

Firm News 12/22/2006

Insurance Law § 3420(d), Broker Liability/Insurance Law § 3420(d), Common-Law Indemnification, Notice of Occurrence, First-Party No-Fault, Contractual Indemnification/Common-Law Indemnification, Duty to Investigate Excess Coverage, Implication of Excess Coverage, Common-Law Indemnification, MVAIC No-Fault, First-Party No-Fault, Scope of Coverage/Auto Liability, Material Misrepresentation, General Obligations Law/Scope of Additional Insured Coverage, OCP Coverage, First-Party No-Fault, Claims Adjusting, Late Notice

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Broker Liability/Insurance Law § 3420(d). In a dispute over insurance coverage in connection with an underlying action commenced by an adopting couple against a foster care agency for agency's alleged failure to notify parents that adopted children were HIV-positive, First Department unanimously reverses trial court's order granting agency's summary judgment motion awarding agency its litigation expenses incurred in the underlying action. Insurance Law § 3420(d) does not require insurer's disclaimer to state that plaintiff was not insured when the underlying causes of action accrued where there is no evidence showing that the insurance coverage was in effect when the parents' causes of action accrued. If a claim falls outside the scope of coverage, disclaimer is unnecessary. *Lutheran Social Services of Metropolitan New York, Inc. v. Guide One Ins.*, 2006 WL 3741928 (1st Dept. December 21, 2006). Broker Liability/Insurance Law § 3420(d). In a dispute over insurance coverage arising from a construction injury action commenced by subcontractor's employee, First Department unanimously affirms trial court's denial of construction manager's and owner's summary judgment motion seeking a declaration of entitlement to coverage from their insurer and denying the cross-motion by subcontractor's insurance broker seeking dismissal of subcontractor's third-party action seeking coverage. Defendant insurer's 50-day delay in disclaiming coverage based on a residential projects exclusion was unreasonable as a matter of law where the basis for the disclaimer was apparent from the documents forwarded with its insureds' tender, and an investigation was unnecessary. However, insurer raised an issue of fact as to whether the certificate of insurance naming plaintiffs as additional insureds under subcontractor's policy was on file with the insurer as required by the policy. The trial court properly denied broker's summary judgment motion where issues of fact existed as to whether it was authorized to issue the certificate of insurance naming plaintiffs as additional insured and whether the broker ever submitted the certificate to defendant insurer. *Gotham Construction Co., LLC v. United National Ins. Co.*, 2006 WL 3741965 (1st Dept. December 21, 2006). Common-Law Indemnification. In a slip and fall case, First Department affirms trial court's denial of commercial tenant's summary judgment motion seeking dismissal of landlord's claims for indemnification and contribution. Where lease required tenant to maintain sidewalk in good repair, the trial court properly denied tenant's motion where triable issues of fact existed regarding whether tenant's negligence was a substantial factor in causing plaintiff's injuries. *Navarreto v. 995 Westchester Avenue LLC*, 2006 WL 3717342 (1st Dept. December 19, 2006). Notice of Occurrence. First Department unanimously reverses trial court's order denying insurer's summary judgment motion seeking a declaration that it had no duty to defend or indemnify a plumbing supply distributor in connection with insured's employee's claim for Workers' Compensation. Insurer was entitled to summary judgment where insured knew of the employee's accident immediately and failed to demonstrate a valid excuse for its 14-month delay in notifying its insurer regarding the occurrence. *Tower Ins. Co. of New York v. Mike's Pipe Yard & Building Supply Corp.*, 2006 WL 3717425 (1st Dept. December 19, 2006). First-Party No-Fault. In an action to recover no-fault medical payments, Second Department affirms the Appellate Term's order denying insurer's motion for summary judgment denying benefits on the ground that patient failed to appear for an IME and denying insured's cross-motion seeking payments for charges incurred before patient's failure to appear. Insurer failed to make a prima facie showing that it notified the patient of the IME and that the patient failed to appear where it submitted no evidence from anyone with personal knowledge of the mailings of non-appearances. With respect to the insured's cross-motion, insured was not entitled to summary judgment because the patient's appearance at an IME is a condition precedent to the insurer's liability on the policy. Court observes that an insurer may deny a claim retroactively to the date of loss for a claimant's failure to attend IMEs when, and as often as, the insurer may reasonably require. *Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co.*, 2006 WL 3733278 (2d Dept. December 19, 2006). Contractual Indemnification/Common-Law Indemnification.

