

---

## Week of June 12, 2008

Employers Liability Coverage/Late Disclaimer/Contractual Liability Exclusion. DECISION OF INTEREST

First-Party No-Fault - Fraud Defense. DECISION OF INTEREST

Failure to Procure Insurance. DECISION OF INTEREST

Choice of Defense Counsel. DECISION OF INTEREST

Business Pursuits Exclusion

Priority of Coverage/Reasonable Belief In Nonliability

Priority of Coverage

Vehicle and Traffic Law § 370

Material Misrepresentation/Timeliness of Disclaimer

Timeliness of Notice of Claim

Policy Limits/Insured Versus Insured Exclusion

Failure to Procure Insurance/Contractual and Common-Law Indemnification

Failure to Procure Insurance

Additional Insured Coverage - Duty to Defend

Late Notice/Reasonable Excuse

Asbestos Coverage - Arbitration

Coverage Litigation - Discovery

Contractual Indemnification

Contractual Indemnification/Common-Law Indemnification

SUM Coverage

UM Coverage First-Party No-Fault - Staged Accidents

First-Party No-Fault - EUOs

First-Party No-Fault - Proof of Mailing/Medical Necessity

First-Party No-Fault - Admissibility of Claim Forms

First-Party No-Fault - Lack of Medical Necessity

Employers Liability Coverage/Late Disclaimer/Contractual Liability Exclusion. DECISION OF INTEREST. In a coverage dispute arising from a third-party action against the insured subcontractor in a Labor Law action against general contractor and subcontractors, Court of Appeals reverses order and declares that subcontractor's insurer owed no duty to defend or indemnify subcontractor under a workers' compensation/employers liability insurance policy with respect to contractual indemnification claims. Although the accident occurred in New York, insured was a New Jersey company with no New York locations. Therefore, policy was not issued for delivery in New York for purposes of Insurance Law § 3420(d), and insurer was not precluded from raising contractual liability exclusion. Court also states § 3420(d) would not apply to claims for indemnification. Court rejects subcontractor's argument that the policy's \$100,000 employers liability limits should be disregarded in favor of unlimited coverage required under New York policies. In the policy, New York was listed as a "3.C." state, for which there is no requirement of unlimited coverage. Insured failed to advise insurer of operations in New York as required under the policy. *Preserver Ins. Co. v. Ryba*, 2008 WL 2338635 (Ct. App. June 10, 2008). First-Party No-Fault - Fraud Defense. DECISION OF INTEREST. In an appeal arising from an action to recover

