
Week of August 18, 2008

LEGISLATIVE UPDATE. Timely Notice by Claimant. Coverage of Post-Judgment Interest. Untimely Disclaimer. Antisubrogation Rule - Owners and Contractors Protective Coverage. Late Notice/Material Misrepresentation. Protection and Indemnity Insurance. Common-Law Indemnification - Vehicle and Traffic Law § 388. Contractual Indemnification/Common-Law Indemnification. Duty to Procure Insurance/Contractual Indemnification. Contractual Indemnification - Partial Indemnification. UM Benefits. UM Benefits - Late Notice/Statute of Limitations. SUM - Exhaustion of Limits. MVAIC No-Fault - Timely Notice. MVAIC First-Party No-Fault - Ripeness. First-Party No-Fault - Preclusion of Defenses. First-Party No-Fault - Failure of Proof. First-Party No-Fault - Fee Schedule Dispute. First-Party No-Fault - Proof of Denial. First-Party No-Fault - Failure to Provide Verification. First-Party No-Fault - Untimely Denial of Claim. First-Party No-Fault - Fraudulent Incorporation. First-Party No-Fault - Claim Determination Period. First-Party No-Fault - Untimely Denial of Claim. First-Party No-Fault - Fraudulent Incorporation. First-Party No-Fault - Business Records. First-Party No-Fault - Inadequacy of Award. First-Party No-Fault - Lack of Medical Necessity.
August 7, 2008

LEGISLATIVE UPDATE. On July 21, 2008, Governor Paterson signed Senate Bill 8610 into law. The new law amends the Civil Practice Law and Rules and the Insurance Law. In effect, the legislation changes New York into a "prejudice" state for purposes of late notice. Prior to the legislation, the New York courts firmly applied a "no prejudice" rule that permitted insurers in many cases to disclaim coverage based on late notice even in the absence of prejudice. By passing legislation requiring proof of prejudice for a late notice disclaimer, New York now joins the vast majority of jurisdictions in the U.S. Key provisions of the legislation include:

- The failure to provide timely notice (if not otherwise excused) shall not invalidate a claim for coverage unless the failure to provide timely notice has prejudiced the insurer.
- A direct action by an injured person against the alleged tortfeasor's insurer is now permitted to challenge a late notice disclaimer 60 days following the disclaimer (but all other challenges to the disclaimer require an unsatisfied judgment against the insured before a direct action is permitted, as before).
- In an action challenging an insurer's late notice disclaimer, if notice was given within two years of the time required under the policy, the insurer has the burden of proving prejudice. If notice was given after more than two years from the date timely notice was required, the burden is on the insured to prove the insurer was not prejudiced.
- Prejudice is not established "unless the failure to timely provide notice materially impairs the ability of the insurer to investigate or defend the claim."
- Insurers who have issued primary liability coverage for bodily injury are obligated to provide the existence and limits of such a policy within 60 days of a written request by an injured person or other claimant for such information.
- The legislation takes effect 180 days after passage. It applies to "policies issued or delivered in this state on or after such date."

Direct Action. Settlement of a bodily injury action included an assignment of the defendant's rights against its excess insurer to the plaintiffs. Plaintiffs continued the insured's declaratory judgment action against the insurer, but lost on summary judgment when the court concluded that the insured's notice to its own broker could not be imputed to the insurer. Plaintiffs also brought separate direct action to litigate the issue of whether they independently provided notice to the insurer. First Department affirms lower court's rejection of insurer's defense of res judicata. Court notes that claim being litigated in the direct action - plaintiffs' own notice - was not the same claim litigated in the declaratory judgment action. *Cicero v. Great American Ins. Co.*, 2008 WL 2885796 (1st Dept. July 29, 2008).

Timely Notice by Claimant. In a direct action by underlying plaintiffs against insured's excess insurer, First Department reverses summary judgment in favor of insurer and grants summary judgment in favor of plaintiffs. Court finds plaintiffs' notice to the excess insurer was timely where insured misled plaintiffs regarding the existence of the excess policy.

Cicero v. Great American Ins. Co., 2008 WL 2885840 (1st Dept. July 29, 2008).

