To be Argued by:
ANTHONY F. DESTEFANO
(Time Requested: 30 Minutes)

CTQ-2020-00002

Court of Appeals
of the
State of New York

BROOKLYN CENTER FOR PSYCHOTHERAPY, INC.,

Appellant,

– against –

PHILADELPHIA INDEMNITY INSURANCE CO.,

Respondent.

ON APPEAL FROM THE QUESTION CERTIFIED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN DOCKET NO. 19-2266

RESPONDENT'S BRIEF

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Date Completed: August 21, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 NYCRR 500.1(f), Respondent Philadelphia Indemnity Insurance Company hereby states that it is a member of the Tokio Marine Group.

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CERTIFIED QUESTION PRESENTED

The Second Circuit poses the following question: Must a general liability insurance carrier defend an insured in an action alleging discrimination under a failure-to-accommodate theory?

Answer: *On the facts of this case*, the general liability insurance carrier, Philadelphia Indemnity Insurance Co. ("PIIC"), was not obligated to defend its insured, Brooklyn Center for Psychotherapy, Inc. ("Brooklyn Center"), against allegations of intentional discrimination.

INTRODUCTION

It is respectfully submitted that the certified question is worded too broadly. If the certified question were answered as posed, it would trump well-established precedent from this Court that an insurer's duty to defend is based on the allegations of the complaint as well as facts known to the insurer. Here, however, the certified question expressly does not include any reference to "facts" or "allegations." Instead, it references only a theory of liability (discrimination under a failure-to-accommodate). Stated otherwise, the certified question would be read: Must a general liability insurance carrier defend an insured in an action alleging

discrimination under a failure-to-accommodate theory *regardless of the factual allegations on which the claim was predicated*?

It is thus no surprise that the focus of Brooklyn Center's Brief is on the proposition that the four discrimination-based causes of action asserted against Brooklyn Center in the underlying litigation triggered PIIC's duty to defend because those claims could have simply been proven with negligence rather than intent. Brooklyn Center does not focus on the actual facts of the underlying litigation, and indeed the Statement of Facts section in Brooklyn Center's Brief is *devoid of any allegations* that were relied on by the underlying claimant. Tellingly absent is reference to paragraph "30" of the underlying Complaint, the last of the factual allegations, which states: "[Brooklyn Center] intentionally discriminated against [Fanni Goldman] and acted with deliberate indifference to her communication needs, causing her to endure humiliation, fear, anxiety and emotional distress" (A045).

Continuing its focus on theories and not facts, Point I of Brooklyn Center's Brief is devoted to arguing that: (1) the PIIC policy only precludes coverage for intentional acts; (2) purposeful discrimination can be accidental and (3) "failure-to-accommodate" is a separate and distinct type of discrimination that also does not

require proof of intent. Viewed in isolation, there is some truth to each of these assertions, but that is not how a determination of insurance coverage is made. Instead, the causes of action in any complaint must be judged against the factual allegations on which they are based. It is again no surprise, therefore, that the underlying facts are not found until Point II (page 27) of Brooklyn Center's Brief where only some of the underlying facts are revealed and reference to paragraph "30" is again omitted.

Since there is no compelling reason for this Court to depart from its well-established precedent that determinations of a duty to defend is based on the factual allegations of the Complaint, not general theories, the certified question should be re-phrased to include reference to the factual allegations on which the failure-to-accommodate theory is based. It is better posed: Must a general liability insurance carrier defend an insured against a failure-to-accommodate claim where the allegations upon which the claim is only based on intentional conduct?

When turning to page 27 of Brooklyn Center's Brief, where the relevant analysis begins (and ends on page 28), the factual allegations relied on by Brooklyn Center do not support its position that the underlying claimant alleged nonintentional (negligent) discrimination. Here, Brooklyn Center relies on three of

the thirty factual allegations from the underlying Complaint which Brooklyn Center argues supports a negligence-based theory of liability. Those three allegations include that Brooklyn Center knew or should have known that: (1) it was subject to the Americans with Disabilities Act, and other statutes; (2) it was obligated to provide a deaf person with reasonable accommodations; and (3) its failure to do so created an unreasonable risk of harm to the underlying claimant.

Significantly, however, none of these claims allege specific facts, nor do any of them allege "negligent" conduct engaged in by Brooklyn Center. They also cannot be viewed in isolation. Instead, they must be read in conjunction with the remaining twenty-seven factual allegations. Those other allegations included not only paragraph "30," which directly asserted that Brooklyn Center's discriminatory practices were intentional, but others including that Brooklyn Center simply "refuses to serve deaf" people (A044). Ms. Goldman *never alleged* that Brooklyn Center had a facially-neutral policy of refusing to provide certain types of treatment that necessarily (and unintentionally) excluded the deaf. Thus, when taken as a whole, the gravamen of the complaint sounded in intentional discrimination and it cannot legitimately be argued that the underlying claimant was pursuing Brooklyn Center for negligent discrimination. In fact, that is precisely what the District Court Judge found:

> The underlying complaint does not allege that Brooklyn Center for Psychotherapy was negligent or that it merely overlooked Ms. Goldman's disability. Instead, the complaint alleged that when the Center learned of Ms. Goldman's disability, it turned her away, explicitly rejected her requests for accommodation, and told her to search for services elsewhere.

(A500).

Accordingly, the certified question should be re-phrased to comport with well-established law in this State that the duty to defend is based on facts as set forth in the pleadings, not claims or generalized legal theories, and once the question is re-phrased it should answered that, on the facts of this case, PIIC had no duty to defend Brooklyn Center.

COUNTER-STATEMENT OF FACTS

The Factual Allegations Of The "Goldman" Complaint

According to Brooklyn Center's Complaint, on November 11, 2014, Fanni Goldman, a deaf person, contacted Brooklyn Center to seek services for her son using a device/service known as Sorenson Video Relay Services (A034). Thereafter, on May 5, 2015, Ms. Goldman commenced an action against Brooklyn Center alleging that she was discriminated against due to Brooklyn Center's failure to accommodate her with effective means of communication (the "*Goldman*

complaint") (A034). Brooklyn Center further alleges that Ms. Goldman's claim was predicated on Title III of the Federal Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act of 1973, New York State Human Rights Law, New York City Human Rights Law and the New York City Administrative Code § 8-101 (A034).