assigned first-party, no-fault benefits, Court of Appeals affirms order holding that insurer's untimely denial of coverage for medical supplies precludes its assertion of fraud defense against provider's claim. Majority recognizes that 30-day window may arguably be too short a time frame in which to detect billing fraud, but states that any change is up to the Legislature. A dissenting opinion argues that the insurer's fraud defense should not be time-barred where the insurer is alleging that medical supplies were never delivered to the insured because the claims fall outside the scope of policy coverage. *Fair Price Medical Supply Corp. v. Travelers Indem. Co.*, 2008 WL 2276218 (June 5, 2008). Failure to Procure Insurance. DECISION OF INTEREST. Commercial tenant in a New York City building was obligated under a long-term lease to obtain insurance on the building for all risks covered by the Extended Coverage Endorsement to the New York Standard Fire Insurance Policy. Original policy expired in 2002, and renewal policy expressly excluded terrorism. Court of Appeals holds tenant breached the lease by procuring a provision excluding terrorism. Court holds that the policy's terrorism exclusion would apply to damage caused by named perils, e.g., fire, depending on who caused the loss, e.g., terrorists. Court holds the coverage therefore was not equivalent to coverage under the New York Standard policy and endorsement. Court holds owner is entitled to damages for costs it incurred in procuring the necessary insurance, and finds that even though tenant acquired the necessary coverage, it remained in breach of the lease for the period in which it failed to disclose to owner that the coverage was obtained. *TAG 380, LLC v. ComMet 380, Inc.*, 2008 WL 2242096 (Ct. App. June 3, 2008). Choice of Defense Counsel. DECISION OF INTEREST. In further proceedings in a case in which it previously held that liability insurers defending under a reservation of rights have an affirmative obligation to advise the insured of its right to select counsel, Third Department holds that insured established a violation of New York General Business Law § 349 as a matter of law based on insurer's failure to advise insured of its right to select counsel. Court observes that retained defense counsel made motions tending to benefit the insurer but not the insured. *Elacqua v. Physicians' Reciprocal Insurers*, 2008 WL 2277860 (3d Dept. June 5, 2008). Business Pursuits Exclusion. In a decision with little factual background or analysis, First Department affirms order denying insured's motion for summary judgment against insurer where motion court properly concluded that exclusion is not clear and unambiguous and issues of fact existed as to whether or not the business purpose of or worked performed by plaintiffs excluded them from coverage under the policy. *Sanginito v. National Grange Mut. Ins. Co.*, 2008 WL 2340392 (1st Dept. June 10, 2008). Priority of Coverage/Reasonable Belief In Nonliability. In declaratory judgment action regarding insurance coverage responsibility among several insurance companies for a multi-million dollar settlement in an underlying injury action arising from a collision between a tractor and a truck, First Department modifies order apportioning settlement among three policies. In determining primary coverage, motion court erred in finding that manuscript endorsement in tractor owner's policy rendered its coverage excess, and orders tractor owner's carrier to reimburse umbrella carrier for amounts contributed to the settlement equal to the limits of the tractor owner's policy. In apportioning excess coverage between two umbrella policies, Appellate Division holds that: (1) "bobtail exclusion" in umbrella policy is void as against public policy, and that exclusion could not be saved under policy's savings clause; and (2) question of fact existed regarding the reasonableness of tractor sublessee's 5-month delay in notifying excess carrier where sublessee presented evidence of a good-faith belief in non-liability. If factfinder determines notice to be timely, First Department directs excess carriers to pro-rate the remainder of the settlement in accordance with the limits of their policies. *National Union Fire Ins. Co. of Pittsburgh, PA v. Connecticut Indem. Co.*, 2008 WL 2342121 (1st Dept. June 10, 2008). Priority of Coverage. In declaratory judgment action between two insurers arising from an underlying bodily injury action, First Department reverses order holding that defendant insurer was not obligated to reimburse plaintiff insurer for their defense costs. Court holds that insurers are co-primary insurers that must share in the underlying defense. Motion court erred in determining that defendant's policy was an excess policy because it was subject to payment of a deductible. Instead, both policies are primary and their other insurance clauses cancel each other out. *233rd Street Partnership, L.P. v. Twin City Fire Ins. Co.*, 2008 WL 2344740 (1st Dept. June 10, 2008). Vehicle and Traffic Law § 370. In car rental company's action against car lessee for property damage to rental car caused in accident, court denies rental company's motion for default judgment and dismisses action where VTL § 370 required the self-insured rental company, as owner, to maintain minimum levels of insurance, the alleged property damage did not exceed those minimum levels, and the car rental company was precluded from recovering the relief sought for the same policy reasons as those behind the anti-subrogation rule. *ELRAC v. Russo*, 2008 WL 2346134 (Dist. Ct. Nassau Co. June 10, 2008). Material Misrepresentation/Timeliness of Disclaimer. In insured's action against insurer seeking a declaration that insurer owed coverage for a fire loss after insurer denied coverage based on alleged misrepresentations in the insurance application relating to claims history, Fourth Department modifies order to grant summary judgment to insurer declaring that it has no obligation to indemnify plaintiff for the fire loss. Court: (1) rejects as irrelevant insured's argument that insurer failed to show that misrepresentations were willful; (2) holds that eight-month delay in disclaimer was not untimely where insured failed to show prejudice; and (3) rejects insured's argument that insurer waived its right to rescind because it knew of the insured's misrepresentations prior to the fire where proffered evidence was inadmissible hearsay. Insurer was entitled to summary judgment where it established as a matter of law that the insured made a material misrepresentation such that insurer would not have issued the policy had it known the misrepresented facts. *Precision Auto Accessories, Inc. v. Utica First Ins.*, 2008 WL 2314503 (4th Dept. June 6, 2008). Timeliness of Notice of Claim. In a personal injury action arising from a rear-end accident, First Department reverses order and grants insurer's motion for summary judgment declaring that it owes no duty to defend and indemnify insured based upon insured's 40-day delay in notice where underlying claimant was taken away by ambulance and insureds failed to raise an issue of fact regarding a good-faith belief in non-liability. *Young Israel Co-Op City v. Guideone Mutual Ins. Co.*, 2008 WL 2277599 (1st Dept. June 5, 2008). Policy Limits/Insured Versus Insured Exclusion. In a brief decision with little factual background or analysis, First Department affirms trial court's judgment awarding insured damages against insurer and trial court's related orders denying insurer's motion to dismiss insured's complaint. Court rejects insurer's contention that sublimit for claims seeking

