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## Week of February 20, 2008

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Consequential Damages. DECISION OF INTEREST. Insured grocery store was damaged following a fire and forced to close. Property insurer disputed amount of loss, and also paid only seven months of business interruption coverage. Following an ADR of the coverage dispute, insured was awarded nearly \$250,000 more than the amount advanced by the insurer. Insured then brought a separate action seeking consequential damages for the loss of its business as a

result on the insurer's delay in paying the claim. Court of Appeals holds that insured can state a cause of action seeking consequential damages in addition to policy limits by proving that insurer denied or delayed the claim in bad faith. Court states that an insurer issuing business interruption coverage should have reasonably foreseen that an excessive delay or improper denial could cause the insured to suffer damages to its business. Court also rejects argument that the policy's exclusions applicable to consequential damages apply to consequential damages for breach of the policy itself. Dissent states that the decision, in effect, overrules Court of Appeals precedent holding that an insurer is not liable for punitive damages based on a bad faith denial of coverage alone. Dissent argues that the majority's description of consequential damages is instead a description of punitive damages since the court's decision requires proof of bad faith. Dissent also states that the majority incorrectly holds that a breach of the covenant of good faith is a predicate for claiming consequential damages, whereas the normal predicate for consequential damages is a simple breach of the policy. Dissent predicts that juries will be disposed to awarding judgments against insurers in excess of limits in cases where denials or delays did not rise to the level of bad faith, and that insurance premiums of all New Yorkers will rise as a result of the court's decision. *Bi-Economy Market, Inc. v. Harleystown Ins. Co. of New York*, 2008 WL 423451 (February 19, 2008). Consequential Damages. DECISION OF INTEREST. In a companion case to *Bi-Economy*, Court of Appeals applies holding of *Bi-Economy* to an insured's claim for consequential damages arising out of the denial of coverage for first-party property damage. Insured claimed that insurer breached the policy by failing to investigate the claim and denying coverage three months after receiving the claim. Decision reflects that *Bi-Economy* is not limited to business interruption claims. Court holds that on remand, Supreme Court must determine whether the damages sought by the insured were sufficiently foreseeable to qualify as consequential damages. Same dissent submitted as in *Bi-Economy*. *Panasia Estates, Inc. v. Hudson Ins. Co.*, 2008 WL 420014 (February 19, 2008). Notice of Suit. DECISION OF INTEREST. Characterizing the issue as one not addressed by the New York Court of Appeals, and one for which lower federal courts have had divergent results, Second Circuit Court of Appeals certifies the question for the Court of Appeals: does notice of suit on the Secretary of State trigger an insured's duty to provide notice where the insured fails to update its business address with the Secretary of State? Court states that should the Court of Appeals not accept the certified question, it will find that insurer properly disclaimed coverage for failure to provide timely notice of suit. Court states that inclusion or absence of the words "or its representative" in the policy's notice condition is not determinative of the issue of whether service on the Secretary triggers the obligation to give notice. *Briggs Avenue L.L.C. v. Ins. Corp. of Hannover*, 2008 WL 398983 (2d Cir. February 15, 2008). Insurable Interest. Insured art dealer had a fine arts policy that was endorsed to cover a painting it purchased. Insured sold the painting to a longtime customer, but instead of being paid in cash, forgave the debt in exchange for two other paintings. Insured elected not to take possession of the two paintings, instead relying on its customer's assertion that he had a buyer for the paintings. Customer subsequently disappeared after being sued by Sotheby's for a \$10 million debt. Insured sought coverage for the value of the original painting it purchased and then sold. Court grants summary judgment to the insurer, finding that insured was judicially estopped from claiming that it still owned the covered painting in light of testimony in a separate proceeding that it sold the painting and was the rightful owner of the other two paintings. Court also rejects insured's claim that the painting was stolen from it and therefore covered, as insured sold the painting