HEADED WRONG

FIRST-PARTY PROPERTY CLAIMS

PROVING LACK OF COOPERATION

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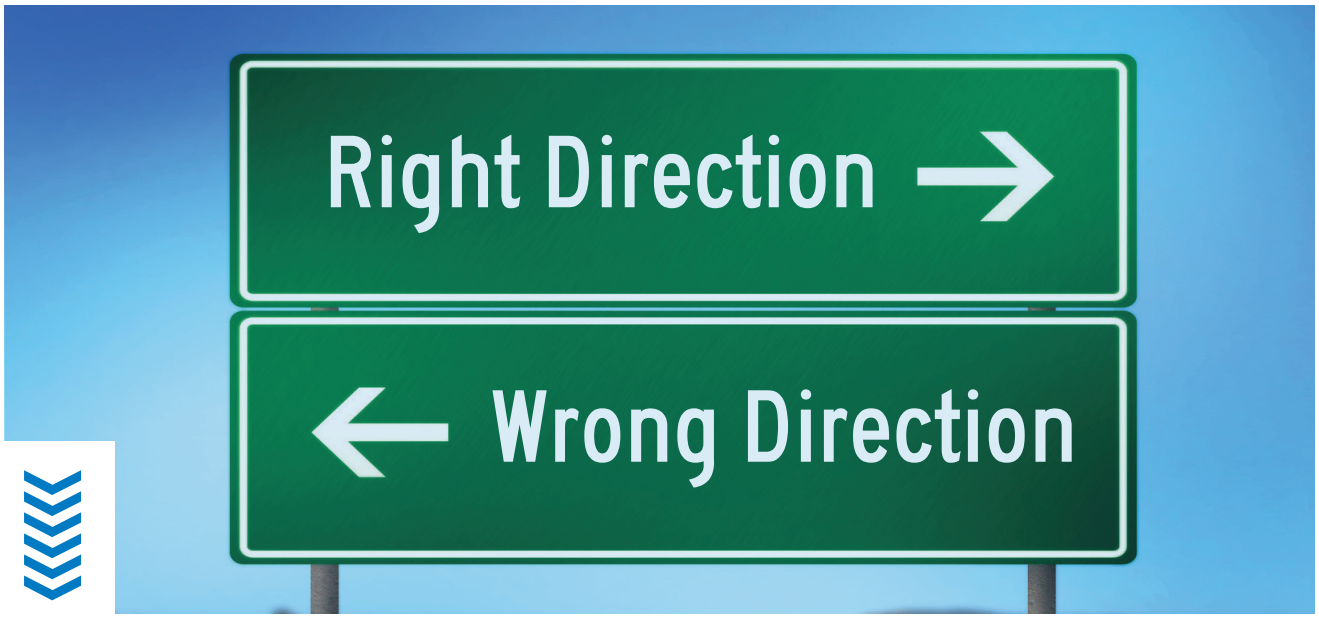
IT'S **NOT** PROGRESS WHEN HEADED IN THE WRONG DIRECTION.



