

Week of October 31

Additional Insured Status. In action against two insurers seeking a defense in an underlying action arising from a construction site accident, Second Department modifies order granting plaintiffs' cross-motion for summary judgment declaring that both insurers owed a duty to defend plaintiffs in underlying action. The court properly determined that first insurer owed a duty to defend where its named insured could be found liable for the underlying accident. Upon a search of the record, Appellate Division modifies the order and grants summary judgment in favor of second insurer declaring that it has no obligation to provide a defense in the underlying action. That the certificate of insurance named plaintiffs as additional insureds is not sufficient to confer coverage in light of the clear language of the policy that plaintiffs are not covered under the policy as named or additional insureds. *International Couriers Corp. v. North River Ins. Co.*, 2007 WL 3146710 (October 30, 2007).

Late Notice of Occurrence. In an action by insured seeking a declaration that it was entitled to a defense and indemnity in an underlying personal injury action, First Department unanimously reverses an order denying insurer's motion for summary judgment and dismisses insured's complaint. Insurer established that insured's notice, given more than one year after the accident, was untimely as a matter of law and insured failed to raise a triable issue of fact regarding whether it had a reasonable belief of nonliability where insured was immediately aware of the accident and failed to inquire as to potential liability. *Reg-Tru Equities, Inc. v. Valley Forge Ins. Co.*, 2007 WL 3146717 (1st Dept. October 30, 2007).

Number of Occurrences. In determining whether personal injury sustained by workers employed at the same manufacturing plant resulting from exposure to a toxic substance constituted a single occurrence for the purpose of applying a deductible under a policy for products liability coverage, First Department holds that class action claims of thirty workers arose from more than a single occurrence where injuries occurred from exposure at different times and of unequal duration and where the policy defined occurrence to include "continuous or repeated exposure [to] harmful conditions" and provided that the deductible applied to injury as the result of any one occurrence, "regardless of the number of persons or organizations who sustain damages because of that occurrence." The policy could have included an explicit aggregation provision had these sophisticated parties sought to aggregate all exposure-related claims. *International Flavors & Fragrances, Inc. v. Royal Ins. Co. of America*, 2007 WL 3146945 (1st Dept. October 30, 2007).

Contractual Indemnification. In an action for personal injuries arising from a shooting on housing authority's premises, First Department unanimously affirms order denying housing authority's motion for summary judgment on its claim for contractual indemnification from security company that installed security system on premises. Security company agreed to indemnify housing authority for damages arising from the security company's work. Housing authority did not establish that locks on the premises were inoperable due to security company's work where evidence tended to show that the locks were inoperable due to vandalism. *Esteves v. City of New York*, 2007 WL 3104274 (1st Dept. October 25, 2007).

Additional Insured Status. In an action by housing authority seeking a defense and indemnity under three policies in an underlying action for personal injuries arising from a shooting on housing authority's premises, First Department modifies order to declare that the three policies at issue do not afford coverage. The housing authority was not entitled to additional insured coverage under security company's CGL or excess policy where the allegations in the underlying complaint did not fall within the covered risk of liability arising out of the security company's ongoing operations. Housing authority was not entitled to coverage under the owners and contractors protective liability (OCP) policy because the OCP policy only afforded coverage for a senior citizens' center at a different location from where shooting occurred. *New York City Housing Authority v. Merchants Mut. Ins. Co.*, 2007 WL 3104330 (1st Dept. October 25, 2007).

UM/SUM Coverage. In an action by insurer seeking a declaration that it was not obligated to provide UM/SUM coverage to insured's employee injured in a hit-and-run accident in New Jersey because employee collected workers' compensation benefits and because New Jersey law required physical contact with the uninsured vehicle, First Department unanimously reverses order and grants summary judgment in favor of employee. Unlike New York, New Jersey does not require a showing of physical contact with another vehicle to trigger uninsured motorist coverage when the identity of the offending vehicle cannot be ascertained. Appellate Division rejects insurer's interpretation of New Jersey law and holds that employee's receipt of workers' compensation benefits did not bar his claim for uninsured motorist benefits. *Atlantic Mut. Ins. Co. v. Goglia*, 2007 WL 3102271 (1st Dept. October 25, 2007).

Contractual Indemnification. In an action for personal injuries, First Department unanimously reverses order denying theater's motion for summary judgment on its claim for contractual indemnification against production company. Theater was entitled to conditional summary judgment where license agreement unambiguously set forth the parties' intention for production company to indemnify theater for injuries involving the subject floor and fogger machine. Theater established that the floor and fogger were under production company's exclusive control and the production company directed every aspect of the work through which plaintiff was injured. *Roddy v. Nederlander Producing Co. of America, Inc.*, 2007 WL 3104903 (1st Dept. October 25, 2007).