and itself elected to not take physical possession of the two other paintings it received in return. *Zurich American Ins. Co. v. Felipe Grimberg Fine Art*, 2008 WL 394808 (S.D.N.Y. February 13, 2008). Business Interruption Coverage. Insured's business was damaged by flooding and drain backup. Policy included an additional coverage endorsement for water damage that stated that certain excluded causes of loss, including water back up, were deleted, with all other provisions staying the same. Coverage under the endorsement was subject to a \$50,000 limit. Insured received \$50,000 limit for damage to property, but claimed that it was owed business interruption coverage in the amount of its actual losses without regard to the \$50,000 limit. Insured argued that no business interruption coverage is available because the loss must be caused by a covered cause of loss, which does not include flooding. Court rejects insurer's argument, holding that the unambiguous language of the endorsement requires that the deletion of excluded causes of loss pertains to the entire policy. Court also holds that the endorsement's \$50,000 limit does not apply to business interruption coverage, which states it provides coverage for the actual loss. Court finds that the \$50,000 limit applies only to property damage coverage. *Dream Spa, Inc. v. Fireman's Fund Ins.*, 2008 WL 355458 (S.D.N.Y. February 6, 2008). Duty to Settle. CGL insurer brought suit against its insured's employers liability insurer after CGL insurer paid to settle an underlying construction accident case. CGL insurer claimed employers liability insurer breached its duty to participate in the settlement negotiations causing the CGL insurer to pay the insured's entire settlement. Court finds that employers liability insurer had a reasonable belief that it was not obligated to participate in the settlement based on its position that the insured faced no actual financial exposure in light of the antisubrogation rule and the fact that the parties claiming against the insured were contractually obligated to provide it with additional insured coverage. *The Home Ins. Co. v. The Travelers Indem. Co.*, 2008 WL 331365 (S.D.N.Y. February 4, 2008). Insurance Law § 3420. Second Department holds that unexplained delay in disclaiming of 34 days is unreasonable as a matter of law. *Sirius America Ins. Co. v. Vigo Construction Corp.*, 2008 WL 324764 (2d Dept. February 5, 2008). Back Up/Overflow Exclusion. In a first-party property damage claim, Second Department reverses summary judgment in favor of insurer. Court holds that back up/overflow exclusion does not apply to damage caused by water where drainpipe failed due to the weight of water bearing down on an obstruction in the drain. *Junius Development, Inc. v. New York Marine and General Ins. Co.*, 2008 WL 331476 (2d Dept. February 5, 2008). Collapse Coverage. In a first-party property damage claim, Second Department affirms denial of insurer's motion for summary judgment. Although insurer produced evidence that damage to home was caused by faulty design rather than a collapse, court finds insured produced evidence to create an issue of fact regarding whether home collapsed due to a hidden condition. *Fontanelli v. Hanover Ins. Co.*, 2008 WL 331679 (2d Dept. February 5, 2008). Notice of Claim. Second Department affirms summary judgment in favor of liability insurer, finding that insured's unexcused five-month delay in providing notice of claim was untimely as a matter of law.

J.C. Contracting of Woodside Corp. v. Ins. Corp. of New York, 2008 WL 331479 (2d Dept. February 5, 2008). Scope of Coverage - Auto Liability. Second Department holds that defendant insurer should have been granted summary judgment declaring that it has no obligation to defend or indemnify driver in an underlying bodily injury action. Policy covers any person using a "covered auto," but since the auto at issue was not owned by the policyholder or qualified as a temporary substitute auto, policy did not cover driver. Empire Fire and Marine Ins. Co. v. Eveready Ins. Co., 2008 WL 331690 (2d Dept. February 5, 2008). Proof of Coverage. Rental car companies sought a declaration that they are entitled to defense and indemnification under the policy issued to the company that rented the truck involved in the accident. Second Department reverse summary judgment in favor of rental companies where their motion failed to include a copy of the rental agreement or the renter's policy. Cendant Car Rental Group v. Liberty Mut. Ins. Co., 2008 WL 331697 (2d Dept. February 5, 2008). General Aggregate Limit/Late Notice - Excess Coverage/Untimely Disclaimer - Excess Coverage. In a coverage dispute between primary and excess liability insurers in connection with three settled construction accident claims, court