equitable relief applies also to claims arising from same underlying occurrence that seek legal relief based on tort and contract law principles. Court also rejects insurer's argument that policy's "insurer versus insured exclusion" applies to claims brought against insured entities by insureds acting in their individual capacities. Trustees of Princeton University v. National Union Fire Ins. Co. of Pittsburgh, 2008 WL 2277830 (1st Dept. June 5, 2008). Failure to Procure Insurance/Contractual and Common-Law Indemnification. In an action involving a slip-and-fall at a subway station under renovation, court finds that issues of fact concerning the cause of the accident preclude summary judgment on owner Transit Authority's third-party claims for contractual and common law indemnification against general contractor. Court notes that cause of accident could have been leaks from one of two pipes, only one of which was under control of the contractor. Court notes that Transit Authority cannot be indemnified for its own negligence, i.e., if the accident was caused by leaks from the pipe under its control. Court holds that contractor did not breach its contract to procure insurance for the Transit Authority, since the coverage was obtained. Fact that insurer denied coverage based on its conclusion that the accident did not arise from contractor's work is immaterial. However, contractor did fail to obtain coverage with the limits set forth in the contract, and is potentially liable to the extent of the shortfall. Castro v. New York City Transit Authority, 2008 WL 2246070 (1st Dept. June 3, 2008). Failure to Procure Insurance. In a case involving a slip-and-fall accident at a store on premises owned by the Long Island Rail Road and leased and sub-leased to the other defendants, Second Department reverses that part of lower court's decision that denied defendant Transit Authority's motion against sublessor for breach of contract to procure insurance where sublessor provided no evidence that it complied with the contract. Boxer v. Metropolitan Transit Authority, 2008 WL 2298826 (2d Dept. June 3, 2008). Additional Insured Coverage - Duty to Defend. Insurer denied a defense to company claiming additional insured status in connection with an underlying assault action. Company subcontracted with the named insured for cable installation services. Contract required subcontractor to obtain additional insured coverage. Company was dismissed from underlying action and brought action to recover its defense costs from insurer. Insurer moved to dismiss complaint based on fact that subcontract by its terms expired prior to the occurrence. Court denies motion to dismiss, finding that complaint adequately alleged that company qualified as an additional insured under the policy. Court notes motion to dismiss requires court only to determine whether facts alleged plead a cause of action. Court observes that no discovery had taken place, and insured had yet to produce the policy. Therefore, court cannot rule as a matter of law that company might not be entitled to additional insured coverage under the policy. Time Warner Cable of New York City v. New Hampshire Ins. Co., 2008 WL 2279753 (Sup. Ct. New York Co. May 27, 2008). Late Notice/Reasonable Excuse. Insured store did not give notice of a slip-and-fall accident involving an employee to its liability carrier until six months after it was impleaded into a suit by the employee against the store's landlord. Insured argued late notice should be excused because it reasonably believed that its workers' compensation insurer would cover any and all liability. Court grants summary judgment to insurer finding that insured's proffered excuse for late notice was unreasonable as a matter of law. Eastern Baby Stores, Inc v. Central Mut. Ins. Co., 2008 WL 2276527 (S.D.N.Y. June 2, 2008). Asbestos Coverage - Arbitration. After remand an evidentiary hearing, District Court confirms awards in two phases of an arbitration between a liquidated primary insurer and a reinsurer that refused to settle claims arising out of asbestos injuries and environmental claims. Court rejects reinsurer's contention that insurer's deceitful redomestication to Bermuda had any prejudicial effect on the arbitration where there was no evidence that the Bermuda liquidators handled claims and settlements any differently than a Massachusetts liquidator would have. Commercial Union Ins. Co. v. Lines, 2008 WL 2234634 (S.D.N.Y. May 30, 2008). Coverage Litigation - Discovery. In connection with an underlying property damage claim arising out of alleged damage to a nearby owner's property caused by the insured contractor's construction operations, liability insurer provided a conditional defense but commenced a declaratory judgment action. Insured complained that insurer assigned the same claim representative to both files, and should have instead assigned separate adjusters and maintained a screen between them. Insured claims insurer is therefore estopped from denying coverage. Insured sought production of insurer's communications with defense counsel in the underlying action and similar documents. Court concludes that insured might be able to state an estoppel claim if insured breached its duty to defend by assigning a single claim representative (although does not indicate that doing so constitutes a per se breach). Court also notes that attorney-client privilege with respect to defense counsel is held by insured, not insurer. Court grants the motion to compel, but rules that only insured, not underlying plaintiff, may be provided the documents. U.S. Underwriters Ins. Co. v. Ziering, 2008 WL 230688 (E.D.N.Y. May 28, 2008). Contractual Indemnification. In worker's bodily injury and Labor Law action against general contractor and subcontractors, First Department affirms order: (1) denying summary judgment on general contractor's claim for contractual indemnification against one subcontractor where contract plainly contemplated a showing of negligence on the part of subcontractor and liability issues remained unresolved; and (2) granting summary judgment for general contractor on contractual indemnification claims against another subcontractor where the purchase order at issue unambiguously provided for indemnification from all liability arising from the work. McCarthy v. Turner Construction, Inc., 2008 WL 2369771 (1st Dept. June 12, 2008). Contractual Indemnification. In worker's bodily injury and Labor Law action against general contractor, First Department affirms order denying general contractor's third-party claim for contractual indemnification against worker's employer where there existed issues of fact regarding the extent of general contractor's negligence in causing worker's injuries. Callan v. Structure Tone, Inc., 2008 WL 2369782 (1st Dept. June 12, 2008). Contractual Indemnification. In floor installer's bodily injury action against general contractor, First Department affirms order denying summary judgment on general contractor's claim for contractual indemnification against installer's employer because issues of fact existed regarding general contractor's negligence in causing installer's injuries. Kamin v. James G. Kennedy & Co., Inc., 2008 WL 2340370 (1st Dept. June 10, 2008). Contractual Indemnification/Common-Law Indemnification. In worker's bodily injury and Labor Law action against general contractor and owners, Fourth Department affirms order denying summary judgment on owners' claim for contractual indemnification against general contractor where contract contained no provision for

