

Asbestos Bodily Injury Coverage. DECISION OF INTEREST, First-Party Disclaimers, Additional Insured Coverage/Notice of Occurrence, Additional Insured Coverage/Misrepresentation by Named Insured. Decision of Interest, First-Party No-Fault. DECISION OF INTEREST, Consequential Damages for Breach of Policy, Bad Faith, Additional Insured Coverage - Procurement, Asbestos-Related Claims, Notice of Claim - Environmental, Contractual Indemnification, Common-Law and Contractual Indemnification, Additional Insured Coverage - Scope, Notice of Occurrence/Broker E&O, Contractual Indemnification, UM Arbitration - Resident Insured, Common Law Indemnification/CPLR Sec.1601, UM Coverage - Lack of Accident, Common-Law Indemnification, Expected or Intended Acts Exclusion, Discoverable Documents Relating to Disclaimer, Common Law Indemnification, Scope of Stockholder Duties, MVAIC No-Fault, First-Party No-Fault

Asbestos Bodily Injury Coverage. DECISION OF INTEREST. Following a bench trial brought by primary and excess insurers against a defendant class of claimants against a defunct insulation contractor, court declares that the claims generally fall under the operations coverage of the primary policies. Claims under operations coverage under the policies at issue, unlike products/completed operations claims, are not subject to aggregate limits. Court also declares that exposure is the trigger of coverage, and that (with the exception of certain policies), each asbestos-related claim constitutes a separate occurrence. Court rejects insurers' various arguments premised on notice, pollution exclusion, laches, estoppel, limitations, expected/intended exclusion, and breach of the duty to cooperate. *Continental Cas. Co. v. Employers Ins. Co. of Wausau*, 2007 WL 1345692 (Sup. Ct. New York Co. May 8, 2007). First-Party Disclaimers. DECISION OF INTEREST. Insurer under an all-risks first-party property policy denied coverage for the collapse of a parking garage. Insured prevailed at trial. On appeal, First Department holds that trial court properly determined that additional coverage for collapse where collapse is caused in part by weight of rain does not require that rain be the dominant cause. Court also finds that insurer failed to satisfy its burden of proving applicability of an exclusion for hidden and latent defects. Court also holds it was proper to include finance charge paid by insured for construction financing as an extra expense. However, court holds it was error for the lower court to exclude evidence that insured failed to rebuild as soon as reasonably possible — a precondition to replacement value coverage. Insured argued that insurer's disclaimer relieved it of the obligation to rebuild as soon as reasonably possible. Court rejects the argument, and draws a distinction between "repudiation" and a disclaimer. Where a denial of coverage is based on insurer's contention that insured is not entitled to coverage based on the terms and conditions of the contract, it is not a repudiation, and therefore does not excuse the insured from compliance with the contract. Court calls attention to previous decisions that did not properly distinguish between disclaimers and repudiations. *Seward Park Housing Corp. v. Greater New York Mut. Ins. Co.*, 2007 WL 1365368 (1st Dept. May 10, 2007). Additional Insured Coverage/Notice of Occurrence. DECISION OF INTEREST. General contractor brought declaratory judgment action against two subcontractors' insurers seeking additional insured coverage in connection with a construction injury suit by a sub-subcontractor's employee. First Department holds that trial court properly held that general contractor's fifteen-month delay in providing notice of the accident to one subcontractor's insurer was untimely as a matter of law, but erred in holding that general contractor's admission in underlying action that the other subcontractor was not at fault precluded the general contractor from claiming additional insured coverage under that subcontractor's policy. Court holds that it is immaterial, for purposes of deciding additional insured coverage, whether subcontractor's installation of the stairs was negligent where the policy defined subcontractor's work to include (1) subcontractor's operations, and (2) materials furnished in connection with the subcontractor's work. A lengthy dissent argues that general contractor's admission in the underlying action that insured subcontractor was not negligent in causing the accident was fatal to general contractor's claim. *Worth Construction Co., Inc. v. Admiral Ins. Co.*, 2007 WL 1470511 (1st Dept. May 22, 2007). Additional Insured Coverage/Misrepresentation by Named Insured. DECISION OF INTEREST. First Department affirms summary judgment declaring that plaintiff is entitled to additional insured coverage notwithstanding the fact that the policy had been issued based upon a misrepresentation by the named insured and was void as to that party. "Under New York law, each individual additional insured must be treated as if separately covered by the policy and indeed as if he had a separate policy of his own," even where, as here, the policy is issued based on a material misrepresentation by the primary insured. *Lufthansa Cargo, AG v. New York Marine & General Ins. Co.