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First-Party No-Fault. DECISION OF INTEREST. Court of Appeals holds that insurer's failure to timely request verification of the patient's assignment of benefits to a hospital precludes the insurer from contesting the validity of the assignment. Court holds that the lack of a valid assignment is not a "coverage defense" that is excepted from the rule that the insurer must pay or deny the claim within 30 days or otherwise make a timely demand for verification. One dissenting judge concludes that the validity of an assignment is a coverage defense, and a matter of standing, which cannot be created by the insurer's inaction. Hospital for Joint Diseases v. Travelers Prop. Cas. Ins. Co., 2007 WL 4104143 (Ct. App. November 20, 2007).
Recoupment of Coverage/Antisubrogation/Bad Faith. DECISION OF INTEREST. Excess insurer contributed \$2 million to a settlement of a Labor Law action. Excess insurer, individually and as subrogee of its insured, sought to recoup \$1 million of its payment by suing defense counsel retained by the primary insurer for malpractice and suing primary insurer for bad faith. Excess insurer claimed that primary insurer and defense counsel failed to raise the antisubrogation rule on behalf of the insured as a defense to contractual and common law indemnification claims against the insured by the owner (who was being defended by the primary insurer under an OCP policy). According to excess insurer, raising the antisubrogation rule would have limited the insured's liability to the owner to amounts in excess of the OCP policy. First Department holds that excess insurer cannot assert a malpractice claim against defense counsel. Court distinguishes cases allowing an excess insurer to sue defense counsel for malpractice as a subrogee of the insured because such cases do not apply where the excess insurer sues in its own capacity. With respect to excess insurer's claim as a subrogee, court dismisses claim because insured suffered no loss to which excess insurer can be subrogated. Settlement was not paid on behalf of the insured because defense counsel failed to raise antisubrogation as a defense to the third-party action, but because insured — a general contractor — was directly liable to the plaintiff. Court does find that excess insurer's assertion of antisubrogation rule would have reduced the excess insurer's liability by \$1 million, since the OCP policy would have been paid before the excess insurer paid, but court finds that grant of contractual indemnification

against the insured has res judicata effect and precludes excess insurer's suit against primary insurer. Court, however, finds that excess insurer properly states a bad faith claim against the primary insurer. *Federal Ins. Co. v. North American Specialty Ins. Co.*, 2007 WL 3306577 (1st Dept. November 8, 2007). Waiver and Release/Common Law Indemnification. In connection with a Labor Law claim, owners brought third-party action against tenant. Lease provided that the parties waive any claim for which the risk is insured by each party's own insurance. First Department holds it was error not to enforce this provision, and since owner had its own coverage, summary judgment dismissing the third-party action should have been granted. Court also finds that common law indemnification claim against tenant should have been dismissed based on fact that tenant did not control or supervise the plaintiff's work. *Artega v. 231/249 W. 39 Street Corp.*, 2007 WL 3293635 (1st Dept. November 8, 2007). Proof of Loss. In a fire loss case, court denies homeowners insurer's motion for summary judgment based on claim that insured failed to submit, as requested, three proofs of loss in connection with fire. Court finds issue of fact regarding sufficiency of proofs. Court finds that alleged insufficiency of a timely submitted proof of loss does not alone constitute a defense to coverage based on timeliness. Court also finds that insured, a husband, was entitled to rely on a reference to his then-wife's separate proofs of loss. Court finds that the policy did not contain any language requiring three separate proofs of loss based on the category of damage claimed. Court also finds that insured's submission of fire-damaged receipts constituted information that would allow the insurer to determine its rights and obligations. *Kenneth v. Nationwide Mut. Fire Ins. Co.