---

contractual indemnification. Without providing analysis, court denies owners' claim for common-law indemnification on grounds that owners failed to meet their burden of proof. *Davis v. Brunswick*, 2008 WL 2315105 (4th Dept. June 6, 2008). Contractual Indemnification. In bodily injury action arising from a parking lot slip and fall, Fourth Department affirms order denying parking lot repair contractor's motion for summary judgment where issues of fact existed regarding whether contractor exacerbated the allegedly dangerous condition at the lot. Consequently, motion court properly refused to dismiss the complaint and properly denied contractor's claim for contractual indemnification from lot repair subcontractor. *Miller v. Pike Co., Inc.*, 2008 WL 2315164 (4th Dept. June 6, 2008). SUM Coverage. In truck driver's action for SUM coverage under his employer's policy and his individual policy after he was allegedly injured by a hit-and-run driver while unloading his truck, Third Department reverses order and grants summary judgment in favor of employer's insurer where driver was not "occupying" his employer's vehicle at the time of the accident and driver was an insured under the SUM endorsement of his individual policy. *Faragon v. American Home Assur. Co.*, 2008 WL 2278093 (3d Dept. June 5, 2008). UM Coverage. Insurer denied UM claim on basis that insured failed to timely report hit-and-run accident to the police or Commissioner of Motor Vehicles. Summary judgment to insurer, noting, inter alia, that insured failed to sign its MV-104 form or to submit an affidavit stating who completed the form and submitted it. *Sitbon v. Unitrin Preferred Ins. Co.*, 2008 WL 2282996 (2d Dept. June 3, 2008). First-Party No-Fault - Staged Accidents. In a claim for assigned no-fault benefits, insurer moved for summary judgment contending that accident was intentionally caused. Court notes that insurer's uncontradicted evidence that the accident is compelling, but that court cannot grant summary judgment to defendant because such relief is unavailable (as opposed to denying a plaintiff's motion for summary judgment in light of such evidence of a staged accident). Court finds that prior cases establish a per se rule against granting such relief, and that even if participants in the accident admit it was staged, such admissions at most create an issue of fact. *AA Acupuncture Service, P.C. v. State Farm Mut. Auto. Ins. Co.*, 2008 WL 2228635 (Civ. Ct. New York Co. May 30, 2008). First-Party No-Fault - EUOs. Court holds that although insurer had a right to demand a pre-claim EUO, it was obligated to timely issue a second request for an EUO after the insured failed to show for the pre-claim EUO and then submitted the claim. Insurer therefore could not raise insured's failure to show for the EUOs as a defense to coverage. *All-Boro Medical Supplies, Inc. v. Progressive Northeastern Ins. Co.*, 2008 WL 2247002 (Civ. Ct. City of New York May 27, 2008). First-Party No-Fault - Proof of Mailing/Medical Necessity. Court denies insurer's motion for summary judgment, concluding that affidavit from insurer's examiner does not reflect personal knowledge of mailing of denials, and that procedures described in affidavit are not designed to ensure proper mailing. Court also finds insurer failed to demonstrate lack of medical necessity since physician's report is conclusory and does not set forth accepted medical standards. Court grants plaintiff's cross-motion for summary judgment based on proof that claim was timely mailed, and since defendant cannot prove timely mailing of denials. *Carle Place Chiropractic v. New York Central Mut. Fire Ins. Co.*, 2008 WL 2228633 (Dist. Ct. Nassau Co. May 29, 2008). First-Party No-Fault - Admissibility of Claim Forms. Summary judgment in favor of provider vacated where affidavit by provider's attorney was insufficient to lay foundation for admission of claim documents as business records. *Struhl v. Alea North America Ins. Co.*, 2008 WL 2283901 (Sup. Ct. App. Term. May 27, 2008). First-Party No-Fault - Lack of Medical Necessity. Summary judgment properly granted to insurer where peer review report adequately established lack of medical necessity and was not rebutted by provider. *Eden Medical, P.C. v. Progressive Cas. Ins. Co.*, 2008 WL 2284838 (Sup. Ct. App. Term May 27, 2008).