IN THE DIRECTION

THE THRASHER STANDARD DOES NOT APPLY WHEN PROVING LACK OF COOPERATION IN FIRST-PARTY PROPERTY CLAIMS

IMPORTANT CASES WHEN EXAMINING LACK OF COOPERATION & THE THRASHER STANDARD

1967: *Thrasher v. U.S. Liability Co.*
1969: *Restina v. Aetna Cas. & Sur. Co.*
1972: *Gross v. U. S. Fire Ins. Co.*
1981: *Lentini Bros. Moving & Storage Co. v. New York Prop. Ins. Underwriting Ass'n*
1981: *Dyno-Bite, Inc. v. Travelers Companies*
1983: *Williams v. Am. Home Assur. Co.*
1984: *Fine v. Bellefonte Underwriters Ins. Co.*
1984: *Abudayeh v. Fair Plan Ins. Co.*
1985: *Averbuch v. Home Ins. Co.*
1985: *Caramanica v. State Farm Fire & Casualty Co.*
1987: *Ausch v. St. Paul Fire & Marine Ins. Co.*
1989: *Cabe v. Aetna Cas. & Sur. Co.*
1990: *Porter v. Traders' Ins. Co. of Chicago*
1990: *Evans v. Int'l Ins. Co.*
1990: *Allstate Ins. Co. v. Longwell*
1991: *Rosenthal v. Prudential Prop. & Cas. Co.*
1992: *Argento v. Aetna Cas. & Sur. Co.*
1992: *304 Meat Corp. v. New York Prop. Ins. Underwriting Ass'n*
1993: *U.S. Ice Cream Corp. v. Carvel Corp.*
1994: *Azeem v. Colonial Assur. Co.*
1994: *Davis v. Allstate Ins. Co.*
1994: *Johnson v. Allstate Ins. Co.*
1995: *Rosetti v. U.S. Fid. & Guar. Co.*
1995: *Blakeslee v. Royal Ins. Co. of Am.*
1996: *Ashline v. Genesee Patrons Cooperative Ins. Co.*
1997: *Harary v. Allstate Ins. Co.*
1997: *Weissberg v. Royal Ins. Co.*
1998: *Cabe at 654; 80 E. 116th St. Corp. v. Galaxy Ins. Co.*
2000: *Ingarra v. General Acc./PG Ins. Co. of N.Y.*
2000: *Compis Servs., Inc. v. Hartford Steam Boiler Inspection & Ins. Co.*
2002: *Stradford v. Zurich Ins. Co.*
2005: *Turkow v. Erie Ins. Co.*
2008: *Richie's Corner, Inc. v. Nat'l Specialty Ins. Co.*
2009: *Erie Ins. Co. v. JMM Properties, LLC*
2011: *Pfeffer v. Harleysville Group, Inc.*
2012: *SCW W. LLC v. Westport Ins. Corp.*
2015: *Wingates, LLC v. Commonwealth Ins. Co. of Am.*
2015: *Eagley v. State Farm Ins. Co.*
2019: *Scott v. AIG Prop. Cas. Co.*

"AN IMMEDIATE CLUE THAT A COURT IS LIKELY HEADED THE WRONG WAY IN DECIDING A FIRST-PARTY PROPERTY COVERAGE ISSUE IS WHEN IT CITES TO CASES WHICH DECIDED THIRD-PARTY LIABILITY COVERAGE ISSUES."

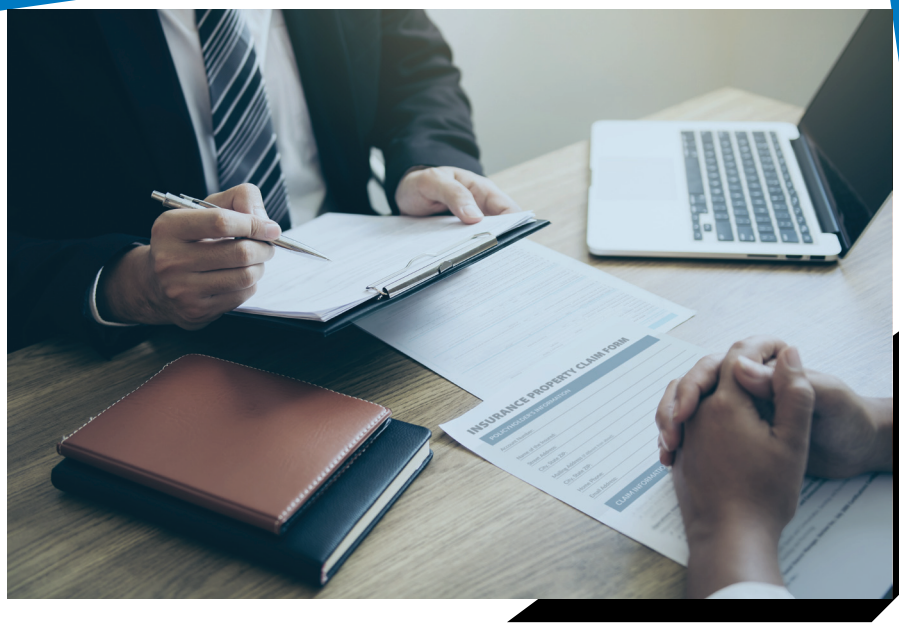
First-party property and third-party liability claims have distinct standards for proving lack of cooperation by an insured, the third-party standard (the "*Thrasher* standard") being more onerous for insurers than the first-party standard.

