Week of August 29

Notice to Excess Insurer/Defense Counsel Obligations to Disclose Excess Coverage. DECISION OF INTEREST. Notice of Cancellation - V&T Law Sec. 313, Material Misrepresentation/Insurance Law Sec. 3105, Contractual Indemnification/General Obligations Law, Business Interruption, Fist-Party No-Fault, First-Party No-Fault - Timely Denial, First-Party No-Fault - Business Records, First-Party No-Fault - Medical Necessity, First-Party No-Fault - Insured Incident, First-Party No-Fault - MVAIC, First-Party No-Fault - Insured Vehicle
Notice to Excess Insurer/Defense Counsel Obligations to Disclose Excess Coverage. DECISION OF INTEREST. In a legal malpractice action, plaintiff claims, inter alia, that his attorneys’ failure to make an effective motion to amend the ad damnum clause limited his $2 million jury verdict to the defendant’s $1 million primary limits. Court dismisses the causes of action based on alleged failure to make an effective motion to amend the ad damnum clause. Court finds that under the terms of the underlying defendant’s excess policy, coverage was lost due to the named insured’s failure to provide timely notice of the occurrence and suit. Court observes that the notice provision of the excess policy requires notice whenever notice is required under the primary policy, and is not limited to requiring notice when the claim is likely to expose the excess policy. Court, however, does not rule on whether plaintiff’s attorney could be liable for not pursuing a motion to compel disclosure of the underlying defendant’s excess policy. Defendant firm commenced a third-party contribution claim against underlying defense counsel alleging defense counsel improperly failed to disclose the existence of the excess policy, though ordered to do so in discovery. Court finds an issue of fact regarding defense counsel’s knowledge of the excess policy. Court notes that if defense counsel knowingly concealed the existence of the excess policy, plaintiff’s counsel may have been thwarted from providing notice to the excess insurer on behalf of its client. Ambra v. Awad, 2007 2409600 (Sup. Ct. Nassau Co. August 6, 2007). Notice of Cancellation – V&T Law § 313. Following a framed issue hearing in a proceeding to stay uninsured motorist arbitration, court finds that deceased car owner’s policy was effectively cancelled. Insurer mailed notice of cancellation to the correct address named in the policy, but addressed the notice to the insured rather than the estate of the insured. Court finds the notice was sufficient under V&T Law § 313 since the administrator of the estate was obligated to open the notice of cancellation addressed to the deceased. Accident at issue involved a relative the executor allowed to use the car after the named insured’s death (which the court found the executor was not permitted to do). Allstate Ins. Co. v. Ochoa, 2007 WL 2416192 (Sup. Ct. Nassau Co. August 27, 2007). Material Misrepresentation/Insurance Law § 3105. First Department affirms summary judgment in favor of holder of disability policy in action by insurer to rescind policy based on material misrepresentation. In his application for the policy, insured indicated he would cancel his existing policy with another insurer. Court finds no misrepresentation since insured issued a letter to the existing insurer directing it to cancel the policy, although the insurer failed to do so. First Unum Ins. Co. v. Gravante, 2007 WL 2389672 (1st Dept. August 23, 2007). Contractual Indemnification/General Obligations Law. Court denies summary judgment on general contractor’s contractual indemnification suit against a plumbing subcontractor for damages arising from the plumbing work. Court finds issue of fact regarding whether subcontractor properly insulated a pipe that froze and burst. Court notes that negligence on the part of the general contractor would prevent enforcement of the indemnification agreement under the General Obligations Law. RD Rice Construction, Inc. v. Sage Mechanical, Inc., 2007 WL 2403170 (Sup. Ct. New York Co. August 23, 2007). Business Interruption. Insured was a drugstore chain whose World Trade Center store was destroyed in the September 11 attack. In an action by the insured to confirm an appraisal award for business interruption coverage, court confirms that part of the appraisal finding business interruption loss under the basic “restoration period,” but vacates that part of the award finding a loss under the policy’s “extended recovery period.” Court notes that the earlier decisions in the case did not find that insured was actually entitled to such coverage. Court holds that such coverage is not triggered until the store is actually replaced, which has yet to happen. Court also finds insured’s claims under new provisions of the policy is barred by res judicata, as the claims should have been brought in the prior coverage action. Duane Reade, Inc. v. St. Paul Fire and Marine Ins. Co., 2007 WL 24211796 (S.D.N.Y. August 28, 2007). First-Party No-Fault. In an action to recover no-fault medical payments, Second Department reverses trial court order granting hospital’s motion for