
Week of May 30, 2008

Late Notice - Notice of Occurrence

Policy Buy-Back - Rescission

Direct Action - Insured Status

Common Law Indemnification - "Grave Injury."

Premium Calculations

Policy Ambiguities

Direct Action/Late Notice

Standing/Direct Action

Declaratory Judgment Action - Abstention

Coverage Litigation - Discovery

Contractual Indemnification/Common-Law Indemnification

UM Benefits - "Motor Vehicle."

UM Arbitration - Physical Contact

UM Arbitration - Covered Person

First-Party No-Fault - Fraudulent Incorporation

First-Party No-Fault - Forum Selection

First-Party No-Fault - Exclusion of Intoxication

First-Party No-Fault - Timely Verification Requests

Late Notice - Notice of Occurrence. Commercial tenant's principal was immediately aware of a client's slip-and-fall accident on the premises, that client was required to be taken from the scene by paramedics, and that client subsequently died. Tenant also knew that decedent's nephew visited the scene days later and advised of a possible claim. Tenant failed to provide notice to its liability insurer for four months. Second Department upholds insurer's late notice disclaimer, finding insured could not have had a reasonable belief in nonliability as a matter of law. *Avery & Avery, P.C. v. American Ins. Co.*, 2008 WL 2066945 (2d Dept. May 13, 2008). Policy Buy-Back - Rescission. Insured entered into a settlement under which it received \$325,000 as a total release from all known and unknown claims under policies that insured alleges it believed had total limits of \$16 million. Limits released actually totaled \$64 million. Four years later, insured brought action to rescind settlement, contending that the graphic used in negotiations did not proportionally display the limits being released. Court notes that the chart listed the proper limits even if it did not accurately display them graphically, and that parties were both sophisticated commercial entities with counsel that negotiated the settlement for 21 months. Court affirms dismissal of the action. *The Scotts Co., LLC v. ACE Indem. Ins. Co.*, 2008 WL 1946732 (1st Dept. May 6, 2008). Direct Action - Insured Status. Second Department reverses lower court and grants summary judgment to insurer dismissing direct action brought by underlying plaintiff who secured a default judgment in the underlying auto accident case. Court holds that default judgment constitutes *res judicata*, and establishes that underlying defendants were not insureds under the policy at issue, which was issued to the owner of the auto who was not named as an underlying defendant. *Perkins v. Allstate Ins. Co.*, 2008 WL 1987275 (2d Dept. May 6, 2008). Common Law Indemnification - "Grave Injury." In connection with a Labor Law claim, Third Department holds that defendants cannot maintain a common law indemnification claim against plaintiff's employer since plaintiff's own bill of particulars reflects that plaintiff did not suffer total loss of use of his leg. Bill of particulars referred only to items such as swelling, a limp, and loss of range of motion. Dismissal of contractual indemnification claims was also proper where there was no proof of a contractual indemnification provision. *Fleischman v. Peacock Water Co.*, 2008 WL 1969807 (3d Dept. May 8, 2008). Premium Calculations. In a decision that does not set forth the factual or legal issues, First Department reverses lower court and grants summary judgment in favor of insured. Opinion consists of court's rejection of insured's argument that insurer incorrectly calculated premiums as conjectural since insured provided no proof of its actual gross sales. *Atlantic Mut. Ins. Co. v. Northport Apparel, Inc.*, 2008 WL 2026149 (1st Dept. May 12, 2008). Policy Ambiguities. Second