Coverage of Post-Judgment Interest. In a bodily injury action, judgment following a damages verdict was entered. On appeal, the Appellate Division conditioned judgment in favor of plaintiff on acceptance of a reduction. Plaintiff accepted the reduction and an amended judgment was entered. Issue before the court was defendant's insurer's obligation to pay post-judgment interest. Court holds that post-judgment interest began to accrue from the time of the original judgment rather than the amended judgment since parts of the original judgment were not affected by the amended judgment, and because the original judgment was never actually vacated. Court holds that pre-judgment interest must be paid within limits only on that amount of the policy limits, but holds that post-judgment interest must be paid on the entire amount of the judgment, even though it is far in excess of policy limits. Court finds that policy's reference to "all interest on the full amount of any judgment" is more generous than standard post-judgment interest provisions. Court, however, agrees with insurer that letter offering to unconditionally pay policy limits stops accrual of post-judgment interest notwithstanding dispute over post-judgment interest since policy language refers to offer to pay policy limits, not limits plus interest. *Miraglia v. Essex Ins. Co.*, 2008 WL 2828535 (Sup. Ct. Orange Co. July 23, 2008).

Untimely Disclaimer. Court finds two-month delay in disclaiming based on an exclusion for operation of a vehicle being used as a livery conveyance unreasonable as a matter of law where underlying complaint on its face alleged that insured's vehicle was being operated as a livery vehicle. Court rejects insurer's argument that delay was justified because it needed to obtain statements of its insured and the insured's passenger. *Long Island Ins. Co. v. Johnson*, 2008 WL 2828533 (Sup. Ct. Kings Co. July 22, 2008).

Antisubrogation Rule - Owners and Contractors Protective Coverage. In a bodily injury lawsuit against a municipality by an employee of a road construction contractor, Third Department finds that city's third-party action against contractor is not barred by antisubrogation rule where contractor purchased an OCP policy for the city. Court observes that contractor is not an insured under the OCP policy, therefore antisubrogation rule is inapplicable. *Pesta v. City of Johnstown*, 2008 WL 2756544 (3d Dept. July 17, 2008).

Late Notice/Material Misrepresentation. In an action commenced by general contractor's insurer seeking an order rescinding its policy and declaring that it owed no coverage in connection with an underlying action arising from a trip and fall on construction debris, court awards summary judgment to insurer on late notice grounds where general contractor first provided notice ten months after the accident and injured claimant never notified the insurer. However, court denies insurer's motion seeking to rescind the policy where the conclusory statements of insurer's employee, without more, were insufficient to establish the materiality of the insured's misrepresentations on the insurance application. *Atlantic Cas. Ins. Co. v. C.A.L. Const. Corp.*, 2008 WL 2946060 (E.D.N.Y. July 30, 2008).

Protection and Indemnity Insurance. In cruise ship caterer's suit against cruise line's P & I insurer seeking indemnity for expenses arising from injuries suffered by three catering employees, court denies cross-motions for summary judgment holding that "genuine issues of material fact permeate every aspect of this dispute", including whether insurer's communications were sufficiently specific and timely to deny coverage and whether caterer complied with the policy's notice provisions. *Trident International Limited v. American Steamship Owners Mutual Protection and Indemnity Association, Inc.*, 2008 WL 2980919 (S.D.N.Y. August 1, 2008).

Common-Law Indemnification - Vehicle and Traffic Law § 388. After a jury found the owner and the driver of one vehicle to be liable in second driver's personal injury action, owner appealed trial court's summary denial of its post-trial motion for indemnification from the driver of its vehicle. Second Circuit holds that trial court's decision was in error where Vehicle and Traffic Law § 388 does not abrogate the common law rule that a vehicle owner may recover indemnity from a negligent user even absent an express indemnity provision. *DeSena v. Pavel*, 2008 WL 2873269 (2d Cir. July 24, 2008).

Contractual Indemnification/Common-Law Indemnification. In personal injury action arising from an alleged trip and fall on steps outside a building, court grants tenant's motion for summary judgment on owner's claims for contractual indemnification where issues of material fact existed with respect to tenant's negligence. Court grants tenant's motion for

summary judgment on owner's claims for common-law indemnification and contribution where owner would not be entitled to indemnification if the jury finds the owner to be partially at fault and the owner would have no need for such indemnification if the jury finds the owner to be free of fault. *Smith v. New York Enterprise America, Inc.*, 2008 WL 2810182 (S.D.N.Y. July 21, 2008).

Duty to Procure Insurance/Contractual Indemnification. In owner's third-party action against snowplow contractor arising from pedestrian's bodily injury action alleging a slip and fall on ice and snow, court denies owner's motion for summary judgment on its breach of contract claim where contractor's policy contained a blanket additional insured endorsement that provided additional insured coverage that met the contractor's obligations under its service agreement with the owner. Court also denies owner's motion for summary judgment on its contractual indemnification claims where issues of negligence remain to be decided. *Reiser v. JT 1211, L.P.*, 2008 WL 2796859 (Sup. Ct. New York Co. July 14, 2008).

