

Week of August 1

LEGISLATIVE UPDATE. Reinsurance - Formation, Reinsurance - Enforcement, Collapse Exclusion, Late Notice/Cancellation, Indemnification/ General Obligations Law Sec. 15-108, Failure to Procure Insurance, Excuse for Late Notice/Insured Status, Common-Law and Contractual Indemnification/Duty to Procure Insurance, First-Party No-Fault - Doctor-Patient Privilege, First-Party No-Fault

LEGISLATIVE UPDATE. On August 1, 2007, Governor Spitzer vetoed a bill that would have: (1) imposed a prerequisite showing of prejudice upon insurers disclaiming coverage on late notice grounds; and (2) allowed injured parties to sue liability insurers to determine the issue of coverage without the prerequisite of an unsatisfied judgment against the insured. The legislation passed both chambers of the state legislature (Senate Bill S6306, Assembly, Bill 8363-A). The bills treated the prejudice requirement with identical language, providing in part, "An insurer subject to the provisions of this article shall not deny coverage for a claim based on the failure of an insured to give timely notice of a claim unless the authorized insurer . . . is able to demonstrate that it has suffered material prejudice as a result of the delayed notice." The veto leaves in place New York's longstanding common law "no prejudice" rule with regard to late notice disclaimers.

Reinsurance & Formation. Second Circuit vacates district court's grant of alleged reinsurer's motion to dismiss alleged cedant's breach of contract, implied indemnity, and reformation claims. Court finds an ambiguity whether the documents at issue created a reinsurance contract given the limited elements necessary to form such a contract. Court also finds an ambiguity regarding whether the documents are binding on the ceding company that wrote the underlying bonds at issue. *AXA Corporate Solutions Ins. Co. v. Lumbermens Mut. Cas. Co.*, 2007 WL 2013519 (2d Cir. July 11, 2007).

Reinsurance & Formation. Court denies cross-motions for summary judgment in a dispute over whether ceding insurer materially misrepresented that a reinsurance facility was facultative rather than facultative obligatory. Court expresses doubt that reinsurer can prove misrepresentation given the facility expressly states it is facultative, but finds an issue of fact given certain representations prior to formation of the contract. *AXA Versicherung AG v. New Hampshire Ins. Co.*, 2007 WL 214302 (S.D.N.Y. July 23, 2007).

Reinsurance & Enforcement. Cedant paid \$197 million as a result of coverage litigation with its insured in connection with breast implant litigation. Cedant commenced an action to recover the unpaid portion of its reinsurance claims in connection with two excess policies. Reinsurer argued that cedant's settlement included amounts paid for consequential damages outside the scope of the "follow-the-fortunes" doctrine. Court finds an issue of fact. Court also orders cedant to produce its communication with other reinsurers regarding the coverage litigation, but rejects a motion by the reinsurer to have the cedant disclose a memorandum from its coverage counsel. *National Union Fire Ins. Co. v. Clearwater Ins. Co.*, 2007 WL 2106098 (S.D.N.Y. July 21, 2007).

Collapse Exclusion. In a dispute under first-party business property coverage, court grants summary judgment in favor of insurer. Insureds sought coverage for property damage arising from a wall discovered to be structurally impaired. Insureds argued that the policy's additional coverage for collapse should be construed broadly to include loss of structural integrity or imminent collapse. Court rejects the argument, and concludes that under New York law, collapse requires falling down or caving in of the structure. Court notes the policy excludes bulging, sinking, and hidden decay, which were the same causes to which insured's expert attributed the damage. *Dalton v. Harleysville Worcester Ins. Co.*, 2007 WL 2120403 (E.D.N.Y. July 23, 2007).

Late Notice/Cancellation. In an action in which insured corporation sought coverage in connection with a personal injury action, court grants insurer's unopposed motion for summary judgment. Court concludes policy was cancelled based on evidence that broker received cancellation notice, discussed cancellation with the insured, and attempted to get the policy reinstated. Court also notes insurer established a presumption of mailing of the notice of cancellation. Court rejects insured's unsupported claim that it never received notice of cancellation as "feigned." Court alternatively finds that insured provided late notice of claim based on a seven-month delay. *184 Irving Realty Corp. v. United National Specialty Ins. Co.*, 2007 WL 2119909 (E.D.N.Y. July 22, 2007).