According to the *Goldman* Complaint, however, Ms. Goldman alleged that she communicated primarily through the use of American Sign Language (A041). Although she generally alleged that Brooklyn Center "fail[ed] to accommodate" her disability, in the very next sentence of the same paragraph, she stated that Brooklyn Center "*flatly refused* to serve [her] because of her disability" (A041 at ¶ "1" [emphasis added]). She further alleged that she was unlawfully discriminated against because she was a disabled individual and the Brooklyn Center was subject to antidiscrimination laws (A041-42 at ¶ "2").

With regard to the factual allegations supporting her claims (the "Statement of Facts"), Ms. Goldman specifically alleged that she contacted Brooklyn Center on November 11, 2014 to schedule an appointment for her minor son (A043 at ¶¶ "8" and "11"). She used Sorenson Video Relay Service (id. at ¶ "8") and spoke with Raquel Arroyo, Director of Clinical Services (id. at ¶ "10"). "*Unprompted*,

and without Ms. Goldman having requested any accommodation" Ms. Arroyo informed Ms. Goldman that *Brooklyn Center would not* provide an ASL interpreter (id. at ¶ "13" [emphasis added]). Ms. Arroyo was "rude, dismissive and disrespectful" to Ms. Goldman (id. at ¶ "16"). "Ms. Arroyo *refused* to schedule an appointment" for Ms. Goldman's son and when told that her refusal to provide an accommodation was discriminatory, "*Ms. Arroyo then hung up, ending the call*" (A043-44 at ¶¶ "14," "17" and "18" [emphasis added]). A similar event took place in December 2014 (A044 at ¶ "19").

Ms. Goldman thus alleged that Brooklyn Center *refused* to serve deaf individuals (A044 at ¶ "21") and *refused* to hire qualified ASL interpreters as a matter of policy and practice (id. at ¶ "22") despite knowing that it was obligated by the ADA, Section 504, NYHRL and NYCHRL to provide reasonable accommodations to disabled individuals such as Ms. Goldman (id. at ¶ "23"). She further alleged that "the *refusal* to offer onsite sign language interpreting services is the result of a *policy or practice* of [Brooklyn Center] to discourage the use of onsite interpreters without regard to whether other methods will provide effective communication" (A045 at ¶ "27"), and that Brooklyn Center's "conduct is part of a *discriminatory and deliberately indifferent policy, pattern, and/or practice*" (id. at ¶ "28" [emphasis added]).

In the final paragraph that comprised the factual allegations of the Complaint, Ms. Goldman alleged that: "[Brooklyn Center] *intentionally discriminated* against [Ms. Goldman] and acted with *deliberate indifference* to her communication needs, causing her to endure humiliation, fear, anxiety, and emotional distress" (A045 at ¶ "30" [emphasis added]).

As can be seen, every factual allegation raised by Ms. Goldman was premised on intentional conduct – *every* one.

All four Counts (claims or theories of liability) in the *Goldman* Complaint repeated and re-alleged all prior factual allegations (A045 at ¶ "31"; A047 at ¶ "43"; A048 at ¶ "54"; A050 at ¶ "64"). Some were also explicitly premised on the same allegations that Ms. Goldman was discriminated against on the basis that Brooklyn Center's refusal to provide an accommodation was part of a pattern or practice to prohibit use of ASL interpreters (see e.g. A046-47 at ¶ "40"; A048 at ¶ "50"). In her "Prayer for Relief," Ms. Goldman sought an order compelling Brooklyn Center to develop non-discriminatory practices regarding the provision of qualified ASL interpreters and other means of communicating with the deaf (A051-53). She also sought compensatory and punitive damages, as well as attorneys' fees (A053-54).

PIIC's Disclaimer And Brooklyn Center's Re-Tender

PIIC insured Brooklyn Center under a commercial general liability policy of insurance effective November 11, 2014 to November 11, 2015 (A167-392). Upon receiving Brooklyn Center's tender of its defense to the *Goldman* Complaint, on May 18, 2015, PIIC disclaimed coverage (A056-063). PIIC's denial was based in part on the fact that the conduct complained of by Ms. Goldman was non-accidental, and therefore not an "occurrence" within the meaning of the policy (A059; 062-63). The policy, which was written on the standard CGL ISO form, defined "occurrence" as an "accident" (A304). Coverage was also excluded under the policy for injury expected or intended from the standpoint of Brooklyn Center (A292), which formed an additional basis for PIIC's disclaimer (A058; 061; 062-63).

Before concluding PIIC's disclaimer letter, Michael McHale, PIIC's Claims Supervisor, stated: "Please contact us if you are aware of any facts or circumstances different, or in addition to those set forth herein which may cause us to reconsider our position" (A063). Mr. McHale further stated: "We trust your understanding that our no coverage position is clear. However, should you disagree with our position, please promptly communicate your notice of disagreement to the undersigned in writing" (A063). Finally, Mr. McHale

informed Brooklyn Center that "[s]hould you have any questions concerning this matter, you may call our home office claims examiner, Gary H. Klein at… extension…, or myself at extension…" (A063).

In August 2018, more than two years after PIIC's denial, Brooklyn Center re-tendered its defense to PIIC claiming that "Plaintiff's Complaint, specifically paragraph 30… makes it clear that she is seeking damages for emotional distress" (A066). That is the only paragraph of the Goldman Complaint referred to by Brooklyn Center in its re-tender of coverage (A065-69). Regarding whether the underlying Complaint alleged an "occurrence" within the meaning of the PIIC policy, Brooklyn Center stated only that, under this Court's decision Agoado Realty "it is undeniable that such claims meet the definition of 'occurrence'" (A067). Brooklyn Center did not offer to provide PIIC with any additional facts that might have been uncovered during the previous two years of litigation (A065-69). And, although it specifically noted that the *Goldman* lawsuit was coming to trial, Brooklyn Center provided no information regarding its planned trial-strategy (id.).

