

Contingent Commissions/Bid Rigging - Decision of Interest, First-Party No-Fault/Priority of Payment - Decision of Interest, Priority of Coverage/Additional Insured Coverage - Decision of Interest, Material Misrepresentation, "In the Care of" Exclusion, Consequential Damages Exclusion, Contractual Indemnification/Severance, Contractual Indemnification/General Obligations Law, Contractual and Common Law Indemnification, Action on Binder, Severance of Coverage Actions, General Business Law, Sec. 349, Auto Repair Rates, Additional Insured Status/General Obligations Law, SUM Arbitration, Life Insurance/Bad Faith, Environmental Insurance/Cost-Cap Coverage, New York Automobile Insurance Plan/Broker Liability, Life Insurance/Breach of Contract, Environmental Insurance/Discovery, First-Party No-Fault - Decision of Interest, First-Party No-Fault, First-Party No-Fault/Experts, First-Party No-Fault/Trial DeNovo

Contingent Commissions/Bid Rigging. DECISION OF INTEREST. Court denies motion to dismiss by Liberty Mutual and related companies in Attorney General's challenge to contingent commissions and alleged bid-rigging perpetrated between the insurers and major brokers. Court finds Attorney General is authorized to bring suit, and denies motions to dismiss causes of action for fraudulent business practices under the Executive Law, unfair competition under Insurance Law § 2316, common law fraud (including punitive damages), unjust enrichment, and inducement of breach of fiduciary duty. *People v. Liberty Mutual Holding Co.*, 2007 WL 900997 (Sup. Ct. New York Co. March 27, 2007). First-Party No-Fault/Priority of Payment. DECISION OF INTEREST. Hospital submitted aggregate claims exceeding the insured's \$50,000 basic economic loss limit. Insurer then requested verification. Before verification was received, insurer received and paid verified claims from other providers, leaving only approximately \$20,000 of basic economic loss coverage. Hospital sued for its entire claim, arguing that under the "priority-of-payment" regulation (11 N.Y.C.R.R. § 65-3.15), insurer was obligated to reserve for the hospital's claim. Court of Appeals rejects hospital's argument and holds that insurer is obligated to pay only verified claims and must do so where such claims post-date claims that remain unverified. However, since insurer demanded additional verification 16 days after receipt of claim, instead of within 15 days as required by regulations, insurer was obligated to pay the hospital's claim within 29 days from the date verification was received, rather than 30. *Nyack Hospital v. General Motors Acceptance Corp.*, 2007 WL 844858 (March 22, 2007). Priority of Coverage/Additional Insured Coverage. DECISION OF INTEREST. Primary insurer defended and paid settlement on behalf of an additional insured, then sued the additional insured's own primary insurer seeking contribution on the basis of coinsurance. Fourth Department affirms summary judgment in favor of defendant insurer. However, unlike trial court, court holds that Pecker Iron Works does not control the issue of priority of coverage. Court rather relies on "other insurance" provision of defendant insurer's policy, which makes coverage excess to coverage available to its insured as an additional insured. Defendant insured, as excess insurer under a primary policy, is obligated to pay the settlement in excess of the additional insured coverage limit. *Harleysville Ins. Co. v. Travelers Ins. Co.*, 2007 WL 778639 (4th Dept. March 16, 2007). Material Misrepresentation. In an action for proceeds of a life insurance policy, Fourth Department holds trial court erred in granting summary judgment to insurer. Court finds that insurer did not prove a misrepresentation as a matter of law since decedent (who died of lymphoma) was not advised that his enlarged lymph node was malignant or a serious health condition. Court also holds insurer did not submit sufficient underwriting evidence to prove materiality as a matter of law where underwriter stated only that had company known of the enlarged node, it would have postponed issuance of the policy to await further tests. A dissent points out that prior to application, insured had multiple consults regarding his enlarged node, as well as a needle biopsy. Also, since further tests revealed lymphoma, underwriting evidence was sufficient to show materiality. *Legawiec v. North American Co. for Life and Health Ins. of New York*, 2007 WL 