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## Week of December 19, 2007

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Work Product Protection. DECISION OF INTEREST. Second Department holds that statements given to a liability insurer's claims department are not immune from discovery as materials in anticipation of litigation, whether statements were taken for internal purposes or liability purposes. Court affirms lower court's order that an insured defendant must disclose to plaintiff the statement of the defendant's employee given to defendant's liability insurer. Court states that burden of proving the material was prepared solely in anticipation of litigation was not met by defendant. *Sigelakis v. Washington Group, LLC*, 848 N.Y.S.2d 272 (2d Dept. December 18, 2007).

Insurance Law § 3420(d)/Duty to Cooperate. DECISION OF INTEREST. Second Department finds that insured's chronic refusal to cooperate in the defense of several professional malpractice claims was sufficient to constitute a breach of the duty to cooperate. However, court finds that insurer could have issued a noncooperation disclaimer in two cases sooner in light of fact that insurer won a declaration in a prior case that it was not obligated to defend the insured based on noncooperation. Court finds two-month delay in disclaiming untimely as a matter of law. A dissent observes that court's opinion places insurers in an "untenable dilemma" whereby they must hurry a disclaimer based on noncooperation while also being obligated to seek to bring about the insured's cooperation. The dissent states that the majority's reasoning will encourage precipitous disclaimers, which will ultimately harm injured persons the statute was designed to protect. *Continental Cas. Co. v. Stradford*, 847 N.Y.S.2d 631 (2d Dept. December 11, 2007).

Not-for-Profit Coverage/Insured Status. Hospital joint venture was served with state and federal subpoenas in connection with an antitrust investigation. One member of the joint venture was insured under a non-for-profit policy with liability coverage for claims against wrongful acts. Insured sought reimbursement of legal costs, and insurer disclaimed. Second Department affirms summary judgment in favor of insurer, finding that the investigation was directed to the joint venture, not the insured, and that the joint venture is not a named insured or otherwise insured under the policy. *Catholic Health*

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Services of Long Island, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA, 847 N.Y.S.2d 638 (2d Dept. December 11, 2007).

Failure to Procure Insurance/Contractual Indemnification. First Department affirms summary judgment in favor of owner against tenant for failure to have owner named as an additional insured as required by lease. Court holds that lower court erred in denying owner's claim for contractual indemnification on conditional basis. *Eagle v. Chelsea Piers, L.P.*, 848 N.Y.S.2d 59 (1st Dept. December 18, 2007).

Contractual Indemnification/General Obligations Law. In a Labor Law case, Second Department holds lower court properly granted summary judgment in favor of third-party defendant, a subcontractor, dismissing the owner's and general contractor's claims for contractual indemnification. Court holds that in light of fact that plaintiff's negligence claims against subcontractor were dismissed, there would be no basis to trigger the contractual indemnification provision, which is limited to liability arising out of the subcontractor's work. Court also finds that general contractor, which was judged not free from negligence, could not enforce the indemnification provision under General Obligations Law § 5-322.1. *Loiek v. 1133 Fifth Avenue Corp.*, 848 N.Y.S.2d 333 (2d Dept. December 18, 2007).

Selection of Counsel/Duty to Cooperate. Court holds that title insurer must allow insured to select counsel of its choice where fraud claims against insurer are outside of coverage of the policy. Court rejects insurer's argument that insured breached duty to cooperate where insurer initially denied the claim, and because insurer insisted on a non-waiver agreement before it would defend. However, court holds that insured must now cooperate given court's order requiring insurer to defend. *Higgins Ave. LLC v. Fidelity National Title Ins. Co. of New York*, 18 Misc. 3d 1103 (Sup. Ct. Queens Co. December 13, 2007).

Policy Reformation/Broker Negligence. The individual named insured under a policy insuring a building owned by the LLC of which she was a majority member died. More than a year later, the insured building was destroyed by fire. Following the loss, owners of the LLC (the late insured's heirs) asked the insurer to reform the policy to make the LLC the named insured. Insurer refused and disclaimed coverage. Court holds that for purposes of mutual mistake, it is not necessary that both parties made overt mistakes. Instead, court finds that an innocent mistake by the insured coupled with proof of intent to cover the loss constitutes a sufficiently mutual mistake. Court grants reformation, rejecting insurer's argument that it might not have agreed to insure the LLC as speculative. Court dismisses negligence claim against broker as untimely. *D.F. Realty LLC v. Security Mut. Ins. Co.*, 18 Misc. 3d 1101 (Sup. Ct. Broome Co. December 12, 2007).

Insurance Law § 3420(d). Second Department holds that insurer's disclaimer issued two months after notice was timely as a matter of law where insurer was required to investigate when insureds received notice of the accident. However, court finds insureds raised an issue of fact regarding whether they had a reasonable belief in nonliability that would excuse late notice. *Hermitage Ins. Co. v. Arm-Ing, Inc.*, 847 N.Y.S.2d 628 (2d Dept. December 11, 2007).

Late Notice - Excess Coverage/ Insurance Law § 3420(d). Insured first gave notice to its excess insurer following judgment in the underlying action. Insured offered no excuse for untimely notice, nor did insured argue it had a reasonable belief in nonliability. Court finds insured gave late notice as a matter of law. Insured argued that excess insurer failed to issue a timely disclaimer. Court rejects argument, observing that after receiving notice, excess insurer became involved with attempts to resolve the coverage dispute between the insured and its primary insurer. Prior to the completion of excess insurer's investigation, insured sued excess insurer seeking defense and indemnification. Excess insurer then brought motion raising late notice. Court concludes disclaimer was timely as a matter of law. *ACE American Ins. Co. v. Unite Here*, 2007 WL 4616383 (Sup. Ct. New York Co. December 10, 2007).