New York courts and litigants have been increasingly misapplying the "*Thrasher* standard" to first-party property losses, gradually blurring the disparity between the two standards, resulting in a reduction of dispositive motions in favor of insurers. The remedy is simply understanding the difference between the two standards and educating the court accordingly.

An immediate clue that a court is likely headed the wrong way in deciding a first-party property coverage issue is when it cites to cases which decided third-party liability coverage issues. Where seemingly similar coverage issues exist between first and third-party claims (*i.e.,* lack of cooperation, untimely notice, intentional acts, etc.), rarely are the standards of proof the same.

The *Thrasher* Standard

In the preeminent Court of Appeals decision of *Thrasher v. U. S. Liability Insurance Co., Thrasher v. U. S. Liab. Ins. Co.*, 19 N.Y.2d 159 (1967), New York's high court established the now well-settled standard for an insurer to prove an insured's lack of cooperation with respect to third-party liability claims. In setting this standard the Court of Appeals specifically seeks to protect the liability recoveries of innocent third parties:



FIRST-PARTY PROPERTY CLAIMS

INSURER ACTING DILIGENTLY IN SEEKING TO BRING ABOUT THE INSURED'S COOPERATION.

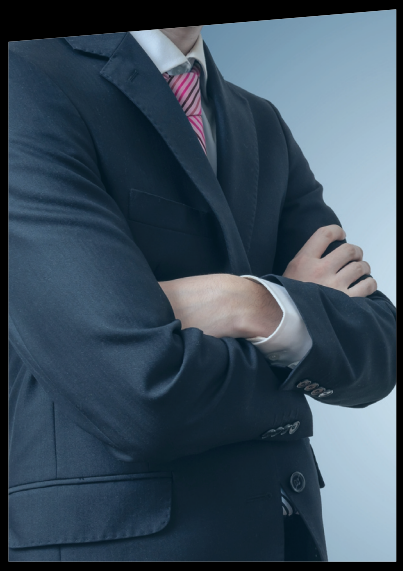
The burden of proving lack of co-operation of the insured is placed upon the insurer ... Since the defense of lack of co-operation penalizes the plaintiff for the action of the insured over whom he has no control, and since the defense frustrates the policy of this State that innocent victims of motor vehicle accidents be recompensed for the injuries inflicted upon them [citations omitted] the courts have consistently held that the burden of proving the lack of co-operation is a heavy one indeed. Thus, the insurer must demonstrate that it acted diligently in seeking to bring about the insured's co-operation [citations omitted]; that the efforts employed by the insurer were reasonably calculated to obtain the insurer's co-operation [citations omitted]; and that the attitude of the insured, after his co-operation was sought, was one of "willful and avowed obstruction." *Id.* at 168.

> **The rationale for imposing this "heavy" burden on the insurer is "to protect an innocent injured party, who may well have relied upon the fact that the insured had adequate coverage, from being penalized for the imprudence of the insured, over whom he or she has no control [citation omitted]."**

The rationale for imposing this "heavy" burden on the insurer is "to protect an innocent injured party, who may well have relied upon the fact that the insured had adequate coverage, from being penalized for the imprudence of the insured, over whom he or she has no control [citation omitted]." *Wingates, LLC v. Commonwealth Ins. Co. of Am.*, 21 F. Supp. 3d 206, 218 (E.D.N.Y. 2014), *aff'd*, 626 F. App'x 316 (2d Cir. 2015). It is also consonant with the public policy which advances such statutes as Insurance Law § 3420(a)(2) creating a cause of action directly against the insurer by an injured party who has a judgment against the insured and which remains unsatisfied after 30 days.

The First-Party Property Standard

Since *Thrasher* was decided, Appellate Division and trial courts have mistakenly been applying it to first-party property claims. Indeed, fourteen years after *Thrasher* was decided, in *Lentini Bros. Moving & Storage Co. v. New York Prop. Ins. Underwriting Association*, 53 N.Y.2d 835, 837 (1981), the Court of Appeals considered a failure to cooperate issue in a first-party property case and did not cite to *Thrasher*. Rather, the Court of Appeals relied, in part, on one of its earlier first-party property coverage decisions going back to 1900, *Porter v. Traders' Ins. Co. of Chicago,* 164 N.Y. 504, 507 (1900).



