

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

THE TURNER CORPORATION and)
TURNER CONSTRUCTION COMPANY,)
)
Plaintiffs,)
v.) C.A. No. N25C-03-301 PRW
) CCLD
LEXINGTON INSURANCE COMPANY and)
NATIONAL UNION FIRE INSURANCE)
COMPANY OF PITTSBURGH, PA,)
)
Defendants.)

Submitted: September 14, 2026

Decided: October 2, 2026

*Upon Defendants' Motion for Entry of Final Judgment or, in the Alternative,
Application for Certification of Interlocutory Appeal,*
DENIED, in part; GRANTED, in part.

ORDER

Upon consideration of Lexington Insurance Company and National Union Fire Insurance Company of Pittsburgh, Pa. (the "AIG Insurers")'s motion under this Court's Civil 54(b) for entry of a final judgment and alternative application under Supreme Court Rule 42 for an order certifying an appeal from the interlocutory order of this Court dated August 3, 2026,¹ it appears to the Court that:

(1) This insurance dispute stems from the AIG Insurers' attempt to recoup

¹ AIG Insurers' Motion for Entry of Final Judgment or Certification of an Interlocutory Appeal (D.I. 101) [hereinafter the "Insurers' Final Judg. or Appeal App."].

amounts paid to settle a lawsuit New York University brought against Turner Corporation and Turner Construction Company (the “Turner Entities”) for damages sustained after Hurricane Sandy (the “NYU Lawsuit”).²

(2) As part of the Turner Entities’ corporate insurance program, National Union issued a commercial umbrella liability policy to Turner Corporation as the named insured with a \$25 million per occurrence limit of liability. This National Union policy covered “those sums in excess of the Retained Limit that the Insured becomes legally obligated to pay as damages by reason of liability imposed by law because of . . . Property Damage . . . to which this insurance applies . . . had a non-accumulation condition.”³

(3) Lexington also issued a follow-form excess liability policy number 62785394 to Turner Corporation as the named insured, with a \$25 million per occurrence limit of liability. Except as stated in the Lexington policy, the Lexington policy generally incorporated by reference or “follow[ed] form to” the insuring terms of the National Union policy.¹⁰ And like the National Union policy, the Lexington policy: (a) required insurer consent to settle a claim; and (b) contained an anti-stacking condition to coverage.⁴

² *The Turner Corp., et al. v. Lexington Ins. Co., et al.*, 2026 WL 2227785, at *1-4 (Del. Super. Ct. Aug. 3, 2026) (D.I. 94).

³ *Id.* at *1-2.

⁴ *Id.* at *2.

(4) NYU owns a large campus of buildings known as NYU Langone Medical Center on the east side of New York City. In December 2011, NYU and Turner Construction entered into a contract to build an energy building that would house a cogeneration and stand-by boiler plant and an emergency generator for an NYU hospital. For this project, NYU acquired an insurance arrangement, known as an Owner Controlled Insurance Program (“OCIP”), that included eight policies providing for \$202 million in coverage. The OCIP included a \$2 million primary policy and three excess policies.⁵

(5) After signing the 2011 Contract, Superstorm Sandy resulted in record storm surges that pushed unprecedented amounts of water from the East River and New York Harbor into lower Manhattan, including onto the NYU Langone Campus. NYU sued Turner Construction in the New York Supreme Court relating to damages from the storm and the energy building project. Ultimately in its suit against Turner Construction, NYU claimed its damages exceeded \$2.2 billion.⁶

(6) That underlying NYU-Turner suit spawned a declaratory judgment action by the Turner Entities’ insurers. Therein, the insurers, other than these AIG Insurers, filed a declaratory judgment action seeking to be absolved from coverage for Turner

⁵ *Id.*

⁶ *Id.* at *2-3.

Construction for any damages it might owe in the NYU Lawsuit.⁷

(7) After a failed mediation and denial of a motion for summary judgment, the New York trial judge set a trial date in the NYU Lawsuit. NYU and Turner Construction renewed settlement talks.

