

Scope of Discovery-Reinsurance Dispute, Duty to Defend-Liquor Liability, Scope of Discovery-First Party Coverage Dispute, Contractual Indemnification, Common-Law Indemnification, Common-Law Indemnification/Contractual Indemnification, Timeliness of Disclaimer/"Mysterious Disappearance" Exclusion, Broker Liability-Additional Insured Coverage, Timeliness of Disclaimer, UM Arbitration-Timeliness of Proceeding, Contractual Indemnification, Savings Clause-"Non-Trucking Use" Endorsement, Additional Insured Coverage, Duty to Indemnify, First-Party No-Fault-Scope of Discovery, First-Party No-Fault - Attorneys' Fees, First-Party No-Fault - Claim Documentation, First-Party No-Fault - Staged Accident, First-Party No-Fault - Denial Documentation, First-Party No-Fault - Severance, First-Party No-Fault - Claim Documentation

Scope of Discovery ‐ Reinsurance Dispute. Insurers that contributed \$975 million to an asbestos claim settlement on behalf of its insured sought \$400 million in reinsurance. Supreme Court affirmed a special referee's ruling in favor of the reinsurers ordering the insurers to disclose communications relating to the insurers's presentation of the reinsurance claim, including how claims were allocated, treatment of each claim as a separate accident, and when and how they chose to inform the reinsurers of the settlement, regardless of whether such communications were subject to attorney-client privilege. On appeal, First Department largely reverses the order. Court finds that insurers and reinsurers did not share a common interest, notwithstanding their common interest in underlying coverage litigation. Court also finds that insurers did not place the settlement at issue by alleging it was reasonable and in good faith. Nor does court find "at issue" waiver is applicable based on reinsurers's claim that parts of the settlement were paid on account of bad faith claims. However, court does find that to extent a representative of the insurers testified in deposition regarding advice of counsel regarding how the reinsurance bill was prepared, "at issue" waiver applies (a partial dissent disagreed with this aspect of the decision). *American Re-Insurance Company v. United States Fidelity & Guaranty Co.*, 2007 WL 1531704 (1st Dept. May 29, 2007). Duty to Defend ‐ Liquor Liability. First Department affirms summary judgment in favor of insurers, declaring they have no duty to defend a manufacturer of alcoholic beverages in underlying suits accusing the company of marketing to minors. Court finds that coverage for "selling, serving or furnishing" alcoholic beverages clearly does not apply to marketing of such beverages. A dissent finds the insured raised an issue of fact whether marketing constitutes selling. *Great Northern Ins. Co. v. Kobrand Corp.*, 2007 WL 1500530 (1st Dept. May 24, 2007). Scope of Discovery ‐ First-Party Coverage Dispute. In a property coverage dispute where the issue is whether a specific part of the damaged building was damaged prior to the loss and/or not causally related to the loss, First Department holds trial court erred in granting insured's motion to compel insurer's reserves, claims service compensation programs, performance reports of insurer's employees, and employee compensation information, observing that such information has no bearing on the coverage issues. *40 Rector Holdings, LLC v. The Travelers Indemnity Co.*, 2007 WL 1500537 (1st Dept. May 24, 2007). Contractual Indemnification. In a Labor Law case, court denies subcontractor's motion for conditional summary judgment on contractual indemnification claims against subcontractor that employed plaintiff and general contractor since factual issues remain regarding movant's and general contractor's potential negligence. *Polanski-Tarnawa v. I. Grace Co., Inc.*, 2007 WL 1500950 (Sup. Ct. Richmond Co. May 22, 2007). Common-Law Indemnification. Second Department affirms denial of summary judgment on common-law indemnification claim where issues of fact remain regarding negligence and control of the work site where plaintiff was injured. *Yonkolowitz v. Phoenix Pharmaceuticals, Inc.*, 2007 WL 1501640 (2d Dept. May 22, 2007). Common-Law Indemnification/ Contractual Indemnification. In a personal injury action against owner and maintenance contractor arising from a stairway slip and fall, Second Department reverses trial court order and grants summary judgment to contractor dismissing owner's cross claims for common-law and contractual indemnification where there was no evidence that the accident was related to any negligent act or omission on the part of contractor or that the accident occurred due to contractor's failure to make repairs under its contract with owner. *Torchio v. New York City Housing Authority*, 2007 WL 1501718 (2d Dept. May 22, 2007). Timeliness of Disclaimer/"Mysterious Disappearance" Exclusion. In art possessor's third-party action against insurer seeking a declaration that possessor was entitled to a defense and indemnity in conversion action brought after art went missing, Second Department holds that trial court erred in applying Insurance Law § 3420(d) standard where underlying claim did not involve death or bodily injury, and possessor failed to show prejudice from insurer's delay in disclaiming based upon the "mysterious disappearance" exclusion. Although the disclaimer was not untimely as a matter of law, Second Department holds that a triable issue of fact existed regarding whether the "mysterious disappearance" exclusion applied where evidence supported a reasonable inference that art was accidentally discarded. *Topliffe v. U.S. Art Co., Inc.