summary judgment where hospital failed to submit sufficient evidence in admissible form eliminating any triable issue of fact. The hospital submitted affidavits of a billing service representative that did not establish that the hospital mailed to the insurer documents specific to insureds’ claims, nor did the hospital’s certified mail receipts establish that those mailings contained documents relating to insureds’ claims. Mary Immaculate Hosp. v. Allstate Ins. Co., 2007 WL 2377008 (2d Dept. August 21, 2007). First-Party No-Fault – Timely Denial. Court reverses summary judgment in favor of provider on certain claims where insurer sufficiently demonstrated that it timely denied provider’s claim. Insurer provided an affidavit by someone with personal knowledge of insurer’s compliance with standard office mailing procedures used to ensure that the denials were properly addressed and mailed. Delta Diagnostic Radiology, P.C. v. Chubb Group of Ins., 2007 WL 2409463 (Sup. Ct. App. Term August 20, 2007); Prestige Medical & Surgical Supply, Inc. v. Clarendon Nat. Ins. Co., 2007 WL 2409515 (Sup. Ct. App. Term August 16, 2007) (granting provider’s motion for summary judgment where insurer failed to establish that its denial of claim forms were timely mailed). First-Party No-Fault – Business Records. Court affirms denial of provider’s motion for summary judgment where provider’s corporate officer’s affidavit did not reflect personal knowledge of provider’s practices and procedures sufficient to admit provider’s documents as business records. V.S. Medical Services, P.C. v. Allstate Ins. Co., 2007 WL 2409533 (Sup. Ct. App. Term August 16, 2007); N.Y.Q. Acupuncture, P.C. v. American Transit Ins. Co., 2007 WL 2409539 (Sup. Ct. App. Term August 16, 2007); A.M. Medical Services, P.C. v. Deerbrook Ins. Co., 2007 WL 2409558 (Sup. Ct. App. Term August 16, 2007); Vista Surgical Supplies, Inc. v. Nationwide Mut. Ins. Co., 2007 WL 2409570 (Sup. Ct. App. Term August 16, 2007); Lexington

Acupuncture, P.C. v. MVAIC, 2007 WL 2409588 (Sup. Ct. App. Term August 16, 2007); Bath Medical Supply, Inc. v. Allstate Ins. Co., 2007 WL 2409591 (Sup. Ct. App. Term August 16, 2007); Boai Zhong Yi Acupuncture Services, P.C. v. Allstate Ins. Co., 2007 WL 2409594 (Sup. Ct. App. Term August 16, 2007). First-Party No-Fault – Medical Necessity. In an action to recover assigned first-party no-fault benefits, court reverses order and denies provider’s motion for summary judgment where insurer showed that it timely denied provider’s claim based upon peer review reports. Where insurer provided sufficient evidence to raise an issue of fact whether treatment was medically necessary, provider was not entitled to summary judgment. Andrew Carothers, M.D., P.C. v. New York Cent. Mut. Fire Ins. Co., 2007 WL 2409544 (Sup. Ct. App. Term August 16, 2007). First-Party No-Fault – Insured Incident. In an action to recover assigned first-party no-fault benefits, court reverses order and denies provider’s motion for summary judgment where insurer submitted an affidavit of its investigator that was sufficient to demonstrate a founded belief that the alleged injuries did not arise out of an insured incident. Where insurer provided sufficient evidence to raise an issue of fact, provider was not entitled to summary judgment. Andrew Carothers, M.D., P.C. v. New York Cent. Mut. Fire Ins. Co., 2007 WL 2409544 (Sup. Ct. App. Term August 16, 2007); Infinity Health Products Ltd. v. State Farm Mut. Auto Ins. Co., 2007 WL 2409553 (Sup. Ct. App. Term August 16, 2007); Ema Acupuncture, P.C. v. State Farm Ins. Co., 2007 WL 2409589 (Sup. Ct. App. Term August 16, 2007) (modifying order where one investigator’s affidavit gave rise to issue of fact with respect to claim of one assignor, and another investigator’s affidavit was insufficient to create an issue of fact). First-Party No-Fault – MVAIC. In a decision with little analysis on this issue, court modifies MVAIC’s motion dismissing provider’s complaint seeking to recover assigned first-party no-fault benefits. The record established that the assignors were not “covered persons” under Insurance Law § 5221(b)(2), thus MVAIC was entitled to summary judgment dismissing certain causes of action brought by provider. Court holds that it was error to dismiss a separate cause of action based upon one assignor’s failure to comply with Insurance Law § 5208 and due to the expiration of the statute of limitations, since the record did not establish when the statute of limitations began to run. Bell Air Medical Supply, LLC v. MVAIC, 2007 WL 2409577 (Sup. Ct. App. Term August 16, 2007). First-Party No-Fault – Insured Vehicle. In an action to recover assigned first-party no-fault benefits, court reverses order and grants provider’s motion for summary judgment where insurer failed to submit evidence in admissible form to support its defense that insured’s vehicle was not involved in the subject accident. Where insurer failed to proffer sufficient evidence to raise an issue of fact, provider was entitled to summary judgment. Great Wall Acupuncture v. Peerless Ins. Co., 2007 WL 2409580 (Sup. Ct. App. Term August 16, 2007).