# New York Insurance Coverage Law Update

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## Insurer Awarded Judgment Based Upon Earth Movement Exclusion In Homeowners Policy

Plaintiffs filed a claim under their homeowners policy, claiming that their house had been damaged by cracked walls and a basement floor that settled. The insurer disclaimed coverage based upon policy language that excluded losses due to "Earth Movement . . . earth sinking, rising or shifting" and due to the "[s]ettling, shrinking, bulging or expansion, including resultant cracking, of pavements, patios, foundations, walls, floors, roofs or ceilings." The appellate court noted that the insurer's expert and the plaintiffs' own engineers, hired to remedy the conditions, all opined that earth movement and settlement had directly or indirectly caused the property damage. It then ruled that the insurer had established its entitlement to judgment as a matter of law by demonstrating that the exclusions for "Earth Movement" and settling "clearly and unambiguously applied to the property loss experienced by the plaintiffs." *[Labate v Liberty Mut. Ins. Co., 2007 NY Slip Op 09366 (2d Dept. Nov. 27, 2007).]*

## Notice Of SUM Claim Seven Months After Accident, But Two Weeks After Discovery Of Other Parties' Limited Insurance, Deemed Timely

About seven months after a sheriff department employee was injured in a county-owned vehicle, he was informed that the other parties' insurance policy had a $100,000 liability limit. About two weeks later, the employee notified the insurance company that provided supplementary uninsured/underinsured motorist ("SUM") insurance coverage to the county about a possible SUM claim. The insurer disclaimed coverage, asserting that it had not been notified of the claim "as soon as practicable." The appellate court observed that, in the SUM context, the phrase "as soon as practicable" means that the insured must give notice with reasonable promptness after the insured knew or should reasonably have known that the tortfeasor was underinsured. Noting that the insurer had not alleged that the employee, through diligent efforts, should reasonably have discovered the limits of the other parties' policy at an earlier time, the appellate court ruled that the employee's notice of his SUM claim had been timely. *[Matter of New York Mun. Ins. Reciprocal v Mcguirk, 2007 NY Slip Op 09183 (3rd Dept. Nov. 21, 2007).]*

## NY Court Of Appeals Holds That "Serious Injury" Exclusion in Auto Policy's SUM Exclusion Is Enforceable

New York's highest court, the Court of Appeals, has ruled that a "serious injury" exclusion in a supplementary uninsured/underinsured motorist ("SUM") endorsement to an automobile liability policy is enforceable. The unanimous decision relied in part upon Insurance Department Regulation 35-D, which requires that SUM recovery be conditioned upon a finding of serious injury. *[Raffellini v State Farm Mut. Auto. Ins. Co., 2007 NY Slip Op 08777 (Nov. 15, 2007).]*

## Court Says Insurer's Disclaimer Was Late Because It Should Have Conducted Its Own Investigation To Determine If Claimant Was Insured's Employee

The insurance company disclaimed coverage based upon a policy exclusion barring coverage for injuries sustained by an employee of the insured. The insured argued that the notice of disclaimer was untimely, but the insurer asserted that it was timely because it sent it 13 days after receiving a decision from the Workers' Compensation Board determining that the injured party was the insured's employee. The court rejected the insurer's argument, finding that the insurer was not allowed to await the Board's decision before issuing a disclaimer and, indeed, "was required to conduct its own investigation into the matter, including obtaining a statement from [the insured]." *[Wood v Nationwide Mut. Ins. Co., 2007 NY Slip Op 08505 (4th Dept. Nov. 9, 2007).]*

## Insurer's Failure To Timely Request Verification Of Patient's Assignment Of Benefits To Hospital Bars It From Contesting The Validity Of The Assignment

The insurer received an NYS Form NF-5 and an assignment of benefits form from a hospital that sought to recover no fault insurance benefits for services rendered to a patient injured in a motor vehicle accident. Because the insurer did not ask for further verification or the original assignment within 15 business days or deny the claim within 30 calendar days of receipt of the hospital's proof of claim, it could not contest the validity of the assignment, the New York Court of Appeals ruled. The Court rejected the insurer's contention that the hospital's failure to proffer a validly executed assignment equated to a lack of coverage that was not subject to preclusion. *[Hospital for Joint Diseases v Travelers Prop. Cas. Ins. Co., 2007 NY Slip Op 09067 (Nov. 20, 2007).]*

## More Than Three Month Delay In Notifying Insurer Dooms Claim

Plaintiff's failure to provide notice to its insurer until March 16, 2004 of an alleged accident it knew about no later than December 2, 2003 was "unreasonable as a matter of law." *[Evangelos Car Wash, Inc. v Utica First Ins. Co., 2007 NY Slip Op 09201 (2d Dept. Nov. 20, 2007).]* ■

*Happy Holidays!*

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