

SUM Coverage - Serious Injury Exclusion. DECISION OF INTEREST, Number of Occurrences. DECISION OF INTEREST, Coverage Litigation Sanctions. DECISION OF INTEREST, Reinsurance Loss Allocation. DECISION OF INTEREST, First-Party No-Fault - Fraudulent Incorporation. DECISION OF INTEREST, Insurance Law Sec. 3420(d) - Federal Law Implications, Bad Faith - D&O, Liquidation Bureau. Duty to Defend, Additional Insured Coverage - Primacy, Contractual Indemnification, Insurer's Duty to Warn, Exclusion for Unexplained Losses, Late Notice of Occurrence, Contractual Indemnification, Allocation Provision, Late Notice of Occurrence/Timely Disclaimer, UM Arbitration, Necessary Parties, SUM Coverage/UM Coverage, Contractual Indemnification, First-Party No-Fault

SUM Coverage ‐ Serious Injury Exclusion. DECISION OF INTEREST. In injured party's action against insurer seeking SUM coverage for injuries sustained in a motor vehicle accident, a divided Fourth Department reverses trial court order and grants insurer a new trial on the issue of serious injury where, under a policy exclusion, SUM coverage did not apply unless the insured suffered a serious injury as defined in Insurance Law § 5102(d). The majority expressly rejects prior Second Department decision invalidating such requirements and holds that serious injury threshold requirements are valid and enforceable. Court reasons that such requirements are not inconsistent with Insurance Law § 3420(d) or any other provision of the Insurance Law and that insureds are free to decline optional SUM coverage upon the specified terms and conditions of coverage. A lengthy dissent agrees with Second Department precedent and argues that the Legislature could have easily included a threshold requirement in the insurance law provisions governing SUM benefits if it intended to do so and that such requirements are less favorable to the insured than Insurance Law § 3420(f)(2). *Meegan v. Progressive Ins. Co.*, 2007 WL 1651872 (4th Dept. June 8, 2007). Number of Occurrences. DECISION OF INTEREST. ExxonMobil settled 13 and 12 property damage products liability suits, respectively, for two different products. ExxonMobil's liability coverage spanned several years, but each policy was subject to a \$5 million SIR, which only one settlement exceeded. ExxonMobil brought suit seeking a declaration that the suits for each product combined to form a single occurrence, thereby entitling ExxonMobil to indemnification for its liability in excess of \$5 million, as well as its defense costs. Court denies ExxonMobil's motion for summary judgment, and grants insurers' motion for summary judgment declaring that each claim constitutes a separate occurrence. Court observes that New York courts have uniformly found that product liability claims constitute separate occurrences under New York's "unfortunate event" test. Court observes that the definition of "occurrence" has repeatedly been found unambiguous, and that ExxonMobil's manufacture of the products at issue does not constitute an accident, as contemplated by the definition of "occurrence." Court states that manufacture of the products is not a "condition" which the claimants were exposed to, noting that claimants' injuries arose from property damage at different times and locations. Court rejects ExxonMobil's alternative argument that under the "unfortunate event" test, its decision to manufacture and sell the products constitutes an occurrence. Court states that prior Court of Appeals decisions have rejected such a "cause" test to determine the number of occurrences. *ExxonMobil Corporation v. Certain Underwriters at Lloyd's, London*, 2007 WL 1615102 (Sup. Ct. New York Co. June 5, 2007). Coverage Litigation Sanctions. DECISION OF INTEREST. In the wake of the 9/11 attack, primary liability insurer initially denied named insured status to leasing corporations created by the WTC's leasee's holding company, and denied additional insured status to the WTC owner and the lessee of WTC retail space. After extended coverage litigation, insurer produced documents reflecting its original compilation of a policy with a broad named insured endorsement and certain blanket additional insured endorsements. Insurer ultimately conceded the insured status of all of the entities it originally denied such status. Following resolution of the coverage issues, court permitted the entities originally denied coverage to make a motion for sanctions against the insurer and coverage counsel pursuant to Rules 11 and 37 of the Federal Rules of Civil Procedure. Court partially grants the motions for Rule 11 sanctions against the insurer. Court finds that insurer's original pleadings stating there was no evidence of the