# LEGAL NEWS IN BRIEF

## News in a Flash for Subrogation and Insurance Professionals

**VOLUME 16, ISSUE 2**

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### INSURER NEED NOT SHOW PREJUDICE TO PROPERLY DISCLAIM DEFENSE

**<u>Templo Fuente De Vida Corp. v. National Union Fire Ins. Co.</u>**
**New Jersey Supreme Court**
**A-18-14**
**(February 11, 2016)**

Defendant insured First Independent Financial Group with a "claims made" policy, which required, as a condition precedent to coverage under the policy, "written notice to the Insurer of any Claim made against an Insured as soon as practicable." First Independent provided notice to Defendant more than six months after being served with the first amended complaint in an action against itself for failure to provide funding in a real estate transaction. The Supreme Court affirmed denial of coverage on the grounds that no reason for the delay in notifying Defendant was provided. Additionally, the language providing for disclaimer of coverage was unambiguous and did not allow for an additional requirement that Defendant show prejudice as a result of the delay. Finally, precedent requiring a showing of prejudice was distinguishable, as it applied to "occurrence-based" policies only, the insureds of which generally tend to be unsophisticated consumers who are unlettered in the fine print of adhesion contracts. ■

### FORUM SELECTION CLAUSE

**<u>TJR Construction Co. Inc. v. Selective Ins. Co. of America</u>**
**New Jersey Appellate Division**
**A-1281-14T1**
**(January 14, 2016)**

Imperium Insurance Company insured Pulte and TJR for a construction project. TJR subcontracted the work to Paixao, which was required to defend and indemnify TJR and Pulte in any litigation relating to its work on the project, and to obtain insurance naming TJR and Pulte as additional insureds with primary coverage. Paixao obtained insurance from Selective which also insured TJR and Pulte. Imperium settled a personal injury action filed in Delaware by a Paixao employee against Pulte and TJR, after Selective denied coverage on the grounds that there were no independent allegations in the complaint of negligence against Paixao. Thereafter, Imperium filed a subrogation action in NJ against Selective and Paixao. The Appellate Division held that as subrogee of its insured, Imperium steps into its insured's shoes and is therefore contractually bound by the forum selection clause in TJR's contracts with both Pulte and Paixao. Imperium cannot seek to invoke the rights of defense and indemnification created by the contracts while avoiding its obligations. ■

### MODE OF OPERATION RULE

**<u>Troupe v. Burlington Coat Factory Warehouse Corp.</u>**
**New Jersey Appellate Division**
**A-1687-14T4**
**(January 26, 2016)**

Plaintiff unsuccessfully opposed summary judgment dismissing her slip and fall complaint for injuries sustained when she slipped on a berry in an aisle of a Burlington Coat Factory outlet in a mall. Here, Defendant had no actual or constructive notice of the dangerous condition or any reasonable

opportunity to discover the berry. No eyewitnesses to the berry's existence or its characteristics, unaccompanied by the presence of anyone eating or spilling the food in the vicinity, would indicate that Defendant's employees could have been aware of the food on the floor so as to remove it in advance of Plaintiff's slip.

Plaintiff then attempted to apply the mode-of-operation rule, which would negate the burden of showing actual or constructive notice, and instead gives an inference of negligence, shifting the burden of production to Defendant to show that it did all that a reasonably prudent man would do in the light of the risk of injury the operation entailed. However, this rule applies only where the dangerous condition arises out of a component of the defendant's business in which the customer foreseeably serves himself or otherwise directly engages with products or services, unsupervised by an employee. Here, the slip and fall occurred in an aisle, not in area of clothing racks or other facilities associated with self-services activities, and there is no demonstrable nexus between such self-service in shopping for non-edible items and the risk of slipping on food in the aisle. ■

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## CAR WASH EMPLOYEE

**Guevara v. Ortega**
**New York Appellate Division**
**2016 NY Slip Op 1106**
**(February 16, 2016)**

The City of New York prevailed on appeal of its motion for summary judgment in defense of an action for injuries sustained when a car wash attendant drove the City's Police Department traffic van into Plaintiff's vehicle. Plaintiff failed to raise any triable issues of fact as to the City's negligence when the City's traffic enforcement agent allowed an unlicensed driver to drive the van for the sole purpose of having the vehicle washed; the agent did not have an affirmative duty to ask the attendant whether he had a driver's license. Additionally, Vehicle and Traffic Law §388 exempts police vehicles from vicarious liability. The provision would have no force if it were to apply only when the owner (here, the "police department") is the one actually operating the vehicle. ■

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## WAIVER OF ARBITRATION

**Newman v. NJM Ins. Co.**
**New Jersey Appellate Division**
**A-0258-15T4**
**(March 1, 2016)**

Plaintiff filed an application for UM benefits under her auto policy with NJM in 2010, and advised NJM of the name of her appointed arbitrator, John Jehl. Discovery proceeded, after which NJM advised Plaintiff that the matter was ready for arbitration. In June, 2010, Defendant's named arbitrator contacted Jehl, only to be told that Jehl had not received confirmation of his designation; Jehl contacted Plaintiff to confirm but Plaintiff failed to respond. NJM sent Plaintiff two followup letters in 2012, and a final warning letter in October, 2013, all of which remained unanswered. NJM thereupon closed the file.

On June 5, 2015, Plaintiff filed a complaint seeking to compel NJM to select a neutral arbitrator, to provide coverage to plaintiff for UM benefits, and to set a date for a UM arbitration hearing. Plaintiff failed to appear at the Order to Show Cause hearing, and in Plaintiff's absence, the Court denied the requested relief. The Appellate Division upheld the decision, finding that the three-year delay between NJM's initial followup letter and Plaintiff's June 2015 demand was "plainly excessive." Plaintiff never provided any explanation for the delay to the motion judge or for why he never responded to NJM. The totality of circumstances supported a finding that Plaintiff had waived her right to arbitration. ■

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## MOTION TO AMEND

**Camara v. Stevens Transport**
**U.S. District Court, N.J.**
**Civ. No. 14-2042 (KM) (MAH)**
**(January 8, 2016)**

The District Court affirmed a motion decision dated September 18, 2015, which granted leave for Plaintiffs to amend their complaint for wrongful death, which has a two-year SOL. Plaintiffs' son died in an automobile accident on May 31, 2013; the truck driver left the scene before the police arrived and the police was unable to provide any information about the truck in its reports. Investigations by Plaintiffs enabled them to identify and sue the vehicle owner, who delayed for seven months in providing the name of the driver. Plaintiffs thereupon filed the motion, which was granted. New Jersey's "fictitious party rule" (R. 4:26-4) permits a plaintiff to file a complaint using a fictitious name for an unknown party and to later amend the complaint to name the true party even after the limitations period has run. Plaintiffs had sufficiently described the fictitious party and exercised due diligence in obtaining that party's true name. ■

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