(8) Eventually, the insurers agreed to fund the settlement of the underlying lawsuit. Each insurer agreed to contribute \$25 million under its respective policy to that settlement. But the insurers reserved their rights to seek, and fully intended to seek, full recoupment of the policies' limits.⁸

(9) The Turner Entities acknowledged the insurers' agreement to pay the settlement but expressly disagreed to any modification of any provisions about recoupment in the policies.⁹

(10) NYU and Turner Construction negotiated the terms of the settlement of the NYU Lawsuit and executed a confidential settlement thereof.¹⁰

(11) Though all of this litigation—addressing both the underlying NYU Lawsuit and the Turner-Insurers' coverage issues—had been filed and deftly handled in the New York courts to this point, the Turner Entities turned South and filed a complaint in this Court asserting five causes of action against the AIG

⁷ *Id.* at *3.

⁸ *Id.* at *3-4.

⁹ *Id.* at *4.

¹⁰ *Id.*

Insurers including: (a) breach of contract; (b) declaratory judgment on the recoupment issue; (c) declaratory judgment on the non-accumulation issue; (d) declaratory judgment on the anti-stacking issue; and (e) breach of the implied covenant of good faith and fair dealing.¹¹

(12) The AIG Insurers responded with counterclaims: seeking (a) a declaration that the National Union corporate tower policy doesn't provide coverage due to the non-accumulation-of-limits condition; (b) a declaration that the Lexington corporate tower policy doesn't provide coverage due to the anti-stacking condition; (c) recoupment of amounts advanced for the settlement of the underlying lawsuit invoking the non-accumulation-of-limits condition; (d) recoupment of amounts advanced for the settlement of the underlying lawsuit invoking the anti-stacking condition; and containing its own allegations of (e) breach of contract invoking the non-accumulation-of-limits condition; (f) breach of contract invoking the anti-stacking condition; (g) unjust enrichment invoking the non-accumulation-of-limits condition; and (h) unjust enrichment invoking the anti-stacking condition.¹²

(13) The sides brought cross-motions for partial summary judgment asking this Court first resolve whether, under New York law, an insurer can recoup settlement payments made with a reservation of rights when the policy doesn't

¹¹ *Id.*

¹² *Id.* at *4-5.

expressly allow for recoupment after a reservation of rights.

(14) The Court observed that there was a split of authority—including in the New York courts—“on whether an insurer can unilaterally create a right to recoup defense costs or settlement costs when the insurance policy is silent on the issue, and the insured doesn’t expressly agree to the reserved right to recoup.”¹³ That notwithstanding, “[h]ere, when applying the facts of this case to the New York Court of Appeals’ well-established insurance and contract law principles, the Court f[ound] that the Insurers have no contractual right to recoupment.”¹⁴ Resultingly, the Court granted the Turner Entities’ Motion for Partial Summary Judgment on Complaint Count II and the Insurers’ Counterclaim Counts I, II, III, IV, V, and VI; it denied the AIG Insurers’ Partial Motion for Summary Judgment on the Turner Entities’ Complaint Counts II and IV and on the AIG Insurers’ Counterclaim Counts II, III, and IV.

***The AIG Insurers’ Have Not Demonstrated that
Entry of Partial Final Judgment under Civil 54(b) is Appropriate.***

(15) This Court’s Civil Rule 54(b) allows it “to certify a final judgment upon one or more claims if: (1) the action involves multiple claims or parties; (2) at least one claim or the rights and liabilities of at least one party has been finally decided,

¹³ *Id.* at *15.

¹⁴ *Id.*

and (3) there is no just reason for delaying an appeal.”¹⁵ “In deciding whether there is ‘just reason for delay,’ the Court must consider: (1) the hardship or injustice suffered by the moving party in the absence of the final judgment; and (2) the interests of judicial administration and judicial economy.”¹⁶ The decision to so certify final judgment is left to the Court’s discretion.¹⁷ But the long-established policy against piecemeal appeals requires this Court to issue Rule 54(b) judgments “sparingly, cautiously, and frugally.”¹⁸

(16) This action involves multiple claims and parties, so the first Rule 54(b) consideration is satisfied.