*, 2007 WL 1471125 (1st Dept. May 22, 2007). First-Party No-Fault. DECISION OF INTEREST. Citing statistics of thousand of no-fault suits each year, and the trend toward litigation over arbitration, court sets forth a detailed framework for summary judgment review of no-fault claims based on the statutes, regulations, and case law to date. *Complete Orthopedic Supplies, Inc. v. State Farm Ins. Co.*, 2007 WL 1394633 (N.Y. City Civ. Ct. May 14, 2007). Consequential Damages for Breach of Policy. Second Department affirms dismissal of insured's claim for consequential damages arising from insurer's bad faith and/or breach of a wrap-up policy in connection with property damage claims. Court finds insured failed to show egregious or fraudulent conduct to support the imposition of punitive damages. Court also rejects argument that consequential damages may be recovered against an insurer based on allegations a claim was denied in bad faith. Court finds policy did not contemplate such damages. Court also finds that even if policy did cover such damages, insured did not show its damages were traceable to the breach. *KSW Mechanical Services, Inc. v. American Protection Ins. Co.*, 2007 WL 1366070 (2d Dept. May 8, 2007). Bad Faith. Second Department holds that trial court erred by not granting insurer's motion to dismiss insured's cause of action for breach of the implied covenant of good faith, as the claim is duplicative of the breach of contract claim. Court also holds it was error not to grant dismissal of claim for

punitive damages, which does not constitute a separate cause of action, and because insured did not allege conduct of an egregious nature or a pattern of such conduct directed at the general public. *Grazioli v. Encompass Ins. Co.*, 2007 WL 1366091 (2d Dept. May 8, 2007). Additional Insured Coverage &dash; Procurement. Second Department holds lower court erred in granting summary judgment motion of insurer seeking additional insured coverage for its named insured from a subcontractor's insurer. Court finds that the subcontract required the subcontractor to maintain certain insurance, but did not contain language requiring it to procure additional insured coverage. Court also rejects reliance on a certificate of insurance to find such coverage. Court also finds insurer seeking additional insured coverage failed to include the policy at issue in its motion submission. *Empire Ins. Co. v. Ins. Corp. of New York*, 2007 WL 1366179 (2d Dept. May 8, 2007). Additional Insured Coverage &dash; Procurement. First Department holds lower court erred in declaring that insurer was obligated to provide additional insured coverage to an owner in connection with a construction accident. Blanket additional insured endorsement in the policy required an agreement to provide such insurance executed prior to the occurrence. Contract between owner and named insured was never reduced to writing, and accident occurred before work was complete. The contract was therefore not "executed." Court rejects argument that term "executed" is ambiguous. Court also notes that any ambiguities would not be construed against the insurer since the real party in interest is not the company seeking additional insured coverage, but that company's insurer. Court also rejects reliance on a certificate of insurance to find coverage. *Rodless Properties, L.P. v. Westchester Fire Ins. Co.*, 2007 WL 1288356 (1st Dept. May 3, 2007). Asbestos-Related Claims. In a dispute pursuant to a previous judicially-supervised settlement agreement that names the court as arbitrator not subject to appeal, court (as arbitrator) rules that excess policies are "in effect" for purposes of the settlement even if there remains unexhausted coverage below the excess policies. Court rejects insurer's argument that the excess policies are not subject to the agreement merely because they have yet to be called on to provide coverage. *In re Goulds Pumps, Inc.*, 2007 WL 1350452 (Sup. Ct. Oneida Co. April 29, 2007). Notice of Claim &dash; Environmental. Court denies excess insurer's motion for summary judgment declaring that energy utility company failed to provide timely notice of remediation claims for four manufactured gas plants. Court finds that duty to provide notice arises upon a reasonable possibility that the policies would be involved based on objective assessment of the information then available. Court finds that regulatory agencies' investigation and discovery of contamination alone did not trigger the duty to provide notice to an excess insurer since actual remediation orders and the costs of remediation developed over time. Court also finds that pro rata allocation (which the excess insurer does not dispute applies) affects insured's notice obligations since allocation over the coverage period makes it less certain that excess policies would be involved. *Century Indem. Co. v. Keyspan Corp.