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## Week of February 27, 2008

Grave Injury. DECISION OF INTEREST

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Direct Action

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First-Party No-Fault - Statute of Limitations

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First-Party No-Fault - Admission of Documents/Timely DenialFirst-Party No-Fault

Grave Injury. DECISION OF INTEREST. Court of Appeals affirms summary judgment granting common law indemnification, finding that plaintiff suffered a "grave injury" under the Workers' Compensation Law based on loss of an index finger. Court concludes that where plaintiff lost both interphalangeal joints on the finger, leaving an amputated stump, plaintiff lost his entire finger as a matter of law. *Castillo v. 711 Group, Inc.*, 2008 WL 357103 (Ct. App. February 12, 2008). Priority of Coverage - Additional Insureds. Second Department grants summary judgment in favor of additional insured and its own primary insurer, finding that the additional insured's own policy, by its language, makes it excess to the policy providing additional insured coverage. *Osorio v. Kenart Realty, Inc.*, 2008 WL 458341 (2d Dept. February 19, 2008). Direct Action. Second Department reverses lower court's denial of summary judgment motion made by insurer sued in a direct action. Court rules that plaintiff failed to properly commence the action under Insurance Law 3420 because it failed to serve the insurer with the unsatisfied judgment. Court finds that plaintiff's service of the papers on a broker did not constitute service on the insurer, even if the broker forwarded the papers to the insurer. Court also rejects plaintiff's assertion that it was impossible to identify the insurer because the broker would not provide information. *Guayara v. Hudson Ins. Co.*, 2008 WL 458516 (2d Dept. February 19, 2008). Common Law Indemnification. In a bodily injury action following an auto accident, driver was found negligent and settled the claim with plaintiff. Leaseholder of the vehicle sought common law indemnification from the driver for defense costs. Second Department reverses denial of owner's post-trial motion seeking indemnification, which was denied by the trial court based on owner's failure to serve a proper notice of motion. Court states there was no prejudice arising from the procedural errors, and that lower court should have heard the motion on its merits. Court notes that owners of vehicles without negligence are entitled to common law indemnification from a negligent driver of the vehicles, and grants the relief. *Baron v. Grant*, 2008 WL 458608 (2d Dept. February 19, 2008). Employee Exclusion/Contractual Liability Exclusion. In connection with a Labor Law action, premises owner and its insured sought additional insured coverage from contractor's insurer. Court observes that policy's broad exclusion for injury to an employee of any insured or employees of any contractor hired by any insured is unambiguous. However, court finds an issue of fact regarding whether underlying plaintiff was an employee in light of evidence that plaintiff was a co-owner of the contractor, and did not file a workers' compensation claim. Court finds insurer's 29-day disclaimer following investigation reasonable as a matter of law. Court denies insurer's motion for summary judgment against its named insured based on the policy's contractual liability exclusion. Court finds that the