intention to provide coverage for the various entities was disclosed to insurer was either dishonest or objectively unreasonable. Court also finds initial failure to produce key documents was not inadvertent. Court does not find sufficient evidence to issue Rule 11 sanctions in connection with the retail company's status as an additional insured. Court grants the motions by all insureds for Rule 37 sanctions based on coverage counsel's failure to produce key documents. Citing the importance and magnitude of the case, court issues a \$750,000 sanction under Rule 11 jointly and severally against insurer and coverage counsel. Court issues an additional \$500,000 joint and several sanction under Rule 37. *In re September 11th Liability Insurance Coverage Cases*, 2007 WL 1739666 (S.D.N.Y. June 18, 2007). Reinsurance Loss Allocation. DECISION OF INTEREST. In an action by reinsurer against reinsured seeking a determination regarding the inconsistency in the manner in which the reinsured evaluated an underlying pollution claim prior to settlement with its insured and the subsequent methodology used in ceding the loss to the reinsurer, First Department grants partial summary judgment to reinsurer, holding that a reinsurer is not bound by the follow-the-fortunes doctrine where the reinsured's settlement allocation is at odds with its allocation of the loss with its insured, designed to minimize reinsured's own loss, and reflects an effort to maximize unreasonably the amount of collectible reinsurance. Reinsured's post-settlement allocation was unreasonable where the one-occurrence-per-site allocation was internally inconsistent, directly contradicted previous trial court rulings regarding the number of occurrences, and contradicted the position that the reinsured and its insured took in underlying litigation. *Allstate Ins. Co. v. American Home Assur. Co.*, 2007 WL 1674631 (1st Dept. June 12, 2007). First-Party No-Fault ‐ Fraudulent Incorporation. DECISION OF INTEREST. Insurer commenced an action against 17 acupuncture providers allegedly owned and controlled by one doctor. Insurer alleged the corporations were fraudulently incorporated and that services were provided by independent contractors. Insurer commenced an action seeking a declaration that the providers are not entitled to

compensation for unpaid claims, and for recovery of over \$5 million in paid benefits based on fraud and unjust enrichment. As part of the action, insurer sought a stay of some 868 current claims by the providers and to enjoin future claim litigation by the providers. Rejecting providers' argument that insurer's defenses must be raised in the individual pending suits, court finds a justiciable controversy suitable for a declaratory judgment action. Court also finds that for purposes of a motion to dismiss, insurer asserted a claim for unjust enrichment and fraud. Court cites allegations that the doctor purchased the use of names and licenses of others to form corporations that he solely controlled, that he formed corporations when he was not licensed to perform acupuncture, and that services were provided by independent contractors. Court grants insurer's request for injunctive relief enjoining pending and future claims litigation by the providers. *St. Paul Travelers Ins. Co. v. Nandi*, 2007 WL 1662050 (Sup. Ct. Queens Co. May 25, 2007). Insurance Law § 3420(d) — Federal Law Implications. In an underlying action arising from injuries to a passenger on a commercial bus, bus company did not provide notice to its insurer and defaulted. Pursuant to an endorsement required by federal law applicable to busing companies, insurer paid the default judgment in the underlying action, then, under the terms of the endorsement, sought reimbursement from the insured based on the insured's failure to provide notice. Insured sought summary judgment dismissing the claim based on its argument that insurer failed to issue a timely disclaimer pursuant to Insurance Law § 3420(d). Insurer sought summary judgment declaring that § 3420(d) does not apply to the case since the endorsement at issue presents an issue of federal law. Court finds that interpretation of the endorsement sufficiently raises a question of federal law to provide subject matter jurisdiction. Court, however, rejects insurer's argument that federal law preempts § 3420(d), as the federal and state aspects of interpreting the policy are not in conflict. Court denies summary judgment regarding whether insurer timely disclaimed. Court states that it is unclear whether § 3420(d) applies to situations in which an insurer seeks reimbursement of coverage it was compelled to provide in the first instance by federal law. Court finds insured is entitled to discovery regarding its argument that it did provide timely notice. Court also states that if first notice was not given until default was entered, it may be tantamount to no notice such that § 3420(d) is not triggered. Court also finds an issue of fact regarding whether insurer gave prompt notice of its intention to seek reimbursement, as required by the endorsement at issue. *Insurance Corporation of New York v. Monroe Bus. Corp.