Contractual Indemnification - Partial Indemnification. In a Labor Law action, court grants unopposed motion by owner and construction manager for contractual indemnification against subcontractor, subject to resolution of the issue of the owner's and/or construction manager's negligence, if any. Decision discusses in detail indemnification agreements that require proof of the indemnitor's negligence versus those that do not, and doctrine of partial indemnification. *Denci v. Bovis Lend Lease, Inc.*, 2008 WL 2854513 (Sup. Ct. Bronx Co. July 21, 2008).

UM Benefits. Second Department reverses order denying insurer's petition to permanently stay arbitration and grants petition. Court finds that petition to stay was timely filed where delay was attributable to a court-ordered stay of litigation involving insurer due to liquidation. Court grants petition based on lack of evidence that two vehicles in accident ever made physical contact. *Interboro Ins. Co. v. Coronel*, 2008 WL 2008 WL 3064011 (2d Dept. August 5, 2008).

UM Benefits - Late Notice/Statute of Limitations. Court grants permanent stay of arbitration based on statute of limitations and late notice. Insured should have known from police accident report and early insurance correspondence that a third, unidentified vehicle was involved in the accident. Statute of limitations therefore began to run at the time of the accident, and claim for UM benefits was untimely under six-year limitations period. Court also finds insured's two-year delay in providing notice of UM benefits unreasonable as a matter of law. *Government Employees Ins. Co. v. Lawrence*, 2008 WL 2779879 (Sup. Ct. Bronx Co. July 14, 2008).

SUM - Exhaustion of Limits. Second Department reverses order granting SUM insurer's petition to stay arbitration. Insured exhausted limits of owner's insurance, which limits were less than insured's. Court holds insured was not also obligated to exhaust operator's limits before petitioning for SUM coverage. Court also holds that by not responding to a letter notifying it of an offer to settle for the owner's policy limits, SUM insurer acquiesced to the settlement. *Hertz Claim Management Corp. v. Kulakowich*, 2008 WL 2747165 (July 15, 2008).

MVAIC No-Fault - Timely Notice. Court grants summary judgment in favor of MVAIC based on provider's untimely submission of claims. Court notes that even if initial filing of claims with an insurer that cancelled the policy at issue was inadvertent, provider failed to justify three-month delay in filing with MVAIC thereafter. *Bronx Expert Radiology, P.C. v. MVAIC*, 2008 WL 2884280 (Sup. Ct. App. Term July 28, 2008).

MVAIC First-Party No-Fault - Ripeness. Court reverses order and grants insurer's motion dismissing provider's complaint where insurer demonstrated that provider and its assignor were aware of the identities of other parties with potential coverage. Provider's action was premature since it must first exhaust its remedies against other involved parties before seeking relief from MVAIC. *Complete Medical Services of N.Y., P.C. v. MVAIC*, 2008 WL 2814854 (Sup. Ct. App. Term July 10, 2008).

First-Party No-Fault - Preclusion of Defenses. Because insurer failed to submit competent proof that it timely denied the claims at issue, it is precluded from raising defense of excessive fees. *Gotham Acupuncture, P.C. v. Country Wide Ins.*

Co., 2008 WL 2884324 (Sup. Ct. App. Term July 28, 2008).

First-Party No-Fault - Failure of Proof. Summary judgment to provider granted where insurer failed to rebut provider's prima facie case where it failed to submit the IME report upon which its lack of medical necessity defense was based. *Mollins v. Allstate Ins. Co.*, 2008 WL 2884332 (Sup. Ct. App. Term July 28, 2008).

First-Party No-Fault - Fee Schedule Dispute. Insurer partially denied claim for MRIs based upon its claim that fees were in excess of those permitted under the Workers' Compensation schedule. Court rejects provider's argument that insurer was obligated to issue a denial based on lack of medical necessity prior to the expiration of its time to pay or deny following verification requests. Court notes that under the regulations, insurers are in fact not supposed to issue any denial until all verification information is received. Court also finds that the information requested was relevant to the issue of medical necessity. However, court concludes that insurer did not support its argument that the fees were in excess of the Workers' Compensation schedule where insurer relied on an attorney's affidavit and citation to a federal court decision that the court observes is not binding authority. Court denies insurer's motion for summary judgment. Court also rejects provider's motion for summary judgment where affidavit submitted in support of admission of documents was apparently by an employee of provider's counsel, rather than the provider itself. Finally, court dismisses insurer's lack of medical necessity defense as waived in light of insurer's failure to issue a timely denial. *Lenox Hill Radiology v. New York Central Mut. Ins. Co.*, 2008 WL 2875295 (Dist. Ct. Nassau Co. July 25, 2008).

