

LEGAL NEWS IN BRIEF

News in a flash for Subrogation
and Defense Adjusters

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LOJM WINS APPEAL ON DAMAGES

**Pomerantz Paper Corp. v. New
Community Corporation**
New Jersey Appellate Division
Docket No. A-3334-07T2
(July 1, 2010)

Plaintiff, a supplier of paper goods, janitorial products and maintenance supplies, appealed its award for damages in its breach of contract claim against a corporation for non-payment of delivered goods. The Appellate Division invoked the Uniform Commercial Code's requirement that a buyer must pay for goods accepted without objection or otherwise properly reject any deficient or non-conforming goods within a reasonable period of time. Plaintiff's driver would habitually obtain a signed slip upon delivering the merchandise, after which Defendant's employees would later determine which items had actually been received. Defendant's oral notification of rejection or non-delivery, allegedly part of the usual course of business, was insufficient, because it did not refute the signed acceptance slips.

PUNITIVE DAMAGES

Ricca v. Cravello
New Jersey Appellate Division
Docket No. A-1949-08T3
(February 22, 2010)

The Appellate Division struck down the trial jury's award of punitive damages to a plaintiff who had sustained damages in an automobile accident. Punitive damages, as codified in N.J.S.A. 2A:15-5.9 to -5.17, are permitted when harm, proven by clear and convincing evidence, is caused by Defendant's "actual malice" or Defendant's acts or omissions are "accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts and omissions." Here, Plaintiff presented police officers' testimony that Defendant appeared intoxicated at the scene; however, Plaintiff only offered as aggravating factors evidence that Defendant was speeding and passing on the right. Without factors such as a serious history of alcoholism, such intoxication does not rise beyond gross negligence to warrant punitive damages.

ENTIRE CONTROVERSY

Johnson v. Allstate Ins. Co.
New Jersey Appellate Division
Docket No. A-4757-08T2
(June 9, 2010)

Plaintiff appealed from an order of summary judgment entered against him in an action against his insurer for uninsured motorist (UM) benefits. Initially, Plaintiff filed a PIP claim and a lawsuit against the truck driver and company whose vehicle rear-ended Plaintiff. At trial, Plaintiff testified that a phantom vehicle changed lanes in front of the adverse driver, causing said driver to collide with Plaintiff to avoid striking the phantom vehicle. Plaintiff had mentioned the phantom vehicle to the police at the time of the accident but not in his interrogatory responses. After the jury entered a no cause of action verdict, Plaintiff filed a UM claim with his insurer. Because Allstate would not consent to arbitration, Plaintiff sued. The court upheld the judgment, invoking the entire controversy doctrine, which bars a successive action against a person or entity not a party to the initial suit or

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at least unmentioned in Plaintiff's certification pursuant to R. 4:5-1(b)(2) as to any additional, potentially liable parties. Plaintiff's early allegation of a phantom vehicle without notifying Allstate of any UM claim for five years constituted inexcusable conduct and substantially prejudiced said insurer by causing Allstate to forfeit its now time-barred subrogation right.

EXCLUSION

Fruit & Vegetable Supreme v. The Hartford Steam

New York Supreme Court,
Kings County
2010 NY Slip Op 20267
(July 7, 2010)

The New York Supreme Court determined that, pursuant to an "equipment breakdown" insurance policy, defendant insurer was only obligated to cover losses to the insured's equipment which occurred immediately prior to the power outage that affected the Northern U.S. in August, 2003. Defendant's policy provided coverage in case of an "accident," defined as a mechanical breakdown or artificially generated electrical current. The policy excluded instances of a "tripping off line." Here, the New York State Public Service report, submitted as evidence, established that the local distribution system's malfunction attributed to a tripping off line which occurred on the transmission system interconnecting a large geographic area.

AFFIDAVIT OF MERIT

Waller v. Lomax New Jersey Appellate Division Docket No. A-0955-09T1 (July 8, 2010)

A New Jersey title insurance agency successfully moved to dismiss pleadings which alleged that said agency failed to deliver funds to Plaintiffs, including proceeds from the sale of real property. Plaintiffs failed to timely serve the agency, a licensed professional, with an affidavit of merit pursuant to N.J.S.A. 2A:53A-27, required in such cases for professional malpractice or negligence. No attorney represented any of the parties in the underlying transaction; for that reason, Plaintiffs needed to file such an affidavit, which would be likewise required in a suit against an attorney under similar circumstances.

UIM

Christie v. Amer. Intl. Ins. Co. New Jersey Appellate Division Docket No. A-0642-09T3 (July 13, 2010)

The Appellate Division upheld dismissal of an insured's suit against his UIM carrier after the insured received an award of \$65,000 at arbitration, reduced by the \$50,000 policy limits which Plaintiff had recovered from the adverse driver's insurer. Plaintiff's

UIM policy provided that an arbitration decision is binding only if the amount of damages does not exceed the minimum limit for liability specified by the New Jersey financial responsibility law, i.e. \$15,000. Defendant successfully argued that the policy language is unambiguous; "damages" applies only to actual additional payments resulting from the arbitration proceeding.

MALPRACTICE

Matter of Kemper Mut. Ins. Co. v. Russell

New York Appellate Division
2010 NY Slip Op 5847
(July 1, 2010)

Respondent unsuccessfully sought supplemental uninsured/underinsured motorist (SUM) coverage from her insurer after recovering the full limit of the adverse driver's automobile liability insurance in her malpractice suit against her attorneys, who had failed to timely file a personal injury suit on her behalf for the underlying accident. The Appellate Division reasoned that SUM coverage is obligatory when the bodily injury liability insurer's limits exceed those of the adverse insurer's policy and all applicable policy limits have been exhausted. Because the adverse insurer, as primary insurer, had paid nothing in this malpractice lawsuit, Respondent was not entitled to SUM.