PIIC responded on September 10, 2018, once again denying coverage, specifically citing to the intentional discrimination language used in paragraph "30," which it noted "has been incorporated into each and every cause of action" in the *Goldman* Complaint (A073).

The declaratory judgment action was commenced against PIIC on or about October 4, 2018 (A031-75). The Declaratory Complaint is devoid of any factual allegations regarding Brooklyn Center's denial of services to Ms. Goldman (A034). Instead, the Complaint merely recites the procedural history (A034-36). The Second Cause of Action for "Breach of Contract to Provide a Defense" summarily states: "the duty of an insurer to defend is broader than the duty to indemnify… PIIC has wrongfully refused to provide a defense… in spite of having been requested to provide such a defense on more than one occasion" (A037). It too is devoid of any factual allegations other than noting that Brooklyn Center allegedly expended $170,000 in defense of the *Goldman* Complaint.

Brooklyn Center's Defense To The Goldman Complaint Compared To The Second Circuit's Decision

The underlying action proceeded to trial after which the jury was charged as follows: "[Brooklyn Center] contends that the only reason it denied [Ms.

Goldman's] son mental health services was because [Brooklyn Center] does not provide immediate mental health services" (JA471).

It is clear from the foregoing that Brooklyn Center did not base its defense to the *Goldman* Complaint on the reasonableness of its refusal to offer the use of an ASL interpreter as an accommodation. That, however, is what the Second Circuit relied on when it certified its proposed question to this Court. More particularly, the Court indicated that:

> the decision to refuse a particular accommodation may be justified, and will not provide a basis for liability, if the requested accommodation is unreasonable or "would impose an undue hardship on the operation of the business." *Felix v. New York City Transit Auth.*, 324 F.3d 102, 104 (2d Cir. 2003) (quoting 42 U.S.C. § 12112(b)(5)(A));
>
> * * *
>
> Thus, as long as Brooklyn Center believed that hiring interpreters to accommodate Goldman's hearing disability would have been unreasonable or would have imposed an undue hardship on its business, any cognizable harm resulting from its refusal to do so would have been accidental.

(A015-16).

Attempting to view the argument from PIIC's perspective, the Second Circuit stated: "Brooklyn Center's refusal to hire interpreters, PIIC argues, was an

intentional act" (A016). Of course, PIIC's argument was more than just that the act of refusing to hire interpreters was intentional. PIIC had argued that the allegations of the *Goldman* Complaint, taken as a whole, alleged intentional discrimination which could never be covered by insurance. Stated otherwise, there was nothing in the *Goldman* Complaint to suggest that there was any "reasonableness" in Brooklyn Center's decision to "flatly refuse" to serve deaf people (A041). Therefore, the *Goldman* Complaint could not be interpreted to allege nonintentional discrimination.

The foregoing thus amply demonstrates that the Second Circuit was misguidedly focused on the theories of liability that were asserted by Ms. Goldman in her Complaint, not the factual allegations that she raised in support of those theories. As such, the certified question posed by the Second Circuit should not be answered. The question would more properly be phrased as whether the factual allegations of the *Goldman* Complaint supported a theory of nonintentional discrimination by failure-to-accommodate (Point II of Brooklyn Center's Brief). Here, the District Court found that the allegations of the *Goldman* Complaint lead solely to the conclusion that Brooklyn Center's conduct was intentional, and therefore not covered by the PIIC policy. As will be shown, the District Court should have been affirmed.

Accordingly, although it is submitted that this Court cannot answer the certified question as posed, if this Court were to answer the question then it should do so with the recommendation that the District Court be affirmed.

ARGUMENT

PIIC WAS NOT OBLIGATED TO DEFEND BROOKLYN CENTER BECAUSE MS. GOLDMAN'S CLAIM THAT SHE WAS REFUSED ACCOMMODATIONS ON THE BASIS OF HER DISABILITY WAS NOT AN "ACCIDENT" WITHIN THE MEANING OF THE PIIC POLICY.

This Court does not issue advisory opinions. The certified question posed by the Second Circuit generally asks whether a claim of discrimination based on a failure-to-accommodate theory can be covered by insurance, but (1) the question is worded too broadly and (2) the answer to that question does not resolve the dispute between the parties in the present case. The question must be re-phrased to acknowledge that the duty to defend in any case is based on factual allegations, not claims. Here, the underlying claimant, Ms. Goldman, only alleged facts that constituted intentional discrimination by Brooklyn Center. Nothing in Ms. Goldman's Complaint can be interpreted as an argument that Brooklyn Center unintentionally discriminated against her. Thus, even if this Court answered the certified question by affirmatively deciding that a discrimination claim based on a

failure-to-accommodate theory can be covered by insurance, it must nevertheless recommend to the Second Circuit that it affirm the declaration that PIIC had no duty to defend Brooklyn Center against Ms. Goldman's claims in this case.

Brooklyn Center Bears The Burden Of Proof

Before demonstrating why Brooklyn Center's claim for coverage must fail, it is worth noting that Brooklyn Center wrongly shifts the burden of proving the lack of coverage for the *Goldman* Complaint on PIIC (App. Br. at pp. 25-26). While it is true that the insurer bears the burden of proving that an exclusion in its policy applies, here the paramount issue is whether the *Goldman* Complaint alleges intentional acts that do not constitute an "occurrence" within the meaning of the policy. If there is no "occurrence," there is no coverage. This Court has held that an insured such as Brooklyn Center bears the burden of proving coverage in the first instance (Consol. Edison Co. of New York v. Allstate Ins. Co., 98 NY2d 208, 220 [2002] [finding that because "insurance policies generally require 'fortuity' and thus implicitly exclude coverage for intended or expected harms" the burden is rightfully on the insured to prove the claimed loss was a fortuity, not on the insurer to prove the harm was intended]).

It is respectfully submitted that Brooklyn Center has failed to meet its burden. In fact, it acknowledges that intentional discrimination claims do not fall within coverage (App. Br. at p. 26). Instead, it posits that the *Goldman* Complaint "arguably" alleges nonintentional discrimination which would be covered (id.). It is this burden that Brooklyn Center has failed to meet.