grants summary judgment in favor of primary insurer, finding that endorsement giving separate aggregate limits for designated projects did not list any projects in the endorsement's schedule. Court finds timely notice was not given to excess insurer where primary insurer gave first notice to excess insurers five years after occurrence when primary policy appeared close to exhaustion. Court, however, finds excess insurer's unexplained 40-day delay in disclaiming untimely as a matter of law. Court also finds primary insurer failed to show primary coverage was exhausted where schedule of underlying insurance in excess policy referred to another primary policy in addition to the one issued by the primary insurer. The Ins. Corp. of New York v. U.S. Fire Ins. Co., 2008 WL 399166 (Sup. Ct. New York Co. February 5, 2008). Contractual Indemnification/Common-Law Indemnification. In a Labor Law action, court finds general contractor and subcontractor's post-accident indemnification agreement applies retroactively. Court finds that subcontractor has no obligation to indemnify owner where the agreement does not refer to owner. Court observes that incorporation clauses in a subcontract purporting to incorporate provisions of the prime contract bind the subcontractor only to provisions regarding scope, quality, and manner of performing work. Court finds no basis for owner's common-law indemnification claim where subcontractor was not negligent. Vezzuto v. The Parr Organization Inc., 2008 WL 425281 (Sup. Ct. Nassau Co. February 4, 2008). Common-Law Indemnification - "Grave Injury"/Contractual Indemnification. In a Labor Law action, court denies third-party defendant employer's motion for summary judgment dismissing the owner's third-party claims for common law and contractual indemnification. Court holds that employer's unsworn physician's report did not constitute admissible evidence to establish the absence of a "grave injury" under the Workers' Compensation Law. With respect to contractual indemnification, court finds an issue fact regarding whether parties had a pre-accident meeting of the minds with respect to an indemnification provision executed after the accident. Gillman v. Columbia University, 2008 WL 399162 (Sup. Ct. Queens Co. February 5, 2008). Grave Injury. In a Labor Law action, Fourth Department affirms summary judgment dismissing common law indemnification claim against third-party defendant employer. Court holds that loss of one eye does not constitute a "grave injury" as a matter of law. Pilato v. Nigel Enterprises, Inc., 2008 WL 275071 (4th Dept. February 1, 2008). Contractual Indemnification. In a Labor Law action, First Department affirms denial of third-party defendant lighting subcontractor's motion for summary judgment on owner's indemnification claim where testimony in case reflected fact issues regarding whether lighting contributed to the accident. Schirmer v. Athena-Liberty Lofts, LP, 2008 WL 305687 (1st Dept. February 5, 2008). Common-Law Indemnification. In an action by fire fighter against city, property owner, managing agent, and occupant after respiratory equipment malfunctioned at a fire scene, First Department affirms portion of order denying city's motion to dismiss indemnification claims against it where a basis for indemnification might exist if a jury were to find that the fire violation issued for a nonfunctioning standpipe in the premises was not a substantial factor in causing plaintiff's injury. Fisher v. City of New York, 2008 WL 427476 (1st Dept. February 19, 2008). Late Notice - Reasonable Excuse/Insurance Law § 3420(d). In an action by property owner against insurer seeking a declaration that insurer owed a duty to defend owner in an underlying construction injury action, court denies cross-motions for summary judgment. Where the insured alleged that 65-day delay in issuing a disclaimer was untimely as a matter of law, court was satisfied that delay was reasonable where insurer showed a need to investigate when its insured received notice of the accident. Where insurer alleged that insured's five-month delay in providing notice of occurrence was untimely as a matter of law, insured raised questions of fact by presenting proof of a reasonable belief in non-liability based upon owner's testimony that it did not control or supervise any of the work and that the injured worker said he would not sue. Equinox Partners, Ltd. v. Greenwich Ins. Co., 2008 WL 427475 (Sup. Ct. Richmond Co. February 15, 2008). Common-Law Indemnification. In an action commenced by a worker injured on a construction site, First Department affirms portion of order granting property owner summary judgment on its common-law indemnification claim against construction company where construction company was liable as general contractor where evidence