*, 2007 WL 1501721 (2d Dept. May 22, 2007). Broker Liability ‐ Additional Insured Coverage. In ice rink's action against contractor, contractor's insurance broker, and contractor's insurer seeking additional insured coverage for a personal injury action that contractor's employees brought against ice rink, Second Department reverses order and dismisses ice rink's complaint against broker where, regardless of broker's delivery of a certificate of insurance to ice rink indicating that ice rink was an additional insured under contractor's policy, ice rink was not in privity with the broker, broker owed no duty to ice rink, and ice rink failed to show that it was an intended third-party beneficiary of the contract between contractor and broker. *Superior Ice Rink, Inc. v. Nescon Contracting Corp.*, 2007 WL 1501750 (2d Dept. May 22, 2007). Timeliness of Disclaimer. In insured's action seeking defense and indemnity in an underlying personal injury action, Second Department affirms denial of insurer's motion for summary judgment where insurer's disclaimer based upon insured's late notice of accident was not issued as soon as

reasonably possible under Insurance Law § 3420(d) where the underlying complaint and the initial inquiry by insurer's claim analyst provided sufficient indicia that the insured may have breached the applicable notice requirements. *Schulman v. Indian Harbor Ins. Co.*, 2007 WL 1501836 (2d Dept. May 22, 2007). **UM Arbitration & Timeliness of Proceeding.** In an action by insurer to stay UM arbitration, Second Department reverses order denying insured's motion to dismiss the proceeding as untimely where insurer brought proceeding several months after insured served two separate notices of intention to arbitrate and insurer failed to offer any explanation for its delay between its initial disclaimer and the time it commenced the action. *Travelers Indemnity Co. v. Castro*, 2007 WL 1502104 (2d Dept. May 22, 2007). **Contractual Indemnification.** In a personal injury action against city and others arising from a sidewalk slip and fall, Second Department affirms the denial of city's and general contractor's cross-claims for contractual indemnification against subcontractor where movants failed to establish that the general contractor was free from negligence as a matter of law. *Davitt v. City of New York*, 2007 WL 1502243 (2d Dept. May 22, 2007). **Savings Clause & "Non-Trucking Use" Endorsement.** In insurer's action seeking a judgment declaring that its obligation to insured tractor-trailer owner/operator in an underlying action was limited by policy's savings clause to the minimum amounts required by the financial responsibility law, Second Department affirms trial court's holding that the savings clause limited coverage to the minimum where it was not part of a voided exclusion. The savings clause that provided for minimum statutory coverage was not against public policy and was not part of the "Non-Trucking Use" endorsement that potentially created a gap in the coverage required by Vehicle & Traffic Law § 388. *Connecticut Indem. Co. v. Hines*, 2007 WL 1502249 (2d Dept. May 22, 2007). **Additional Insured Coverage.** In owner's action against oil seller and oil deliverer to recover environmental clean-up costs arising from a leak in owner's heating system, Second Department affirms the dismissal of seller's cross-claim for additional insured coverage against deliverer's general liability and commercial auto insurer where insurer demonstrated that the allegations of the complaint fell solely and entirely within a pollution exclusion in the general liability policy and the complaint did not allege any basis upon which the leak arose from the ownership, maintenance, or use of a covered vehicle under the commercial auto policy. *Bruckner Realty, LLC v. County Oil Co., Inc.*, 2007 WL 1502254 (2d Dept. May 22, 2007). **Duty to Indemnify.