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## THE INSURANCE DEFENSE UPDATE

### Appellate Division Upholds Insurer's Disclaimer of Liability

*LeHigh Const. Group, Inc. v. Lexington Ins. Co.*, 70 AD3d 1430 (4th Dept 2010)

The matter of *LeHigh Const. Group, Inc. v. Lexington Ins. Co.*, is a declaratory judgment action in which the named plaintiff, LeHigh Construction Group ("LeHigh"), sought a determination that Lexington Insurance Company ("Lexington") was obligated to defend and indemnify it in connection with an underlying personal injury action. In the underlying action, a worker was injured during the construction and renovation of a church during January, 2004. The injured worker commenced suit for his injuries in January, 2007, and immediately, thereafter, served LeHigh as a named defendant in that action.

LeHigh's commercial liability carrier relative to the work it performed on the church was Lexington. Lexington's insurance policy required that LeHigh give it notice of any occurrence or claim "as soon as practicable". LeHigh, however, did not provide Lexington any notice of the underlying action or claim until April, 2007. As a result of what Lexington determined was untimely notice, the carrier issued a letter of disclaimer in May, 2007, stating that it would neither defend nor indemnify LeHigh in that action. LeHigh, thereafter, commenced the instant suit seeking a determination that it was entitled to coverage in the underlying personal injury action.

LeHigh argued that its late notice was reasonable because it was, in fact, only a "pass through" defendant in the underlying action, and its good faith belief in nonliability should serve as a reasonable excuse for its failure to provide timely notice of the claim. Lexington, however, maintained that an unexcused "three-month delay is unreasonable as a matter of law," especially where LeHigh has provided notice of the claim to its excess carrier shortly after being served in January, 2007.

The Appellate Division, Fourth Department, ultimately determined that LeHigh's assumption that the other parties would ultimately bear responsibility for the injured worker's injuries was an insufficient excuse for its failure to provide Lexington with timely notice of the underlying claim. As such, the Court concluded that Lexington's notice of disclaimer was timely as a matter of law, and dismissed LeHigh's complaint.



### Questions of Fact Preclude Determination on Duty to Defend and Indemnify

*Short v. Progressive Northwestern Ins. Co.*, 70 A.D.3d 1514 (4th Dept. 2010)

The plaintiff in this action initiated suit against the defendant insurer seeking a declaration that it was obligated to defend and indemnify him in connection with a motor vehicle accident that occurred when the plaintiff was driving a vehicle owned by his girlfriend's father. The plaintiff's friend, a passenger in the vehicle, sustained a serious brain injury as a result of the accident, and an action was commenced to recover for those injuries.

Subsequent to the underlying personal injury suit being initiated, the plaintiff placed the insurer for the vehicle he was driving, Progressive, on notice of the accident, but Progressive disclaimed coverage on the grounds that the notice it had received was untimely. The trial court ruled that questions of fact concerning when notice was received precluded a grant of summary judgment in favor of the defendant.

The Appellate Division affirmed the lower court's ruling. It determined that there existed triable issues of fact as to when Progressive was provided notice of the accident and whether such notice was given "within a reasonable time under all the circumstances." As such, summary judgment in favor of the insurer was not appropriate.

## Volunteer Firefighter Denied SUM Coverage

*Gallaher v. Republic Franklin Ins. Co.*, 70 A.D.3d 1359 (4th Dept 2010)



In the matter of *Gallaher v. Republic Franklin Ins. Co.*, a volunteer firefighter commenced a declaratory judgment action against the insurance carrier that issued a supplementary uninsured motorist (“SUM”) policy to the volunteer fire department for which he worked.

After being called to and arriving at the site of an emergency, the plaintiff exited his fire truck and began to direct traffic away from the scene of the motor vehicle accident to which he was responding. While directing traffic away from the accident, the plaintiff was struck by another vehicle. The plaintiff subsequently made a SUM claim against the department’s insurance carrier, but was denied coverage on two separate grounds.

The SUM endorsement issued by the defendant insurer defined the “insured” as “[y]ou, as the named insured” and “[a]ny other person while occupying . . . [a] motor vehicle insured for SUM under this policy.” The SUM endorsement also defined “occupying” as “in, upon, entering into, or exiting from a motor vehicle.” Based on the fact that the policy defined the “insured” as the volunteer fire department itself, as well as the fact that the plaintiff was injured while outside of the firetruck while directing traffic, the defendant disclaimed coverage.

Upon addressing these issues during a summary judgment motion, the trial court agreed with the defendant that the plaintiff was not a named insured, but determined there were questions of fact as to whether he fit within the occupant language of the policy. On appeal, the Fourth Department affirmed the lower court’s determination that the plaintiff was not a named insured, but it reversed the remainder of the lower court’s decision concerning the perceived questions of fact as to “occupancy.” The Appellate Division determined that the plaintiff had unequivocally exited the vehicle, in as much as he was directing traffic at the time of his accident, and, therefore, could not be considered an occupant entitled to coverage under the SUM policy.

