

## Week of March 7

Firm News 3/7/2007

Valuation of Rental Losses - DECISION OF INTEREST, Agent E&O, Policy Cancellation, Late Notice of Occurrence, Deductible Recoupment, Cleanup Cost Cap Coverage, Contribution/Estoppel, Misrepresentation/Broker E&O, Contractual Indemnification, Direct Action/State Insurance Fund, Common-Law Indemnification, Contractual Indemnification/General Obligations Law § 5-322.1, Notice of Occurrence/Duty to Cooperate, Additional Insured Coverage, Unearned Premiums/Premium Financing, SUM Arbitration, First-Party No-Fault/Fraud, First-Party No-Fault/Interest, First-Party No-Fault/Attorneys Fees, First-Party No-Fault/Statute of Limitations, First-Party No-Fault

Firm News 3/7/2007

Valuation of Rental Losses. DECISION OF INTEREST. Leaseholder of World Trade Center contended that rental loss value, to be determined by an appraisal panel, should look to the theoretical time to rebuild the WTC as it would have to be rebuilt today. Court previously ruled that for purposes of replacement cost valuation, the appropriate measure is cost to rebuild WTC as it stood, not cost to rebuild a replacement under current laws, codes, etc. Court holds that for appraisal panel's calculation of period of restoration to determine rental losses, the period must also be measured by the time to rebuild WTC as it stood, not cost to rebuild a replacement under current laws, codes, etc. Court notes, however, that the appraisal panel may consider the changes in the rental market following the 9/11 attack. SR International Business Ins. Co. v. World Trade Center Properties LLC, 2007 WL 519245 (S.D.N.Y. February 16, 2007). Agent E&O. Insured under a marine policy suffered a fire loss that the insurer was ordered to pay even though insured failed to advise insurer prior to renewal that the business had been sold prior to the loss. In a separate action, the court ruled that the insurer was charged with knowledge of the change in ownership since its agent learned of the change within the scope of its agency. An action by the insurer against the agent followed based on breach of contract and fiduciary duty and negligence. Court finds insurer's action against agent is precluded by court's previous finding that insurer would have issued the policy even had it actually known of the sale of the insured's business prior to renewal of the policy. One Beacon Ins. Co. v. The Elite Ins. Agency, 2007 WL 541967 (S.D.N.Y. February 16, 2007). Policy Cancellation. In connection with a fire loss claim under a homeowners policy, Third Department reverses summary judgment in favor of insurer based on cancellation of the policy for nonpayment of premium. Court finds that insured's evidence reflected only mailing of a check intended to pay premium, not that the check was cashed or honored, and also that insurer proved that policy had been canceled by describing the office procedure used to ensure that notices of cancellation are properly mailed. However, court finds insureds proffered evidence that the address used by the insurer was incomplete and that the notice would not have been received, creating an issue of fact. Thibeault v. Travelers Ins. Co., 2007 WL 528538 (3d Dept. February 22, 2007). Late Notice of Occurrence. First Department reverses summary judgment ordering insurer to defend the insured in an underlying assault case based on late notice of occurrence. Court finds insured's delay in providing notice of an incident in which its employee allegedly assaulted a fire inspector was unreasonable as a matter of law. Employee was brother of insured's owner, and was arrested after assaulting the fire inspector and a police officer after refusing access to the property for an inspection. RMD Produce Corp. v. Hartford Cas. Ins. Co., 2007 WL 528711 (1st Dept. February 22, 2007). Deductible Recoupment. First Department affirms summary judgment dismissing breach of contract and quantum meruit claims of insurance company seeking repayment of outstanding deductibles paid by insurer against car rental franchisees. Court finds policies and a deductible agreement unambiguously do not require repayment. General Security Property Cas. Co. v. American Fleet Management, Inc., 2007 WL 528912 (1st Dept. February 22, 2007). Cleanup Cost Cap Coverage. Owner of contaminated land retained remediation contractor prior to planned sale of land and acquired cleanup cost cap coverage from defendant insurer. Insurer paid maximum sum under policy. Insured claimed it is entitled to additional compensation under a supplemental policy. Insurer relied on an exclusion in the supplemental policy for extra cleanup costs associated with documentation created by the remediation contractor. Court finds exclusion applies to costs associated with cleanup the contractor was supposed to perform originally but failed to do until discovery of further contamination. Denihan Ownership Co., LLC v. Commerce and Industry Ins. Co., 2007 WL 510066 (1st Dept. February 20, 2007). Contribution/Estoppel. DECISION OF INTEREST. Second Department affirms summary judgment in favor of defendant-insurer declaring that it is not obligated to defend or indemnify the insured where plaintiff-insurer accepted tender of the defense without a reservation of rights. Fireman's Fund Ins. Co. v. Zurich American Ins. Co., 2007 WL 466245 (2d Dept. February 13, 2007). Misrepresentation/Broker E&O. In an action by putative insured against insurer for breach of contract in disclaiming coverage for a loss resulting from a fire, First Department affirms summary judgment in favor of insurer where insured misrepresented on his application that no restaurant using a deep fryer was in the