Indemnification/General Obligations Law § 15-108. After bank settled a personal injury claim arising from an accident on premises to which bank took title six weeks earlier, First Department unanimously reverses trial court and denies bank's third-party action against its maintenance contractor for indemnification. Court holds that under General Obligation Law § 15-108, the bank could not seek indemnification from its contractor where the bank: (1) had ample time to discover and repair the open and obvious defect at issue, but failed to do so; and (2) had previously failed to oppose contractor's motion for summary dismissal. *Brazell v. Wells Fargo Home Mortg., Inc.*, 2007 WL 2127832 (1st Dept. July 26, 2007).

Failure to Procure Insurance. In a personal injury action by an employee of a subcontractor commenced against the general contractor and owner of a work site, Third Department modifies order to limit general contractor's potential damage award in general contractor's third-party action against subcontractor for breach of insurance procurement provision in subcontract. Damages for violating the contractual requirement to obtain insurance are limited to out-of-pocket expenses. Trial court erred in expanding subcontractor's liability to include general contractor's liability to plaintiff. *Antinello v. Young Men's Christian Ass'n*, 2007 WL 2127302 (3d Dept. July 26, 2007).

Excuse for Late Notice/Insured Status. In an insurance coverage dispute by apartment owners against insurer seeking coverage for a personal injury action commenced after tenant fell down stairs in her apartment, court denies insurer's motion for summary judgment on late notice grounds where fact issues existed regarding the reasonableness of owners' ten-month delay. Testimony gave rise to issues regarding whether building supervisor that discovered the injured tenant knew that a fall had caused tenant's injuries, whether the subsequent installation of a railing occurred merely as part of an overall renovation, and whether owners failed to investigate further out of respect for tenant's privacy. Court also denies

insurer's motion for summary judgment on the insured status of certain defendants, holding that the allegations of the complaint are drafted broadly enough to potentially implicate liability of the cooperative, a partnership controlling shares of the cooperative, and a board member as shareholders or as lessors. *426-428 West 46th Street Owners, Inc. v. Greater New York Mut. Ins. Co.*, 2007 WL 2127341 (Sup. Ct. New York Co. July 25, 2007). Common-Law and Contractual Indemnification/Duty to Procure Insurance. In millwright's personal injury action against barge owner, general contractor, and subcontractors after millwright fell into an open manhole on owner's barge, court denies owner's motion for summary judgment against general contractor on its claims for common-law and contractual indemnification where fact issues existed as to general contractor's negligence, but granted owner summary judgment with respect to its breach of insurance procurement provision claim on grounds that general contractor did not oppose this branch of owner's motion. To the extent that owner could rely on its own liability insurance, owner's damages were limited to out-of-pocket expenses. Court also denies general contractor's motion for summary judgment seeking common-law indemnification from electrical and wiring subcontractors on the basis that questions of fact surrounded general contractor's negligence. Court also denies cross-motions brought by owner and plaintiff's employer for contractual indemnification where employer did not produce a witness to testify regarding any contract that may have been in effect at the time of the accident. Court grants employer's motion to dismiss wiring subcontractor's claims for common-law indemnification and contribution as barred pursuant to Workers' Compensation Law. Court grants summary judgment dismissing general contractor's common-law indemnification and contribution claims against electrical subcontractor where a fact question existed whether the general contractor created the open manhole. *Ashjian v. Orion Power Holdings, Inc.*, 2007 WL 2127562 (Sup. Ct. Kings Co. July 13, 2007). First-Party No-Fault – Doctor-Patient Privilege. In determining a petition brought by five no-fault medical providers seeking to quash grand jury subpoenas issued by the Attorney General's office in furtherance of an investigation into suspected fraud in the no-fault system, court denies providers' petition except to those subpoenaed documents that providers demonstrate to be highly sensitive, privileged, and irrelevant to the Attorney General's investigation. Court holds that a medical provider should not be entitled to invoke the statutory doctor-patient privilege to prevent an investigation of fraud. *In re Bergamo Medical, P.C.*, 2007 WL 2161866 (Sup. Ct. Kings Co. July 26, 2007). First-Party No-Fault. In an action to recover assigned first-party no-fault benefits, Second Department affirms trial court order denying provider's motion for summary judgment where insurer presented a copy of the denial form that it mailed to provider within thirty days. In response to provider's argument that denial was insufficient where it premised the denial on an IME report that insurer did not attach to the denial letter. trial court correctly concluded that the insurer issued a timely denial of claim, despite the fact that the denial form did not attach a copy of the IME report or otherwise explain the basis for the denial. *St. Vincent's Hosp. & Medical Center v. Nationwide Mut. Ins. Co.*, 2007 WL 2127226 (2d Dept. July 24, 2007).