## Medical Report That Did Not Quantify Limitations Deemed Qualitatively Sufficient

*Byong Yol Yi v. Canela*, 70 AD3d 584 (1st Dept. 2010)

In the matter of *Byong Yol Yi v. Canela*, the plaintiff did not sustain a serious injury within the meaning of no-fault law under 90/180-day category where he was not confined to bed and home and had returned to work within the first month after the accident. Because plaintiff’s doctor reported that plaintiff sustained only limitations to his spine in the accident and not a total loss of use, he was unable to establish permanent loss of use. With regard to whether plaintiff suffered cervical and lumbar changes from the subject accident, the court found an issue of fact to exist. Despite that defendant’s doctor opined that such changes were age-related, plaintiff’s doctor held the opinion that there was a causal relationship between plaintiff’s accident and his neck and back pain. In reaching this conclusion, the plaintiff’s doctor performed objective tests, and did not rely solely on MRIs showing bulging and herniated discs. Even though plaintiff’s doctor did not quantify all the limitations in plaintiff’s range of motion, his report was sufficient on a qualitative basis. Unfortunately, defendant did not preserve his arguments that plaintiff’s doctor did not show limitations in plaintiff’s spine contemporaneous with the 2006 accident and that there was a gap in treatment, so the court declined to consider those arguments.



## SERIOUS INJURY CASE UPDATES

*Casimir v. Bailey*, 70 AD3d 994 (2d. Dept. 2010) – **Bulging or Herniated Discs**

The Second Department reversed the lower court and dismissed the complaint on the grounds that defendant met his prima facie burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d) as a result of the subject accident and plaintiff failed to raise a triable issue of fact. Plaintiff’s medical experts failed to address the findings of defendant’s radiologist who concluded the bulging and herniated discs observed in plaintiff’s cervical and lumbar spine MRIs were degenerative in nature and unrelated to the subject accident. Consequently, the conclusions of plaintiff’s experts that the injuries and limitations noted during their respective examinations were the result of the subject accident were speculative. The court reiterated that the mere existence of a herniated or bulging disc is not evidence of a serious injury absent any other evidence as to the extent of the resulting limitations and their durations. Plaintiff offered no such evidence in opposition to defendant’s motion.

*Noh v. Duffe*, 70 AD3d 1017 (2d Dept. 2010) – **Subjective Complaints**

The Second Department affirmed that subjective complaints of range of motion limitation and pain, without any verified, objective medical evidence in substantiation, cannot defeat a prima facie showing by the defendant that neither plaintiff sustained a serious injury within the meaning of Insurance Law 5102(d) as a result of the subject evidence. Defendant submitted affirmed reports of a neurologist, an orthopedist, and a radiologist, as well as plaintiffs' own deposition testimony to support her motion.



*Daly-Caffrey v. Licausi*, 70 AD3d 884 (2d Dept 2010) – **Leave to Replead Denied**

Plaintiff sought to add a new injury to the bill of particulars which had not been mentioned previously, and which did not appear in the medical records until nearly a year after the date of the accident. The court denied her leave to amend stating there must be both an explanation for the delay and a medical affidavit showing a causal connection between the accident and the alleged injury. Because this was missing, the trial court erred in granting leave.

*Benitez v. Lashnitz*, 70 AD3d 879 (2d Dept 2010) – **Chiropractic Affidavit Sufficient**

Plaintiff defeated defendants' motion for summary judgment by submitting an affidavit of her treating chiropractor which was based on contemporaneous and recent examinations and causally related plaintiff's permanent lumbar and cervical injuries to the subject accident.

**Plaintiff Worker's Decision to Voluntarily Jump From a Height does Not Constitute a Labor Law 240(1) Violation**

*Fenty v. City of New York*, Slip Op 01839 (1st Dept 2010)

In *Fenty v. City of New York*, Slip Op 01839 (1st Dept 2010), a plaintiff commenced an action for violations of Labor Law Sections 240(1) and 241(6) for personal injuries sustained when he jumped from a bucket lift in order to avoid hot steam which had emanated from a ruptured pipe. On defendant's motion for summary judgment, the Court dismissed the plaintiff's 240(1) claim finding that the plaintiff's injury-producing accident was not attributable to the risk arising from the elevation differentials at his worksite which brought about the need for the safety device required under the Labor Law. Rather, it was the plaintiff's decision to jump as a result of the separate and unforeseeable hazard of steam emanating from the ruptured pipe which caused his accident. The Court similarly dismissed the plaintiff's 241(6) claim because the work being conducted at the time of the accident did not constitute demolition work, as required for application of the relied upon section of the Industrial Code, 12 NYCRR § 23-3.2(a)(2). The First Department affirmed the lower court's findings.

**The Court of Appeals Finds that Plaintiff Who Was Carrying a Heavy Reel Whose Weight Caused Him to be Injured Has a Valid Claim Under the Scaffolding Law**

*Runner v. New York Stock Exchange, Inc.*, 13 NY3d 599 (2009)

In *Runner v. New York Stock Exchange, Inc.*, 13 NY3d 599 (2009), a plaintiff was injured while moving a large reel of wire down a set of four stairs. A rope tied to the reel was wound around a horizontal bar held in a door jam, with the plaintiff holding the other end of the rope. The plaintiff and his co-workers were acting as a counterweight, but their weight was insufficient to counter the force of the downward-directed reel. As the reel descended, it pulled the plaintiff and his fellow workers toward the metal bar. Plaintiff was subsequently drawn into the bar, injuring his hands as they jammed against the bar. The Court of Appeals held that the injury-producing risk was a risk contemplated by the scaffolding law. The Court found that Labor Law § 240(1) does not require that the plaintiff fell from one level to another or that a falling object struck the plaintiff. The movement of the reel created a gravity-related risk. The danger in this case "plainly arose from the force of the very heavy object's ... descent", which was sufficient to invoke the statute.