building. Insurer demonstrated that such misrepresentation was material by submitting a description of its computer system's handling of applications and an affidavit from the underwriter stating that applications were always denied where a deep fryer or restaurant was present above the premises of the proposed insured. In a third-party action by broker against wholesale broker for contribution and indemnification, First Department dismisses claim where broker, as the agent having direct contact with the insured, failed to exercise due care in reviewing the application for accuracy. Broker could not seek common-law indemnification from wholesale broker where its liability toward the insured was predicated on its own fault. Broker could not seek contribution because it is not available for economic loss resulting solely from breach of contract. *Bleecker Street Health & Beauty Aids, Inc. v. Granite State Ins. Co.*, 2007 WL 656291 (1st Dept. March 6, 2007). Contractual Indemnification. In a personal injury action by a Starbucks' employee arising from an explosion on premises leased by Starbucks, First Department affirms trial court's order awarding landlord judgment on its third-party complaint against Starbucks. Where the indemnification clause in Starbucks' lease with landlord obligated it to indemnify landlord for "any injury to Tenant or any other person," the indemnification language was "sufficiently express" to include Starbucks' employees for purposes of the exception to Workers' Compensation Law § 11 permitting a third-party claim against an employer based on a written contract in which the employer had expressly agreed to contribution to or indemnification of the claimant. *Sostre v. Jaeger*, 2007 WL 656300 (1st Dept. March 6, 2007). Misrepresentation/Broker E&O. In an action by insured against his homeowner's insurer for property loss occurring after insurer discovered material misrepresentation on insured's application but prior to cancellation date, Third Department affirms summary judgment for insured where insurer, pursuant to Insurance Law § 3105(b), could have rescinded the insured's policy upon discovery of the misrepresentation, rendering the policy void ab initio, but instead chose to cancel the policy on a future date. The policy was in full effect until the cancellation notice's stated effective date. Court reverses trial court's order denying third-party defendant broker's motion for summary judgment dismissing insurer's third-party complaint where insurer's decision to cancel the policy on a future date was the proximate cause of insurer's damage, not any act or omission by broker, regardless of whether broker or insured was at fault for including misrepresentations on insured's application. *Stein v. Security Mut. Ins. Co.*, 2007 WL 610167 (3d Dept. March 1, 2007). Direct Action/State Insurance Fund. In direct action pursuant to Insurance Law § 3420(a) and (b) against the State Insurance Fund as the insurer of a company against whom claimant had obtained a judgment, First Department modifies trial court's order to grant State Insurance Fund's motion for summary judgment dismissing claimant's complaint on grounds that the State Insurance Fund is exempt from the direct action statute. *Kenmore-Tonawanda School Dist. v. State*, 2007 WL 610660 (1st Dept. March 1, 2007). Common-Law Indemnification. In a personal injury action arising from an alleged slip and fall, court affirms trial court's denial of premises owners and managers' summary judgment motion seeking common-law indemnification from co-defendant janitor where trial court properly determined that their right thereto was not established since it was not demonstrated that janitor had notice of the hazardous condition. *Wildman v. 200 Park Ave. LLC*, 2007 WL 656898 (Sup. Ct. App. Term February 27, 2007). Contractual Indemnification/General Obligations Law § 5-322.1. In a Labor Law action against general contractor and crane lessor arising from a construction site injury, First Department reverses trial court's order denying lessor's motion for summary judgment dismissing general contractor's claim for contractual indemnification. Court holds that lessor was entitled to summary judgment on the issue of contractual indemnification where lessor merely leased the crane, was not shown to be negligent in any way, and where the indemnification provision was not void under General Obligations Law § 5-322.1 on the ground that it would indemnify lessor for its own negligence. *Mahoney v. Turner Const.*, 2007 WL 582754 (1st Dept. February 27, 2007). Notice of Occurrence/Duty to Cooperate. In insurer's action seeking an order declaring that it has no obligation to defend or indemnify a project manager in an underlying construction site injury action, Second Department affirms summary judgment in favor of insurer where insurer established that its disclaimer was not untimely where project manager misrepresented its role at the site for at least 18 months and project manager did not admit until more than two years after the underlying accident that he learned of the accident on the day it occurred. *Sirius America Ins. Co. v. TGC Const. Corp.*, 2007 WL 610104 (2d Dept. February 27, 2007). Additional Insured Coverage. In owner's action against subcontractor's insurer seeking an order declaring that it is entitled to additional insured coverage in an underlying action brought by subcontractor's employee alleging personal injuries as a result of a slip and fall on ice in the owner's parking lot on a lunch break, Second Department holds that trial court properly determined that insurer owed a defense in the underlying action because the allegations in the complaint stated a cause of action giving rise to the reasonable possibility of recovery under the policy. The trial court erred, however, in concluding that owner was entitled to indemnification. The conclusion was premature where owner was named as an additional insured only with respect to bodily injury arising out of subcontractor's work on behalf of owner. *Sandy Creek Cent. School Dist. v. United Nat. Ins. Co.*, 2007 WL 610169 (2d Dept. February 27, 2007). Unearned Premiums/Premium Financing. In an action to recover unearned insurance premiums and for a judgment declaring that insurance premium finance agency is entitled to the return of unearned insurance premiums, Second Department holds that Banking Law § 576(1)(f), Insurance Law § 3428(d), and NYAIP §§ 14(E)(2)(i) and 18(5) require insurers to return the gross unearned premiums due under the insurance contract to the premium finance agency upon the cancellation of a financed insurance policy and the current regulatory scheme does not permit insurers to deduct a debt incurred by the insured on a previously issued policy. *Premins Co., Inc. v. Travelers Indem. Co.*, 2007 WL 610653 (2d Dept. February 27, 2007). Contractual Indemnification. In an automatic door mechanic's Labor Law action against site owners and lessee, Second Department modifies trial court's order to grant owner conditional summary judgment on its cross-claim for contractual indemnification against lessee where any owner liability would be purely statutory and the lease agreement included an indemnification clause in which lessee agreed to indemnify owner for any and all liabilities of every kind or

