day after receiving notice of claim, it issued reservation of rights letter informing insured that it could not make decision about coverage until it completed its investigation, (2) in one week, its claims adjuster obtained statement from insured’s principal, visited accident scene, and requested approval of disclaimer from division office, and (3) it disclaimed coverage one week later, only 3 weeks after receiving notice of accident.”

Tully Constr. Co., Inc. v TIG Ins. Co., 43 AD 3d 1150, 842 NYS2d 528 (2nd Dept. 2007)- Forty-two days an excess insurer took before disclaiming liability on an insured’s claim was not unreasonable where the letter the excess insurer believed was its first notice of the claim had insufficient information and warranted further investigation of whether the notice was late and the investigation was pursued diligently.

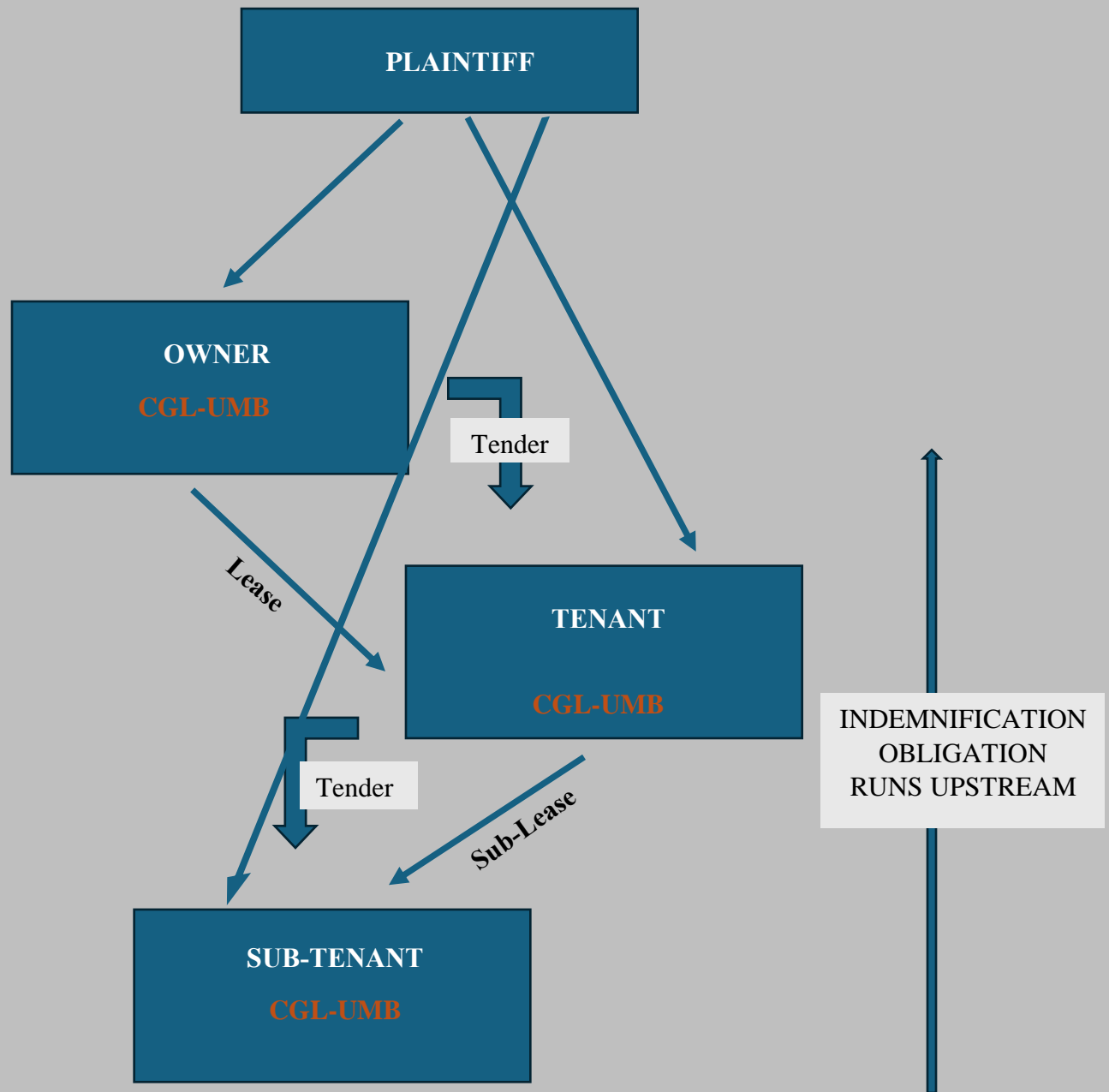
H. Necessary Content of Disclaimers of Coverage- With SPECIFICITY notify the insured or other claimants of the basis. If they fail to cite to a policy provision they waive

The notice of disclaimer must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated. “Absent such specific notice, a claimant might have difficulty assessing whether the insurer will be able to disclaim successfully. This uncertainty could prejudice the claimant’s ability to ultimately obtain recovery. In addition,