The Factual Allegations Of The Goldman Complaint Indicate That Brooklyn Center's Conduct Was Intentional

This Court has routinely held that "an insurer's duty to defend its insured arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy" (Fitzpatrick v. Am. Honda Motor Co., 78 NY2d 61, 65 [1991]). This is so because, the duty to defend being broader than the duty to indemnify, "an insurer's duty to defend is called into play whenever the pleadings allege an act or omission within the policy's coverage" (id. at 65–66). The allegations of the *Goldman* Complaint allege only intentional acts, which do not lead to a reasonable possibility of coverage under the PIIC policy because such acts do not constitute an "occurrence" or are expressly excluded from coverage.

In an effort to avoid this obvious outcome, the focus of Brooklyn Center's Brief is on the words "failure to accommodate" contained in paragraph "1" of the *Goldman* Complaint while ignoring the remaining twenty-nine paragraphs of allegations. In fact, its focus is ignorant of the remainder of the language found in paragraph "1" itself, which provides that Brooklyn Center "flatly refused to serve [Ms. Goldman], because of her disability" (A041 at ¶ "1"). According to Brooklyn Center, however, it was simply "[f]aced with a complaint… alleging disability discrimination by failure to accommodate" (App. Br. at p. 1), arguing that "a failure-to-accommodate theory requires no showing of discriminatory intent" (App. Br. at p. 6), and that it is a "highly fact-dependent question" (App. Br., at p. 12). Thus, it claims that it was exposed to liability for nonintentional discrimination which would be a covered "occurrence" under the PIIC policy (App. Br. at p. 1).

What Brooklyn Center must be suggesting is that whenever there is a claimed failure-to-accommodate it must be defended against by the insurer regardless of the factual allegations on which the claim is predicated, but that is not the law. The rationale supporting Fitzpatrick and its progeny --that the duty to defend is based on facts-- is most particularly evident here, where Ms. Goldman had not simply alleged a failure-to-accommodate. Instead, Ms. Goldman alleged

that Brooklyn Center refused to serve deaf people in general (A045 at ¶ "21") and that it developed a pattern or practice of refusing to offer accommodations to the deaf (A045 at ¶¶ "22," 23"; A045 at ¶¶ "27," "28," "30"; A046-47 at ¶ "40"; A048 at ¶ "50"). None of these allegations speak of negligence or nonintentional discrimination.

Brooklyn Center's assertion that the allegations it "knew or should have known of its obligations… to provide reasonable accommodations" (A044 at ¶ "23" and "24") (A044 at ¶ "24"), support a negligence theory is likewise misplaced. These are not specific allegations of factual conduct they are elements of a legal standard. And, "[w]hile the Complaint contains [those] allegations… the gravamen of the Complaint [remains] one alleging intentional acts and violations of Federal and State statutes" (Board of Educ. of East Syracuse-Minoa Cent. School Dist. v Continental Ins. Co., 198 AD2d 816, 817 [4th Dept 1993]; see also Atlantic Mutual Insurance Co. v Terk Technologies Corp., 309 AD2d 22 [1st Dept 2003] [finding that allegations of "reckless disregard" were still premised on conduct both knowing and intentional]).

For this reason, Brooklyn Center's reliance on Agoado Realty Corp. v United International Insurance Co. (95 NY2d 141 [2000]) and McGroarty v. Great Am. Ins. Co. (36 NY2d 358 [1975]), is misplaced.

In Agoado, this Court stated that whether an alleged loss was the result of a covered "accident" must be viewed from the standpoint of the insured. The insured was granted coverage because the acts of an unknown assailant were unexpected from the insured's standpoint. Here, however, Ms. Goldman did not even allege that Ms. Arroyo, an employee (Director) of Brooklyn Center discriminated against her, which might have otherwise carved out an exception for coverage (see RJC Realty Holding Corp. v. Republic Franklin Ins. Co., 2 NY3d 158, 163 [2004] [holding that assault by employee was unexpected from the standpoint of the employer-insured]). Instead, Ms. Goldman alleged that *Brooklyn Center* had specifically developed policies and practices of discrimination. Thus, her allegations were directly addressed to the "standpoint of the insured," Brooklyn Center, and Agoado does not alter the conclusion that Brooklyn Center intentionally discriminates against the deaf, and more particularly Ms. Goldman.

Similarly, in McGroarty (36 NY2d 358), this Court determined that intentional acts may lead to unintentional results. Once again, however, those were not the facts alleged by Ms. Goldman in her Complaint. Instead, she specifically alleged that Brooklyn Center knew its actions would result in harm and cause her anxiety, humiliation and emotional distress (A044 at ¶ "25"; A045 at ¶ "30"). As also noted by the District Court, actions undertaken with deliberate indifference to the harm they might cause (which was also alleged here) are akin to recklessness and the resulting harm must therefore be deemed "intentional" (A499;[1] c.f. I.M. by L.M. v. City of New York, 178 AD3d 126, 136 [1st Dept 2019] [finding that plaintiff demonstrated a prima facie case of statutory discrimination where City acted with deliberate indifference to providing accommodations for student's educational needs]).

Indeed, in certifying its question to this Court, the Second Circuit even acknowledged that:

> Recovery will be barred only if the insured intended the damages, or if it can be said that the damages were, in a broader sense, 'intended' by the insured because the insured knew that the damages would flow directly and immediately from its intentional act." Id. (internal citations omitted) (citing *McGroarty v. Great Am. Ins.*

[1] Brooklyn Center thus fails to explain how the District Court "created a new rule at odds with New York caselaw by misapplying broad language far outside its original context" (App. Br. at p. 10).

> *Co.*, 36 N.Y.2d 358, 363–65 (1975), and *Mary & Alice Ford Nursing Home Co.*, 446 N.Y.S.2d at 601). "In those instances, coverage is precluded because the damages are not 'accidental.'" *City of Johnstown*, 877 F.2d at 1151.

