// LEGAL NEWS IN BRIEF

News in a flash for Subrogation and Defense Adjusters

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NEW YORK PASSES ANTI-SUBROGATION BILL: *"ARE WE IN TROUBLE" ?*

The New York State Senate and Assembly have passed an anti-subrogation bill, which is expected to be signed by Governor Paterson. Essentially, the bill says that personal injury losses may not be subrogated unless there is specific statutory authority otherwise. Although any analysis of this impending law can only be preliminary at this point, its main thrust will likely be to render health insurance claims non-subrogatable. Self-funded ERISA plans are a probable exception, because ERISA preemption will apply (ERISA preemption will likely not apply to fully-funded ERISA plans, as this bill will probably be construed as an insurance regulation, which is not preempted by fully-funded ERISA plans). PIP and Workers' Compensation recovery laws remain unchanged, since they have specific statutory authority. Additional PIP will remain subrogatable due to a specific exception in the bill. Recovery of other medical expense coverage provided through an automobile policy (e.g. MedPay and UM/UIM) will likely be prohibited. Further analysis will appear in our next newsletter.

VICARIOUS LIABILITY

Amex Assurance Co. V. Kulka
New York Appellate Division
2009 NY Slip Op 07965
(November 4, 2009)

The Appellate Division upheld the Supreme Court's denial of judgment as a matter of law to the New York Institute of Technology (NYIT) and its employee, Harriet Kulka. NYIT provided Kulka with a vehicle for her use as its employee. While Kulka and her husband were out of town, her stepson operated the vehicle and collided with a vehicle insured by Amex, which filed this **subrogation** action against all three family members. New York Vehicle and Traffic Law §388 imputes liability to any vehicle owner who gives permission, express or implied, to any person using or operating the tortfeasing vehicle. Such a strong presumption of permissive use mandates rebuttal through substantial evidence otherwise; the vehicle owner's testimony is therefore insufficient. Although the Court upheld the complaint as against NYIT and its employee, it did dismiss the complaint insofar as asserted against the operator's father as that party was neither the owner nor entrusted user of the vehicle and no evidence existed to show that he had entrusted the vehicle to his son or permitted him to use same.

INSURED'S COOPERATION

Erie Ins. Co. v. JMM Props., LLC
New York Appellate Division
2009 NY Slip Op 07715
(October 29, 2009)

Plaintiff insurer appealed the lower court's declaration that the insurer properly denied coverage to the insured limited liability company, as the court had conditioned its decision on Defendant producing its three members within 30 days. In its investigation of a fire on the defendant's premises, Plaintiff had demanded that Defendant produce documentation as well as two of its members for examinations under oath. Conflicting schedules of

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counsel postponed the examinations for several months, during which one member faced criminal charges in connection with the fire; that member's attorney informed Plaintiff that he would not be available for examination until after the conclusion of the criminal action. Later, the criminal attorney produced the charged member for examination but Plaintiff failed to give notice of its change of the examination's location. The Appellate Division acknowledged that criminal proceedings were insufficient to exempt Defendant from the insurance policy's cooperation clause, whereby the insurer can properly investigate a claim while the evidence is still fresh so as to protect itself from fraudulent claims. Nonetheless, the Court found that the totality of Defendant's conduct, including its production of all requested documentation and all three members at the outset of the investigation, alongside Plaintiff's insistence on examining two members on the same occasion, barred the extreme penalty of denying Defendant one last chance to cooperate with the terms of the insurance policy.

TITLE INSURANCE LIABILITY

N.J. Lawyers' Fund v. Stewart Title
New Jersey Appellate Division
Docket No. A-2622-07T1
(August 4, 2009)

The New Jersey Appellate Division held that a title insurance company is vicariously liable to the insured buyer for the closing attorney's misappropriation of funds where the insurer fails to send direct notice to the buyer that it is not an agent for the attorney. Service of such notice to the attorney is insufficient in itself and cannot be imputed to the buyer, who is a victim to the attorney's theft, nor can it constitute constructive notice to the buyer. Here, the title insurer failed to communicate with the buyer at any time prior to the closing, relying upon the attorney to perform legal tasks necessary to close title. Because the insurer generally deals solely with the attorney and not with the buyer in such transactions, the insurer thereby enables the attorney to mislead and otherwise harm the buyer; since the attorney acts on the insurer's behalf in carrying out essential functions in closing title, a potential conflict of interest emerges, which triggers a duty of disclosure towards the buyer. An embezzling attorney is not trustworthy so as to faithfully notify his client that its policy will not protect it from theft of funds. Notably, the title insurer's liability begins even before the attorney contacts same, because the attorney acts in the guise of title agent against the buyer's choice. Ideal service of notice upon the buyer disclaiming liability should include a signed verification from the insured buyer, acknowledging receipt of said notice.

"OCCUPATION" OF VEHICLE

Severino v. Malachi
New Jersey Appellate Division
No. A-0248-07T3, A-0299-07T3
(August 12, 2009)

This action arose out of an accident in which the driver and his friend exited the driver's fiancee's automobile and were fatally struck by a vehicle on the street. The Appellate Division held that their estates were not entitled to UIM or PIP death benefits under the fiancee's policy because the driver was not a "named insured" under said policy, nor were the decedents "occupying" the vehicle at the time they were struck. A "substantial nexus" must exist between the accident and the covered vehicle in order for the decedents to obtain coverage. In prior case law, "occupation" in similar insurance policies had been defined in slightly varying terms as "in, upon, entering into and alighting from" the insured vehicle. Unlike cases where the driver left lights on and the engine running in the vehicle, intending to return shortly, or remained standing with his arm resting on the car roof, the decedents had already left the vehicle, closed its doors, and were walking away; one passenger remained in the vehicle at that time, presumably intending to exit himself, but was not injured in the impending accident. "'[M]ere coincidental connection between the accident and some touching of the car would not be enough' to establish coverage."