In a construction injury action commenced by subcontractor's employee, Second Department modifies the trial court's order and grants subcontractor's motion for summary judgment dismissing general contractor's third-party claims for common-law indemnification and denies subcontractor's motion to dismiss general contractor's contractual indemnification claims. General contractor's claim for common-law indemnification should have been dismissed because employers who provide Workers' Compensation are immune from tort liability except when plaintiff suffers "grave injury." Subcontractor was not entitled to summary judgment with respect to general contractor's contractual indemnification claim because issue of fact existed as to whether the parties to a purchase order that was in effect at the time of the accident intended the provisions of a contract to be incorporated by reference into the purchase order. *Spiegler v. Gerken Building Corp.*, 2006 WL 3733308 (2d Dept. December 19, 2006). Duty to Investigate Excess Coverage.

DECISION OF INTEREST. In an action to recover damages for legal malpractice and breach of contract brought by a premises owner against its defense attorneys in an underlying construction injury suit, Second Department modifies trial court's order to grant law firm's motion to dismiss owner's breach of contract claim, and to deny law firm's motion to dismiss owner's legal malpractice claim. In the underlying injury action, the owner was insured under a primary policy with limits of \$1,000,000. The underlying plaintiff sought \$52,500,000 in damages. Owner's primary insurer advised owner that plaintiff's demand exceeded the policy limits and that owner may wish to notify any excess insurance carrier and engage separate counsel in regards to any potential excess judgments. Owner's primary insurer appointed the defendant law firm to represent the owner in the underlying action. The underlying plaintiff was awarded summary judgment against the owner on the issue of liability. The law firm tendered the case to the owner's alleged excess carrier before the commencement of the damages trial. The carrier disclaimed coverage on the ground that it had not received timely notice of claim. The carrier also claimed that it had no information to confirm that the owner was an insured under the excess policy. The underlying plaintiff and his wife subsequently obtained a judgment in excess of \$6,000,000. The owner commenced an action alleging that the firm's failure to advise the owner's excess carrier of the underlying action constituted legal malpractice or, in the alternative, breach of contract. The trial court then granted the law firm's motion to dismiss the complaint. The Second Department states that, to succeed on its motion to dismiss, the firm was required to establish that it owed the owner no duty to identify and notify potential excess carriers or that any negligence on the firm's part did not cause the loss as a matter of law. The Second Department holds that the firm failed to meet its burden on the proof presented, and declines to hold, "as a matter of law, that a legal malpractice action may never lie based upon a law firm's failure to investigate its client's insurance coverage or to notify its client's carrier of a potential claim." The trial court properly dismissed owner's breach of contract claim as they were merely duplicative of the legal malpractice claim. A lengthy dissent opined that the complaint was appropriately dismissed because the record showed that the owner had knowledge superior to the law firm regarding the need for additional coverage and the potential sources of such coverage, the owner's obligation to notify the excess carrier preceded the designation of the law firm, and the owner's obligation to notify the carrier cannot be diminished by "attempting to foist such obligation on an unsuspecting law firm selected by the primary carrier particularly where, as here, the law firm may have been assigned the case after the time to notify the excess carrier had expired. *Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 2006 WL 3733752 (2d Dept. December 19, 2006). Implication of Excess Coverage. First Department affirms trial court's order denying summary judgment to excess insurer where plaintiff's highest projected damages, as established by their expert, gave rise to an issue of fact as to whether excess insurance policy is implicated. A dissenting justice opined that where there is only a slim chance that the policy would be reached, the action against the excess insurer should be dismissed on the ground that there is at present no real dispute permitting adjudication by the court. *Long Island Lighting Co. v. Allianz Underwriters Ins. Co.