(17) But “[n]ot all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims.”¹⁹ “Rule 54(b) is an exception to the well-established policy against piecemeal appeals, and does not contemplate the entry of final judgment absent a showing of some degree of hardship or injustice through delay which would

¹⁵ *CVR Refining, LP v. XL Specialty Ins. Co.*, 2023 WL 6690908, at *4 (Del. Super. Ct. Oct. 12, 2023) (quoting *Boeing Co. v. Spirit Aerosystems, Inc.*, 2017 WL 3233068, at *1 (Del. Super. Ct. Jul. 28, 2017)(cleaned up)).

¹⁶ *Lima Delta Co. v. Glob. Aerospace, Inc.*, 2016 WL 1169125, at *2 (Del. Super. Cr. Mar. 17, 2016); *Boeing*, 2017 WL 3233068, at *1; *CVR Refining*, 2023 WL 6690908, at *4.

¹⁷ *Lima Delta Co.*, 2016 WL 1169125, at *2; *Boeing*, 2017 WL 3233068, at *1; *CVR Refining*, 2023 WL 6690908, at *4.

¹⁸ *Boeing*, 2017 WL 3233068, at *1; *CVR Refining*, 2023 WL 6690908, at *4.

¹⁹ *Mattel, Inc. v. XL Insurance America, Inc.*, 2025 WL 1894998, at *3 (Del. Super. Ct. July 9, 2025) (quoting *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980)).

be alleviated by immediate appeal.”²⁰ And to warrant entry of a partial final judgement via a Rule 54(b), the applicant must show a hardship that is an “impending, exigent situation, external to the litigation, which necessitate[s] expedient review by a higher court.”²¹

(18) The AIG Insurers have demonstrated no such hardship here; all of the difficulties they allege are visited upon them are directly related to the further course of this litigation. Nothing more. Thus, their resort to Rule 54(b) falls short and that request in the application is **DENIED**.

Certification Under Supreme Court Rule 42 is Warranted.

(19) Delaware Supreme Court Rule 42 governs interlocutory appeals from this Court’s orders.²² Accordingly, the Court considers the AIG Insurers’ application under Rule 42’s rigorous standards.²³

²⁰ *Zimmerman v. Home Shopping Network, Inc.*, 1990 WL 140890, at *1 (Del. Ch. Sept. 25, 1990) (citation modified).

²¹ *Johnson v. Preferred Pro. Ins. Co.*, 2015 WL 413608, at *5 (Del. Super. Ct Jan. 28, 2015); *id.* at *5 (“[T]he potential prejudice to movant must be severe.”). See *In re Tri-Star Pictures, Inc., Litigation*, 1989 WL 112740, at *1 (Del. Ch. Sept. 26, 1989) (“Indeed, Rule 54(b) exists to create ‘a discretionary power to afford a remedy in the infrequent harsh case. . . .’”(quoting *Panichella v. Penn R.R. Co.*, 252 F.2d 452, 455 (3d Cir. 1958)).

²² *DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102, 103 (Del. 1982).

²³ See *TowerHill Wealth Mgmt., LLC v. Bander Family P’ship, L.P.*, 2008 WL 4615865, at *2 (Del. Ch. Oct. 9, 2008) (citation omitted) (noting that Rule 42 contains “rigorous criteria” and the Supreme Court requires “strict compliance with Rule 42”)); see also *JB and Margaret Blaugrand Foundation v. Guggenheim Funds Investment Advisors, LLC*, 2023 WL 2562933, at *3 (Del. Ch. Mar. 17, 2023) (“[A] Rule 42 application cannot be certified unless it clears two ‘rigorous’ hurdles.”).

(20) Under Rule 42, when faced with a litigant’s request for certification of an interlocutory appeal, the Court must: (a) determine that the order to be certified for appeal “decides a substantial issue of material importance that merits appellate review before a final judgment;”²⁴ (b) decide whether to certify via consideration of the eight factors listed in Rule 42(b)(iii);²⁵ (c) consider the Court’s own assessment of the most efficient and just schedule to resolve the case; and then, (d) identify whether and why the likely benefits of interlocutory review outweigh the probable costs, such that interlocutory review is in the interests of justice.²⁶ “If the balance is

²⁴ Del. Supr. Ct. R. 42(b)(i).