THE HEAVY BURDEN FALLS ON THE INSURER

Proving lack of cooperation by an insured falls on the ***insurer****.*

THE LIABILITY INSURER MUST SHOW THAT:

- They actively sought cooperation of the insured.
- The efforts of the insurer were reasonably calculated in seeking the insured's cooperation.
- After cooperation was reasonably sought the insured showed willfull and avowed obstruction.

NON-COOPERATION IN THIRD-PARTY CLAIMS

HEAVY BURDEN

Although some courts mistakenly apply *Thrasher* to first-party property claims, others recognize the dichotomy in the standards, stating that the burden of proof for the first-party insurer is substantially lower than for third-party claims:

> A distinction may be drawn, however, between a court's natural reluctance to see an accident victim deprived of his source of payment because a liability carrier claims that its assured has failed to cooperate [citing to *Thrasher*; other citations omitted], and an indemnity carrier denying payment to its insured because the insured has failed to cooperate in discovering a possible arson...The injured accident claimant is an innocent victim of the insured's failure to cooperate. A fire insured, however, controls his own fate[.] *Dyno-Bite, Inc. v. Travelers Companies*, 80 A.D.2d 471, 476 (4th Dept. 1981), *appeal dismissed* 54 N.Y.2d 1027 (1981).

"Although the insurer is said to have a "heavy burden" to establish non-cooperation in third-party claims, it has repeatedly been held that the burden of proof is far less stringent for property insurers."

Although the insurer is said to have a "heavy burden" to establish noncooperation in third-party claims, it has repeatedly been held that the burden of proof is far less stringent for property insurers. *Harary v. Allstate Ins. Co.*, 988 F. Supp. 93, 102 (E.D.N.Y. 1997), *aff'd,* 162 F.3d 1147 (2d Cir. 1998). *See also*, *Eagley v. State Farm Ins. Co.*, 2015 WL 5714402, at *7 (W.D.N.Y. 2015).

"SINCE THRASHER IS NOT THE STANDARD FOR PROVING LACK OF COOPERATION IN FIRST-PARTY PROPERTY CLAIMS, WHAT IS?"

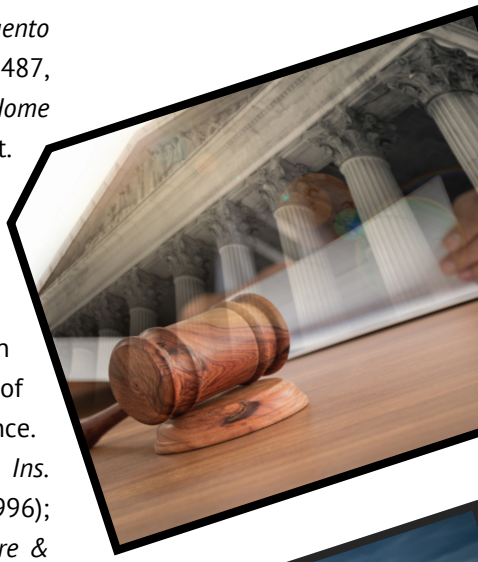
"THE SAME FACTS MAY ALSO CONSTITUTE A BREACH OF A CONCEALMENT OR FRAUD CONDITION WHICH CARRIES A HIGHER BURDEN OF PROOF OF "CLEAR AND CONVINCING" EVIDENCE, THESE DEFENSES BEING CHARGED SEPARATELY TO THE JURY."

Since *Thrasher* is not the standard for proving lack of cooperation in first-party property claims, what is? With respect to first-party property claims the insured must provide full disclosure of all requested material information and anything less constitutes a breach of the policy conditions precedent to coverage and is an absolute defense to a claim under the insurance policy. In this regard the property insurer must prove two elements: 1.) the materiality of the request(s); and 2.) lack of full compliance by the insured.