showed that the construction company was authorized to direct workers, oversaw progress, and hired subcontractors. Szpakowski v. Shelby Realty, LLC, 2008 WL 383309 (1st Dept. February 14, 2008). Common-Law Indemnification. In an action commenced by a worker injured on a construction site, First Department affirms portion of order denying property owner summary judgment on its common-law indemnification claim against general contractor. In a decision with little analysis on the issue, the court concluded that there was ample evidence to support the jury's finding that owner was more than merely vicariously liable for the accident. Burgos v. 213 West 23rd Street Group LLC, 2008 WL 383793 (1st Dept. February 14, 2008). Mortgagee Loss Payable Clause. In an action by mortgagee to recover damages for breach of an insurance contract, Second Department holds that trial court properly granted summary judgment in favor of mortgagee on the issue of liability. Policy provided that property would be protected even where there was an increase in hazard where insured failed to take all reasonable steps to preserve the property if the mortgagee has no knowledge of these conditions. Where evidence showed that mortgagee knew that there had been an "increase in hazard" because he was aware the property had been abandoned, court holds that coverage was not forfeited where mortgagee undoubtedly complied with another provision of the mortgagee loss payable

clause by notifying insurer of any change in occupancy. *Washington Mut. Bank, F.A. v. Allstate Ins. Co.*, 2008 WL 383011 (2d Dept. February 13, 2008). Common-Law Indemnification. In an action commenced by a woman alleging injuries sustained by negligence of worker, Second Department reverses an order denying property owner's and property manager's motions for summary judgment seeking to dismiss the complaint and all cross-claims against them. Court holds that owner and manager could not be held vicariously liable for the alleged negligence of an independent contractor, thus summary judgment should have been granted in their favor. Dismissal of complaint and cross-claims rendered their claim for common-law indemnification academic. *Stagno v. 143-50 Hoover Owners Corp.*, 2008 WL 383050 (2d Dept. February 13, 2008). Additional Insured Status. In a personal injury action against State, Second Department modifies order to deny summary judgment on State's third-party claim seeking a declaration that contractor's insurer must defend and indemnify it as additional insured where the policy was not a part of the record. Copies of the certificates of insurance were insufficient to establish the existence of coverage for the underlying accident. *Gonnerman v. State*, 2008 WL 391179 (2d Dept. February 13, 2008). Common-Law Indemnification/Contractual Indemnification. In a personal injury action against property owner, property manager, and maintenance contractor arising from a trip on a pothole in a parking lot, Second Department affirms the denial of owner's claim against property manager seeking a defense and contractual indemnification where owner failed to show that the injury arose out of property manager's failure to monitor and report potholes. Court states that if the injury can be attributed solely to the negligence of maintenance contractor, contractor may be held liable for indemnification to an owner. Owner's claim for common-law indemnification against maintenance contractor was properly dismissed where contract had no duty to monitor the parking lot for potholes. *Curreri v. Heritage Property Investment Trust, Inc.*, 2008 WL 391197 (2d Dept. February 13, 2008). Common-Law Indemnification. In a very brief decision with little factual background or analysis regarding this personal injury action, Second Department affirms order denying third-party defendants' motions for summary judgment seeking to dismiss third-party plaintiff's claim for common-law indemnification where the contract between plaintiff's employer and a third-party defendant gave both third-party defendants authority to direct plaintiff's work. *Crane v. Jab Realty, LLC*, 2008 WL 391198 (2d Dept. February 13, 2008). Contribution/Common-Law Indemnification. In a very brief decision with little factual background or analysis regarding this personal injury action, Second Department affirms order dismissing all claims and cross-claims for contribution and indemnification against defendant where co-defendants failed to raise a triable issue of fact in response to defendant's establishment of its prima facie entitlement to summary judgment. *Armentano v. Broadway Mall Properties, Inc.