²⁵ Those factors are:

- (A) The interlocutory order involves a question of law resolved for the first time in this State;
- (B) The decisions of the trial courts are conflicting upon the question of law;
- (C) The question of law relates to the constitutionality, construction, or application of a statute of this State, which has not been, but should be, settled by this Court in advance of an appeal from a final order;
- (D) The interlocutory order has sustained the controverted jurisdiction of the trial court;
- (E) The interlocutory order has reversed or set aside a prior decision of the trial court, a jury, or an administrative agency from which an appeal was taken to the trial court which had decided a significant issue and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice;
- (F) The interlocutory order has vacated or opened a judgment of the trial court;
- (G) Review of the interlocutory order may terminate the litigation; or
- (H) Review of the interlocutory order may serve considerations of justice.

Del. Supr. Ct. R. 42(b)(iii).

²⁶ Del. Supr. Ct. R. 42(b). Those “probable costs” are informed, in part, by Rule 42(b)(ii), *i.e.*, interlocutory appeals “disrupt the normal procession of litigation, cause delay, and can threaten to exhaust scarce party and judicial resources.” Del. Supr. Ct. R. 42(b)(ii).

uncertain, the trial court should refuse to certify the interlocutory appeal.”²⁷

Applications for certification of an interlocutory appeal require the exercise of the trial court’s discretion and are granted only in extraordinary or exceptional circumstances.²⁸

(21) The first consideration—whether the order seeking certification decides a substantial issue of material importance that merits appellate review before a final judgment—is a threshold finding without which certification is inappropriate.²⁹ A substantial issue is usually understood as one that “decides a main question of law which relates to the merits of the case, and not to collateral matters.”³⁰ Put another way, the Court’s determination must decide a legal right, “meaning an issue essential to the positions of the parties regarding the merits of the case.”³¹ And “[a] legal right is discernable when one of the parties’ rights has been

²⁷ Del. Supr. Ct. R. 42(b).

²⁸ *In re Pure Res., Inc.*, 2002 WL 31357847, at *1 (Del. Ch. Oct. 9, 2002); *Mercury Pr’s Mgmt., LLC v. Valo Health, Inc.*, 2024 WL 413784, at *3 (Del. Ch. Feb. 5, 2024) (“Applications for an interlocutory review are addressed to the sound discretion of th[e] Court and are accepted only in extraordinary circumstances.”) (quotation omitted).

²⁹ *Invictus Special Situations Master I, L.P. v. Invictus Glob. Mgmt., LLC*, 2024 WL 5097929, at *3–4 (Del. Ch. Dec. 12, 2024).

³⁰ *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2861717, at *1 (Del. Ch. July 22, 2008); *Invictus Special Situations Master I, L.P.*, 2024 WL 5097929, at *3 (“As commonly articulated, the substantial issue requirement is met when a decision speaks to the merits of the case.”).

³¹ *TowerHill Wealth Mgmt.*, 2008 WL 4615865, at *2 (citing *Sprint Nextel Corp.*, 2008 WL 2861717, at *1); see *Pepsico, Inc. v. Pepsi-Cola Bottling Co. of Asbury Park*, 261 A.2d 520, 521 (Del. 1969) (“[A]s to the appealability of interlocutory orders . . . to be appealable, there must have been the determination of a substantial issue and the establishment of a legal right.” (citation omitted)); accord *Castaldo v. Pittsburgh-Des Moines Steel Co., Inc.*, 301 A.2d 87, 87 (Del. 1973) (“The oft-repeated test of the appealability of an interlocutory order is that it must determine a

enhanced or diminished as a result of the order.”³²

(22) The Court agrees with the AIG Insurers that it decided a central, merits-based issue at an early stage of the proceedings largely at the Turner Entities’ behest. Indeed, the Court’s ruling resolved *the* core issue in this dispute—whether, under New York law, the AIG Insurers can seek recoupment of the \$50 million advanced toward the settlement of the underlying lawsuit. The Court found they cannot. This satisfies Rule 42’s threshold requirement.³³

(23) An examination of both the delineated Rule 42 factors and exercise of its own ultimate duty to assess what the most efficient and just schedule is to resolve the case further convinces the Court that certifying this particular application is warranted.