*, 2007 WL 3533887 (W.D.N.Y. November 13, 2007). Duty to Defend & Copyright Infringement. Insurers moved for summary judgment declaring they have no duty to defend insured in connection with underlying copyright infringement action. Insured cross-moved for its defense costs, its settlement, and attorney's fees in the coverage action. Insurers contended that alleged infringement did not occur in the course of advertising, as required under the policy. Court grants insurers' motion, concluding that no reasonable reading of the underlying complaint alleged a covered advertising injury. Although complaint alleged copyright infringement, which is an advertising injury, the infringement must have occurred in the course of advertising. Court observes that manufacture and selling of goods alone does not constitute advertising, and an allegation that infringement occurred in the course of advertising is insufficient if the advertisements themselves did not allegedly infringe on copyright. *Axelrod v. Magna Carta Cos.*, 2007 WL 3378346 (Sup. Ct. New York Co. November 7, 2007). Recoupment of Premium. Court grants summary judgment to insurer seeking earned, unpaid premium under two policies issued to a car and truck rental fleet through New York's assigned risk plan. Court concludes that insurer provided the coverage at issue, and calculated earned premiums only on the fleet vehicles it insured. Court finds fact that other fleet vehicles were never insured under the policies was the fault of the insured, who failed to provide requested registration information. Court rejects insured's counterclaim that insurer caused damage to insured as a result of, among other things, liability for an accident involving a vehicle not insured under the policies, as there is no question the insured failed to request the vehicle be added to the policy prior to the accident. *St. Paul Fire & Marine Ins. Co. v. Adeo Truck & Car Rental, Inc.*, 2007 WL 3355390 (S.D.N.Y. November 8, 2007). Contractual Indemnification/Failure to Procure Insurance. In personal injury actions arising from a building explosion, court denies summary judgment on owner's third-party action for contractual indemnification. Court observes that fact issue regarding owner's negligence renders contractual indemnification premature. However, court awards summary judgment to owner on its claim for failure to procure insurance (although the court dismisses the failure to procure action by other individuals and entities not named in the lease's insurance procurement provision). *Pavon v. 19th Street Associates, LLC*, 2007 WL 3314014 (Sup. Ct. New York Co. November 8, 2007). Contractual Indemnification. In a Labor Law case, Second Department affirms denial of construction manager's third-party action for contractual indemnification against subcontractor that employed plaintiff, observing that contractual indemnification is premature absent determination of subcontractor's negligence. *D'Angelo v. Builders Group*, 2007 WL 3317991 (2d Dept. November 7, 2007). Contractual Indemnification. In a battery case between children following an altercation at a mall, court denies mall's summary judgment motion on its contractual indemnification claim against the mall's hired security company. Court finds an issue of fact regarding whether mall's potential liability might be for its own negligence, rather than vicarious only. *Wade v. Nicholas A.*, 2007 WL 4097398 (Sup. Ct. Nassau Co. November 5, 2007). Late Notice of Occurrence. In an action by insured seeking a declaration that it was entitled to defense and indemnification in an underlying personal injury action, First Department affirms order confirming Special Referee's report that insurer established that insured's notice, given seven months after the subject slip and fall accident, was untimely as a matter of law, and insured failed to establish the reasonableness of its belief that no claim would be asserted against it where insured was immediately aware of the accident, knew that the injured party was removed by ambulance, and discussed the accident internally and with others. *St. Nicholas Cathedral of Russian Orthodox Church in N. Am. v. Travelers Prop. Cas. Ins. Co.*, 2007 WL 4106266 (1st Dept. November 20, 2007). Default Judgment. In an action brought by neighboring property owners against golf course alleging property damage due to water run off from the golf course, Third Department affirms order vacating a default judgment where golf course presented a reasonable excuse for the default based upon the internal operations failure of the course's insurance underwriter. Golf course explained that the course owner contacted his insurance agent immediately, the agent contacted the underwriter by fax, insurance underwriter failed to act, and owner was not notified again regarding the litigation until he was notified of the default judgment. *Acker v. VanEpps*, 2007 WL 3377972 (3d Dept. November 15, 2007). Contractual Indemnification/Additional Insured Status. In action against subcontractor's insurer seeking additional insured coverage in an underlying action arising from a construction site accident, First Department modifies order denying plaintiffs' motion for summary judgment declaring that insurer owes defense and indemnification to award defense costs where insurer conceded that it is obligated to reimburse plaintiffs for their defense costs. As issues of fact remain as to whether the accident arose out of the insured contractor's work, summary judgment regarding insurer's duty to indemnify plaintiffs was