*, 2006 WL 3627579 (1st Dept. December 14, 2006). Common-Law Indemnification. In a construction injury action commenced by subcontractor's employee, First Department affirms trial court's order denying subcontractor's motion for summary judgment seeking the dismissal of cross-claims for common-law indemnification where subcontractor did not sufficiently establish that it could not have been the negligent party. *Andrade v. Triborough Bridge & Tunnel Authority*, 2006 WL 3627588 (1st Dept. December 14, 2006). MVAIC No-Fault. In an action to recover no-fault medical payments from the MVAIC, Court grants MVAIC's motion for summary judgment dismissing provider's complaint seeking to recover no-fault benefits for acupuncture services provided to assignor. MVAIC established a prima facie showing of its entitlement to summary judgment by showing that assignor failed to comply with the reporting requirements that are prerequisite to coverage. Provider failed to raise a triable issue of fact as to whether its assignor provided a police report and a Notice of Intent as required by Insurance Law Article 52. *Akita Medical Acupuncture, P.C. v. MVAIC*, 2006 WL 3703880 (Dist. Ct. December 14, 2006). First-Party No-Fault. In an action by chiropractor to recover no-fault medical payments upon eight different claims, chiropractor and insurer disputed the statutory fees claimed by the chiropractor, the statutory interest due to chiropractor, and the time from which statutory interest accrues. Where insurer did not issue any denials, Court determines that under the regulations, any accruing interest is to be calculated from 30 days after receipt of each claim. Regarding attorney's fees, court holds that statutory attorney's fees shall be awarded as per each claim form submitted, not upon the total principal the court awards. *Alpha Chiropractic P.C. v. State Farm Mutual Auto Ins.*, 2006 WL 3627942 (Civ. Ct. New York City December 13, 2006). Insurance Law § 3420(d). Court grants summary judgment in favor putative additional insureds, directing excess/umbrella insurer to indemnify them in a Labor Law case. Court concludes that insurer was under duty to disclaim under an employers liability exclusion once it began monitoring the underlying case. Insurer did not disclaim for nearly three years after. Court finds cases holding that § 3420(d) does not apply to claims for contribution does not apply because parties seeking coverage were "claimants" based on their contractual indemnification claims

against the named insured. The decision appears to apply § 3420(d) in response to insurer's argument that the parties seeking coverage are not insureds, instead of addressing the issue of whether the parties are insureds. *Yoda, LLC v. National Union Fire Ins. Co of Pittsburgh*, 2006 WL 3615293 (Sup. Ct. New York Co. December 12, 2006). Scope of Coverage/Auto Liability. In a direct action, Second Department reverses summary judgment in favor of judgment creditor and enters judgment in favor of insurer. Court finds insurer's disclaimer's timeliness immaterial since underlying accident did not arise out of the "inherent nature" of the automobile. Plaintiff, a bystander, injured his back pulling the driver out of his crashed and burning car. *Zaccari v. Progressive Northwestern Ins. Co.*, 2006 WL 3628618 (2d Dept. December 12, 2006). Material Misrepresentation. Second Department affirms summary judgment in favor of life insurer on action to recover policy proceeds where insurer provided competent underwriting proof that it would not have reinstated policy had it known of the insured's misrepresentations regarding his blood pressure. *Roudneva v. Bankers Life Ins. Co. of New York*, 2006 WL 3628837 (2d Dept. December 12, 2006). General Obligations Law/Scope of Additional Insured Coverage. Second Department reverses summary judgment in favor of construction manager's and subcontractor's insurers and grants judgment in favor of parties seeking additional insured coverage. Court finds lower court improperly applied General Obligations Law § 5-322.1 to the insurance procurement provision of the contract. Court also finds lower court improperly found the accident did not arise out of the construction manager's and subcontractor's work since injured employee was working for the subcontractor at the direction of the construction manager at the time of his accident. *Longwood Central Sch. Dist. V. American Employers Ins. Co.