exclusion is inconsistent with the policy's blanket additional insured endorsement, finding that enforcing the exclusion would render the endorsement "meaningless." *LaBoutique NY, Inc. v. Utica Ins. Co.*, 2008 WL 441841 (Sup. Ct. Richmond Co. February 15, 2008). Common-Law Indemnification. In owners' third-party action against tenant seeking common-law indemnification in contractor's personal injury action, First Department affirms order dismissing the third-party complaint and denying owners' motion for summary judgment against tenant. Dismissal of the third-party complaint was proper where tenant exercised no control over contractor and did not supply any equipment to contractor and was not otherwise shown to be in any way negligent in causing the accident. *Uribe v. Fairfax, L.L.C.*, 2008 WL 495900 (1st Dept. February 26, 2008). Common-Law Indemnification - "Grave Injury"/Contractual Indemnification. In a decision with little factual background or analysis, First Department holds that court erred in granting summary judgment to owners on their claims for common-law indemnification against employer without proof that plaintiff suffered a "grave injury" under Workers' Compensation Law. Court finds that the issue of the owners' liability was determined in their favor in a previous proceeding in which they were granted judgment on their third-party claims against the employer for contractual indemnification. *Olszewski v. Park Terrace Gardens, Inc.*, 2008 WL 451290 (1st Dept. February 21, 2008). First-Party No-Fault - Untimely Denial of Claim. In an action to recover assigned first-party, no-fault medical payments, court reverses order granting insurer's motion to vacate a default judgment where insurer's conclusory allegations that it possessed a meritorious defense were insufficient to warrant vacatur of the default judgment since insurer failed to show that its proffered defenses were set forth in timely denial of claim forms such that defendant is not precluded from interposing its defenses. *Stracar Medical Services, P.C. v. State Farm Mut. Auto. Ins. Co.*, 2008 WL 442576 (Sup. Ct. App. Term February 6, 2008). First-Party No-Fault - Documentation of Claim. In an action to recover assigned first-party, no-fault medical payments, court reverses order granting summary judgment in favor of provider where provider's motion was supported by a conclusory affidavit of its billing manager that was insufficient to establish that she possessed personal knowledge of provider's practices. Court rejects insurer's contention in its cross-motion that provider failed to respond to insurer's verification requests where insurer did not establish that such requests were timely served upon provider. *Infinity Health Products, Ltd. v. Progressive Ins. Co.*, 2008 WL 506160 (Sup. Ct. App. Term February 21, 2008). First-Party No-Fault - Unqualified Provider. In an action to recover assigned first-party, no-fault medical payments, court reverses order granting summary judgment in favor of provider. Award to provider was improper because it does not qualify as a provider of medical services pursuant to the regulations. Moreover, insurer showed that some services encompassed by provider's claim were timely denied on the basis that it was not in line with the applicable fee schedule. *East Coast Acupuncture, P.C. v. New York Cent. Mut. Ins.*, 2008 WL 506152 (Sup. Ct. App. Term February 21, 2008). First-Party No-Fault - Statute of Limitations. In insurer's action to permanently stay arbitration of provider's claim to recover assigned first-party, no-fault medical payments, First Department reverses order denying insurer's petition where provider waited more than six years to seek arbitration challenging insurer's timely denial of provider's claim based upon lack of medical necessity. Insurer's acceptance of unsolicited additional medical records relative to the claim did not extend the applicable six-year statute of limitations. *Travelers Indem. Co. of Connecticut v. Glenwood Medical, P.C.*, 2008 WL 451748 (1st Dept. February 21, 2008). First-Party No-Fault - Worker's Compensation. In an action to recover assigned first-party, no-fault medical payments, court grants insurer's motion to dismiss complaint without prejudice where assignor was a taxicab driver that may have Workers' Compensation benefits available. Court rejects provider's argument that documents proffered to show that assignor was employed as a taxi driver were inadmissible. The NF-2 and the police report were subject to the business records exception to the hearsay rule. Motion must be denied because Workers' Compensation Board, not the court, is the proper forum to determine availability of Workers' Compensation benefits. *Lenox Hill Radiology, P.C. v. American Transit Ins. Co.*, 2008 WL 490583 (N.Y. City Civ. Ct. February 25, 2008). First-Party No-Fault - Statute of Limitations. In an action to recover assigned first-party, no-fault medical payments, court reverses order granting summary judgment in favor of MVAIC on grounds that claim was barred by the statute of limitations. The statute of limitations did not begin to run until the no-fault benefits become overdue, and MVAIC's motion should have been denied where the record does not establish all of the facts necessary to determine when the instant cause of action accrued. *New Era Acupuncture, P.C. v. MVAIC*, 2008 WL 506232 (Sup. Ct. App. Term February 26, 2008). First-Party No-Fault - Business Records. In an action to recover assigned first-party, no-fault medical payments, court reverses order granting summary judgment in favor of provider where provider's motion was supported by an affidavit of a corporate officer that stated in a conclusory manner that the documents annexed to provider's motion were business records and that, as a result, provider failed to establish a prima facie case. *Colonia Medical, P.C. v. New York Cent. Mut. Fire Ins. Co.*, 2008 WL 506229 (Sup. Ct. App. Term February 26, 2008). First-Party No-Fault - Fraudulent Incorporation. In an action to recover assigned first-party, no-fault medical payments, court reverses order granting summary judgment in favor of provider where provider's motion was supported by an affidavit of a corporate officer that stated in a conclusory manner that the documents annexed to provider's motion were business records and that, as a result, provider failed to establish a prima facie case. With respect to insurer's cross-motion for summary judgment on that basis that provider was a fraudulently incorporated professional service corporation, the court properly denied insurer's motion where EUO testimony by provider's owner did not establish that plaintiff's business manager, a non-physician, was the true owner. *Nagle Medical Plaza, P.C. v. Allstate Ins. Co.*, 2008 WL 506219 (Sup. Ct. App. Term February 26, 2008). First-Party No-Fault - Timely Denial. In an action to recover assigned first-party, no-fault medical payments, court reverses order granting summary judgment in favor of provider where provider's motion was supported by an affidavit of a corporate officer that stated in a conclusory manner that the documents annexed to provider's motion were business records and that, as a result, provider failed to establish a prima facie case. Court should have granted insurer's cross-motion for summary judgment where insurer showed that it timely mailed the denial of claim forms at issue based upon its standard office procedure designed to ensure that items are properly addressed and mailed, and affidavit of insurer's peer review chiropractor established that equipment was not medically necessary. *Bath Medical*

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Supply, Inc. v. New York Cent. Mut. Ins. Co., 2008 WL 506208 (Sup. Ct. App. Term February 26, 2008). First-Party No-Fault - Verification Requests. Court rejects argument that an insurer is entitled to verification prior to paying or denying a claim even if the verification request was untimely, as the argument would render the regulation's 30-day time limit "virtually meaningless" and inconsistent with the purpose of the no-fault regulations. Court denies insurer's summary judgment motion because insurer's affidavits did not show when the bills at issue were received, making it impossible to determine if insurer's verification requests were timely. Court grants plaintiff's summary judgment motion because insurer's affidavits show the claim was received. Lenox Hill Radiology MIA, P.C. v. American Transit Ins. Co., 2008 WL 448901 (Civ. Ct. February 20, 2008). First-Party No-Fault - Discovery. Court holds that insurer asserting defense of fraudulent incorporation is entitled to depose the provider's alleged owner and the assignor's treating physician. Bromer Medical, P.C. v. Chubb Indem. Ins. Co., 450199 (1st Dept. February 20, 2008). First-Party No-Fault - Admission of Documents/Timely Denial. Court denies provider's motion for summary judgment, concluding that affidavit of provider's corporate officer did not contain sufficient proof of knowledge of provider's practices and procedures to lay a foundation for the admission of the documents submitted in support of its motion. Court also denies insurer's motion for summary judgment, finding that insurer failed to show its denial for lack of medical necessity was timely, where denial forms were mailed more than 30 days after receipt of claim forms. Delta Diagnostic Radiology, P.C. v. Progressive Cas. Ins. Co., 2008 WL 450094 (Sup. Ct. App. Term February 8, 2008). First-Party No-Fault. Provider's motion for summary judgment denied where the affidavits of a corporate officer submitted in support of the motion were insufficient to lay a foundation for the admission of documents as business records. Boro Medical Supplies, Inc. v. Country Wide Ins. Co., 2008 WL 450197 (Sup. Ct. App. Term February 8, 2008).