Professional Liability. Insured law firm was sued by former client based on failure to file a timely notice of claim. Insured provided notice to liability insurer following commencement of the suit. Insurer disclaimer for failure to provide notice of a potential claim. Court finds that insured law firm had notice of a potential claim long before suit was filed, and should have known of potential claim when motions were brought in underlying bodily injury case seeking dismissal based on failure to timely move for leave to file a late notice of claim. Court notes that fact that firm filed a notice of appeal did not relieve it of obligation to provide notice of potential claim. Court also observes that underlying plaintiff did not give independent notice to the malpractice insurer. *Leavitt, Kerson & Duane v. American Guarantee and Liability Ins. Co.*, 2007 WL 4748438 (Sup. Ct. Queens Co. December 10, 2007).

Broker Negligence. On reconsideration, court grants summary judgment to broker, dismissing negligent procurement claim. Court holds that since insurer properly disclaimed based on insured's failure to provide timely notice, broker could not be liable for failure to procure. *Sutton Street Realty Corp. v. Butwin Ins. Group*, 2007 WL 4565158 (E.D.N.Y. December 21, 2007).

Assignment/Classification Limitations. Court holds it is common and proper for a party claiming against an insured to take an assignment of the insured's rights against its insurer, and rejects insurer's argument that assignee lacks standing to litigate coverage. Court also dismisses as immaterial argument that the real party in interest is the assignee's insurer. On the coverage issues, court finds that for purposes of summary judgment, insurer failed to show that there are no potential

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facts under which insured's notice was timely. Court holds that classification limitations for, e.g., construction and reconstruction does not unambiguously exclude roofing work, raising an issue of fact. *Grand Crossing, L.P. v. U.S. Underwriters Ins. Co.*, 2007 WL 4591989 (S.D.N.Y. December 18, 2007).

**Notice of Occurrence.** In context of numerous ongoing environmental claims, court holds that notice of claim letters received from insured and accepted by insurers did not constitute notice of occurrence as required by the policy language, but that insurers accepted claim letters as such and therefore waived any defects in notice. *Olin Corp. v. Certain Underwriters of Lloyd's*, 2007 WL 4456464 (S.D.N.Y. December 14, 2007).

**Contractual Indemnification.** In action by injured elevator passenger against building owner, building manager, and maintenance company, First Department holds that maintenance company was conditionally liable to owner and manager where there was no showing of actual negligence on the part of owner and manager and where maintenance company assumed responsibility for elevator repair and agreed to indemnify owner and manager pursuant to the service contract. *Ianotta v. Tishman Speyer Properties, Inc.*, 2007 WL 4302814 (1st Dept. December 11, 2007).

**UM Arbitration - Notice of Cancellation.** First Department reverses lower court and grants petition to stay arbitration. Court finds that tortfeasor's insurer failed to validly cancel its policy by not filing a copy of the notice of cancellation with the DMV within 30 days of the cancellation date. Court dismisses as insufficient an uncertified copy of insurance activity downloaded from the DMV website. Court finds insurer failed to submit evidence of its office procedures for transmitting cancellation notices to the DMV. *Progressive Classic Ins. Co. v. Kitchen*, 2007 WL 4387470 (1st Dept. December 18, 2007).

**UM Arbitration - Late Notice of Claim.** Second Department reverses lower court, and holds that insured not entitled to uninsured motorist coverage after failing to file a sworn statement within 90 days of the policy. Court holds that fact that insurer had some notice through the insured's claim for no-fault benefits is immaterial. *Hanover Ins. Co. v. Etienne*, 848 N.Y.2d 312 (2d Dept. December 18, 2007).

**First-Party No-Fault - Default Judgment/Standing.** Third Department holds that inquest following default judgment in no-fault case should go forward. Court holds that insurer that denied the claim for failure to appear for IMEs cannot move to vacate the default judgment on new non-coverage defenses, i.e., failure to timely submit claims. Court rejects argument that claimant cannot pursue no-fault claim against insurer where health insurance paid the claims. *Todaro v. GEICO Gen. Ins. Co.*, 848 N.Y.S.2d 393 (3d Dept. December 13, 2007).

**First-Party No-Fault - Intoxication.** Second Department holds that insurer raised an issue of fact where its defense to the provider's claim was the intoxication of the assignor. Court notes regulations allowing an insurer raising the defense of intoxication time to collect all information necessary and requested. Court cites medical reports and accident reports indicating possibility that assignor was intoxicated, and that such intoxication contributed to the accident. Court, however, holds that lower court erred by granting insurer conditional summary judgment. *Westchester Medical Center v. Progressive Cas. Ins. Co.*, 2007 WL 4326741 (2d Dept. December 11, 2007).

**First-Party No-Fault - Medical Necessity.** Court grants insurer's motion to renew and for a new trial where court previously directed verdict in favor of provider based on insurer's failure to include with its denial a statement of the factual basis and medical rationale of its disclaimer for lack of medical necessity. Court observes that appellate cases since then have clarified that insurer need only provide a copy of its medical peer review report upon request. *Odessa Medical Supply, Inc. v. Government Employees Ins. Co.*, 2007 WL 4571172 (Civ. Ct. Bronx Co. December 10, 2007).

**First-Party No-Fault - Lack of Medical Necessity.** In an action to recover assigned first-party, no-fault medical payments, court reverses order denying insurer's motion for summary judgment where insurer demonstrated lack of medical necessity by competent medical evidence, including a peer reviewer's affidavit, and provider's opposition relied on an attorney's affidavit and an unsworn doctor's report which should not have been considered. *CPT Medical Services, P.C. v. New York Cent. Mut. Fire Ins. Co.*, 2007 WL 4442448 (Sup. Ct. App. Term December 19, 2007).