(A009 [emphasis added in underscore]). That is precisely what Ms. Goldman alleged and what the District Court found. She alleged that Brooklyn Center acted with deliberate indifference to her need for accommodations directly causing her anxiety and emotional distress (A045 at ¶ "30").

Moreover, to the extent that Brooklyn Center goes so far as to argue that flatly refusing to serve deaf people is not an "indisputably wrongful act" because it is not as though Brooklyn Center molested a child (App. Br. at p. 11), I.M. did not involve child molestation and the First Department still found sufficient evidence that the City of New York had acted with reckless indifference when it discriminated against the plaintiff.

As such, McGroarty does not change the import and meaning of the underlying allegations regarding the alleged harm caused to Ms. Goldman, which, like the allegations regarding Brooklyn Center's conduct, demonstrate that it too was "intentional."

Nor does this Court's nearly 100-year-old decision in Messersmith v Am. Fid. Co., 232 NY 161 [1921]) alter the outcome. Since it quoted so much of this Court's decision as observed that liability is determined by the transaction *as a whole* (App. Br. at p. 11), Brooklyn Center must thus concede that the two interactions between Ms. Goldman and Brooklyn Center form the basis for Brooklyn Center's alleged liability under a "failure-to-accommodate" theory. The allegations in the *Goldman* Complaint regarding these two incidences demonstrate that each and every one of Brooklyn Center's discriminatory actions were purposefully undertaken with deliberate indifference to the emotional distress it would cause Ms. Goldman. More specifically: (1) unprompted, Ms. Goldman was told that she would not receive accommodations from Brooklyn Center; (2) Ms. Arroyo (Brooklyn Center's Director) was rude, dismissive and disrespectful; (3) Ms. Goldman was explicitly told to look elsewhere for services; and (4) Ms. Arroyo repeatedly hung-up on Ms. Goldman. Therefore, Messersmith simply reinforces the argument that the only complaint made against Brooklyn Center by Ms. Goldman was based on uncovered, intentional discrimination even though her claim was premised on a "failure-to-accommodate" theory.

Accordingly, since the factual allegations of the *Goldman* Complaint, read as a whole, demonstrate purely intentional conduct on the part of Brooklyn Center, it failed to meet its burden of proving that there was an "accident" covered by the PIIC policy.

The Harm Caused By Brooklyn Center's Discriminatory Practices Was Not A Fortuity

Equally unavailing is Brooklyn Center's reliance on the Insurance Department's Circular Letter No. 6 for the proposition that coverage exists if the relationship between Brooklyn Center's wrongful acts and the resultant harm is "sufficiently fortuitous" (App. Br. at pp. 9-10). As explained, nothing in the *Goldman Complaint* can be interpreted to allege fortuity. Both the acts and the harm were directly attributed to intentional discrimination undertaken with deliberate indifference to causing Ms. Goldman emotional distress (A121).

To be sure, the allegations of the *Goldman Complaint* also distinguish Brooklyn Center's example of a "left-turn" case. According to Brooklyn Center, a driver making an intentional left turn in front of an oncoming vehicle may not intend the ensuing collision (App. Br., pp. 12-13). Of course, the driver's response would be that he never saw the oncoming vehicle or he underestimated his ability to complete the turn, i.e. he was negligent in the operation of his own vehicle.

That analogy ignores the actual allegations of the *Goldman Complaint*, however, that Brooklyn Center refused to serve deaf people and knew that what it was doing would cause emotional distress to Ms. Goldman and others similarly-situated. To put it in Brooklyn Center's terms, the *Goldman Complaint* alleged that Brooklyn Center intended the ensuing collision.

What Brooklyn Center is actually suggesting is that it could engage in an intentional act while knowing it would cause harm, but because it did not undertake the act for the purpose of causing harm its actions should be insured against. That is counter-intuitive to the purpose of insurance, which is intended to protect against fortuitous events beyond the insured's, Brooklyn Center's, control. There is an entire doctrine of "known loss" which prohibits the type of insurance proposed by Brooklyn Center. As summarized by the Second Circuit:

> "insurance is not available for losses that the policyholder knows of, planned, intended, or is aware are substantially certain to occur." Barry R. Ostrager & Thomas R. Newman, Handbook on Insurance Coverage Disputes § 8.02, at 248 (5th ed.1991) (collecting cases). New York has codified a somewhat narrower version of the doctrine… [insuring] "any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party." N.Y. Ins. Law § 1101(a)(1)-(2).

Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. Stroh Companies, Inc., 265 F3d 97, 106 (2d Cir. 2001).

Here, based on the allegations of the *Goldman Complaint* it was substantially certain that Ms. Goldman and other deaf people would be damaged by Brooklyn Center's discriminatory practices. The Complaint further alleged that the conduct undertaken by Brooklyn Center was entirely within its control. The Complaint specifically alleged that Brooklyn Center had, in fact, developed a pattern or practice of discriminating against the deaf. Therefore, even if Brooklyn Center did not set out to purposefully hurt Ms. Goldman (which does not explain why Ms. Arroyo was rude, dismissive and disrespectful), the harm caused by its deliberate actions was under no circumstances a "fortuity," and thus it cannot be insured against.

Covered "Claims" Must Have Factual Predicate

Most of Brooklyn Center's Brief is devoted to arguing that *claims* which do not require proof of intent are covered occurrences (App. Br. at pp. 29-33). At once, Brooklyn Center must know that it wrongly asserts this position by its citation to Atlantic Mutual v Terk (309 AD2d 22). Brooklyn Center admits that the Atlantic Mutual-Court determined that, because the allegations of the complaint were solely premised on intentional conduct the fact that the *claim* asserted against the insured could have been proven without intent was irrelevant (App. Br. at p. 33). Quoting from an earlier decision from the same Court, the

Atlantic Mutual-Court determined that the duty to defend does not exist where, *like the present case*, "the allegations of the Complaint… [were] ... premised, without exception, upon conduct both knowing and intentional" (id. at 31).