778934 (4th Dept. March 16, 2007). "In the Care of" Exclusion. Fourth Department affirms judgment that insurer is obligated to defend and indemnify insured as a matter of law in connection with a claim by a minor injured while operating a corn chopper on insured's farm. Policy excluded injuries to persons under twenty-one "in the care of" the insured. Court disagrees with trial court's conclusion that exclusion is ambiguous, but finds that claimant was not in the care of insured. Claimant and his mother lived with insured at time of the accident, but claimant was not a dependent of the insured or subject to his discipline. Insured also requested claimant to leave his home immediately after claimant was released from the hospital. *Chatauqua Patrons Ins. Assoc. v. Ross*, 2007 WL 778947 (4th Dept. March 16, 2007). Consequential Damages Exclusion. Fourth Department affirms granting of insurer's motion to dismiss insured's claim for consequential damages (including lost profits) following an armed robbery of insured's jewelry store. Court observes policy expressly excludes consequential damages. *Stern v. The Charter Oak Fire Ins. Co.*, 2007 WL 779432 (4th Dept. March 16, 2007). Contractual Indemnification/Severance. First Department modifies trial court's order in order to sever a contractual indemnification claim from the underlying Labor Law action, finding that prejudice would arise from trying the claim in the underlying action since it would put the existence of insurance coverage before the jury. *Smith v. McClier Corp.*, 2007 WL 764492 (1st Dept. March 15, 2007). Contractual Indemnification/General Obligations Law. First Department affirms summary judgment in favor of construction manager on its claim for contractual indemnification. Court observes that the indemnification provision does not violate General Obligations Law § 5-322.1 since it contains language limiting the indemnitor's obligation to that permitted by law. *Jackson v. City of New York*, 2007 WL 764504 (1st Dept. March 15, 2007). Contractual and Common Law Indemnification. Fourth Department finds trial court erred in denying owner's and contractor's motions to dismiss Labor Law causes of action where plaintiff entered into an indemnification agreement in favor of owner and contractor. Court finds that indemnification agreement was not too vague to be enforceable where it did not set forth particular job sites or duration. However, unlike owner, contractor did

not establish as a matter of law that it was free from negligence, therefore trial court did not err by denying contractor's motion to dismiss plaintiff's common law negligence cause of action. O'Connor v. William Metrose Ltd., 2007 WL 778986 (4th Dept. March 16, 2007). Contractual Indemnification/General Obligations Law. First Department affirms summary judgment in favor of contractor on its claim against subcontractor for contractual indemnification in connection with a construction injury case. Court finds evidence reflected contractor did not exercise control over work. Court finds fact that contractor inspected the site from time to time failed to raise an issue of fact regarding notice of the alleged condition. Since contractor was not negligent, contract did not violate General Obligations Law § 5-322.1 even though agreement was impermissibly broad. Court also finds issue of fact regarding whether subcontractor is obligated to indemnify an affiliate of contractor. Crouse v. Hellmann Constr. Co., 2007 WL 925647 (1st Dept. March 29, 2007). Action on Binder. First Department affirms granting of motion to dismiss in favor of insurer and broker in case where insured claimed broker did not procure promised insurance and that insurer issued only a draft policy, therefore allowing insured to sue on the binder. Court finds policy superceded binder, and that insured's claim that policy issued was only a draft policy was contradicted by the evidence. Court also affirms dismissal of attempted second action asserting fraud and estoppel on res judicata grounds. North American Van Lines, Inc. v. American International Companies, 2007 WL 898947 (1st Dept. March 27, 2007). Severance of Coverage Actions. First Department affirms trial court's granting of motion to sever coverage action brought as a third-party action in the underlying negligence action. Court observes that even where there are common fact questions between the two claims, it is prejudicial to have the same jury pass on