

## Week of November 7, 2007

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**Reasonable Belief in Nonliability.** In action by insured contractor against insurer seeking a declaration that insurer was obligated to defend and indemnify it in an underlying personal injury action, Second Department reverses order granting summary judgment in favor of insurer where insured had delayed two years in reporting the underlying accident. Court holds that while insurer made a prima facie showing of entitlement to judgment as a matter of law based upon the insured's two-year delay, a triable issue of fact existed regarding insured's belief in nonliability where insured was not named as a defendant in the underlying action until the injured party filed an amended complaint shortly before insured put insurer on notice. *St. James Mechanical, Inc. v. Royal & Sunalliance*, 2007 WL 3196912 (2d Dept. October 30, 2007). **Common-law Indemnification.** In an action brought on behalf of workers killed during the installation of a boiler, First Department modifies order to deny summary judgment on owner's and subcontractor's respective claims for common-law indemnification. In a decision with little factual background, court holds that motions for summary judgment were premature since no allocation could be made prior to the resolution of factual issues concerning liability. *Rivera v. Ambassador Fuel and Oil Burner Corp.*, 2007 WL 3205325 (1st Dept. November 1, 2007). **Contractual Indemnification.** In a labor law action arising from a scaffold accident, First Department affirms those parts of an order: (1) denying owner's cross-motion for summary judgment on its claims for contractual indemnification against scaffold design subcontractor and scaffold erection subcontractor; and (2) denying scaffold design subcontractor's cross-motion for summary judgment on its claims for contractual indemnification against scaffold erection subcontractor. Owner's and scaffold design subcontractor's motions were properly denied where issues of fact remain as to whether plaintiff's injuries arose out of dismantling the scaffold or the performance of other work under the scaffold design subcontractor's and scaffold erection subcontractor's respective contracts. *Balbuena v. New York Stock Exchange, Inc.*, 2007 WL 3208578 (1st Dept. November 1, 2007). **Insured Location.** Second Department reverses trial court's denial of insurer's motion for summary judgment, and grants summary judgment to insurer where policy unambiguously limited coverage for locations where the insured resided. Court rejects argument that language "where you reside" does not modify the entire definition of "residence premises." *Marshall v. Tower Ins. Co. of New York*, 2007 WL 3208816 (2d Dept. October 30, 2007). **Broker Liability - Additional Insured Coverage.** Second Department affirms granting of motion to dismiss in favor of insurance broker in action by a contractor that was denied additional insured coverage by the broker's client's carrier. Court finds that putative additional insured was not in privity of contract with broker, nor did it allege fraud or collusion sufficient to plead a cause of action against the broker. Court also rejects argument that putative additional insured was an intended third-party beneficiary of the contract between the broker and its client. *Griffin v. DaVinci Development, LLC*, 2007 WL 3209346 (2d Dept. October 30, 2007). **Broker Liability.** Court grants summary judgment in favor of broker in action by insured for failure to procure insurance. Insured, a contractor, was impleaded in a Labor Law action arising out of the death of one of its employees. Its insurer disclaimed based on an exclusion for injuries to employees. Insured sued broker, claiming that broker failed to procure coverage for insured's contractual indemnification obligation. Court rejects insured's claims, finding no evidence that insured ever requested such coverage or advised broker of the insured's contractual obligations. Court also rejects argument that broker should be liable for failure to procure additional insured coverage where broker did forward the request to the wholesale broker, and because there would be no coverage in any event based on the policy's exclusion for injuries to employees. *Ebro Restoration Corp. v. Frank J. Mantovi Insurance Brokerage Co.*, 2007 WL 3171457 (Sup. Ct. Queens Co. October 22, 2007). **Business Interruption Coverage.** Bankruptcy court rejects proof of loss of insured/debtor, two retail cosmetic stores destroyed or rendered inoperable as a result of the September 11 attack. Prior to the attack, insured had arranged to sell off all of its inventory and go out of business by December 24, 2001. Court finds that insured's maximum recovery, properly calculated, would be difference between what it expected to sell through December 24. Court orders insured to submit a new proof of loss, noting, however, that insured likely is entitled to little or no coverage given that insurer previously covered loss to insured's inventory. *Cosmetics Group, Ltd. v. American International Group*, 2007 WL 3197417 (Bankr. S.D.N.Y. October 24, 2007). **UM Arbitration/Duty of Cooperation.** Second Department affirms granting of permanent stay of arbitration of uninsured motorist coverage where tortfeasor's insurer failed to prove its noncooperation defense. Court finds insurer did not prove its efforts to obtain its insured's cooperation were sufficiently diligent or calculated, or that its insured's inaction constituted willful obstruction. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 2007 WL 3207058 (2d Dept. October 30, 2007). **First-Party No-Fault.** In an action to recover no-fault medical payments, court modifies order to deny provider's cross-motion for summary judgment where provider's submissions were insufficient to establish that it mailed the claim within the 180-day period prescribed by regulation. While provider submitted an affidavit of an

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employee responsible for overseeing the mailing of its billings, the affidavit did not explain the office's mailing procedures or the basis for affiant's recollection of the mailing three years later. *Westmed Physician, P.C. v. State Farm Auto Ins. Co.*, 2007 WL 3197658 (Sup. Ct. App. Term October 31, 2007).