First-Party No-Fault - Proof of Denial. Court affirms summary judgment in favor of provider where insurer's examiner's affidavit did not sufficiently set forth office practice and procedure to ensure denials and verifications are properly addressed and mailed. Court holds insurer is estopped from raising defense of medical necessity. A dissent takes issue with case law holding that courts in no-fault cases may decline to decide whether the provider proved its prima facie case, and finds that the affidavit at issue was sufficient to prove mailing of the denial. Dissent finds services at issue were not medically necessary. *Uptodate Medical Services, P.C. v. Lumbermens Mut. Cas. Co.*, 2008 WL 2796064 (Sup. Ct. App. Term July 18, 2008).

First-Party No-Fault - Failure to Provide Verification. Summary judgment granted to insurer who sufficiently proved mailing of request for verification, and provider admittedly failed to supply the information requested. *Beta Supply, Inc. v. Government Employees Ins. Co.*, 2008 WL 2763102 (July 16, 2008).

First-Party No-Fault - Untimely Denial of Claim. Court affirms order denying insurer's summary judgment motion where insurer failed to timely deny claim on the basis that the injured party was not a qualified person. The insurer's time to pay or deny the claim began to run upon receipt of the claim and not after defendant determined that plaintiff's assignor was a qualified person. *Complete Medical Services, P.C. v. MVAIC*, 2008 WL 2814791 (Sup. Ct. App. Term July 10, 2008).

First-Party No-Fault - Fraudulent Incorporation. Court modifies order to grant insurer's motion to compel provider to produce corporate documents where insurer set forth detailed and specific reasons for believing that plaintiff may be ineligible to recover no-fault benefits as a fraudulently incorporated professional service corporation. *Great Wall Acupuncture v. State Farm Mut. Auto. Ins. Co.*, 2008 WL 2814818 (Sup. Ct. App. Term July 10, 2008).

First-Party No-Fault - Claim Determination Period. In action to recover assigned first-party, no-fault medical payments, court affirms order denying insurer's summary judgment motion where insurer failed to adhere to the regulations governing initial and follow-up verification requests thus rendering ineffective the insurer's efforts to toll the 30-day claim determination period. *Infinity Health Products, Ltd. v. Eveready Ins. Co.*, 2008 WL 2814795 (Sup. Ct. App. Term July 10, 2008); *North New York Medical Care, P.C. v. New York Central Mut. Fire Ins. Co.*, 2008 WL 2832168 (Sup. Ct. App. Term July 10, 2008).

First-Party No-Fault - Untimely Denial of Claim. Court reverses order and grants provider's summary judgment motion

where provider established prima facie case that insurer's payment of benefits was overdue, and insurer failed to present evidence that it timely requested additional verification within 15 days of its receipt of claim. *Quality Health Products, Inc. v. Auto One Ins. Co.*, 2008 WL 2814820 (Sup. Ct. App. Term July 10, 2008).

First-Party No-Fault - Fraudulent Incorporation. In psychological service provider's action to recover payments, court reverses order and grants insurer's motion to dismiss provider's complaint where insurer established that provider performed services in violation of Limited Liability Company Law. *Multiquet, P.L.L.C. v. Allstate Ins. Co.*, 2008 WL 2814823 (Sup. Ct. App. Term July 10, 2008).

First-Party No-Fault - Business Records. Court reverses order granting summary judgment in favor of provider where provider's motion was supported by an affidavit of a corporate officer that stated in a conclusory manner that the documents annexed to provider's motion were business records and that, as a result, provider failed to establish a prima facie case. *Liberty Orthopedics, PLLC v. MVAIC*, 2008 WL 2814791 (Sup. Ct. App. Term July 10, 2008).

First-Party No-Fault - Inadequacy of Award. In provider's appeal of an award after trial on the sole basis that the award of \$33.55 was inadequate, court affirms judgment where provider failed to show that trial court's conclusion could not have been reached under any fair interpretation of the evidence. *S.J. Pahng, M.D., P.C. v. Progressive Northeastern Ins. Co.*, 2008 WL 2814841 (Sup. Ct. App. Term July 10, 2008).

First-Party No-Fault - Lack of Medical Necessity. Court modifies order to grant insurer's motion for summary judgment dismissing provider's complaint where insurer demonstrated by competent medical evidence, including an affirmed independent medical examination report, that claimed expenses were not medically necessary and provider failed to present any evidence refuting the insurer's prima facie showing. *Eagle Surgical Supply, Inc. v. Progressive Cas. Ins. Co.*, 2008 WL 2814845 (Sup. Ct. App. Term July 10, 2008).