(24) The AIG Insurers cite three Rule 42(b)(iii) factors as weighing in favor

substantial issue and establish a legal right.”).

³² *In re Cogent, Inc. S’holder Litig.*, 2010 WL 4146179, at *1 (Del. Ch. Oct. 15, 2010) (internal quotation marks omitted).

³³ *See, e.g., Solera Holdings, Inc. v. XL Specialty Ins. Co.*, 2019 WL 4733431, at *3 (Del. Super. Ct. Sept. 26, 2019) (“The Court’s opinion resolved key issues in this [insurance coverage] matter, including interpretation of several contractual provisions, and therefore interlocutory appellate review will resolve substantial issues of material importance.”); *id.* at n.33 (citing as examples: *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 606 A.2d 73, 74 (Del. 1992) (finding insurer’s right to exclude certain claims from coverage a “substantial issue”); *State Far, Mut. Auto Ins. Co. v. Abramowicz*, 386 A.2d 670, 671 (Del. 1978) (finding the “validity of a contract provision essential to the position of the parties” is considered to be a substantial issue); *Shook & Fletcher Asbestos Settlement Trust v. Safety Nat. Cas. Corp.*, 2005 WL 3007806, at *2 (Del. Super. Ct. Oct. 27, 2005) (“The extent of insurance coverage as a matter of law is a substantial issue for purposes of interlocutory appeal”)).

of certification³⁴—those at Rule 42(b)(iii) (A), (B), and (H).³⁵ So, the Court takes each in turn.

(25) Factor (A). Rule 42(b)(iii)(A) suggests that certification is more appropriate when “[t]he interlocutory order involves a question of law resolved for the first time in this State.” The Court does not take the more cramped view of this factor urged by the Turner Entities.³⁶ The Court’s decision on whether New York law permits an insurer to seek recoupment of a settlement payment made under an express reservation of rights was a first for a Delaware court. And even the New York Court of Appeals hasn’t definitively spoken on that precise recoupment question. So this Court was left to make a “reasoned prediction” of how New York’s highest court would decide it. In doing so, the Court set forth a framework for deciding such questions of unsettled foreign law that might be considered novel. And that is the question—How should Delaware trial courts go about such in a jurisdiction that so regularly deals with and applies foreign law?—that might be addressed by our high court in this instance.³⁷ The Court finds in this circumstance

³⁴ Insurers’ Final Judg. or Appeal App. at 11–12.

³⁵ By selecting only these three Rule 42(b)(iii) factors, the AIG Insurers tacitly concede that the others don’t support certification. *See Elutions Capital Ventures S.A.R.L. v. Betts*, 2022 WL 17075692, at *5 n.40 (Del. Ch. Nov. 18, 2022).

³⁶ Turner Entities’ Opp. at 8 (quoting *Lincoln Benefit Life Co. v. Wilmington Tr., N.A.*, 2018 WL 2074713, at *3 n.10 (Del. Super. Apr. 30, 2018) that it must be a novel question of Delaware law for the Rule 42(b)(iii)(A) factor to be met).

³⁷ As both parties recognize, the recoupment issue has yielded mixed results when Delaware courts have attempted to apply Delaware law and/or divine our sisters’ law. *Id.* at 9; Insurers’

this factor weighs in favor of certification.

