

Week of September 26

Coverage Litigation & Scope of Discovery. In coverage dispute regarding property damage caused by Hurricane Rita, insured brings motion to compel certain claims and underwriting information from insurer. Court grants motion to extent insured seeks identity and job description of involved underwriting and claims personnel. Court also grants motion to produce non-privileged information regarding claims policies and practices. Court denies as unduly burdensome request for all insureds making claims arising from the hurricane and disposition of such claims. Court orders parties to work together to narrow scope of request for documents and information regarding denial of certain claims. *Convermat Corp. v. St. Paul Fire and Marine Ins. Co.*, 2007 WL 27433696 (E.D.N.Y. September 18, 2007).

Retrospective Premiums. In a dispute over allegedly unpaid retrospective premiums, court denies cross-motions for summary judgment, concluding that insurer failed to submit sufficient documentation to show how premiums were calculated, and that insured failed to show that insurer was not the carrier at the time of last exposure with respect to certain claims. *Federal Ins. Co. v. ELF Aquitane Inc.*, 2007 WL 2746813 (S.D.N.Y. September 18, 2007). Broker E&O. Second Department reverses order granting broker summary judgment dismissing insured's claim of failure to procure. Broker procured insurance from a lesser-rated company that went into liquidation, causing insured to recover only a portion of its insured loss. Insured claimed it had an oral agreement with broker that broker would place coverage with an A-rated carrier. Court finds issues of fact regarding alleged agreement. *Dweck v. Friedlander Group, Inc.*, 2007 WL 2670138 (2d Dept. September 11, 2007). New York Automobile Insurance Plan & Negligent Misrepresentation. Insurer was assigned to insure transportation company through plan. In the application, insured's broker attested to accuracy of information regarding insured's transportation services. Insurer alleges it set its premium rates based on the information, which turned out to be false. Court holds that insurer sufficiently pled a cause of action for negligent misrepresentation against broker, finding sufficient evidence of a relationship nearing contractual privity. Court, however, dismisses fraud claim against broker. *Liberty Mut. Ins. Co. v. Wawa Tours, Inc.*, 2007 WL 2743500 (E.D.N.Y. September 19, 2007). Insurance Law § 3420(d). In insured's action against excess insurer seeking a declaration of insured's entitlement to indemnification in an underlying wrongful death case, Second Department affirms summary judgment in favor of excess insurer where insurer explained that its 42-day delay in disclaiming on late notice grounds resulted from the need to investigate the timing of insured's first notice to insurer. *Tully Construction Co., Inc. v. TIG Ins. Co.*, 2007 2782066 (2d Dept. September 25, 2007). Late Notice. In an action by insured against insurer seeking a defense and indemnity in an underlying personal injury action, First Department affirms summary judgment in favor of insurer where insured's first notice to insurer was two years after the occurrence. Without providing any analysis of insured's defenses, court concludes that insured's claimed belief in nonliability was unreasonable under the circumstances. *Macro Enterprises, Ltd. v. QBE Ins. Corp.*, 2007 WL 2728485 (1st Dept. September 20, 2007). First-Party No-Fault & Fraudulent Formation. In an action to recover assigned first-party no-fault benefits, court dismisses provider's claims on insurer's motion. Court denies insurer's motion for summary judgment on grounds that independent contractors, not provider's employees, provided the subject medical services. Testimony and tax forms submitted by provider raised issue of fact regarding whether medical professionals were acting as independent contractors or as employees at the time of the subject medical services. However, court grants insurer's motion for summary judgment based upon provider's alleged fraudulent formation where numerous prior courts concluded that qualified medical professionals did not own stock in the provider at the time of formation. *Multiquest, P.L.L.C. v. Allstate Ins. Co.*, 2007 WL 2729253 (Dist. Ct. Nassau Co. September 20, 2007). Standstill Agreements. In insurer's action against its insured involving insurer's obligations in underlying claims, First Department reverses order denying insured's motion to dismiss the complaint. Where insurer filed the action four days prior to the expiration of the standstill agreement, and the parties previously agreed that the remedy for all breaches would be dismissal without prejudice, majority holds that contractual remedy applied to insurer's breach and dismissal was warranted. Two justices dissented on grounds that insurer's breach was immaterial. *OneBeacon Ins. Co. v. NL Industries, Inc.*, 2007 WL 2701938 (1st Dept. September 18, 2007). UM Arbitration/Late Notice of Claim. In an action to stay arbitration of a claim for underinsured motorist benefits, Second Department affirms order granting the petition and permanently stays arbitration. In a decision providing no analysis, Appellate Division holds that insured failed to provide insurer with notice of his underinsured motorist claim as soon as practicable. *Liberty Mutual Ins. Co. v. Rapisarda*, 2007 WL 2729452 (2d Dept. September 18, 2007). UM Coverage & Cancellation/Right of Review. In an action to permanently stay arbitration of an uninsured motorist claim, Second Department reverses order granting the petition where premium finance agency with power of attorney cancelled alleged tortfeasor's policy due to his failure to make required payments without advising him that he had a right to have the NYAIP review the policy cancellation. Court holds that the trial court erred in granting the petition where there was no such notice requirement imposed by statute or NYAIP rule at the time the premium finance company cancelled the policy. *AIU Ins. Co. v. Rodriguez*, 2007 WL 2729592 (2d Dept. September 18, 2007). SUM Arbitration & Collateral Estoppel. In an action to stay arbitration of a SUM claim, Second Department reverses order granting the petition and permanently stays arbitration. Insurer denied SUM benefits on the basis that the insured failed to exhaust all other coverage available for the underlying accident because coverage was still available from a second insurer. Second insurer and insured argued that insurer could not join second insurer where insurer was collaterally estopped from challenging second insurer's previously-litigated disclaimer to insured. Second Department holds, in a decision with little analysis, that insurer demonstrated that it was not afforded a full and fair opportunity to contest second insurer's disclaimer, thus collateral estoppel was not properly applied. *New York Central Mut. Fire Ins. Co. v. Steiert*, 2007 WL 2729430 (2d Dept. September 18, 2007). First-Party No-Fault & Timely Denial. Court affirms dismissal of provider's complaint where insurer sufficiently demonstrated