Once the insurer has satisfied these two-prongs the burden shifts to the insured to demonstrate a reasonable excuse for failing to fully comply. *Harary* at 102 (quoting *Dyno-Bite, Inc.* at 473); *Eagley* at *8; *Pfeffer v. Harleysville Group, Inc.*, 2011 WL 6132693 at *9 (E.D.N.Y. 2011); 13A Couch on Ins. § 196:23. Failure to comply; generally; *Lentini Bros. Moving & Storage Co.* at 837; *Rosetti v. U.S. Fid. & Guar. Co.*, 219 A.D.2d 819, 819 (4th Dept. 1995); *Azeem v. Colonial Assur. Co.*, 96 A.D.2d 123, 124 (1983), *aff'd*, 62 N.Y.2d 951 (1984); *Bulzomi v. New York Cent. Mut. Fire Ins. Co.*, 92 A.D.2d 878, 878 (2nd Dept. 1983); *Pizzirusso v. Allstate Ins. Co.*, 143 A.D.2d 340, 341 (2nd Dept. 1988), *appeal dismissed,* 73 N.Y.2d 808 (1988); *Weissberg v. Royal Ins. Co.*, 240 A.D.2d 733, 734 (2nd Dept. 1997); *Argento v. Aetna Cas. & Sur. Co.*, 184 A.D.2d 487, 488 (2nd Dept. 1992); *Williams v. Am. Home Assur. Co.*, 97 A.D.2d 707, 708 (1st Dept. 1983), *aff'd*, 62 N.Y.2d 953 (1984); *Evans v. Int'l Ins. Co.*, 168 A.D.2d 374, 376 (1st Dept. 1990).

With respect to lack of cooperation defenses the insurer's burden of proof is by a preponderance of the evidence. *Ashline v. Genesee Patrons Cooperative Ins. Co.,* 224 A.D.2d 847, 847 (3d Dept. 1996); *Harary* at 102; and *Ausch v. St. Paul Fire & Marine Ins. Co.*, 125 A.D.2d 43, 46 (2d Dept. 1987), *appeal denied*, 70 N.Y.S.2d 610 (1987).

The same facts may also constitute a breach of a concealment or fraud condition which carries a higher burden of proof of "clear and convincing" evidence, these defenses being charged separately to the jury. *Ashline* at 849.



Material Request

The information requested by the insurer must be "material" (important). The purpose of provisions requiring an insured to cooperate with the insurer's investigation is to enable the insurance company to acquire knowledge and information that may assist it in the claim investigation determining its liability under the policy or with respect to underwriting the risk. Requests to the insured:

> are material if they might have affected the attitude and action of the insurer. They are equally material if they may be said to have been calculated either to discourage, mislead or deflect the company's investigation in any area that might seem to the company, at that time, a relevant or productive area to investigate. *Fine v. Bellefonte Underwriters Ins. Co.*, 725 F.2d 179, 184 (2d Cir. 1984). *See also, Eagley* at *7; *Allstate Ins. Co. v. Longwell,* 735 F.Supp. 1187, 1194–95 (S.D.N.Y. 1990).

The law is clear that materiality during an insurance company's investigation is not to be judged by what the facts later turn out to be. The materiality requirement is satisfied if the information requested concerns a subject relevant and germane to the insurer's investigation as it was then proceeding. *Fine* at 183.

Conversely, the materiality requirement is not satisfied and non-compliance will not defeat recovery when the insured's attempt to comply has fallen short merely "through some technical or unimportant omissions or defects". *Porter* at 509. *See also, Argento* at 488; *Lentini Bros. Moving & Storage Co.* at 836.

In simple terms, a request is "material" if a qualified insurance professional is able to testify that the information sought was important to the investigation of the claim at the time requested because it assists in determining whether coverage exists, in evaluating damages or in deciding whether to continue underwriting the risk and determining the policy terms (*i.e.* premium).

Full Compliance by the Insured

When material information has been asked for, the insured may not satisfy the duty to cooperate by partial performance or by promises of evidence to be supplied in some indefinite future. "[A]n insured is not entitled to 'pick and choose which information to provide'". *Richie's Corner, Inc. v. Nat'l Specialty Ins. Co.*, 598 F. Supp. 2d 274, 277 (E.D.N.Y. 2008). *See also, Harary,* at 102; *Dyno–Bite, Inc.* at 473-4; *Allstate Ins. Co. v. Longwell,* at 1195, n. 4; *Eagley* at *8.

"The materiality requirement is satisfied if the information requested concerns a subject relevant and germane to the insurer's investigation as it was then proceeding."

"WHEN MATERIAL INFORMATION HAS BEEN ASKED FOR, THE INSURED MAY NOT SATISFY THE DUTY TO COOPERATE BY PARTIAL PERFORMANCE OR BY PROMISES OF EVIDENCE TO BE SUPPLIED IN SOME INDEFINITE FUTURE."

