
Week of April 2, 2008

Bad Faith Litigation & Equitable Subrogation DECISION OF INTEREST.

Contractual Indemnification

First-Party No-Fault & Fraudulent Incorporation

Bad Faith Litigation - Equitable Subrogation. DECISION OF INTEREST. In bad faith action against insurer, Fourth Department reverses order dismissing insurer's third-party malpractice claim against insured's attorney alleging losses due to attorney's failure to appear and defend its insured on grounds that principle of equitable subrogation gave rise to a cause of action that should have survived attorney's motion to dismiss. Court recognizes that New York courts generally impose a strict privity requirement to legal malpractice claims, but holds that subrogation places the insurer in the position of the insured so that it may recover from a third party responsible for the loss. A dissenting opinion argues that insurer failed to state a cause of action for legal malpractice where insurer was not in strict privity with insured's attorney. *Kumar v. American Transit Ins. Co.*, 2008 WL 748098 (4th Dept. March 21, 2008).

Contractual Indemnification. In worker's Labor Law action arising from a construction site accident, First Department affirms order dismissing owner's third-party claim for contractual indemnification against subcontractor where the promise on which the claim was based was found in the main agreement between the owner and the original contractor to which subcontractor was not a signatory. While the contract between owner and subcontractor incorporated the main contract by reference, such incorporation only applied to the main contract provisions relative to scope, quality, character, and manner of the work to be performed by the subcontractor. *Waitkus v. Metropolitan Housing Partners*, 2008 WL 852017 (1st Dept. April 1, 2008).

First-Party No-Fault - Fraudulent Incorporation. Court denies insurer's motion for summary judgment based upon provider's alleged failure to respond to its verification requests and demand for verified bill of particulars where insurer's demands were aimed to support a Mallela defense of fraudulent incorporation and dismissal was not appropriate where insurer failed to offer any justification for its request for Mallela-type documents. *Cambridge Medical, P.C. v. Nationwide Property and Cas. Ins. Co.*, 2008 WL 818943 (N.Y. City Civ. Ct. March 21, 2008).