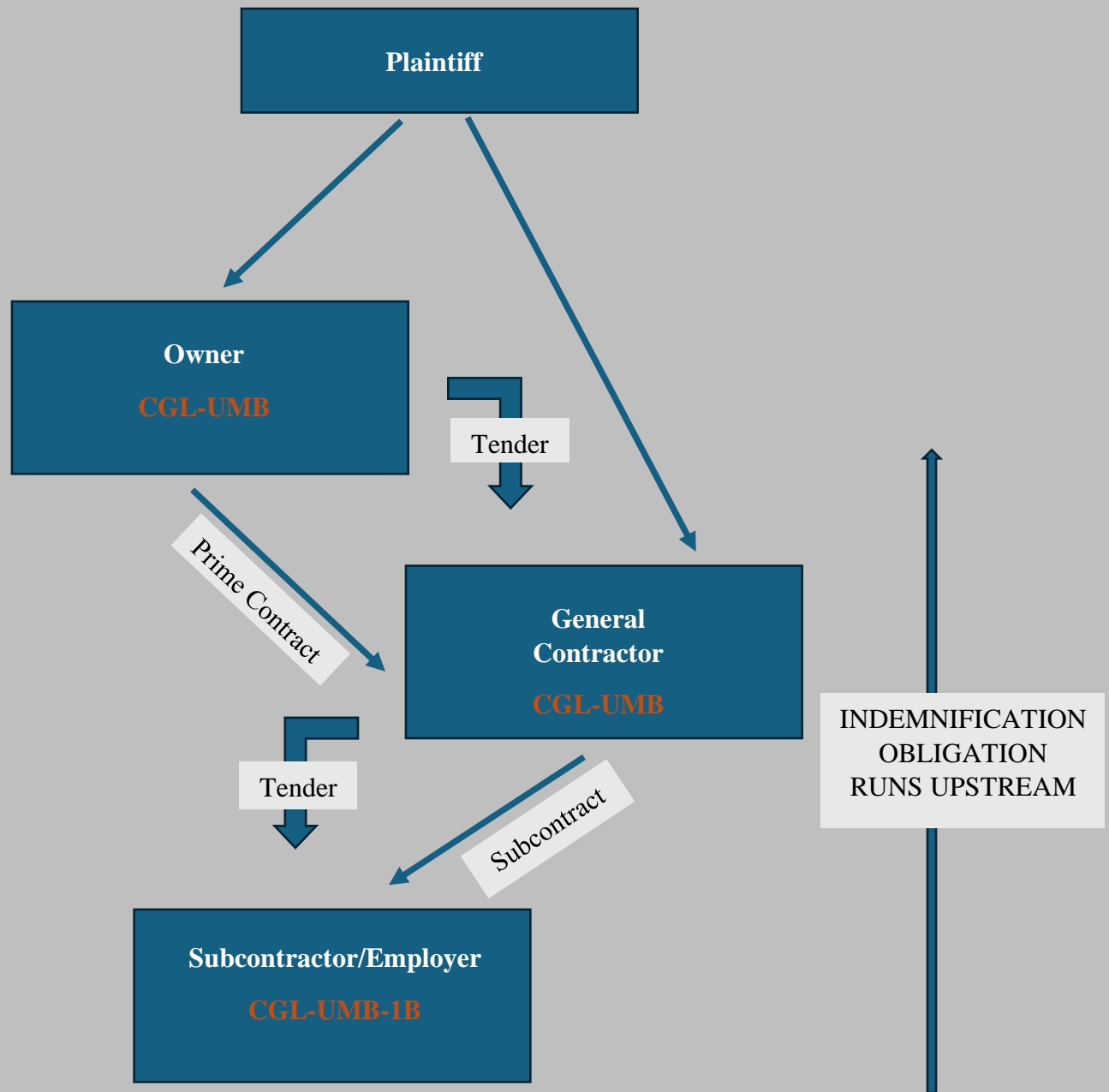
the insurer's responsibility to furnish notice of the specific ground on which the disclaimer is based is not unduly burdensome, the insurer being highly experienced and sophisticated in such matters." *General Accident Insurance Group v. Cirucci*, 46 N.Y.2d 862 (1979).

An insurer's justification for denying coverage is strictly limited to the ground stated in the notice of disclaimer. An insurer, which denied coverage on a specific ground, may not later deny coverage on another ground which was known or should have been known to it at the time of its disclaimer. *Adames v Nationwide Mut. Fire Ins. Co.*, 55 AD3d 513, 866 NYS2d 210 (2d Dept 2008) *Prus v. Glencott Realty Corp.*, 10 A.D.3d 390, 780 N.Y.S.2d 499 (2nd Dept. 2004).

ANATOMY OF A NEW YORK PREMISES LIABILITY CASE



ANATOMY OF A NEW YORK LABOR LAW CASE



DISCLAIMER OF COVERAGE CHECKLIST

Insurance Disclaimers Checklist

Insurance Law 3420(d)(2)

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**.

- ☐ Was the policy Issued or Delivered in New York State?
- ☐ Is the claim for Death or Bodily Injury?
- ☐ Did the accident occur in New York State?
- ☐ Was the Disclaimer Timely?- Rule of Thumb 30-Day Rule
- ☐ Was the Disclaimer Written?
- ☐ Did the Disclaimer Advise of the basis with “Specificity”?
- ☐ Did the Insurer provide a detailed Disclaimer or Copy of the Disclaimer to the insured, the injured person or any other claimant?
- ☐ Is the Exclusion Ambiguous?
- ☐ Does the policy contain a choice of law clause?

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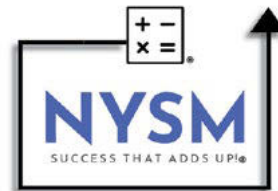
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