negligence and coverage. Cruz v. Taino Constr. Corp., 2007 WL 851646 (1st Dept. March 22, 2007). General Business Law § 349. In decision without analysis of the specific allegations involved, First Department affirms granting of insurer's motion to dismiss claim under General Business Law § 349 where complaint alleged a private contract dispute rather than conduct affecting the public at large. Jiang Ming Huang v. Utica National Ins. Group, 2007 WL 852517 (1st Dept. March 21, 2007). Auto Repair Rates. Insured elected to have her car repaired at a shop charging \$70.80 an hour. Insurer claimed it had reached an agreement to be charged \$50.00 an hour. Court rejects insurer's claim that there was an oral agreement, and finds no evidence insurer sent a Notice of Rights letter to insured to elect to have the car repaired at a different shop at the \$50.00 rate. Court, however, finds the reasonable rate to be \$65.00. Gapud v. Kaur, 2007 WL 824113 (Dist Ct. Nassau Co. March 20, 2007). Additional Insured Status/General Obligations Law. Second Department finds trial court erred in granting summary judgment in favor of owner on its claim that property manager failed to procure additional insured coverage. Court observes that contract only required property manager to maintain certain amounts of CGL insurance, and was silent as to additional insured coverage. Court, however, finds trial court also erred in not granting summary judgment to owner on contractual indemnification claim for defense costs. Contract was not void under General Obligations Law § 5-322.1 since owner was free from negligence. Rogers v. Rockefeller Group International, Inc., 2007 WL 852546 (2d Dept. March 20, 2007). SUM Arbitration. Second Department reverses lower court's denial of petition to stay SUM arbitration. Court finds insured did not provide notice as soon as practicable where insured's SUM claim was premised on the tortfeasor's insurance company being placed into liquidation. Insured's demand for arbitration was delayed at least five months after insured knew of the liquidation, which was untimely as a matter of law. Nor did insured identify liquidation as the basis of his claim until his opposition to the insurer's petition to stay. Insurer's reply papers constituted a timely disclaimer. State Farm Mut. Auto. Ins. Co. v. Tubis, 2007 WL 765965 (2d Dept. March 13, 2007). SUM Arbitration. Second Department affirms trial court's order permanently staying SUM arbitration where SUM endorsement required the insured to provide insurer with notice of claim as soon as practicable. Court finds that insured's notice eleven months after he became aware of underlying defendant's policy limits did not constitute "reasonable promptness after the insured knew or should reasonably have known that the tortfeasor was uninsured." Assurance Co. of America v. Delgrosso, 2007 WL 766035 (2d Dept. March 13, 2007). Contractual Indemnification/Common-Law Indemnification. In a construction injury action brought by an employee of an electrical subcontractor, owner and lessee moved for summary judgment for contractual and common law indemnification against general contractor and electrical subcontractor. Court holds that lessee's contract with general contractor is enforceable despite the fact that the executed copy was destroyed in the World Trade Center where objective evidence supported the parties' intent to be bound by the unexecuted copy presented. Court holds that where plaintiff's failure to exercise due care was not the sole factor causing injury, general contractor and electrical subcontractor must indemnify lessee where general contractor and electrical subcontractor admitted to exerting some supervisory control over the worksite. Morarak v. Port Authority of New York & New Jersey, 2007 WL 865889 (Sup. Ct. New York Co. March 9, 2007). Life Insurance/Bad Faith. Upon hearing insured's objections to magistrate judge's report and recommendation for summary judgment in favor of life insurers dismissing insured's claims that insurers acted in bad faith and in violation of General Business Law § 349, district court adopts magistrate's recommendation dismissing both causes of action on the bases that New York law does not recognize an independent tort of bad faith denial of coverage, and, with respect to insured's General Business Law § 349 claim that insurers sold policies they never intended to honor, insured failed to demonstrate that insurers did