Priority of Coverage. In an action by insurer seeking a declaration that liability policy issued by third-party defendant insurer affords primary additional insured coverage to certain defendants in an underlying action, Second Department affirms order denying summary judgment on issue of priority of coverage. In order to determine the priority of coverage among different insurance policies, a court must review and consider all of the relevant policies at issue. Since all policies were not before the court, priority of coverage could not be determined. *Tower Ins. Co. of New York v. T & G Contracting Inc.*, 2007 WL 3104398 (2d Dept. October 23, 2007).

Duty to Cooperate. In an action by insurer seeking a declaration that it owed no duty to defend or indemnify insured in underlying action based upon insured's failure to cooperate, Second Department affirms order granting summary judgment in favor of insurer where insurer presented evidence that it sent the insured numerous letters regarding its discovery obligations, hired two investigators to locate and interview the insured, and submitted an affidavit

of one investigator that stated that the insured avoided all attempts by the investigator to contact him for one month. Preferred Mut. Ins. Co. v. SAV Carpentry, Inc., 2007 WL 3104757 (2d Dept. October 23, 2007). SUM Arbitration. In an action by insurer seeking to permanently stay arbitration of insured's claim for supplemental underinsured motorist benefits, Second Department reverses order granting insured's cross-motion to compel arbitration and grants petition to permanently stay arbitration. Trial court erred in denying insurer's petition where it was clear that there was no agreement to arbitrate contained in the subject policy. State Farm Mut. Auto. Ins. Co. v. Juma, 2007 WL 3105163 (2d Dept. October 23, 2007). UM Arbitration. In an action by insurer seeking to temporarily stay arbitration of a claim for uninsured motorist coverage submitted by user of insured vehicle and user's passenger, Second Department reverses order permanently staying arbitration without a hearing regarding insurance coverage for other vehicle. Where insurer produced evidence indicating that the other vehicle had insurance coverage and claimants submitted evidence showing that other vehicle's coverage was cancelled prior to the accident, an issue of fact existed requiring a framed-issue hearing to resolve the dispute, and without such a hearing, the arbitration should not have been permanently stayed. Nationwide Ins. Enterprise v. Harris, 2007 WL 3105274 (2d Dept. October 23, 2007). UM Arbitration – Resident Relative. In an action by insured's mother seeking a declaration that son's insurer is obligated to provide uninsured motorist benefits, a hearing was held before a judicial hearing officer to determine whether the mother was a resident of the named insured's household. Over mother's objections, the insurer called an investigator to testify regarding insured's statements about mother's living arrangements, and insurer introduced as evidence the corresponding investigative reports. The judicial hearing officer ruled that mother was not a resident relative of insured, and trial court subsequently granted summary judgment in favor of insurer. Second Department reverses and grants summary judgment for mother. The investigator's testimony and report were inadmissible hearsay, thus insurer failed to rebut mother's showing that she was a resident relative. Hochhauser v. Electric Ins. Co., 2007 WL 3105684 (2d Dept. October 23, 2007). First-Party No-Fault – Medical Necessity. In an action to recover no-fault medical payments, court grants summary judgment in favor of insurer dismissing providers' complaints. Where insurer denied providers' claims based upon an IME that concluded that treatment was not warranted or medically necessary, insurer was entitled to summary judgment where (1) insurer sufficiently established proof of mailing through an affidavit of insurer's director of operations detailing insurer's standard office mailing procedures, and; (2) insurer's IME report and affirmed peer review sufficiently demonstrated that provider's services were not medically necessary and "conclusive" and "conclusory" opposing affidavit was insufficient to raise an issue of fact. Presutto v. Travelers Ins. Co., 2007 WL 3146580 (N.Y. City Civil Ct. October 29, 2007).

First-Party No-Fault – Timely Denial. In an action to recover no-fault medical payments, Second Department affirms summary judgment in favor of insurer dismissing provider's cause of action based upon insurer's untimely denial where insurer sufficiently demonstrated that it timely requested additional information to verify provider's claim, and when provider failed to respond, that insurer made a timely follow-up request. Since the requested verification was not provided, the 30-day period within which insurer was obligated to pay or deny the claim did not begin to run. Hospital for Joint Diseases v. New York Cent. Mut. Fire Ins. Co., 2007 WL 3105648 (2d Dept. October 23, 2007).