** In an action to enforce a judgment against a subcontractor's insurance carrier after subcontractor agreed to settle general contractor's third-party claim against him for the actual settlement or verdict amount in an underlying personal injury action, Second Department affirms order granting summary judgment against insurer on the issue of liability. The liability of the insurer attaches when there is a final judgment against the insured as a result of an obligation imposed by law and subcontractor became legally obligated to pay damages pursuant to its settlement agreement, regardless of general contractor's agreement never to execute against subcontractor for the settlement amount. *Westchester Fire Ins. Co. v. Utica First Ins. Co.*, 2007 WL 1514708 (2d Dept. May 22, 2007). **First-Party No-Fault & Scope of Discovery.** Court denies insurer's motion to reargue order granting providers' claims for unpaid no-fault insurance benefits where it was established that office manager personally mailed the pertinent no-fault claim forms to insurer and that insurer failed to timely deny such claims. Court denies insurer's request for discovery relating to one provider's corporate structure based upon prior administrative finding that provider's employee engaged in fraudulent billing and medical practices where it was undisputed that employee was lawfully practicing medicine at the time provider was organized. Court denies insurer's request for discovery relating to another provider's corporate structure based upon insurer's claim that provider was not properly licensed where such allegations, even if true, were inapposite to the issue of insurer's defense that provider was fraudulently incorporated at the time services were rendered. *Devonshire Surgical Facility v. AIU Ins. Co.*, 2007 WL 1518927 (Civ. Ct., New York Co. May 21, 2007). **First-Party No-Fault & Attorneys' Fees.** Court holds that \$850 maximum for award of attorneys' fees applies on a per-claim basis. Court rejects persuasiveness of Insurance Department opinion letter (and decisions following the letter) stating that the maximum applies on a per-assignor basis under the regulations. *Midwood Total Rehab. Medical, P.C. v. State Farm Mut. Auto. Ins. Co.*, 2007 WL 1501043 (Dist. Ct. Nassau Co. 2007). **First-Party No-Fault & Claim Documentation.** Court affirms denial of provider's motion for summary judgment where its corporate officer's affidavit did not establish that officer possessed personal knowledge of provider's practices and procedures sufficient to lay a foundation for admission of its records. *IVB Medical Supply, Inc. v. Allstate Insurance Co.*, 2007 WL 1532065 (Sup. Ct. App. Term May 25, 2007); *V.S. Medical Services, P.C. v. New York Central Mut. Ins.*, 2007 WL 1532072 (Sup. Ct. App. Term May 25, 2007). **First-Party No-Fault & Staged Accident.** Court affirms summary judgment in favor of provider, finding that insurer failed to submit admissible evidence of a staged accident because its submitted accident reports were not sworn or supported by an affidavit by a person with personal knowledge of the facts. A dissent would find the affidavit of the insurer's SIU investigator describing the insured's involvement in several similar accidents over a short period of time to be admissible evidence sufficient to demonstrate a founded belief that the accident was staged. *LMS Medical Care, P.C. v. State Farm Mut. Auto. Ins. Co.*, 2007 WL 1532077 (Sup. Ct. App. Term May 24, 2007). **First-Party No-Fault & Denial Documentation.** Court reverses summary judgment in favor of provider, finding that insurer was not obligated by the regulations to set forth a medical rationale for defense of lack of medical necessity in the prescribed denial of claim form. *A.I.D. Medical Supplies v. GEICO Gen. Ins. Co.*, 2007 WL 1518622 (Sup. Ct. App. Term May 23, 2007). **First-Party No-Fault & Severance.** Court reverses trial court's denial of insurer's motion to sever five causes of action to recover no-fault benefits arising from five different accidents where the facts of the claims are likely to raise few, if any, common issues of fact or law, even if the assignors' insurance policies are identical. *Ladim DME, Inc. v. GEICO General Ins. Co.*, 2007 WL 1438735 (Sup. Ct. App. Term May 15, 2007). **First-Party No-Fault & Denial Documentation.** Summary judgment in favor of provider affirmed where insurer failed to submit evidence of timely objection to the completeness of the claim forms or a request for verification, and therefore waived defense of lack of standing. *Westchester Medical*

Center v. Safeco Ins. Co. of America, 2007 WL 1501683 (2d Dept. May 22, 2007). First-Party No-Fault – Claim Documentation. Second Department reverses trial court order and grants summary judgment to provider where the provider submitted evidence in the form of certified mail receipts with postmarks, postal service “Track & Confirm” printouts, and signed receipt cards showing that the billing forms had been mailed and received and that payment of no-fault benefits was overdue. Westchester Medical Center v. Liberty Mutual Ins. Co., 2007 WL 1501701 (2d Dept. May 22, 2007).