anything deceptive or misleading. Dekel v. Unum Provident Corp., 2007 WL 812986 (E.D.N.Y. March 14, 2007). Environmental Insurance/Cost-Cap Coverage. Following the Second Circuit's affirmance of district court's judgment declaring that insured was entitled to broad cost-cap coverage under the an environmental insurance policy for all EPA remedies and certain investigation costs, insurer refused to pay on grounds that Second Circuit's decision limited the district court's judgment. District court held that an affirmance serves as an order to carry the judgment into execution, and insurer's position was meritless. Frazer Exton Development, L.P. v. Kemper Environmental, Ltd., 2007 WL 756494 (S.D.N.Y. March 13, 2007). New York Automobile Insurance Plan/Broker Liability. In an action by insurer against broker and insured alleging that insured misrepresented key facts in

an application for insurance under the New York Automobile Insurance Plan, district court denies broker's motion to dismiss insurer's claims, holding that the New York Automobile Insurance Plan does not preclude a misrepresentation cause of action, and that lack of contractual privity between broker and insurer did not bar cause of action where functional equivalent existed. *Liberty Mut. Ins. Co. v. Grand Trans. Inc.*, 2007 WL 764542 (E.D.N.Y. March 12, 2007). Life Insurance/Breach of Contract. In insured's action against the issuing insurer of two whole-life insurance policies alleging breach of contract, breach of fiduciary duty, fraud, unjust enrichment, and deceptive practices under General Business Law § 349, district court grants insurer's motion to dismiss insured's claim of fraud and deceit where such cause of action arose from the same underlying contract terms as insured's breach of contract claim. Court denies insurer's motion to dismiss all other causes of action where complaint satisfied the requirements for a breach of contract claim, complaint alleged a fiduciary relationship that exceeded that of insured-insurer, unjust enrichment claim survived where contract is in dispute or does not cover the disputed subject matter, and where it cannot be said that insured could not present proof under which insurer's behavior violated General Business Law § 349. *Rabin v. MONY Life Ins. Co.*, 2007 WL 737474 (S.D.N.Y. March 8, 2007). Environmental Insurance/Discovery. In landowner's action seeking a declaration that insurer is obligated to defend and indemnify it with respect to investigation and clean-up costs arising from newly-discovered contamination on the property, district court stays insurer's motion to dismiss and landowner's motion for reconsideration in order to grant landowner more time to conduct discovery regarding the coverage allegedly provided by insurers to lessees on the property and regarding whether the contamination resulted from "sudden and accidental" acts. Where insurer could not produce copies of the policies issued or determine whether it issued general liability or automobile policies to property lessees, and where additional discovery is potentially significant to determine the cause of the pollution, court stays its decisions on the pending motions to allow landowner to conduct further discovery. *Emerson Enterprises, LLC v. Kenneth Crosby-New York, Inc.*, 2007 WL 655761 (W.D.N.Y. February 26, 2007); *Emerson Enterprises, LLC v. Kenneth Crosby-New York, Inc.*, 2007 WL 700846 (W.D.N.Y. February 27, 2007). First-Party No-Fault. DECISION OF INTEREST. Appellate Term modifies lower court's order with respect to provider's claim for reimbursement for assigned costs of two MRIs. Appellate Term declares that provider is entitled to payment for first MRI where insurer failed to provide proof on personal knowledge to support its claim that provider's assignor failed to appear at an IME. Court finds provider is entitled to reimbursement for second MRI because 11 NYCRR 65-3.3(e) requires that all insurers advise an untimely claimant of his right to submit an excuse for claimant's failure to give timely notice. While the majority holds that the NF-10 form drafted by the Insurance Department and issued to the insured failed to meet the requirements of the regulation, a dissenting opinion argued that it "seems incredibly unfair" that the insurer should be penalized for using Insurance Department forms to which deference should be granted, and that an insured who failed to provide a reasonable excuse in violation of the rules should be rewarded. *Radiology Today, P.C. v. Citiwide Auto Leasing Inc.