Undeterred, Brooklyn Center posits that there are "different theories of liability supporting the claims in the *Goldman* Complaint" which can either be proved under a disparate treatment (intentional) or failure-to-accommodate (nonintentional) theory (App. Br. at p. 29). Thus, it asserts, as long as there is "at least one covered *claim*," PIIC must defend against them all (App. Br. at p. 30 [emphasis added]). Here, it argues, "Brooklyn Center's need to defend against a nonintentional failure-to-accommodate claim triggered PIIC's duty to defend" (App. Br. at p. 33).

The problem with Brooklyn Center's analysis is that it is not fact-based, its claim-based, yet this Court has routinely held that determinations of insurance coverage are based on factual allegations. As this Court succinctly summarized in BP Air Conditioning Corp. v. One Beacon Ins. Grp. (8 NY3d 708, 714 [2007]):

> [I]t is well settled that an insurer's "duty to defend [its insured] is 'exceedingly broad' and an insurer will be called upon to provide a defense whenever the *allegations* of the complaint 'suggest ... a reasonable possibility of coverage'" (*Automobile Ins. Co. of Hartford v. Cook*, 7 N.Y.3d 131, 137, 818 N.Y.S.2d 176,

> 850 N.E.2d 1152 [2006] [citation omitted]). "The duty to defend [an] insured[ ] ... is derived from the *allegations* of the complaint and the terms of the policy. If [a] complaint contains *any facts or allegations* which bring the claim even potentially within the protection purchased, the insurer is obligated to defend" (*Technicon Elecs. Corp. v. American Home Assur. Co.*, 74 N.Y.2d 66, 73, 544 N.Y.S.2d 531, 542 N.E.2d 1048 [1989]).
>
> A duty to defend is triggered by the *allegations* contained in the underlying complaint. The inquiry is whether the *allegations fall within the risk of loss* undertaken by the insured…

Id. at 714 (emphasis added).

By definition, "allegations" are matters of fact (see Black's Law Dictionary [11th ed. 2019] ["allegation… Something declared or asserted as a matter of fact, esp. in a legal pleading; a party's formal statement of a factual matter as being true or provable, without its having yet been proved"]). The definition of "claim," however, is "a legal remedy to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for" (Black's Law Dictionary [11th ed. 2019]). Thus, while the relative question is whether there is a claim or "risk of loss" covered by the policy, the answer to that question, derived from legions of case law from this Court, is determined based on the *factual allegations* supporting that claim.

Indeed, this analysis is in keeping with the general proposition that the viability of a cause of action in a complaint is determined based on the facts alleged. For example, on a motion to dismiss pursuant to CPLR 3211, courts look to the facts to determine whether they "fit within any cognizable legal theory" (Leon v. Martinez, 84 NY2d 83, 87–88 [1994]). The analysis is *not* undertaken from the perspective of the cause of action, i.e. the courts are not tasked with deciding whether the cause of action itself stated a cognizable theory.

The same is true when analyzing whether there is a potentially covered "claim." As this Court observed in Allstate Ins. Co. v Mugavero (79 NY2d 153, 162-63 [1992]), if the theory of liability is questionable from the facts as pleaded, then there is a duty to defend, but *where the facts as pleaded cannot sustain a covered cause of action, then there is no duty to defend*. The focus is not on the cause of action, its on the facts as pleaded. Stated otherwise, insurance coverage is not triggered by some formulaic recitation of the elements of a cause of action but rather the existence of allegations involving fortuity.

Here, however, Brooklyn Center is asking this Court to disregard this practice and to ignore thirty paragraphs of factual allegations in the *Goldman Complaint*. Instead, Brooklyn Center wants this Court to focus solely on the four

Counts. According to Brooklyn Center, if any one of those Counts can be proven without proving intentional conduct then PIIC must defend against them all, but that type of backward analysis stands contrary to well-established New York law.

It is for this reason that Brooklyn Center looks *outside of New York* to argue that other jurisdictions focus on "causes of action" which can be proved via "multiple theories" instead of facts (App. Br. p. 30). Even then, Brooklyn Center does not cite applicable law, nor does it look to the myriad of other jurisdictions which treat the duty to defend issue by applying the same fact-based analysis as the Courts of this State.

In this regard, Brooklyn Center relies on the Seventh Circuit's decision in Solo Cup Co. v. Fed. Ins. Co. (619 F.2d 1178 [7th Cir. 1980]). There, the Circuit Court stated that the well-settled law of Illinois was that an insurer's duty to defend extended to causes of action or theories of recovery (id. at 1183). Notably, however, again analyzing Illinois Law *thirty years later*, the Seventh Circuit subsequently observed that "[t]he allegations of the complaint, rather than the legal theory under which the action is brought, determine whether there is a duty to defend" (Amerisure Mut. Ins. Co. v. Microplastics, Inc., 622 F3d 806, 815 [7th Cir 2010]).

Brooklyn Center has also cited a case applying Oregon law, where the Court of Appeals of Oregon observed that the duty to defend is based on the facts of the complaint, and the insurer must defend "if the complaint may, without amendment, admit proof of conduct that is covered by the policy" (Ron Tonkin Chevrolet Co. v. Cont'l Ins. Co., 126 Or. App. 712, 715 [1994]).

It is notable, however, that in another case decided in the same year, the Supreme Court of Oregon, En Banc, held that: "In evaluating whether an insurer has a duty to defend, the court looks *only at the facts alleged in the complaint* to determine whether they provide a basis for recovery that could be covered by the policy" (Ledford v. Gutoski, 319 Or. 397, 400, 877 P.2d 80, 82 [1994] [emphasis added]). The Ledford-Court further observed that the above-quoted portion of Ron Tonkin should be stated "the insurer may still have a duty to defend if certain *allegations* of the complaint, without amendment, could impose liability for conduct covered by the policy" (id. at 83 [emphasis added]). Thus, like New York law, Ron Tonkin also stands for the proposition that the duty to defend is determined by the *allegations* of the complaint.