(26) Factor (B). Rule 42(b)(iii)(B) is satisfied because “[t]he decisions of the trial courts are conflicting upon the question of law.” Again, the Turner Entities urge a too-narrow read of this factor.³⁸ This factor weighs in an applicant’s favor if it identifies conflict in a question of law, not fact.³⁹ “Generally, for court decisions to be ‘conflicting upon a question of law,’ they must disagree about legal standards.”⁴⁰ As the Court found, there’s a “national split” and a “clear disagreement” between courts in New York’s First and Second Departments on the specific recoupment issue raised here. And the issue has been resolved here—and in earlier instances—by the Court’s prediction of another jurisdiction’s legal standard.⁴¹

(27) Factor (H). “The Court should find that review of an interlocutory order

Final Judg. or Appeal App. at 11-12. Most importantly here, is that fact that our trial courts are called upon to do so and the question of how they should would obviously lie within our high court’s resolution of whether the Court did so correctly here.

³⁸ Turner Entities’ Opp. at 9-10.

³⁹ See *US Dominion, Inc. v. Fox News Network, LLC*, 2022 WL 100820, at *3 (Del. Super. Ct. Jan. 10, 2022) (finding that result of the decisions movant included in their brief failed to satisfy Rule 42(b)(iii)(B) because they were factual differences, not legal).

⁴⁰ *JB & Margaret Blaugrund Found.*, 2023 WL 2562933, at *6 (quotation omitted).

⁴¹ And too, this Court’s decisions have reached mixed conclusions when attempting to discern whether a particular jurisdiction—including Delaware—should or might allow recoupment. *E.g.*, *Textron Inc. v. Endurance American Insurance Co.*, 346 A.3d 639, 647-48 (Del. Super. Ct. 2025) (applying Delaware law when holding recoupment was not available); *Catlin Specialty Insurance Co. v. CBL & Associates Properties*, 2018 WL 3805868 (Del. Super. Ct. Aug. 9, 2018) (addressing recoupment under Tennessee law).

serves considerations of justice under Rule 42(b)(iii)(H) when the party applying for interlocutory review is in peril of irreparable harm and the other party is not.”⁴² “A court should not certify an interlocutory appeal on a legal issue if there is ‘no particular urgency to litigating the issue before a final judgment’ is entered, even if the issue is novel.”⁴³ Certainly, there is no danger of irreparable harm here. Eventual direct appeal after final judgment on the remaining bad-faith claim is still available. But that bad-faith claim depends greatly on the other counts and claims resolved by the Court’s partial summary judgment decision. Thus, the balance on this factor here is more even than it might at first appear.

(28) After examining and giving due weight to the eight Rule 42(b)(iii) factors, the Court lastly engages its own “assessment of the most efficient and just schedule to resolve the case. . . [and] whether and why the likely benefits . . . outweigh the probable costs, such that interlocutory review is in the interests of justice.”⁴⁴

(29) Our rules counsel that “[i]nterlocutory appeals should be exceptional, not routine, because they disrupt the normal procession of litigation, cause delay,

⁴² *Verizon Commc’ns Inc. v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA*, 2021 WL 1016445, at *7 (Del. Super. Ct. Mar. 16, 2021) (citing *DG BF LLC v. Ray*, 2020 WL 4720685, at *2 (Del. Aug. 13, 2020)).

⁴³ *Id.* (quoting *In re: Shawe & Elting LLC*, 2016 WL 279400, at *1 (Del. Jan. 22, 2016)).

⁴⁴ Del. Supr. Ct. R. 42(b)(iii) (2020).

and can threaten to exhaust scarce party and judicial resources.”⁴⁵ There is no such threat here. Indeed, a more definitive resolution of the recoupment issue decided will likely be of far greater benefit to conserving party and judicial resources than the norm. At bottom, because of the importance of resolution of the issue decided and the Turner Entities’ choice to have this Court do so—making its best prediction of as-yet-uncertain New York law—in the procedural posture it incited, the Court believes this case is exceptional.

NOW, THEREFORE, the AIG Insurers’ Application for Certification of Interlocutory Appeal under Supreme Court Rule 42 is **GRANTED**.

SO ORDERED,

/s/ Paul R. Wallace

Paul R. Wallace, Judge

⁴⁵ Del. Supr. Ct. R. 42(b)(ii).