

Firm News 5/2/2007

Marine Policy/Good Faith, Decision of Interest, Fiduciary Duty, Liquor Liability Exclusion/Duty to Defend, Disclaimers, Contractual Indemnification, SUM Arbitration, Direct Action/Notice, Common-Law Indemnification, Duty to Cooperate, Uninsured Motorist Coverage/Covered Auto, Contractual Indemnification, Notice of Suit/Prejudice, Direct Action/Claimant's Notice, Firt-Party No-Fault

Firm News 5/2/2007 Marine Policy/Good Faith. DECISION OF INTEREST. Electronics company insured goods sent to and warehoused in China under a marine policy. Goods mysteriously disappeared from two Chinese warehouses. Court ruled as a matter of law that the policy is an all-risks policy covering mysterious disappearance. Court held a bench trial to determine whether insured's suit was time-barred by the policy's one-year limitations period. Court concludes that given the nature of the loss, one-year limitations period does not commence until insured knew or should have known of the loss. Court finds claim with respect to one warehouse timely. Court finds claim with respect to the second warehouse untimely. However, court estops insurer from raising the limitations period as a defense to the second claim based on a breach of the duty of good faith. Court concludes insurer knew it was going to deny the second claim for the same reasons it denied the first, but delayed in doing so for over a year, while advising the insured that investigation of the loss was ongoing. *North American Foreign Trading Corp. v. Mitsui Sumitomo Ins. USA, Inc.*, 2007 WL 1222640 (S.D.N.Y. April 24, 2007). Fiduciary Duty. In a dispute over allegedly unpaid premiums under a workers' compensation policy, insured counterclaimed for breach of fiduciary duty based on its contention that insurer improperly withdrew an application to the Second Injury Fund on insured's behalf. Court dismisses the counterclaim as time-barred; however, court rejects insurer's motion to strike insured's affirmative defense based on breach of fiduciary duty. Notwithstanding general rule that insurer-insured relationship is not fiduciary, court observes that when an insurer is litigating its insured's rights, a fiduciary duty is triggered. Court finds Second Injury Fund application sufficiently similar to litigation on behalf of the insured. *Employers Ins. Co. of Wausau v. Crouse-Community Center, Inc.*, 2007 WL 1231696 (N.D.N.Y. April 25, 2007). Liquor Liability Exclusion/Duty to Defend. Second Department affirms that part of lower court's grant of summary judgment finding insurer obligated to defend its insured, a social club, in an underlying action for injuries allegedly arising out of the distribution of alcohol on the insured premises. Court finds the liquor liability exclusion ambiguous, and that insurer's contention that the exclusion does not apply to casual, nonrecurring consumption of alcohol is reasonable. Court finds a duty to defend based on information supplied to the insurer by the insured that premises were not used for distribution of alcohol. However, court finds summary judgment on the duty to indemnify was premature. *Staten Island Molesi Social Club v. Nautilus Ins. Co.*, 2007 WL 1217386 (2d Dept. April 24, 2007). Disclaimers. Second Department affirms denial of insured's motion for summary judgment against insurer in an action seeking a declaration that insurer is obligated to defend and indemnify the insured in a bodily injury action. Insured failed to establish the disclaimer was ineffective where disclaimer adequately apprised insured that the basis for disclaiming was untimely notice of the occurrence. Immaterial misstatement of fact in the disclaimer did not render it ineffective. Court also notes that where underlying claimant does not exercise its right to provide notice, a disclaimer directed to the insured for failure to provide notice is also effective against the underlying plaintiff. *Maldonado v. C.L.-M.I. Properties, Inc.*, 2007 WL 1218034 (2d Dept. April 24, 2007). Contractual Indemnification. In a Labor Law action, Second Department reverses that part of lower court judgment that failed to grant summary judgment on contractor's claim for contractual indemnification against subcontractor. Contractor showed it was not actively negligent, and that plaintiff's damages were caused by the subcontractor. *Argueta v. Pomona Panorama Estates, Ltd.*, 2007 WL 1218678 (2d Dept. April 24, 2007). SUM Arbitration. Second Department affirms permanent stay of SUM arbitration where SUM insurer demonstrated that auto in which the deceased was a passenger was insured by the appellant insurer. Appellant insurer failed to raise an issue of fact that the auto was not owned by its insured. Court finds appellant insurer is obligated to reimburse the SUM insurer for all sums paid as a result of the accident. *Merchants Ins. Group v. Geralis*, 2007 WL 1217880 (2d Dept. April 24, 2007). Direct Action/Notice. In injured parties' action against tortfeasor's insurer seeking to enforce a judgment against the insured, First Department affirms trial court's denial of insurer's motion for summary judgment where issues of fact exist with respect to when the insurer received notice of the claim, whether the injured parties were diligent in their efforts to locate the insured, and whether the injured parties' efforts to notify the insurer of the accident were reasonable. Injured parties raised questions of fact by showing that they had difficulty in obtaining relevant information from the insured. *Kiladze v. Country-Wide Ins. Co.*, 2007 WL 1247110 (1st Dept. May 1, 2007). Common-Law Indemnification. In a contractor's action alleging negligent construction against subcontractor, First Department affirms the denial of subcontractor's third-party claims for indemnification against architect and other subcontractors where it was too early in the litigation to determine whose wrongdoing caused contractor's injuries. *Structure-Tone, Inc. v. Ignelzi Interiors, Inc.*, 2007 WL 1247193 (1st Dept. May 1, 2007). Duty to Cooperate. In an action by injured party against tortfeasor's insurer for uninsured motorist coverage, Third Department upholds insurer's disclaimer on noncooperation grounds where record established that insurer's investigation involved multiple calls to the insured's home and work, multiple letters to the insured, a visit to the insured's home, and a