*, 2007 WL 1705661 (S.D.N.Y. June 14, 2007). Bad Faith — D&O. An individual company officer agreed to settle a securities class action during trial for \$20 million, without his insurers' consent. Although officer was insured under primary and excess D&O policies, the primary carrier would not tender its \$10 million limits prior to the settlement, and excess carriers would not fund settlement in light of primary carrier's position. Following settlement, insured sued the carriers. The primary carrier and one excess carrier tendered their limits in settlement. At trial, a jury awarded insured \$5 and \$4 million against the remaining two excess carriers, respectively. Jury also awarded the excess carriers \$2 and \$3 million against the primary carrier on claims of bad faith. On post-trial motions, court finds under California law that there was ample evidence for the jury's verdict against the excess carriers in favor of insured and also that insured is entitled to prejudgment interest from the date of his settlement. Applying New York law, court vacates the bad faith verdict against the excess carriers and grants the primary carrier judgment as a matter of law since jury did not find requisite "gross disregard," as inquired under the verdict form. *Schwartz v. Twin City Fire Ins. Co.*, 2007 WL 1658681 (S.D.N.Y. May 31, 2007). Liquidation Bureau. Second Department reverses lower court's decision that the Superintendent of Insurance is not estopped from disclaiming coverage on behalf of a liquidated company where the insurer previously undertook the defense of its insured without a reservation of rights. Court holds that Superintendent is not treated as a state entity for purposes of litigation involving the liquidated insurer. *Serio v. United States Fire Ins. Co.*, 2007 WL 1629962 (2d Dept. June 5, 2007). Duty to Defend. Second Department affirms summary judgment in favor of insurer declaring that it has no obligation to defend the insured in an underlying dental malpractice action where the policy provides coverage for "bodily injury," but the underlying suit does not seek such damages. *Fortress Ins. Co. v. Kollander*, 2007 WL 1633239 (2d Dept. June 5, 2007). Additional Insured Coverage — Primacy. Second Department reverses decision of lower court finding that named insured's own coverage was primary where insured was entitled to primary additional insured coverage, citing *Pecker Iron Works. Serio v. United States Fire Ins. Co.*, 2007 WL 1629962 (2d Dept. June 5, 2007). Contractual Indemnification. In a Labor Law case, Fourth Department finds lower court properly denied cross-motions on claim of contractual indemnification. Although the alleged indemnification agreement was dated a year prior to the accident, it was not signed until after the accident, thereby raising an issue of fact regarding whether the parties intended the agreement to apply as of the contract date. *McGovern v. Gleason Builders, Inc.*, 2007 WL 1653507 (4th Dept. June 8, 2007). Insurer's Duty to Warn. In an auto injury case, First Department affirms lower court's denial of plaintiffs' motion to amend the complaint to add a claim against defendant's insurer based on the theory that the insurer had a duty to warn defendant of the insured vehicle's rollover risk. Court finds that in the absence of a fiduciary relationship between insurer and insured, there was no such duty to warn. *Blake v. Ford Motor Company*, 2007 WL 1630907 (1st Dept. June 7, 2007). Exclusion for Unexplained Losses. In insured's action seeking a declaration that insurer was obligated to pay insured's claim for property discovered missing from insured's storage unit under a policy excluding "property that is missing, but there is no physical evidence to show what happened to it," First Department modifies order to dismiss insured's complaint where evidence established, as a matter of law, that the claim fell within the policy exclusion. Testimony regarding evidence of prior break-in attempts did not give rise to an issue of fact where such attempts were unsuccessful. *WestCom Corp. v. Greater New York Mut. Ins. Co.*, 2007 WL 1746257 (1st Dept. June 19, 2007). Late Notice of Occurrence. First Department affirms summary judgment in favor of excess insurer declaring insurer has no duty to defend or indemnify insured where insured did not notify the insurer of its employee's accident until five and a half years after becoming aware of the accident and insured offered no evidence of any action on its part to ascertain the possibility of its own liability for the accident. *Sorbara Const. Corp. v. AIU Ins. Co.*, 2007 WL 1746907 (1st