nature arising from the use or occupancy of the demised premises. *Lofaso v. J.P. Murphy Associates*, 2007 WL 582754 (2d Dept. February 27, 2007). Additional Insured Coverage. In subcontractor's personal injury action against general contractor, Second Department reverses trial court and grants summary judgment in favor of insurer of subcontractor dismissing general contractor's claim for additional insured coverage where insurer's policy contained an exclusion for bodily injury to an employee of an insured if the injury occurs in the course of employment. *Guachichulca v. Laszlo N. Tauber & Associates, LLC*, 2007 WL 610169 (2d Dept. February 27, 2007). Common-Law Indemnification. In subcontractor's personal injury action against site owner, general contractor, and subcontractors arising from a construction site accident, court denies owner's motion for summary judgment on its claims against co-defendants for common-law indemnification where such would be premature where there remain numerous questions of fact regarding the alleged negligence of all defendants and regarding who may or may not have exercised the requisite supervision, authority and control of the work site. *Hendrickson v. Dynamic Medical Imaging, P.C.N.Y.*, 2007 WL 623468 (Sup. Ct. Queens Co. February 27, 2007). SUM Arbitration. Second Department reverses denial of a petition to permanently stay arbitration and grants the petition where insured failed to file a sworn statement with insurer, which is a condition precedent to coverage under the SUM endorsement. The fact that the insurer had notice of the accident through an application for no-fault benefits is immaterial. *Eveready Ins. Co. v. Mesic*, 2007 WL 466058 (2d Department February 13, 2007). First-Party No-Fault/Fraud. DECISION OF INTEREST. Insurer sued provider for no-fault benefits paid between 1996 to 2002, alleging, among other things, provider was fraudulently incorporated. Court rules that no claims lie for unjust enrichment or fraud for claims paid prior to 2002 regulation that made fraudulently licensed corporations ineligible for reimbursement. Court finds that claims arising from alleged overbilling or billing for unnecessary services are subject to preclusion where denials were untimely. However, court holds that defense that billed services were never provided are not subject to preclusion (adopting the dissent's position in a prior decision of Supreme Court, Appellate Term). Insurer also brought RICO claim against provider, which court rules largely time-barred since insurer knew it was billed for services by an allegedly fraudulently incorporated provider prior to the limitations period (although court finds an issue of fact regarding timeliness of RICO claims with respect to a second provider sued in the action). Court abstains from hearing a claim for declaratory judgment seeking order that no-fault benefits billed by one provider are not due under state law since state law actions between the parties are pending. *Allstate Ins. Co. v. Valley Physical Medicine & Rehabilitation, P.C.*, 2007 WL 570130 (E.D.N.Y. February 21, 2007). First-Party No-Fault/Interest. Summary judgment granted in favor of provider where denial form used was an outdated form and not the form mandated by regulation. Court rejects insurer's argument that provider must come forward with evidence of medical necessity in addition to prima facie case. With respect to the measure of interest, the court characterizes the applicable regulations as in conflict with each other. Court finds that where there is not a proper denial, interest runs from 30 days following receipt of the claim. In cases where a proper and timely denial is issued, interest runs from the commencement of arbitration or suit. *Elmont Open MRI & Diagnostic Radiology, P.C. v. Country-Wide Ins. Co.