Department affirms lower court's determination that certain provisions in a commercial liability policy pertaining to unspecified "Loss Conditions" were ambiguous, and that such ambiguities are to be construed against the insurer. Court finds insurer obligated to reimburse the insured for expense of hiring guards to protect the subject property following a fire. *NIACC, LLC v. Greenwich Ins. Co.*, 2008 WL 2131618 (2d Dept. May 20, 2008). Direct Action/Late Notice. Second Department affirms denial of plaintiff's motion for summary judgment in a direct action where insured offered no proof that it placed insurer on notice of underlying action anytime prior to commencement of the direct action. *Lopez v. State Farm Fire & Cas. Co.*, 2008 WL 1990007 (2d Dept. May 6, 2008). Standing/Direct Action. In a personal injury action, Second Department reverses lower court and grants motion for summary judgment by defendant's insurer to dismiss injured party's complaint against it where injured party lacked standing to maintain a direct action against insurer under Insurance Law § 3420. Injured party was not a named insured under the policy and did not obtain a judgment against the named insured that remained unsatisfied for 30 days. *Azad v. Capparelli*, 2008 WL 2210296 (2d Dept. May 27, 2008). Declaratory Judgment Action - Abstention. United States District Court for the Southern District dismisses declaratory judgment action brought by excess insurer based on abstention principles where insured brought broader coverage action in Ohio state court in connection with the underlying case. Court notes that although insured's suit was filed after insurer's action, the delay was only a week, and that the coverage action involves no federal law issues. *TIG Ins. Co. v. The Fairchild Corp.*, 2008 WL 2198087 (S.D.N.Y. May 27, 2008). Coverage Litigation - Discovery. In insurer's action seeking a declaration that it owed no duty to defend its insured in underlying personal injury action on the basis that the subject automobile collision was intentional and not an accident, Second Department reverses order conditionally granting insured's motion to dismiss complaint unless insurer produced its claim procedure guide. Lower court's order was in error where insured was not entitled to discovery of the guide and failed to establish the relevancy of the guide. *Travelers Indem. Co. v. Sung Won Lee*, 2008 WL 2199500 (Sup. Ct. Queens Co. May 28, 2008). Contractual Indemnification/Common-Law Indemnification. In worker's personal injury action against scaffold designer and general contractor, First Department affirms order denying scaffold designer's motion for summary judgment on its claims for contractual and common-law indemnification against general contractor. In a decision with little analysis, court holds that lower court did not err in denying motion where liability issues remained unresolved. *Metus v. Ladies Mile Inc.*, 2008 WL 2095876 (1st Dept. May 20, 2008). UM Benefits - "Motor Vehicle." Second Department affirms permanent stay of petition for UM benefits where uninsured vehicle in the accident was an ATV, as policy's definition of a "motor vehicle" unambiguously does not include an ATV, and Vehicle & Traffic Law's definition of motor vehicle expressly excludes ATVs. Court also rejects argument that ATV could be considered a motorcycle, since it has four wheels. *Progressive Northeastern Ins. Co. v. Scalamandre*, 2008 WL 2132129 (2d Dept. May 20, 2008). UM Arbitration - Physical Contact. In claimant's appeal of an order permanently staying arbitration of an uninsured motorist claim on the ground that there was no physical contact between claimant's vehicle and an alleged hit-and-run vehicle, Second Department declines to disturb bench decision and affirms order in a decision with little analysis. *Government Employees Ins. Co. v. Steinmetz*, 2008 WL 2209041 (2d Dept. May 27, 2008). UM Arbitration - Covered Person. In insurer's action to permanently stay arbitration of an uninsured motorist claim on the ground that claimant was not a covered person under its policy, Second Department remits matter for a framed issue hearing regarding claimant's alleged residence with insurer's named insured. Court holds that a new determination will be made after framed issue hearing in order to decide the applicability of the time limits set forth in CPLR § 7503. *Interboro v. Maragh*, 2008 WL 2208932 (2d Dept. May 27, 2008). First-Party No-Fault - Fraudulent Incorporation. A doctor was the sole member of a professional limited liability company seeking reimbursement of first-party no-fault services. Subsequent to the services at issue, doctor was suspended from practice. Insurer sought to have no-fault claim dismissed based on fraudulent incorporation. Court rejects insurer's argument, as the PLLC was not fraudulently incorporated by virtue of the doctor's subsequent suspension. However, court rules that doctor was required by the Limited Liability Company Law to dissolve the PLLC. Court rules that plaintiff PLLC therefore has no right to bring the action. However, because doctor could pursue the claim as part of winding down the PLLC, court grants a sua sponte stay to allow doctor to do so. *A.B. Medical Services PLLC v. Travelers Indem. Co.*, 2008 WL 2081134 (Dist. Ct. Nassau Co. May 19, 2008). First-Party No-Fault - Forum Selection. In insured's action to recover first-party, no-fault medical benefits in an arbitration forum after his case was dismissed without prejudice by county civil court, court permanently stays arbitration on grounds that allowing insured to flit between forums would drain resources, prolong controversies, and invite inconsistent adjudications. *Travelers Indem. Co. v. Sung Won Lee*, 2008 WL 2199500 (Sup. Ct. Queens Co. May 28, 2008). First-Party No-Fault - Exclusion of Intoxication. In insurer's appeal of a decision on cross-motions for summary judgment in an action to recover assigned first-party, no-fault medical payments, Second Department modifies order to deny summary judgment in favor of insurer where insurer failed to make out a prima facie showing that claimant's intoxication was the proximate cause of the accident. Court holds that insurer raised a triable issue of fact as to whether it timely denied the claim by submitting evidence that it requested additional information regarding the insured's alleged intoxication. However, insurer was not entitled to summary judgment where lab results showing elevated blood alcohol levels did not establish that claimant's accident was caused by intoxication. *Westchester Medical Center v. Progressive Cas. Ins. Co.*, 2008 WL 2205778 (2d Dept. May 27, 2008). See also *Westchester Medical Center ex rel. Beaton v. Progressive Cas. Ins. Co.*, 2008 WL 2205963 (2d Dept. May 27, 2008) (denying cross-motions where certificate of disposition regarding claimant's DWI charge did not establish that intoxication was the proximate cause of claimant's injuries). First-Party No-Fault - Timely Verification Requests. In an action to recover assigned first-party, no-fault medical payments, court dismisses action as premature where insurer established that it timely sent verification requests that remained unsatisfied, thus the time period to pay or deny the claim had not elapsed. *Park Slope Medical and Surgical Supply, Inc. v. Country-Wide Ins. Co.*, 2008 WL 2219916 (N.Y. City Civ. Ct. May 27, 2008); *Lennox Hill Radiology v. Global Liberty Ins.*, 2008 WL 2189627 (N.Y. City Civ. Ct. May 21, 2008).