

Week of November 1, 2006

Firm News 11/1/2006

Uninsured Motorist Coverage; First-Party No-Fault; Bad Faith; Common Law Indemnification/Contribution; Rescission; Mold Exclusion; Additional Insured Status; Surety Bonds; SUM Coverage

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Uninsured Motorist Coverage. Second Department reverses grant of petition to permanently stay arbitration of uninsured motorist claims. Insurer argued that arbitration should be stayed on grounds of res judicata because claimant previously made an identical demand to arbitrate a claim for uninsured motorist coverage, and lost. However, insurer brought its petition to stay arbitration almost six months after claimant's notice of intent to arbitrate. Court finds that 20 day period to petition to stay arbitration is mandatory and must be strictly enforced. *State Farm Mut. Auto. Ins. Co. v. Scudero*, 2006 WL 3026089 (2d Dept. October 24, 2006). First-Party No-Fault. Court modifies trial court order to award provider summary judgment in 10 of 12 claims. Although provider's motion papers failed to establish mailing of statutory forms, insurer's letters to provider (which were attached to provider's moving papers) were sufficient to establish insurer's receipt of the claims. *Spineamericare Medical, P.C. v. State Farm Mut. Auto. Ins. Co.*, 2006 WL 3025581 (Sup. Ct. App. Term October 5, 2006). Bad Faith. Court denies primary insurer's motion to dismiss bad faith claims, finding insured sufficiently alleged bad faith based on an allegation that insurer failed to advise insured that settlement was in excess of coverage. Insured also sufficiently alleged malpractice claim against retained defense counsel on same basis, and also based on the allegation that defense counsel were employees of insurer working under a conflict of interest. *Tokio Marine and Fire Ins. Co., Ltd. v. Grodin*, 2006 WL 3054321 (S.D.N.Y. October 27, 2006). Common Law Indemnification. Court denies common law indemnification to car leasing company against driver for portion of settlement in excess of driver's policy. Court observes that by settling the action, leasing company assumed risk of being able to prove driver's liability to plaintiff. Court finds driver raised sufficient issue of fact regarding his liability to plaintiff. Court, however, grants summary judgment in favor of leasing company regarding reasonableness of settlement. Court also finds driver sufficiently pled action alleging that his primary insurer must defend the common law indemnification action, regardless of exhaustion of driver's policy limits. *Tokio Marine and Fire Ins. Co., Ltd. v. Grodin*, 2006 WL 3054321 (S.D.N.Y. October 27, 2006). Rescission. Court affirms magistrate's conclusion that 6% interest to be used to determine coverage and premiums paid in order to bring insured and insurer back to status quo ante where disability policy was rescinded based on insured's material misrepresentations. Magistrate applied 6% interest based on considerations of fairness after holding that rescission is an equitable remedy for which interest may be calculated according to the court's discretion. *Kirton v. Northwestern Mut. Life Ins. Co.*, 2006 WL 3051772 (E.D.N.Y. October 24, 2006). Mold Exclusion. First Department affirms trial court's order granting insurer's motion for summary judgment dismissing insured's complaint and awarding insurer the return of all coverage advanced to insured. Where insurer demonstrated that mold exclusion of its all-risk policy barred coverage for insured's claim, court ruled that insurer was entitled to reimbursement of all extra living expenses advanced to insured when insured was forced to vacate his condominium due to high levels of environmental toxins. *Siegel v. Chubb Corp.*, 2006 WL 3071238 (1st Dept. October 31, 2006). Additional Insured Status. First Department affirms trial court's order granting insurer's motion for summary judgment and declaring that plaintiff was not an additional insured in connection with an underlying personal injury action. Plaintiff was not entitled to additional insured coverage where policy required written contract, and where no such contract existed at the time of the accident. Court finds that plaintiff's claim that parties intended to be bound by an unsigned contract had no bearing on enforcement of terms of policy endorsement. *National Abatement Corp. v. National Union Fire Ins. Co. of Pittsburgh*, 2006 WL 3071347 (1st Dept. October 31, 2006). Common Law Indemnification/Contribution. In a wrongful death case arising from a construction accident, court denies adjacent property owner's request to amend its answer to assert a cross claim for common law contribution and indemnification against co-defendants construction site owner and contractor. Court disallowed cross claims for indemnification and contribution where it was clear that neither the construction site owner nor the contractor could be found liable to the adjacent property owner because neither party was negligent and neither party directed or supervised the injured plaintiff's work. *Figueiredo v. New Palace Painters Supply Co.*, 2006 WL 3068845 (Sup. Ct. October 27, 2006). Common Law Indemnification. First Department reverses trial court's order denying lessee's motion for a conditional order of indemnification against landlord where plaintiff alleged injuries from a slip and fall. Court rules lessee failed to raise an issue of fact regarding landlord's actual or constructive notice of the alleged defect where lessee maintained the area where the alleged defect existed, lessee did not notify landlord of any defect, and record did not show that landlord should have discovered the defect through regular inspections of the area. *Lennard v. Mendik Realty Corp.*, 2006 WL 3026040 (1st Dept. October 26, 2006). Surety Bonds. First Department affirms trial court's order granting surety's motion for summary

judgment dismissing the owner's complaint against it. Court rules that summary judgment in surety's favor was appropriate where conditions of the bond with which owner failed to comply went directly to the surety's liability and required strict compliance. Court also holds that judgment in favor of surety for indemnification against the contractor on the bond does not establish the surety's liability to owner. *Tishman Westwide Constr. LLC v. ASF Glass Inc.*, 2006 WL 3026164 (1st Dept. October 26, 2006). First-Party No-Fault. In an action to recover first-party no-fault benefits where defendant insurer denied claims for services rendered by plaintiff facility, court rules that insurer could amend its answer to add as an affirmative defense a claim that plaintiff facility was not legally authorized as a provider entitled to reimbursement under no-fault regulations where insurer submitted certifications from the Department of State and the New York State Department of Education showing that the facility was not registered at relevant times. *Devonshire Surgical Facility v. Prudential Property & Casualty Co.*, 2006 WL 3041620 (N.Y. City Civ. Ct. October 25, 2006). SUM Coverage. Second Department rules insurer may not allege as an affirmative defense that the insured did not sustain a serious injury within the meaning of Insurance Law § 5102(d), thus the trial court properly granted plaintiff's motion to strike that defense from insurer's answer. The court held that the insurer's defense of lack of serious injury is "legally irrelevant" in light of the legislature's omission of the serious threshold requirement in Insurance Law § 3420(f)(2). *Raffellini v. State Farm Mut. Auto. Ins. Co.*, 2006 WL 3025825 (2d Dept. October 24, 2006).