The company is entitled to obtain, promptly and while the information is still fresh, "all knowledge, and all information as to other sources and means of knowledge, in regard to the facts, material to their rights to enable them to decide upon their obligations, and to protect them against false claims. And every interrogatory that [is] relevant and pertinent in such an examination [is] material, in the sense that a true answer to it [is] of the substance of the obligation of the assured [brackets in original]." *Dyno-Bite, Inc.* at 473–74. *See also, Levy v. Chubb Ins.*, 240 A.D.2d 336, 338 (1st Dept. 1997); *Allstate Ins. Co. v. Longwell* at 1194; *Azeem v.* at 124–25; *Evans* at 375; *Weissberg* at 733–734; *Ashline* at 849; *Erie Ins. Co. v. JMM Properties, LLC*, 66 A.D.3d 1282, 1284 (3rd Dept. 2009).

The right of discovery under the Civil Practice Law and Rules (CPLR), which governs litigation, has been interpreted broadly:

> It is well established that there shall be full disclosure of "all" evidence "material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101[a]), and that CPLR 3101 is to be "liberally" construed to require disclosure where the matter sought will assist in trial preparation by sharpening the issues [citations omitted]. Restricted only by a test for materiality of "usefulness" and "reason", pretrial discovery is to be encouraged [citations omitted]. *U.S. Ice Cream Corp. v. Carvel Corp.*, 190 A.D.2d 788, 788 (2nd Dept. 1993).

It is well-settled that "[t]he right to examine under the cooperation clause of the insurance policy, however, is much broader than the right of discovery under the CPLR. By its terms the insured promises to render full and prompt assistance to discover the facts surrounding the loss and anything less results in breach of contract". *Dyno-Bite, Inc.* at 474. *See also, Eagley* at *6; *Harary* at 102; *Scott v. AIG Prop. Cas. Co.*, 417 F. Supp. 3d 329, 350 (S.D.N.Y. 2019).

"The insured "is contractually bound by the disclosure provision in the policies and no suit or action is 'sustainable' unless there be compliance therewith."

The insured "is contractually bound by the disclosure provision in the policies and no suit or action is 'sustainable' unless there be compliance therewith." *Gross v. U. S. Fire Ins. Co.*, 71 Misc. 2d 815, 817 (Sup. Ct., Kings Co. 1972). "[N]either can the insured insulate itself against co-operation by commencing an action before there has in fact been repudiation of liability by the insurer [citation omitted]." *Lentini Bros.* at 836.

Reasonable Excuse for Non-Compliance

Once the insurer has demonstrated material non-compliance by the insured with a policy condition, the burden then shifts to the insured to demonstrate a reasonable excuse for not fully providing the requested information. When the record is indicative of a pattern of noncooperation for which no reasonable excuse has been offered, a complaint is properly dismissed as a matter of law. *Argento* at 488; *Azeem* at 124; *Cabe v. Aetna Cas. & Sur. Co.*, 153 A.D.2d 653, 654 (2nd Dept. 1989); *Abudayeh v. Fair Plan Ins. Co.*, 105 A.D.2d 764, 765–66 (2nd Dept. 1984); *Ingarra v. General Acc./PG Ins. Co. of N.Y.*, 273 A.D.2d 766, 767–768 (3rd Dept. 2000); *Turkow v. Erie Ins. Co.*, 20 A.D.3d 649, 651 (3rd Dept. 2005); *SCW W. LLC v. Westport Ins. Corp.*, 856 F. Supp. 2d 514, 522 (E.D.N.Y. 2012); *304 Meat Corp. v. New York Prop. Ins. Underwriting Ass'n*, 188 A.D.2d 382, 382 (1st Dept. 1992).