*, 2008 WL 391234 (2d Dept. February 13, 2008). Unearned Insurance Premiums. In an action to recover unearned premiums on policies cancelled by the plaintiff insureds, Second Department holds that a fair interpretation of the evidence supports the non-jury determination that the defendant insurance broker received refund checks representing unearned premiums on policies cancelled by the insureds and that broker wrongfully failed to remit to insureds the full amount due. *Tiffany Properties, LLC v. Stithos*, 2008 WL 391198 (2d Dept. February 13, 2008). Additional Insured Status/Broker Liability. In insured's action against insurers and brokers seeking coverage, First Department affirms order finding that insured did not have additional insured status under construction manager's liability policy and broker, not wholesale broker, was responsible for failure to place coverage. An unsigned letter proposal could not be considered a written contract with construction manager requiring the procurement of additional insured coverage. The wholesale broker was not responsible for failure to place coverage where it was carrying out the orders of plaintiff's broker to cancel coverage. *Nicotra Group, LLC v. American Safety Indem. Co.*, 2008 WL 324825 (1st Dept. February 7, 2008). UM Coverage - Other Insurance. In an action by insurer to stay the arbitration of a claim for uninsured motorist benefits, Second Department affirms order granting insurer's petition to stay arbitration where insurer showed the existence of insurance coverage with respect to other vehicle and other vehicle's insurer failed to show (1) that its insured breached the duty to cooperate and (2) that it issued a timely disclaimer. *State Farm Mut. Auto. Ins. Co. v. Mazyck*, 2008 WL 384631 (2d Dept. February 13, 2008). UM Coverage - Physical Contact. In an action by insurer to stay the arbitration of a claim for uninsured motorist benefits on the ground that there was no physical contact with a hit-and-run vehicle, Second Department affirms order denying insurer's petition where insured testified that he lost control of his motorcycle and was struck in the leg by a van that fled the scene. *Nova Cas. Co. v. Musco*, 2008 WL 385607 (2d Dept. February 13, 2008). First-Party No-Fault. In an action to recover assigned first-party, no-fault medical payments, court denies insurer's motion for summary judgment on grounds that provider failed to comply with verification requests and failed to appear at scheduled EUOs where insurer failed to submit proof of mailing notices of the alleged requests and EUOs. Court further denies provider's cross-motion for summary judgment where affidavit of provider's shareholder was too vague and conclusory to make out a prima facie case that proof of claim forms were timely mailed. *High Street Medical, P.C. v. Travelers Ins. Co.*, 2008 WL 343025 (N.Y. City Civ. Ct. February 7, 2008). MVAIC Coverage - "Qualified Person." Second Department reverses that part of lower court order requiring MVAIC to answer plaintiff's complaint. Plaintiff was owner of the vehicle being driven by another, which was insured under a Florida policy issued to the owner's girlfriend. Court finds that driver did not establish he was a "qualified person" because he was the owner of an uninsured vehicle. Court affirms that part of the order directing MVAIC to answer the complaint of the passenger, who did not own the car, and who proved the other vehicle in the accident was also uninsured. *Naula v. Dela Puente*, 2008 WL 331414 (2d Dept. February 5, 2008). Uninsured Motorist Benefits - Agreement to Arbitrate. Second Department affirms denial of insurer's petition to stay uninsured motorists benefits. Court finds that lower court erred in denying stay based on insured's failure to timely apply for a stay, since basis of stay was that the parties did not agree to arbitrate. Court, however, finds stay was proper because New York law obligates insurer to provide uninsured motorist benefits. *Dairyland Ins. Co. v. Figueroa*, 2008 WL 331466 (2d Dept. February 5, 2008). Uninsured Motorist Benefits - Calculation of Limits. Second Department reverses lower court and grants insurer's permanent stay of arbitration for SUM benefits. Claimants, all in the same car at the time of the accident and insured under the same policy, received the total per-accident limits of tortfeasor's policy, then made a demand for SUM benefits.

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Court holds that the SUM insurer is entitled to a stay because the bodily injury limits under its policy were the same as the tortfeasor's policy limits. Court rejects argument that tortfeasor's limits are calculated by subtracting the amount of payments to the claimants. Court states that under the regulations, the only amounts subtracted from the tortfeasor's limits are payments to "other persons," not the claimants themselves. *Clarendon Nat. Ins. Co. v. Nunez*, 2008 WL 331467 (2d Dept. February 5, 2008).