*, 2006 WL 3634383 (2d Dept. December 12, 2006). OCP Coverage. Town was not entitled to reimbursement of its defense costs against its contractor in connection with the successful defense of an accident case where contractor satisfied its contractual obligation by procuring an OCP policy for the Town. *DiNova v. Wahlfeld*, 2006 WL 3635329 (2d Dept. December 12, 2006). First-Party No-Fault. DECISION OF INTEREST. Court finds provider entitled to summary judgment despite the fact that its own papers failed to establish prima facie proof that it mailed its claim. Court holds that it is within the court's discretion to find provider established prima facie proof of mailing based on denial forms attached to the insurer's opposition papers. Burden of proof therefore shifted to the insurer, which failed to issue a timely denial or offer any admissible evidence of fraud. A vigorous dissent takes issue with the court's use of the opposition papers in favor of the movant's case. *Barshay, DC, P.C. v. State Farm Ins. Co.*, 2006 WL 3613284 (Sup. Ct. App. Term December 8, 2006). First-Party No-Fault. Summary judgment in favor of insurer affirmed where provider failed to establish submission of claim form. Provider was not entitled to rely on a letter in the insurer's moving papers that acknowledged receipt of the claim since the letter did not set forth the amount of the claim. *Impulse Chiropractic v. Travelers Ins. Co.*, 2006 WL 3613305 (Sup. Ct. App. Term December 8, 2006). First-Party No-Fault. Court holds that provider's motion for summary judgment was properly denied where insurer's denial on grounds of medical necessity fully and explicitly set forth the reasons for denial. *Delta Diagnostic Radiology, P.C.*, 2006 WL 3613307 (Sup. Ct. App. Term. December 8, 2006). First-Party No-Fault. Court grants summary judgment in favor of provider where insurer's affidavits failed to offer sufficient proof of actual mailing of denial or standard office procedure. *Capri Medical, P.C. v. Auto One Ins. Co.*, 2006 WL 3734539 (Civ. Ct. Kings Co. December 6, 2006). MVAIC No-Fault. MVAIC's motion for summary judgment dismissed where provider's assignor failed to submit a notice of claim pursuant to § 5208(2)(a). Assignor is therefore not a "covered person," and insurer was under no duty to disclaim. *Akita Medical Acupuncture P.C. v. MVAIC*, 2006 WL 35000631 (Dist. Ct. Nassau Co. December 5, 2006). MVAIC No-Fault. MVAIC's motion for summary judgment dismissed where provider's assignor failed to submit a notice of claim pursuant to § 5208(2)(a). Assignor is therefore not a "covered person," and insurer was under no duty to disclaim. Provider also failed to prove residency of its assignor, and several of its claims were also time-barred. *Universal Acupuncture Pain Services, P.C. v. MVAIC*, 2006 WL 3510617 (Dist. Ct. Nassau Co. December 5, 2006). UM Arbitration. Denial of insurer's petition to permanently stay uninsured motorist arbitration affirmed where undisputed evidence showed that the offending vehicle, if insured, was insured by an unauthorized foreign insurer beyond New York's personal jurisdiction. *Allstate Ins. Co. v. Vitello*, 2006 WL 3525381 (2d Dept. December 5, 2006). Claims Adjusting. DECISION OF INTEREST. Court recognizes both negligence- and contract-based causes of action for spoliation of evidence against an insurer that is a third-party to litigation concerning the discarded property. Case involved a subrogation action following a fire. Defendant contractors brought a third-party action against the insurer of a fellow defendant contractor for spoliation after the insurer discarded a space heater that it allegedly promised to preserve. Court finds negligence-based cause of action because insurer knew litigation involving the heater was imminent. Court also finds third-party plaintiffs sufficiently alleged a breach of contract. *Federal Ins. Co. v. U.S. Distributing Inc.*, 2006 WL 3726139 (December 15, 2006). Late Notice. Court grants insurer's motion for summary judgment, upholding insurer's late notice disclaimer where notice of the occurrence was provided over a year after the occurrence. Court finds as a matter of law that insured, a retail store, knew of the slip-and-fall injury immediately, and should have realized a claim was likely. Court agrees with insured that the disclaimer's reference to late notice of "claim" did not constitute an effective disclaimer based on late notice of occurrence, but that insurer's reservation of rights allowed it to assert late notice of occurrence in a supplemental disclaimer issued three months later. Court applies a common law waiver analysis, and notes that arguments regarding the effect of § 3420(d) were not before the court. *Home Décor Furniture and Lighting, Inc. v. United National Group*, 2006 WL 3694554 (E.D.N.Y. December 14, 2006). Material Misrepresentation. Court grants summary judgment to insurer, declaring insurer entitled to rescind a lawyer's malpractice policy based on material misrepresentation where insured in his application did not disclose money laundering for which he would subsequently be convicted. Court applies collateral estoppel to insured's criminal proceeding. *Chicago Ins. Co. v. Fasciana*, 2006 WL 3714310 (S.D.N.Y. December 13, 2006).