Dept. June 19, 2007). Contractual Indemnification. In a personal injury action by tenant against property owner and building manager after tenant was scalded by hot water, First Department rejects defendants' argument that they are free from liability because they delegated full responsibility for boiler maintenance to an independent contractor where the Multiple Dwelling Law imposes a non-delegable duty upon owners to keep their premises, plumbing, and drainage system in good repair. "However, an owner can look to a party with whom it maintained a contract for maintenance to indemnify it for its losses pursuant to proven violations of the Multiple Dwelling Law." *Carlos v. 395 E. 151st Street, LLC*, 2007 WL 1704060 (1st Dept. June 14, 2007). Allocation Provision. In insured's claim for reimbursement of settlement amount under policy with allocation provision, First Department affirms order denying summary judgment for insured holding that the allocation provision had the effect of a partial exclusion and insurer is only obligated to pay a portion of insured's claim despite the joint and several liability of the insured and uninsured defendants. The portion is to be based upon the insured's and the uninsured's relative exposures in the litigation and the benefits received from the settlement. *Clifford Chance Ltd. Liability Partnership v. Indian Harbor Ins. Co.*, 2007 WL 1704202 (1st Dept. June 14, 2007). Late Notice of Occurrence/Timely Disclaimer. In an action by general contractor against subcontractor and subcontractor's insurer for damage to equipment on a construction site, First Department holds that subcontractor's unexcused delay of more than ten months in notifying its insurer of the claim violated the policy's notice provision, and the insurer's disclaimer, issued less than one month later, was reasonable in light of insurer's prompt and diligent investigation into the claim. First Department rejects general contractor's argument that its notice directly to subcontractor constituted prompt notice where general contractor knew the identity of subcontractor's insurer and subcontractor was not its carrier's agent. *R.C. Dolner, inc. v. My-Way Contracting Corp.*, 2007 WL 1673460 (1st Dept. June 12, 2007). UM Arbitration. In an action by insurer to permanently stay arbitration, Second Department affirms order granting the stay where insurer showed that claimants breached the cooperation clause by willfully refusing to comply with disclosure requirements. Claimants repeatedly failed to comply with disclosure demands despite court order and subsequent notice of noncompliance. *New York Central Mut. Fire Ins. Co. v. Rafailov*, 2007 WL 1704171 (2d Dept. June 12, 2007). UM Arbitration. In an action by insurer of claimant's parents to permanently stay arbitration, Fourth Department affirms order granting the stay where petitioning insurer paid no-fault benefits but disclaimed UM coverage based upon insured's failure to provide timely notice of the accident after seven-month delay. Court rejects insured's argument that insurer's payment of no-fault benefits waived insurer's right to disclaim coverage for the uninsured motorist claim and that insurer was required to show prejudice before disclaiming on the uninsured motorist claim since there was no timely notice of claim. *Progressive Northeastern Ins. Co. v. Heath*, 2007 WL 1651857 (4th Dept. June 8, 2007). Necessary Parties. In general contractor's action against subcontractor's insurers seeking a declaration that insurers are obligated to defend and indemnify general contractor in underlying action, Fourth Department affirms the denial of insurer's motion seeking a declaration that its policy was excess to two policies issued to general contractor. Court holds that lower court properly declined to make a declaration of priority of coverage where general contractor's own insurer was not a party to the action and could not be bound by the requested declaration. *David Christa Const., Inc. v. American Home Assur. Co.*, 2007 WL 1652409 (4th Dept. June 8, 2007). SUM Coverage/UM Coverage. In passenger's action against driver's insurer seeking to recover SUM benefits after the vehicle containing driver and passenger was forced off the road by an unidentified vehicle, Fourth Department affirms pre-answer dismissal of passenger's complaint where passenger was actually seeking UM coverage since he did not recover damages from unidentified driver, and arbitration of both SUM and UM coverage is mandatory pursuant to the terms of the policy. *Williams v. Progressive Northeastern Ins. Co.