properly denied. *Bovis Lend Lease LMB, Inc. v. American Alternative Ins. Co.*, 2007 WL 3380189 (1st Dept. November 15, 2007). **Timeliness of Disclaimer.** In insurer's action against insured seeking a declaration that it owed no duty to insured in an underlying construction injury action under a CGL policy that insured procured to insure a vacant brownstone she planned to renovate, First Department affirms order denying insurer's motion for summary judgment seeking to enforce its disclaimer based upon an exclusion for claims involving personal injuries of independent contractors. Court holds that insurer did not establish that its 56-day delay in issuing its disclaimer was reasonable as a matter of law where the insurer was aware shortly after first notice of the claim that the complaint alleged that the injured party was an independent contractor and the insured confirmed in a statement to the insurer's investigator that the injured party was an independent contractor. *Those Certain Underwriters at Lloyds, London v. Gray*, 2007 WL 3380450 (1st Dept. November 15, 2007). **Contractual Indemnification.** In an action by drywall subcontractor for personal injuries at a construction site, Second Department affirms order denying owner's motion for summary judgment on its third-party claim for contractual indemnification against lessee. The trial court properly denied owner's motion where the indemnification clause at issue did not specifically include the claims of the drywall subcontractor's employees, thus indemnification for claims by the subcontractor's employees was not the unmistakable intent of the parties and lessee was not required to indemnify owner. *Sumba v. Clermont Park Associates, LLC*, 2007 WL 3407127 (2d Dept. November 13, 2007). **Untimely Disclaimer.** In insurer's action seeking a declaration that it owed no duty to insureds in an underlying action based upon insureds' failure to provide timely notice of claim, Second Department affirms order declaring that insurer was obligated to defend and indemnify insureds where insurer failed to submit evidence demonstrating that an investigation was necessary and that it diligently pursued and completed any investigation that was undertaken. Insurer's manager noted the late notice issue upon her receipt of the notice of claim and directed an investigator to look into the issue, but insurer failed to submit an affidavit from the manager or the investigator, a copy of the investigator's report, or a copy of the statement obtained from the insureds. *Quincy Mut. Fire Ins. Co. v. Uribe*, 2007 WL 3407191 (2d Dept. November 13, 2007). **Contractual Indemnification/Common-law Indemnification.** In a personal injury action against city, Second Department affirms that order denying judgment as a matter of law on city's third-party contractual indemnification claim against an engineer, holding it was correct to have the jury determine the issue of the engineer's negligence. However, court reverses judgment to extent court instructed the jury to assign a percentage of negligence to the engineer. City's liability under the Labor Law was vicarious only, and it is entitled to complete common law indemnification from the engineer at fault. Jury should therefore not have been instructed to allocate fault. *Cunha v. City of New York*, 2007 WL 3408480 (2d Dept. November 13, 2007). **Contractual Indemnification/Common-law Indemnification.** In a teacher's personal injury action commenced after she was struck in the face by part of a "bungee run" amusement ride at a school dance, Fourth Department modifies order limiting ride owner's claim for contractual indemnification to exclude negligence on the part of ride owner. Without citing language from the contract, court holds that the indemnification provision unequivocally expresses school district's intent to indemnify ride owner against the owner's own negligence, thus the indemnification provision is valid and enforceable in its entirety. However, trial court properly denied ride owner's and school district's respective cross-motions for summary judgment on owner's common-law indemnification claim where there are issues of fact regarding whether teacher suffered a grave injury and the respective fault of the parties. *McGuire v. Parties, Picnics & Promotions*, 2007 WL 3317995 (4th Dept. November 9, 2007). **Untimely Disclaimer.