

## Week of February 19

Number of Occurrences-DECISION OF INTEREST, Blanket Additional Insured Coverage-DECISION OF INTEREST, Discovery of Claim File Documents- DECISION OF INTEREST, Pollution Exclusion, Contribution/Subrogation, Business Interruption, Scope of Coverage/Homeowners, Insurance Law § 3420(d), Commercial Property/Rust, Corrosion, and Deterioration Exclusion, Contractual/Common Law Indemnification, Common Law Indemnification, Auto Physical Damage/Illicit Transportation Exclusion, Broker E&O, First-Party No-Fault

### Firm News 2/19/2007

Number of Occurrences. DECISION OF INTEREST. In a dispute over the attachment point of excess insurance in connection with asbestos claims, Court of Appeals holds that each asbestos claim constitutes a single occurrence. As a result, excess policies that attach after \$5 million per occurrence were not reached despite thousands of claims. Court applies New York's "unfortunate event" test to determine number of occurrences, which looks to the nature of the incident rather than causation alone. Court identifies the temporal and spatial relationship between incidents and whether incidents can be viewed as part of the same causal continuum as factors relevant to the unfortunate event test. Court notes that its finding that the underlying claims cannot be grouped as a single occurrence under the unfortunate event test is not the result of counting claims, which approach has been previously rejected. *Appalachian Ins. Co. v. General Electric Co.*, 2007 WL 470394 (Ct. App. February 15, 2007). Blanket Additional Insured Coverage. DECISION OF INTEREST. City was made an additional insured under a contractor's liability policy under a blanket endorsement that expressly limited additional insured coverage to where the loss is determined to be "solely" the result of the named insured's negligence. Named insured's employee was injured in the course of employment by vehicles owned by other persons. Employee sued the drivers, who then commenced a third-party action against the City. The contractor's insurer disclaimed coverage to the City on the basis that there was no duty to defend the City unless and until there was a determination that the named insured was 100% at fault. Second Department reverses summary judgment in favor of insurer. Court finds word "solely" in the blanket additional ambiguous, and holds that language should be construed in favor of additional insured such that if parties other than the named insured and the City are at fault, there is additional insured coverage. Court finds a duty to defend the additional insured based on the allegations of the third-party complaint alleging the named insured was at fault for the accident. *City of New York v. Evanston Ins. Co.*, 2007 WL 466254 (2d Dept. February 13, 2007). Discovery of Claim File Documents. DECISION OF INTEREST. After paying its insured for a fire loss under first-party property coverage, insurer brought a subrogation action against the tortfeasor. Tortfeasor's liability carrier disclaimed coverage based on an exclusion for roofing operations. Following a default judgment against the tortfeasor in the subrogation action, subrogated insurer brought a direct action against the disclaiming liability insurer. Subrogated insurer sought discovery of liability insurer's claim file. Liability insurer refused to produce certain documents post-dating its disclaimer and documents interpreting the exclusion in connection with the claims of other insureds. Supreme Court denied discovery. First Department reverses and orders production of the documents because subrogated insurer alleges liability insurer acted in bad faith in disclaiming coverage. *Diamond State Ins. Co. v. Utica First Ins. Co.*, 2007 WL 270432 (1st Dept. February 1, 2007). Pollution Exclusion. First Department affirms summary judgment in favor of insured finding a duty to defend in connection with an action for injuries caused by inhalation of fumes from a nail salon. Court finds pollution exclusion does not apply since underlying suit does not allege the fumes caused pollution, and, at best, finds the exclusion ambiguous with respect to the claim at issue. *Tower Ins. Co. v. Breyter*, 2007 WL 509672 (1st Dept. February 20, 2007). Contribution/Subrogation. Insureds settled with tortfeasors that caused damage to the insureds' property. Insureds' own insurer denied their claim. Following the settlement, insureds brought suit against their insurer. Insurer then filed a third-party action against tortfeasors, characterizing action not as subrogation, but as contribution. Court concludes the third-party action must be for subrogation since the first-party action is based on contract and because third-party defendants have no contractual relationship with the insurer to support a contribution/indemnification claim. Court finds that if a subrogation claim even lies in light of the settlement, the claim is time barred. *Iyageh v. State Farm Fire and Cas. Co.*, 2007 WL 474591 (Sup. Ct. Kings Co. February 14, 2007). Business Interruption. First Department affirms summary judgment in favor of insurer, declaring that business interruption coverage for store destroyed as a result of September 11 attack runs until insured was able to resume operations at a different location, and not until it was able to achieve its pre-attack revenues or until reconstruction of the World Trade Center. *The Children's Place Retail Stores, Inc. v. Federal Ins. Co.*, 2007 WL 446604 (1st Dept. February 13, 2007). Scope of Coverage/Homeowners. Without analysis of the facts, claims, or policy language at issue, Second Department affirms summary judgment in favor of insured under homeowners policy declaring that insurer is obligated to defend and indemnify insured for certain claims by home purchaser alleging contamination of the home, and finding other claims beyond the coverage of the policy. *Rotunno v. Stiles*, 2007 WL 465669 (2d Dept. February 13, 2007). Insurance Law § 3420(d). Second Department affirms summary judgment in favor of insurer that second insurer waived its ability to disclaim its duty to defend and indemnify their insured in the underlying action. Disclaimer based on exclusion was untimely as a matter of law. Second insurer also proved as a matter of law that by express terms of first insurer's policy, a \$100,000 limit did not apply because the underlying plaintiff is subject to the Workers Compensation Law. *Preserver Ins. Co. v. Ryba*, 2007 WL 465731 (2d Dept. February 13, 2007). Commercial