Even if this Court needed to look outside its jurisdiction to consider this issue, which it does not, it would find that this Court's long-standing principles are in keeping with the vast majority of other jurisdictions. In fact, "[t]he rule that the insurer's duty to defend is determined by the allegations contained within the 'four corners of the complaint' is widely followed" (Ostrager and Newman, Insurance Coverage Disputes [15th ed.] § 5.02[a][1] at 282). Research reveals that only nine[2] out of the fifty States employ an analysis using something other than the factual allegations of the complaint (or extrinsic facts known to the insurer) to ascertain whether there is coverage. Significantly, Brooklyn Center has not offered any compelling reason why this Court should change the law in this jurisdiction to follow the underwhelming minority.

It is for these reasons that the question posed by the Second Circuit was too broadly worded and should not be answered, but instead the question should be posed so that its answer could be based on the underlying facts of this case.

[2] The nine States are: Alaska (nature of the claim); California (claim); Hawaii (claim); Maryland (claim); Minnesota (cause of action); Missouri (potential for liability); New Jersey (nature of the claim); Wisconsin (nature of the claim); and West Virginia (claim).

Extrinsic Facts Unknown to PIIC

It is further significant that Brooklyn Center never provided additional facts or circumstances that might change PIIC's coverage position. This Court made clear in Fitzpatrick that the duty to defend is not confined to the allegations in the "four corners of the complaint." Instead, it is also based on extrinsic facts known by the insurer. Indeed, in Fitzpatrick, this Court observed that, after the insurer's denial of coverage both the insured and the *insurer's own agent* brought facts to the insurer's attention which triggered coverage under the policy.

By contrast here, Brooklyn Center failed to bring any facts to PIIC's attention. PIIC expressly informed Brooklyn Center that Brooklyn Center had an opportunity to provide PIIC with any facts that might suggest coverage under the PIIC policy. PIIC further instructed Brooklyn Center to communicate these facts in writing so that they could be responded to in kind, but at a minimum PIIC provided Brooklyn Center with two contacts at PIIC with whom Brooklyn Center could discuss the *Goldman Complaint*. At no time between the disclaimer of May 18, 2015 and the re-tender of August 8, 2018 did Brooklyn Center make any effort to change PIIC's "mind."

Then, in August 2018, when Brooklyn Center wrote to PIIC asking it to reconsider its denial of coverage, Brooklyn Center offered no new facts in support of its re-tender. Instead, it relied on paragraph "30" of the *Goldman Complaint*. As seen throughout this Brief, paragraph "30" explicitly indicated that Ms. Goldman was complaining that Brooklyn Center intentionally discriminated against her. Thus, PIIC was given no reason to change its mind, and, in fact, the re-tender strengthened PIIC's position.

In the underlying case, however, Brooklyn Center was taking the position that it never refused Ms. Goldman an accommodation. Brooklyn Center was arguing that when it denied service to Ms. Goldman it did so because the type of service that she was seeking was not available. In fact, according to the District Court's opinion in denying the parties' motions for summary judgment in Goldman v Brooklyn Center for Psychotherapy:

> Ms. Arroyo testified in her deposition that BCP "wouldn't have [had] any problems putting in an interpreter but that – but at first I'd have to be able to offer the services for the child… I wasn't able to provide mental health services for the child. The interpreter services we would have put in place if that's what she needed."

(Goldman v Brooklyn Center for Psychotherapy, 2018 WL 1385888 at p. 5).[3] In other words, while it was true that Ms. Goldman was turned away, it was simply because of a miscommunication, not discrimination.

In the declaratory action, Brooklyn Center claimed that its decision to deny accommodations could have been "reasonable" under the circumstances. As the Second Circuit wrote in certifying to this Court, "as Brooklyn Center believed that hiring interpreters to accommodate Goldman's hearing disability would have been unreasonable or would have imposed an undue hardship on its business, any cognizable harm resulting from its refusal to do so would have been accidental" (A016). This argument is repeated in Brooklyn Center's Brief at pages 19-22. Of course, we know from Ms. Arroyo's testimony that cost had nothing to do with Brooklyn Center's decision to turn away Ms. Goldman. The issue of "reasonableness" is an after-thought, raised only in a desperate attempt to trigger coverage under the PIIC policy for a claim that anyone could see was clearly based on intentional discrimination.

[3] This case was reproduced as part of the Appendix to the Brief for Appellant.

Thus, Brooklyn Center alternatively suggests that PIIC should have interpreted the allegations of the Goldman Complaint to include a claim based on negligence. According to Brooklyn Center, PIIC should have understood that "the alleged discrimination [regarding] Brooklyn Center's 'policy and practice,' [allowed] for the possibility that any failure to accommodate was the result of decisions made at some earlier point in time, rather than an in-the-moment decision driven by discriminatory animus" (App. Br. at pp. 28-29). An earlier decision to discriminate against the deaf, which is what Ms. Goldman alleged, would still have been intentionally discriminatory regardless of when the decision was made. Nonetheless, the takeaway from this point is that PIIC was not obligated to "read between the lines" and theorize all possible meanings of the plain language used in the *Goldman Complaint*. Thus, Brooklyn Center's proposed interpretation is equally irrelevant.

Accordingly, since none of the foregoing was brought to PIIC's attention before the underlying litigation was concluded and PIIC was not obligated to interpret Ms. Goldman's allegations of intentional acts as having an element of "reasonableness" to them, the Second Circuit should not have taken this into consideration when it certified the question to this Court.

A Complaint Rife With Allegations Of Intentional Acts Cannot Be Deemed "Gratuitous" Or "Superfluous"

According to Brooklyn Center, the majority of the allegations in the Goldman Complaint are "superfluous" (App. Br. at p. 34). It believes that if this Court were to delete all allegations of intentional conduct, then the *Goldman Complaint* would still state a claim for failure to accommodate (id.). That is simply not so.

PIIC will not belabor this point any further. It has already shown that the allegations of the *Goldman Complaint* alleged intentional discrimination under a failure-to-accommodate theory. This Court need look no further than paragraph "1" of the *Goldman Complaint*, which states that the failure-to-accommodate was premised on the fact that "[Brooklyn Center] flatly refused to serve Ms. Goldman, because of her disability" (A041). This theme pervades the underlying allegations to the point that the District Court correctly drew the only rational conclusion: "The Goldman Complaint alleged only intentional acts resulting in discrimination" (A501).