that it timely sought additional verification relative to provider's claim. Where provider conceded that it did not provide the additional information requested, provider's claim was premature and dismissal was appropriate. *Westchester Medical Center v. Progressive Cas. Ins. Co.*, 2007 WL 2728755 (2d Dept. September 18, 2007). See also *AVA Acupuncture, P.C. v. GEICO General Ins. Co.*, 2007 WL 2701236 (Sup. Ct. App. Term September 14, 2007) (dismissing provider's claims upon insurer's showing that it timely mailed denial of claim forms).

First-Party No-Fault & Severance of Claims. Court denies insurer's unopposed motion to sever two claims brought by the same no-fault plaintiff-assignee arising out of the services of two unrelated assignors. Where case only involved two different assignors and two different accidents, the court declined to exercise its discretion to sever where case would not be unwieldy or confusing to the trier of fact. *Annette Medical, P.C. v. State Farm Mut. Auto. Ins. Co.*, 2007 WL 2729247 (Dist. Ct. Nassau Co. September 18, 2007).

First-Party No-Fault. Court affirms summary judgment in favor of provider where provider made an evidentiary showing that the prescribed statutory billing forms were mailed and received and that payment of no-fault benefits was overdue and, in response, insurer failed to raise a triable issue of fact. *New York Presbyterian Hosp. v. Selective Ins. Co. of America*, 2007 WL 2729404 (2d Dept. September 18, 2007).

Contractual Indemnification/Duty to Procure. In an action to recover damages for breach of contract, Second Department modifies order granting summary judgment dismissing flight support company's claims for contractual indemnification against aircraft cleaner, and awarding flight support company's insurance carrier all of flight support company's defense costs for aircraft cleaner's breach of its obligation to procure insurance naming the flight support company as additional insured. Trial court correctly determined that aircraft cleaner had no obligation to indemnify flight support company after trial court dismissed all of plaintiff's causes of action against flight support company that touched on such obligations. However, Appellate Division deletes the provision of the order directing aircraft cleaner to pay flight support company's insurance carrier for flight company's defense costs. Such an award was premature where insurer was not a party to the action, and the action had not yet been finally resolved. *Netjets, Inc. v. Signature Flight Support, Inc.*, 2007 WL 2729405 (2d Dept. September 18, 2007).

First-Party No-Fault & Insured Vehicle. In an action to confirm an arbitration award of assigned first-party no-fault benefits, court affirms order vacating the award where insurer was not given notice of a workers' compensation hearing where the workers' compensation board determined that the assignor was not injured in the course of his employment. Where a party is not afforded an opportunity to participate in a hearing before the workers' compensation board, that party is not bound by the board's determination. *Lutheran Medical Center v. Hereford Ins. Co.*, 2007 WL 2729440 (2d Dept. September 18, 2007).

First-Party No-Fault & Improper License. In an action to recover assigned first-party no-fault benefits, court affirms order denying provider's motion for summary judgment where provider failed to offer any evidence to refute insurer's allegation that provider may be improperly licensed and thus ineligible to receive reimbursement of no-fault benefits. *PDG Psychological, P.C. v. State Farm Mut. Ins. Co.*, 2007 WL 2701259 (Sup. Ct. App. Term September 14, 2007).

First-Party No-Fault & Fraudulent Incorporation. Court reverses summary judgment in favor of provider and grants summary judgment to insurer. Court finds that defense of fraudulent incorporation cannot be waived by not being raised in claim denial, and applies regardless of date of services. Court finds proof was sufficient to show that purported owner was not an owner or member, or compensated as such. Court also observes that fraudulent incorporation defense applies to professional services LLCs. *Multiquest, P.L.L.C. v. Allstate Ins. Co.*, 2007 WL 2682879 (Sup. C. App. Term September 12, 2007).

First-Party No-Fault & Priority of Payments. Claimant submitted no-fault bills to her own auto insurer, although she was driving a rental vehicle at the time. Court finds that insurer failed to rebut presumption of coverage based on its failure to submit the policy at trial. Court observes it is possible the policy would have provided coverage for a temporary rental. However, court holds that issue is one of priority of payment between rental company and insurer, and that matter is subject to mandatory arbitration. *Ave T MPC, Corp. v. Progressive Ins. Co.*, 2007 WL 2701278 (Civ. Ct. Queens Co. September 5, 2007).

First-Party No-Fault & Independent Contractors. In a dispute over no-fault services performed by dental PCs owned and operated by one dentist, court denies insurers' motion for summary judgment, finding an issue of fact regarding whether services were performed by employees or independent contractors. However, court rules that services admittedly performed by certain independent contractors are not recoverable. *Perfect Dental, PLLC v. Allstate Ins. Co.*, 2007 WL 2687664 (E.D.N.Y. September 10, 2007).