Property/Rust, Corrosion, and Deterioration Exclusion. Second Department reverses denial of insurer's summary judgment motion, finding that collapse of an outdoor concrete deck was clearly the result of decay, and insured failed to produce proof otherwise to create an issue of fact. *Catucci v. Greenwich Ins. Co.*, 2007 WL 466280 (2d Dept. February 13, 2007). Contractual/Common Law Indemnification. In a Labor Law case, defendant owner commenced third-party action against contractor for contractual and common law indemnification and breach of contract to procure insurance. Second Department modifies trial court order, holding that owner demonstrated its lack of negligence, and was therefore entitled to contractual indemnification. However, since contractor established that plaintiff was its special employee, common law cause of action should have been dismissed. Court finds General Obligations Law § 5-322.1 inapplicable in light of owner's lack of negligence. Court finds owner failed to establish entitlement to judgment on breach of contract to procure insurance claim. *Castilla v. K.A.B. Realty, Inc.*, 2007 WL 466303 (2d Dept. February 13, 2007). Common Law Indemnification. In Labor Law case, court modifies trial court order by finding that City was not negligent due to oily condition of floor, which was a necessary incident to an operational power plant, and was therefore entitled to indemnification against two contractors. Case remanded to apportion liability between the contractors. *Sickler v. City of New York*, 2007 WL 487598 (Sup. Ct. App. Term February 7, 2007). Auto Physical Damage/Illicit Transportation Exclusion. Court grants summary judgment in favor of insurer that insured commercial truck for physical damage. Insured's truck was damaged when it turned over during transportation of fragrances. Owner's application for interstate operating authority had been accepted by FMCSA but owner did not have operating authority until it complied with certain other licensing requirements, which it had not done so on date of the accident. Insurer disclaimed based on exclusion for loss while truck is used in connection with "illicit trade or transportation." Court found exclusion unambiguously applied, rejecting insured's argument that exclusion applied to transportation of contraband. *Federal Ins. Co. v. P.K. Carrier Corp.*, 2007 WL 489269 (S.D.N.Y. February 13, 2007). Broker E&O. Court finds triable issue of fact regarding whether broker breached its common law duty to procure the insurance coverage requested by its client, a general contractor sued in a Labor Law case. Contractor claimed that by requesting "head to toe" coverage, it requested coverage for liability arising out of its subcontractors' operations. Policy procured excluded subcontractor operations. Court took note of allegation that at the time of procurement, broker explained premium was high because of coverage for subcontractor operations. Although insured is presumed to have knowledge of the terms of its policy, court notes broker may have duty failed to correct a misimpression of coverage or affirmatively misrepresented the scope of coverage. Court dismisses action against broker by the subcontractor that failed to procure insurance for the general contractor based on absence of contractual relationship with the broker. *Ordonez v. Lovelace, Inc.