Some courts have considered whether the proof demonstrates the insured's lack of cooperation was "willful." *Averbuch v. Home Ins. Co.*, 114 A.D.2d 827, 829 (2nd Dept. 1985); *Evans* at 375; *Richie's Corner, Inc.* at 278. "Willfulness" is a factor in the *Trasher* standard. However, to any extent that "willfulness" is arguably a consideration for first-party property claims, when the insured fails to demonstrate a reasonable excuse for the failure to fully cooperate "willfulness" is inferred. *Bulzomi* at 878; *Harary* at 106; *Eagley* at *8; *Lentini Bros. Moving & Storage Co.* at 836; *Ausch* at 50; *Caramanica v. State Farm Fire & Casualty Co.*, 110 A.D.2d 869, 870 (2d Dept. 1985); *Rosenthal v. Prudential Prop. & Cas. Co.*, 928 F.2d 493, 494–95 (2d Cir. 1991). Therefore, to any extent a court deems "willfulness" to be an element to be proven by the insurer, it is satisfied by the insured's failure to substantiate a reasonable excuse for the non-compliance.

Once the requested information is determined to be material, reasonable excuses for non-compliance are few and far between but may include "waiver" (a clear manifestation of an intentional relinquishment of a known right, which is not lightly presumed) by the insurer of the condition; or equitable estoppel (detrimental reliance), that the acts or words of the insurer reasonably lulled the insured into a false belief that fulfillment of the condition was not required. Both of which are negated by the carrier issuing a reservation of rights letter during the investigation of the claim. *Pfeffer* at *8; *Compis Servs., Inc. v. Hartford Steam Boiler Inspection & Ins. Co.*, 272 A.D.2d 886, 887 (4th Dept. 2000).

Excuses held to be unavailing include the insured's reliance on the mistaken advice of legal counsel that the information asked for is beyond the scope of inquiry by the insurer. Reliance on the advice of legal counsel alone does not excuse a breach of a policy condition. *Davis v. Allstate Ins.*

"When the record is indicative of a pattern of noncooperation for which no reasonable excuse has been offered, a complaint is properly dismissed as a matter of law."

Co., 204 A.D.2d 592, 593–94 (2nd Dept. 1994); *Evans* at 376; *Wingates* at 219–20; *Blakeslee v. Royal Ins. Co. of Am.*, 1995 WL 122724 at *6 (S.D.N.Y. 1995); *Evans* at 376; *Eagley* at *11.

It is also well-settled that an individual may not refuse to cooperate without voiding the policy because of a contemporaneous criminal investigation or based upon Fifth Amendment grounds. *Dyno–Bite* at 476; *Allstate v. Longwell* at 1193; *Eagley* at *12. The insurer is not obligated to provide to the insured the specific information on which its questions are based before the insured answers them. *Fine Gold Jewelry, Inc.* at *4. Because failure to perform a condition precedent is an absolute defense to an insurance claim, belated offers to comply after coverage for the claim has been denied are of no consequence. *Blakeslee* at *7; *Wingates* at 220; *Allstate Ins. Co. v. Longwell* at 1195; *Azeem* at 125; *Dyno–Bite* at 560–61; *Lentini Bros.* at 687; *Restina v. Aetna Cas. & Sur. Co.,* 61 Misc. 2d 574, 577 (Sup. Ct., Schenectady Co. 1969); *Johnson v. Allstate Ins. Co.*, 197 A.D.2d 672 (2nd Dept. 1993), *leave to appeal denied,* 82 N.Y.2d 664 (1994).

When the insured has failed to demonstrate a reasonable excuse for the non-compliance, this extinguishes being afforded one "last opportunity" to comply with policy conditions and no reason exists to deny summary judgment dismissing the complaint unconditionally. *Rosenthal* at 495; *Lentini Bros. Moving & Storage Co.* at 836–37; *Stradford v. Zurich Ins. Co.*, 2002 WL 31819215 at *5 (S.D.N.Y. 2002); *Eagley* at *8. Demands made as part of pretrial discovery pursuant to the CPLR will not cure the breach. *Abudayeh* at 765; *Wingates* at 218-19; *Lentini,* at 836; *Cabe at* 654; *80 E. 116th St. Corp. v. Galaxy Ins. Co.*, 249 A.D.2d 168, 168–69 (1st Dept. 1998); *Harary* at 106.

A Guiding Light for the Court

New York law protects an insurer's right to request material information from an insured during the investigation of a first-party property claim. Educating the court as to the difference between the first and third-party standards for proving lack of cooperation will increase the percentage chance of success of the insurer's dispositive motion or at trial. One thing about heading the wrong way is that one's direction can always be turned around. We need to be the GPS for the court to make sure it is headed in the right direction in deciding first-party property coverage issues.

"One thing about heading the wrong way is that one's direction can always be turned around."

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