*, 2007 WL 788888 (Sup. Ct. App. Term March 8, 2007). First-Party No-Fault. Court reverses trial court's order denying summary judgment in favor of provider where insurer's peer review reports were insufficient to raise a question of fact regarding medical necessity where the peer review reports were not in admissible form; they bore stamped facsimile signatures of the doctor that authored the peer reviews, instead of original ink signatures. *Support Billing & Management Co. v. Allstate Ins. Co.*, 2007 WL 788903 (Sup. Ct. App. Term March 12, 2007). First-Party No-Fault. In an action to recover assigned first-party no-fault benefits, court affirms an order denying summary judgment in favor of provider where provider failed to make a prima facie case for entitlement with an affidavit making conclusory allegations made without personal knowledge. Trial court's order granting insurer's motion to strike provider's complaint unless provider responded to insurer's discovery demands affirmed where provider failed to oppose insurer's motion in the lower court. *Fortune Medical, P.C. v. Nationwide Mut. Ins. Co.*, 2007 WL 788938 (Sup. Ct. App. Term March 12, 2007); *A.M. Medical Services, P.C. v. Liberty Mut. Ins. Co.*, 2007 WL 788896 (Sup. Ct. App. Term March 8, 2007); *Bedford Park Medical Practice, P.C. v. Progressive Cas. Ins. Co.*, 2007 WL 789007 (Sup. Ct. App. Term March 8, 2007). First-Party No-Fault/Experts. After trial, judgment entered in favor of insurer in claims for treatment of alleged psychological injuries. Court finds insurer's claim that assignors did not suffer any psychological injury is a defense of "no coverage" and was not waived by an untimely denial. Court finds insurer's experts were entitled to testify based on assignors' statement during their examinations under "professional reliability" doctrine, since statements were the type of evidence accepted in the profession to formulate an opinion. *Primary Psychiatric Health, P.C. v. State Farm Mut. Auto Ins. Co.*, 2007 WL 914536 (Sup. Ct. Kings Co. March 27, 2007). First-Party No-Fault/Trial De Novo. Court finds insurer's demand for trial de novo to be timely because there was no proof the Commissioner of Arbitration served the arbitration award and notice of entry. However, court rejects insurer's argument that trial de novo rules are unconstitutional because time to demand trial de novo is measured from time of service by Commissioner rather than a party. *Bajaj v. State-Wide Ins. Co.*, 2007 WL 881526 (Dist. Ct. Nassau Co. March 23, 2007). First-Party No-Fault. Provider's motion for summary judgment properly denied where its corporate officer's affidavit was insufficient to establish that officer possessed personal knowledge of provider's practices and procedures to lay a foundation for the admission of annexed business records. *Capri Medical, P.C. v. New York Central Mutual Ins. Co.*, 2007 WL 846624 (Sup. Ct. App. Term March 19, 2007); *All Mental Care Medicine, P.C. v. Travelers Indemnity Co.*, 2007 WL 846626 (Sup. Ct. App. Term March 19, 2007); *Vista Surgical Supplies, Inc. v. Allstate Ins. Co.*, 2007 WL 789010 (Sup. Ct. App. Term March 15, 2007). First-Party No-Fault. Summary judgment in favor of provider affirmed where insurer failed to prove it issued timely verification requests that would toll the 30-day determination period, precluding its defense of fraudulent billing. *SZ Medical, P.C. v. Trumbull Ins. Co.*, 2007 WL 788942 (Sup. Ct. App. Term March 15, 2007). First-Party No-Fault. Summary judgment in favor of insurer affirmed where provider's action is premature since provider failed to provide an assignment in response to verification requests, thereby tolling the 30-day determination period. *Metroscan*

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Medical Diagnostics, P.C. v. Progressive Cas. Ins. Co., 2007 WL 788944 (Sup. Ct. App. Term March 15, 2007). First-Party No-Fault. After trial, court finds treatment (MRI and several EMGs) at issue was medically necessary. Court credits testimony of provider's witness, the treating doctor, over that of insurer's doctor. Court declines to decide apparent conflict regarding which party has the burden of proof of medical necessity of EMGs and nerve conduction studies. James M. Ligouri Physician, P.C. v. State Farm Mut. Auto Ins. Co., 2007 WL 755417 (Dist. Ct. Nassau Co. March 14, 2007).