*, 2007 WL 1341264 (Sup. Ct. New York Co. May 7, 2007). Contractual Indemnification. Second Department affirms that part of an order granting a general contractor's third-party claim for contractual indemnification against a subcontractor in connection with a Labor Law case. Court holds that even though the general contractor was dismissed from the plaintiff's Labor Law claims, it failed to prove that it did not have control or notice of the allegedly dangerous condition. Court holds that since general contractor's negligence cannot be determined as a matter of law, subcontractor's motion for summary judgment dismissing the contractual indemnification claim must also be denied. *Keating v. Nanuet Board of Education*, 2007 WL 1366066 (2d Dept. May 8, 2007). Common-Law and Contractual Indemnification. In a Labor Law case, Second Department holds that lower court properly granted summary judgment to construction manager dismissing owner's claim for common law indemnification, as owner failed to establish construction manager was negligent or supervised or controlled the work. However, court finds lower court erred in not also granting the construction manager's motion for summary judgment to dismiss the owner's contractual indemnification claim. Court finds that the contract between owner and construction manager did not contain an indemnification agreement, and a subsequent unsigned indemnification agreement was insufficient basis for the claim. *Delahaye v. Saint Anns School*, 2007 WL 1366182 (2d Dept. May 8, 2007). Common-Law and Contractual Indemnification. In a Labor Law case, Second Department holds that lower court erred in not granting owner and property manager summary judgment on their common law indemnification claim against a contractor where the owner/property manager's liability would be purely vicarious. Court finds lower court properly denied owner/property manager's motion for summary judgment on their contractual indemnification claim, since agreement was limited to indemnification for contractor's negligence, which is an issue of fact. Court finds lower court properly denied contractor's motion for summary judgment on its contractual and common law indemnification claims against subcontractor since contractor failed to establish the absence of negligence on its part. *Balladares v. Southgate Owners Corp.*, 2007 WL 1366267 (2d Dept. May 8, 2007). Additional Insured Coverage &dash; Scope. Second Department affirms judgment following a bench trial declaring that insurer was not obligated to indemnify companies for an underlying settlement where companies claimed to be additional insureds. Court finds that the accident did not occur within the operations of the named insured/subcontractor, as defined by the scope of work in the contract. *American Bridge Co. v. Acceptance Ins. Co.*, 2007 WL 1366269 (2d Dept. May 8, 2007). Notice of Occurrence/Broker E&O. Second Department affirms summary judgment in favor of insurer finding that insured's 2½ month delay in providing notice of a construction accident was unreasonable where its principals were admittedly aware of the accident on the day it happened. Court also affirms summary judgment in favor of insured's broker on claim for failure to procure since any negligence by the broker in connection with procurement was not the proximate cause of the insured's failure to provide notice. *120 Whitehall Realty Associates, LLC v. Hermitage Ins. Co.*, 2007 WL 1366295 (2d Dept. May 8, 2007). Contractual Indemnification. In an action for personal injuries sustained by a worker on a construction site, First Department affirms summary judgment in favor of general contractor and owner dismissing the complaint as against them, and dismisses owner's cross-claim for indemnification against general contractor where evidence established that underlying plaintiff's Labor Law claims were unavailing and general contractor was not negligent in causing the accident.

“There is no merit to the owner's cross claim for indemnification against the general contractor, given the finding that the general contractor was not negligent and that the contract provides for indemnification only if the act giving rise to the claim was caused by the general contractor's negligence.” *Lewis v. Lower East Side Tenement Museum*, 2007 WL 1470656 (1st Dept. May 22, 2007). UM Arbitration &dash; Resident Insured. In an action by insurer to stay UM arbitration, First Department reverses order denying the petition where trial court improperly relied upon a deed showing that the injured driver and the named insured held joint title to insured's house, which was insufficient to show that driver was a resident of the named insured's household. In contrast, tortfeasor's insurer demonstrated facts to warrant entitlement to a stay on the ground of lack of coverage where accident report and medical records showed that injured driver was not a resident in the same household as the named insured. *Allstate Ins. Co. v. DiBello*, 2007 WL 1438762 (1st Dept. May 17, 2007). Common-Law Indemnification/CPLR § 1601. In a construction site injury action where fault was apportioned at trial ninety percent to plaintiff and ten percent to co-defendant, First Department affirms order entitling general contractor to indemnification from co-defendant where general contractor previously settled with plaintiff after being found statutorily liable under Labor Law § 240(1). Since plaintiff is not a person liable under CPLR § 1601, plaintiff's ninety percent share of fault is excluded from the calculation when determining the extent of co-defendant's responsibility under CPLR § 1601. *Risko v. Alliance Builders Corp.