*, 2007 WL 496445 (E.D.N.Y. February 12, 2007). First-Party No-Fault. Court affirms denial of provider's motion for summary judgment and granting of insurer's motion for summary judgment. Court finds that provider's corporate officer's affidavit was vague and did not specify services rendered, when services were rendered, the amounts owed, or the dates on which claims mailed. Instead, affidavit only stated that the attached bills were accurate and that proofs of mailing were available for inspection. *PDG Psychological, P.C. v. National Grange Mut. Ins. Co.*, 2007 WL 489162 (Sup. Ct. App. Term February 7, 2007). First-Party No-Fault. Court affirms denial of provider's motion for summary judgment. Provider's corporate officer's affidavit failed to lay a foundation to admit exhibits as business records. Affidavit did not set forth personal knowledge of practices and procedures for creating bills. Court notes that production of insurer's denial merely establishes receipt of claim forms, and does not operate as a concession of their admissibility. *Fortune Medical, P.C. v. Allstate Ins. Co.*, 2007 WL 489167 (Sup. Ct. App. Term February 7, 2007). First-Party No-Fault. Court affirms denial of provider's motion for summary judgment, observing only that provider's motion papers were "insufficient." *Vista Surgical Supplies, Inc. v. Progressive Cas. Ins. Co.*, 2007 WL 489171 (Sup. Ct. App. Term February 7, 2007). First-Party No-Fault. Court affirms denial of provider's motion for summary judgment where provider's motion papers failed to allege personal knowledge of mailing of the claims. Affidavit by corporate officer was insufficient to show personal knowledge of practices and procedures to lay the foundation for admissibility of annexed documents as business records. *Delta Diagnostic Radiology, P.C. v. Allstate Ins. Co.*, 2007 WL 489175 (Sup. Ct. App. Term February 7, 2007); *Fair Price Medical Supply Corp. v. Nationwide Mut. Ins. Co.*, 2007 WL 488521 (Sup. Ct. App. Term February 6, 2007); *Delta Diagnostic Radiology, P.C. v. American Transit Ins. Co.*, 2007 WL 488724 (Sup. Ct. App. Term February 6, 2007); *DJS Medical Supplies, Inc. v. Progressive Cas. Ins. Co.*, 2007 WL 509406 (Sup. Ct. App. Term February 1, 2006); *Infinity Chiropractic, P.C. v. New York Central Mut. Ins. Co.*, 2007 WL 509421 (Sup. Ct. App. Term February 1, 2007); *All Mental Care Medicine, P.C. v. Travelers Indem. Co.*, 2007 WL 28749 (Sup. Ct. App. Term January 31, 2007). First-Party No-Fault. Court reverses denial of insurer's motion for summary judgment. Provider's assignor failed to appear for duly scheduled IMEs. Court finds that insurer's affidavits were sufficient to establish that IME notices were sent in accordance with regulations. Court finds no material issues of fact regarding assignor's reasons for not appearing. *Celtic Medical P.C. v. New York Central Mutual Fire Ins. Co.*, 2007 WL 487388 (Sup. Ct. App. Term February 6, 2007). First-Party No-Fault. Court affirms trial court's severance of five separate no-fault claims where denials were based on five different peer reviews involving five different individuals in five different accidents. *King's Medical Supply Inc. v. GEICO Cas. Ins. Co.*, 2007 WL 487969 (Sup. Ct. App. Term February 5, 2007). First-Party No-Fault. Court affirms denial of summary judgment in favor of provider where assignor failed to appear for IME. Court finds insurer's opposition affidavit by an employee of a third-party company retained to schedule and perform IMEs was sufficient to prove mailing of notice. *A.B. Medical Services PLLC v. State-Wide Ins. Co.*, 2007 WL 509399 (Sup. Ct. App. Term February 1, 2007).