** In insured's action seeking a declaration that insurer owed a duty to defend and indemnify him in actions relating to a construction accident, Fourth Department modifies trial court order and declares that insured is entitled to defense and indemnification where insurer failed to timely disclaim based upon an exclusion barring coverage for insured's own employees. Court rejects insurer's argument that it timely disclaimed shortly after the Workers' Compensation Board confirmed that injured party was insured's employee, where insurer was required to conduct its own investigation into the matter. *Wood v. Nationwide Mut. Ins. Co.*, 2007 WL 3318070 (4th Dept. November 9, 2007). **Contractual Indemnification.** In an action by insurer, as surety, against recipients of performance bonds issued in connection with a construction project, Fourth Department reverses order denying surety's claim for contractual indemnification from defendants for certain expenses incurred during litigation on the bonds. Where surety and defendants entered into an agreement pursuant to which defendants agreed to indemnify surety for losses and expenses incurred in connection with the bonds, surety is entitled to recover reasonable legal fees in litigation surrounding the bonds. *Hartford Fire Ins. Co. v. Edgewater Const. Co., Inc.*, 2007 WL 3318228 (4th Dept. November 9, 2007). **Contractual Limitations Clause.** In an action by insured to recover under the terms of its policy, First Department affirms the dismissal of insured's complaint where insurer conclusively established that plaintiff's action was commenced after the policy's two-year limitations period. Court rejects insured's contentions that they were unaware of the limitations clause, or that insurer had a duty to bring the clause to insured's attention. Court holds that insurer's participation in settlement negotiations is alone insufficient to prove waiver or estoppel. *Beekman Regent Condominium Ass'n v. Greater New York Mut. Ins. Co.*, 2007 WL 3291604 (1st Dept. November 8, 2007). **UM Coverage.** First Department holds it was error to exercise personal jurisdiction over foreign insurance company not licensed in New York, with no offices in New York, and no agents soliciting business in New York. Fact that insured occasionally drove the vehicle in New York was insufficient to find that the insurer was doing business in New York. *American Transit Ins. Co. v. Hoque*, 2007 WL 3293733 (1st Dept. November 8, 2007). **First-Party No-Fault — Timely Denial.** In an action to recover no-fault medical payments, Second Department affirms summary judgment in favor of provider where it submitted evidence demonstrating that insurer received proof of the claims and failed to pay the bills or issue a denial of claim form within the requisite 30-day period, and insurer failed to raise an issue of fact whether provider failed to respond to insurer's verification requests because affidavit submitted in opposition to provider's motion were not based upon personal knowledge. *Westchester Medical*

Center v. Countrywide Ins. Co., 2007 WL 3407105 (2d Dept. November 13, 2007). First-Party No-Fault ‐ Specificity of Denial. Second Department affirms denial of provider's motion for summary judgment, rejecting argument that provider's timely dismissal was not sufficiently specific. Westchester Medical Center v. Allstate Ins. Co., 2007 WL 3307373 (2d Dept. November 7, 2007). First-Party No-Fault ‐ Timing of EUO/Evidence of Medical Necessity. Court rules that insurer must conduct an EUO within the time it has to pay or deny a claim, just as insurers are obligated to conduct medical examinations during such time frame. However, court denies provider's summary judgment motion based on failure to provide evidence of when request for verification received. However, court finds that insurer failed to provide any evidence that request for verification was timely mailed, and that time to pay or deny claim was never tolled. Regardless of timeliness of EUO, court grants judgment to provider after trial, finding that insurer's expert did not provide persuasive evidence that the services were not medically necessary. All-Boro Medical Supplies, Inc. v. Progressive Northeastern Ins. Co., 2007 WL 3313888 (Civ. Ct. November 6, 2007).

First-Party No-Fault ‐ Overpayment of Benefits. In a dispute between an injured plaintiff and his insurer after plaintiff collected an overpayment of no-fault benefits, Third Department affirms an order granting insured's motion to require insurer to accept a sum certain in full satisfaction of its claim for the overpayment. Where insurer and insured agreed that insured would accept a lien on his personal injury action in the amount of \$10,000 in satisfaction of insurer's claim, insurer could not later seek \$19,000 from insured after insurer completed a more thorough investigation of the overpayment. The prior agreement was clear, the product of mutual accord, and contained all the material terms. *Palmo v. Straub*, 2007 WL 3377236 (3d Dept. November 15, 2007).