discussion with the insured's mother in which she advised that insured was aware of the accident and received insurer's letters. In light of insurer's diligent efforts, insured's failure to respond and willful obstruction of insurer's investigation constituted a breach of the policy's cooperation clause. *In re New South Ins. Co./GMAC Ins.*, 2007 WL 1216019 (3d Dept. April 26, 2007). Uninsured Motorist Coverage/Covered Auto. In an action by injured party against her insurer for uninsured motorist coverage for injuries sustained as a passenger on an ATV, Third Department affirms trial court's order granting a permanent stay of arbitration where ATVs were excluded from definition of "motor vehicle" in the policy, and phrase "except as otherwise defined in this policy" did not create an ambiguity where allegedly broader definition of "uninsured motor vehicle" referenced the phrase "motor vehicle," which is unambiguously defined in the General Definitions. *In re Progressive Ins. Co.*, 2007 WL 1216780 (3d Dept. April 26, 2007). Contractual Indemnification. In a Labor Law action arising from a construction accident, First Department modifies an order granting summary judgment on the issue of contractual indemnification in favor of subcontractor against sub-subcontractor (the injured party's employer) to make such order conditional upon a determination of fault where the subject agreement limited subcontractor's right to indemnification to employer's proportionate share of fault for the accident. *Steakin v. Voicestream Wireless Corp.*, 2007 WL 1217729 (1st Dept. April 26, 2007). Notice of Suit/Prejudice. First Department affirms order granting insured's motion to dismiss insurer's complaint and declares that insurer is obligated to indemnify its insured in the underlying action where insurer received timely notice of claim from claimant. Court holds insurer was not entitled to disclaim for untimely notice of suit in the absence of prejudice. *American Transit Ins. Co. v. B.O. Astra Management Corp.*, 2007 WL 1217845 (1st Dept. April 26, 2007). Direct Action/Claimant's Notice. First Department affirms summary judgment in favor of plaintiff against tortfeasor's insurer. Court holds insurer was not entitled to disclaim based on failure of its insured to provide notice of the occurrence. Court finds plaintiff took sufficient efforts to locate and give notice to the insurer, despite the fact plaintiff did not provide separate, formal, and written notice to the insurer. *Cirone v. Tower Ins. Co. of New York*, 2007 WL 1217872 (1st Dept. April 26, 2007). First-Party No-Fault. Second Department reverses summary judgment in favor of provider, finding that insurer raised issues of fact by demonstrating timely requests for medical verification, and a timely denial based on a peer review report. Court holds that insurer was not obligated to set forth a medical rationale in its denial, as the regulations only require that insurer release a copy of the peer review report upon request. *New York University Hospital Rusk Institute v. Government Employees Ins. Co.*, 2007 WL 12177751 (2d Dept. April 24, 2007). See also *A.B. Medical Services, PLLC v. Liberty Mut. Ins. Co.*, 2007 WL 1218688 (2d Dept. April 24, 2007) (holding that trial court properly denied provider's motion for summary judgment); *A.B. Medical Services, PLLC v. GEICO Cas. Ins. Co.*, 2007 WL 1218691 (2d Dept. April 24, 2007) (reversing summary judgment in favor of provider). First-Party No-Fault. Court affirms insurer's motion for summary judgment in a dispute over the proper amount to charge for acupuncture services for which there is no scheduled fee in the regulations. Court finds insurer properly paid the claims at a reduced rate based on the scheduled fee for physical therapy. Provider did not rebut insurer's contention that physical therapy was a sufficiently similar procedure to acupuncture. *Forrest Chen Acupuncture Services, P.C. v. GEICO Ins. Co.*, 2007 WL 12282772 (Sup. Ct. App. Term April 26, 2007). First-Party No-Fault. Court affirms trial court's order denying summary judgment in favor of insurer where insurer failed to submit supporting affidavits based upon personal knowledge to show timely mailing of the verification requests. *IVB Medical Supply, Inc. v. State Farm Mut. Ins. Co.*, 2007 WL 1240452 (Sup. Ct. App. Term April 27, 2007). First-Party No-Fault. Court reverses trial court's order granting provider partial summary judgment where insurer raised an issue of fact regarding whether the alleged injuries arose out of an insured incident by submitting the affidavit of a special investigator claiming that the alleged vehicle accident was staged. *Umed Medical, P.C. v. State Farm Ins. Co.*, 2007 WL 1240456 (Sup. Ct. App. Term April 27, 2007).

First-Party No-Fault. Court reverses trial court's order and grants summary judgment in favor of provider where insurer that based its denial on assignor's failure to appear at independent medical examinations failed to submit proof of such nonappearance sufficient to raise a triable issue of fact. *Psychological Practice, P.C. v. State Farm Fire and Cas. Co.*, 2007 WL 1228770 (Sup. Ct. App. Term A