*, 2007 WL 1653038 (4th Dept. June 8, 2007). Contractual Indemnification. In injured worker's Labor Law action against site owner and construction manager, Fourth Department reverses order granting construction manager summary judgment on the issue of contractual indemnification from plaintiff's employer where the subject contractual indemnification provision was conditioned upon negligence of plaintiff's employer and triable issue of fact existed regarding such negligence. *Sheridan v. Albion Central School Dist.*, 2007 WL 1653163 (4th Dept. June 8, 2007). First-Party No-Fault. In an action to recover first-party no-fault benefits, Second Department holds that insurer is precluded under Insurance Law § 5106 from interposing a defense if it fails to pay or deny the claim within thirty days on grounds that it suspects that the claim fraudulently seeks reimbursement for medical supplies that were never delivered to the insured. Whether a failure to timely disclaim coverage will result in preclusion depends upon the insurer's reason for not paying the claim. Where an insurer is entitled to deny a claim based on an absence of coverage, its failure to timely disclaim coverage does not preclude it from denying liability on that ground. Because the alleged fraud was not related to the existence of coverage, enforcing the preclusion rule does not create coverage where it would not otherwise exist. *Fair Price Medical Supply Corp. v. Travelers Indem. Co.*, 2007 WL 1704621 (2d Dept. June 12, 2007). First-Party No-Fault. Court affirms summary judgment in favor of provider on certain claims based on insurer's failure to provide an affidavit by someone with personal knowledge of alleged failure to appear at IMEs, but vacates summary judgment on claims where peer review reports were either unsworn or conclusory. Court also vacates summary judgment for provider on claims where insurer established timely denials based on failure to submit/execute an assignment. *First Help Acupuncture, P.C. v. Progressive Northeastern Ins. Co.*, 2007 WL 1662073 (Sup. Ct. App. Term June 5, 2007). First-Party No-Fault. Court affirms denial of provider's motion for summary judgment where denial form's reference to a negative peer review report was sufficient to apprise of the basis for the determination that the services were not medically necessary. Court notes that cases to the contrary are no longer good law. *Delta Diagnostic Radiology, P.C. v. American Transit Ins. Co.*, 2007 WL 1662654 (Sup. Ct. App. Term June 4, 2007). First-Party No-Fault. Court affirms denial of provider's motion for summary judgment based on a defective affidavit from its corporate officer, but vacates summary judgment in favor of insurer, which did not prove as a matter of law that the claim was premised on a staged accident. *Capri Medical,*

P.C. v. Progressive Cas. Ins. Co., 2007 WL 1662139 (Sup. Ct. App. Term June 1, 2007). First-Party No-Fault. Court affirms denial of provider's motion for summary judgment, but does so not on the basis of an issue of fact regarding whether provider was an independent contractor, but because provider's corporate officer's affidavit did not reflect personal knowledge of provider's practices and procedures sufficient to admit provider's documents as business records. Delta Diagnostic Radiology, P.C. v. Country-Wide Ins. Co., 2007 WL 1662240 (Sup. Ct. App. Term June 1, 2007). First-Party No-Fault. Court reverses lower court's grant of insurer's motion to dismiss based on provider's president's failure to appear for an EUO. Insurer did not provide admissible proof of the dates the claims were received, which was necessary to prove its EUO requests were timely made. Court also holds it was therefore error to direct the deposition of provider's president. Inwood Hill Medical, P.C. v. Allstate Ins. Co., 2007 WL 1558699 (Sup. Ct. App. Term May 30, 2007). First-Party No-Fault. In an action to recover first-party no-fault benefits, court reverses order granting provider summary judgment where, although provider established a prima facie case, affidavit of insurer's investigator was sufficient to raise a question of fact regarding whether the subject collision was in furtherance of an insurance fraud scheme. The insurer also raised an issue of fact regarding whether provider was fraudulently incorporated. VA Acutherapy Acupuncture, P.C. v. State Farm Mut. Ins. Co., 2007 WL 1732794 (Sup. Ct. App. Term June 15, 2007).