*, 2007 WL 570539 (Dist. Ct. Nassau Co. February 23, 2007). First-Party No-Fault/Attorneys Fees. Court joins previous decisions rejecting a 2003 Insurance Department opinion letter that attorneys fees should be calculated at 20% of the total amount of claims at issue in a suit rather than at 20% per claim. However, since insurer owed no benefits or interest on the claim at issue (which was settled by the provider using a different attorney), no award of attorneys fees was warranted. *Valley Stream Medical & Rehab, P.C. v. Allstate Ins. Co.*, 2007 WL 586619 (Civil Ct. February 23, 2007). First-Party No-Fault/Statute of Limitations. In an action by provider to recover no-fault medical payments brought five years after insurer's denial of such benefits, Second Department affirms trial court's determination that claim was not time-barred because six-year statute of limitations applied where action was premised on the terms of a contract for automobile liability insurance. Following the Court of Appeals' application of a six-year statute of limitations in an action based upon wrongfully withheld first-party benefits, court holds that the same statute applies because a no-fault claimant's right to recover benefits derives primarily from the terms of the relevant insurance contract. *Mandarino v. Travelers Property Cas. Ins. Co.*, 2007 WL 613596 (2d Dept. February 27, 2007). First-Party No-Fault. Summary judgment for plaintiff provider reversed where corporate officer's affidavit in support of motion lacked personal knowledge of practices and procedures sufficient to lay a foundation for documents as business records. *Bedford Park Medical Practice, P.C. v. New York Central Mutual Fire Ins. Co.*, 2007 WL 656888 (Sup. Ct. App. Term February 27, 2007). First-Party No-Fault. Court reverses denial of provider's motion for summary judgment and grants the motion. Court finds insurer's affidavit lacked sufficient demonstration of actual mailing of denial forms or information giving rise to a presumption of mailing. A dissent finds provider failed to establish its prima facie case, an argument the majority did not address since defendant did not raise it. *Delta Diagnostic Radiology, P.C. v. Republic Western Ins. Co.*, 2007 WL 659193 (Sup. Ct. App. Term February 27, 2007). First-Party No-Fault. Court denies provider's motion for summary judgment. Court observes that assignor's lack of an authenticated signature on the assignment does not constitute a defect, but that assignor did fail to appear for duly noticed IMEs, warranting denial of summary judgment. *Vega Chiropractic, P.C. v. Eveready Ins. Co.*, 2007 WL 656643 (Sup. Ct. App. Term February 26, 2007). First-Party No-Fault. Summary judgment for plaintiff properly denied where corporate officer's affidavit in support of motion lacked personal knowledge of practices and procedures sufficient to lay a foundation for documents as business records. *Vista Surgical Supplies, Inc. v. GEICO Ins. Co.*, 2007 WL 656858 (Sup. Ct. App. Term February 26, 2007). First-Party No-Fault. Court finds summary judgment properly granted to provider where motion was supported by billing forms, certified mail receipt, return receipt card referencing the forms, and an affidavit of the third-party biller. Defendant failed to respond within 30 days. *New York and Presbyterian Hospital v. Travelers Property Cas. Ins. Co.*, 2007 WL 530222 (2d Dept. February 20, 2007). First-Party No-Fault. Summary judgment for plaintiff properly denied where corporate officer's affidavit in support of motion lacked personal knowledge of practices and procedures sufficient to lay a foundation for documents as business records. However, summary judgment in favor of