*, 2007 WL 1412554 (1st Dept. May 15, 2007). UM Coverage &dash; Lack of Accident. First Department affirms order finding insurer's disclaimer valid and permanently stays insured's demand for uninsured motorist arbitration where “court correctly concluded that the collision was intentional, under which circumstances neither of respondents was entitled to coverage, regardless of the innocence of either one, and regardless of whether the incident was motivated by fraud or malice.” *Travelers Indem. Co. v. Cruz*, 2007 WL 1412878 (1st Dept. May 15, 2007). Common-Law Indemnification. In wrongful death action arising from a construction accident, Second Department modifies order to conditionally grant defendant subcontractor common-law indemnification against decedent's employer where employer failed to raise a triable issue of fact that subcontractor was in any way negligent in causing decedent's injuries. Court affirms order denying summary judgment in favor of general contractor in its indemnification claim against decedent's employer because decedent's injuries are alleged to arise from a dangerous condition on the premises and a general contractor may be liable if it has control over the work site and has notice of the condition. *Public Adm'n of Kings Co. v. 8 B.W., LLC*, 2007 WL 1439559 (2d Dept. May 15, 2007). Expected or Intended Acts Exclusion. In insurer's action seeking a declaration that it was not obligated to defend or indemnify insured in underlying action brought by a police officer that sustained injuries when assaulted by the insured, Second Department affirms order declaring that insurer has no duty to defend or indemnify insured where coverage did not apply to “bodily injury or property damage expected or intended from the standpoint of the Insured.” Notwithstanding insured's subsequent guilty plea to “recklessly” causing physical injury, the insured's acts of grabbing the officer's arm, accelerating the vehicle, dragging the officer forty feet, and causing the officer's body to strike the insured's vehicle were “reasonably expected.” *Hereford Ins. Co. v. Segal*, 2007 WL 1441210 (2d Dept. May 15, 2007). Discoverable Documents Relating to Disclaimer. In an action for medical malpractice and wrongful death, First Department affirms order requiring self-insured hospital to disclose the disclaimer letter and any communication between the hospital and the co-defendant physician that aided the hospital's decision to disclaim coverage for physician where hospital failed to show that the disclaimer constituted material prepared solely for litigation immune from discovery under CPLR § 3101(d). *Rosario v. North General Hosp.*, 2007 WL 136308 (1st Dept. May 10, 2007). Common-Law Indemnification. In insured's breach of contract action surrounding coverage limits on insured's property that were insufficient to replace structure damaged in fire loss, Second Department affirms order denying insurance agent's motion for summary judgment dismissing the co-defendant retail insurance broker's claim for indemnification and contribution where agent failed to establish as a matter of law that it owed no duty to broker, and fact issues existed regarding whether broker's request to agent to renew policy included specifications regarding coverage limits. *Ruddy v. Lexington Ins. Co.*, 2007 WL 1365413 (2d Dept. May 8, 2007). Scope of Stockholder Duties. In action by medical facility's excess professional liability insurer seeking a declaration that it was not obligated to defend or indemnify a physician in underlying medical malpractice actions, Second Department affirms order declaring that insurer has no duty to defend or indemnify physician where the policy did not provide coverage for employees engaged in the practice of medicine and the malpractice actions arose out of surgeries performed by physician as facility's employee, not within his duties as a stockholder. *Physicians' Reciprocal Insurers v. Jordan*, 2007 WL 1365639 (2d Dept. May 8, 2007). MVAIC No-Fault. Appellate Term affirms summary judgment for provider where the provider submitted evidence showing that the billing forms had been mailed and received and that payment of no-fault benefits was overdue and insurer failed to raise a triable issue of fact where it was undisputed that insurer did not pay or deny the subject claims within thirty days. *Aronoff v. Motor Vehicle Acc. Indemnification Corp.*, 2007 WL 1345553 (Sup. Ct. App. Term May 8, 2007). First-Party No-Fault. Denial of provider's motion for summary judgment affirmed where provider's affidavit by a corporate officer was insufficient to establish that the officer possessed personal knowledge of provider's practices and procedures to lay a foundation for the admission, as business records, of the documents annexed to provider's motion. *Vista Surgical Supplies, Inc. v. New York Central Mut. Fire Ins. Co.*, 2007 WL 1321164 (Sup. Ct. App. Term May 7, 2007). First-Party No-Fault. Appellate Term reverses summary judgment for provider where the affidavit submitted by insurer's investigator was sufficient to demonstrate that insurer's denial was based on “a founded belief that the alleged injuries do not arise out of an insured incident.” *Executive MRI Imaging, P.C. v. State Farm Ins. Co.*, 2007 WL 143828 (Sup. Ct. App. Term May 14, 2007).