Accordingly, PIIC's disclaimers of May 18, 2015 and September 10, 2018, should be upheld and if this Court is going to answer the certified question then it should do so with the recommendation that the Second Circuit affirm the

declaration that PIIC had no duty to defend Brooklyn Center against the *Goldman Complaint*.

The Theories Underlying Disparate Treatment, Disparate Impact And Failure To Accommodate Do Not Support Brooklyn Center's Claim

Finally, rather than focus on the factual allegations that gave rise to PIIC's disclaimer of coverage, Brooklyn Center focuses on the theories underlying the claims of disparate treatment, disparate impact and failure to accommodate. It notes that disparate treatment is purposeful discrimination, whereas disparate impact is a "facially neutral" policy that results in discrimination (App. Br. at pp. 13-14). At once, of course, it can be seen that a policy which flatly refuses to serve the deaf could never be considered "facially neutral" and can only be considered purposeful discrimination. Therefore, engaging in this analysis does not aide Brooklyn Center's argument, as it concedes that "[i]nsurance coverage for disparate treatment is barred as a matter of New York public policy" (App. Br. at p. 15).

Thus, Brooklyn Center attempts to shoehorn this case into a claim for failure-to-accommodate which it argues is distinct from the other two theories and is a more "relaxed" type of discrimination (App. Br. at p. 17). It urges that the foundation of failure-to-accommodate is "thoughtlessness and indifference" (id.),

but the analysis of failure-to-accommodate remains focused on facially neutral policies that are "difficult or impossible to predict in advance" that they would be discriminatory (App. Br. at p. 18). Here, however, Brooklyn Center should have been able to predict that its deliberate refusal to serve the deaf was more than just thoughtless and would be considered discriminatory. That is what the allegations of the *Goldman Complaint* said, i.e. that Brooklyn Center knew it was obligated to provide accommodations to Ms. Goldman, that it refused to provide any accommodations and that it did so with deliberate indifference to the harm it would cause.

Brooklyn Center also quotes at length from the Insurance Department's Circular Letter No. 6 to no avail (App. Br. at p. 19). The Insurance Department made clear that intentional discrimination could never be insured against. Thus, Circular Letter No. 6 was intended only to promote insurance coverage for facially neutral employment practices that were not undertaken with the intent to discriminate. Such claims, it was determined, were "grounded upon statistical or other numerical profiles that reflect disparities between or among groups" (Circular Letter No. 6). Here, however, Ms. Goldman's claim was not grounded upon statistics or numerical profiles. It was grounded upon targeted discrimination against the hearing impaired. As such, it could never be covered by insurance.

This point is underscored by the citations on pages 21 and 22 of the Appellant's Brief. In the cited cases, there were alternatives to the ASL interpreters sought by the claimants. In Howard v United Parcel Service, Inc. (101 F Supp 3d 343, 354-55 [SDNY 2015], aff'd sub nom., 648 Fed Appx 38 [2d Cir 2016]), it was noted that the claimant was provided "several other accommodations." In Berry-Mayes v New York City Health and Hospitals Corp (712 Fed Appx 111, 112 [2d Cir 2018]), it was noted that the claimant's decedent was provided with an ASL interpreter on fourteen occasions and when unavailable hospital staff "meticulously documented [decedent's] communication abilities." Therefore, the Courts in each of those cases correctly held that the defendants did not intentionally discriminate against their respective claimants.

By contrast here, however, according to the *Goldman Complaint,* no alternative form of communication was offered. It was specifically alleged that, unprompted, Ms. Goldman was told that no interpreter would be provided to allow her to participate in the mental health treatment of her son (A043 at ¶ "13"). Ms. Goldman was then repeatedly, explicitly told that *she should seek treatment elsewhere* (A043 at ¶ "15" and A044 at ¶ "20"). Nowhere in the Complaint does it allege that Brooklyn Center offered an alternative accommodation.

We are therefore back to the beginning of this Brief, which rightly focuses on the facts of the case. It was patently obvious from the face of the allegations in the *Goldman Complaint* that Ms. Goldman was not complaining about facially neutral practices, she was complaining about purposeful discrimination against the deaf. She did not allege that Brooklyn Center had a policy of refusing to provide certain types of treatment that necessarily (and unintentionally) excluded the deaf. Instead, she alleged that Brooklyn Center refused to serve the deaf and refused to make any accommodations for the hearing impaired.

Thus, even when viewed from the perspective of the legal standard for a failure-to-accommodate claim, the facts of this case, on which the determination of coverage *must* be made, simply do not warrant imposing a duty to defend on PIIC. The certified question, which is divorced of a fact-based analysis, broadly seeks to know whether an insurer must defend against a claim of failure-to-accommodate. As seen, the legal standard of such a claim would indicate so, but that underscores precisely why the duty to defend is not based on legal standards. Therefore, and because the certified question cannot be answered as posed without wiping out the well-established law of this State, the question must be re-phrased to take the facts of this case into consideration.

Accordingly, it is respectfully submitted that on the facts of this case, this Court can, and should come to the conclusion that PIIC owed no duty to defend Brooklyn Center against the allegations of the *Goldman Complaint*.

CONCLUSION

Viewing the certified question from the perspective of this Court's long-standing precedent that an insurer's duty to defend is based on the facts alleged by the underlying claimant against its insured, as well as extrinsic facts known to the insurer, it is respectfully submitted that this Court should re-phrase the question and recommend to the Second Circuit that it affirm the District Court's declaration that PIIC had no duty to defend Brooklyn Center against the allegations in the *Goldman Complaint*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
Pursuant to Part 500.13(c)(1) of the Rules of Practice of the Court of Appeals, State of New York

The foregoing brief was prepared on a computer using Microsoft Word 2010. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

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Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, this Statement, or any authorized addendum containing statutes, rules, regulations, etc., is 8,411.

Dated: Woodbury, New York
August 20, 2020