---

defendant reversed where affidavit regarding failure to appear for IMEs was not based on personal knowledge. *Fair Price Medical Supply Corp. v. New York Central Mutual Fire Ins. Co.*, 2007 WL 656571 (Sup. Ct. App. Term February 16, 2007). First-Party No-Fault. Insurer's motion for summary judgment properly denied where, although insurer provided sufficient evidence to show mailing of IME notices, its motion did not contain admissible evidence of personal knowledge of assignor's failure to appear. *Chi Acupuncture, P.C. v. Kemper Auto & Home Ins. Co.*, 2007 WL 656843 (Sup. Ct. App. Term February 14, 2007). First-Party No-Fault. Provider compelled to produce a witness with knowledge regarding whether treating physician was an employee of provider or an independent contractor, but since it is unclear whether physician was an employee, provider cannot be compelled to produce the physician. *A.M. Medical Services, P.C. v. Allstate Ins. Co.*, 2007 WL 659969 (Sup. Ct. App. Term February 14, 2007). First-Party No-Fault. In an action to recover assigned first-party no-fault benefits, court affirms summary judgment in favor of provider where provider made a prima facie case for entitlement and insurer opposed the motion by conclusory allegations, made without personal knowledge, that the insured failed to appear after insurer sent several requests for examinations under oath. Insurer's opposition to provider's motion on grounds that the injuries do not arise out of a covered incident similarly fail where affidavit of insurer's investigator failed to allege facts on personal knowledge sufficient to establish a founded belief that the injuries do not arise out of an insured incident. *Wei Wei Acupuncture, P.C. v. State Farm Mut. Auto. Ins.*, 2007 WL 660808 (Sup. Ct. App. Term March 5, 2007). First-Party No-Fault. Court affirms order granting partial summary judgment to insurer where insurer established that it issued timely verification requests by submitting affidavits based on personal knowledge detailing the description of standard office mailing procedure giving rise to the presumption of mailing. *DSL Medical Practice, P.C. v. American Transit Ins. Co.*, 2007 WL 661118 (Sup. Ct. App. Term March 5, 2007). First-Party No-Fault. Court reverses trial court's order granting summary judgment in favor of provider where insurer raises for the first time on appeal that the affidavit of provider's corporate officer, submitted in support of provider's summary judgment motion, did not establish that provider's officer possessed personal knowledge of provider's practices and procedures, thus plaintiff failed to make a prima facie showing of entitlement to summary judgment. *V.S. Medical Services, P.C. v. Allstate Ins. Co.*, 2007 WL 661301 (Sup. Ct. App. Term March 5, 2007); *Fortune Medical, P.C. v. Kemper Ins. Co.*, 2007 WL 660042 (Sup. Ct. App. Term March 2, 2007); *Fair Price Medical Supply Corp. v. Clarendon Nat. Ins. Co.*, 2007 WL 656883 (Sup. Ct. App. Term February 27, 2007); *Fortune Medical, P.C. v. Nationwide Mutual Ins. Co.*, 2007 WL 656885 (Sup. Ct. App. Term February 27, 2007); *Mega Supply & Billing, Inc. v. Clarendon Nat. Ins. Co.*, 2007 WL 656887 (Sup. Ct. App. Term February 27, 2007); *V.S. Medical Services, P.C. v. One Beacon Ins.*, 2007 WL 656867 (Sup. Ct. App. Term February 27, 2007).