

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IA Part 15  
Justice

PETER BIONDO, x

Plaintiff,

- against -

THE TRAVELERS INDEMNITY COMPANY, et al.

Defendant.

Index  
Number 9092/1997

Motion  
Date June 3, 2003

Motion  
Cal. Number 2

x

The following papers numbered 1 to 14 read on this motion by the defendant The Travelers Indemnity Company, (hereinafter "Travelers"), for an Order granting summary judgment dismissing the complaint as against it, and for the issuance of a declaration that Travelers is not obligated to defend or to indemnify the plaintiff-insured Peter Biondo, (hereinafter "Biondo"), the defendant in a pending action entitled *Nicholas Mendolia and Josephine Mendolia v. Peter J. Biondo* ; and a cross-motion by plaintiff-insured Biondo for an Order granting summary judgment on his complaint, and for the issuance of a declaration that Travelers is obligated to defend and to indemnify Biondo, the defendant in a pending action entitled *Nicholas Mendolia and Josephine Mendolia v. Peter J. Biondo*.

Papers  
Numbered

Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Memorandum of Law in Support of Motion.....	5
Notice of Cross Motion-Affirmation-Exhibits-Service	6 - 9
Movant's Reply and Opposition to Cross-Motion.....	10 - 12
Reply .....	13 - 14

Upon the foregoing papers it is ordered that the motion is decided as follows:

This application presents three issues of coverage under a policy of insurance issued by Travelers. The first issue is the efficacy of the defendant's disclaimer of coverage in the underlying personal injury action based upon Travelers' position that the incident was intentional conduct on the insured's part, rather than an "occurrence" arising from an "accident". The second issue is whether the insured breached the timely-notice condition of the subject policy. Notwithstanding any breach of the timely-

notice provision by the insured, the third issue is whether, given the circumstances, Travelers timely disclaimed coverage.

### Background and Facts

On April 12, 1996, plaintiff-insured Peter Biondo, who was then 53 years old, 6'1" tall and weighed 210 pounds, approached his neighbor, Nicholas Mendolia, who was then 85 years old, 5'6" tall and weighed 118 pounds, to ask Mendolia to have his wife stop scraping dinner plates out the window because it was drawing vermin to the garden apartment complex in which they both resided. The two apparently exchanged words. The parties offer differing versions of what transpired next. Biondo testified that Mendolia stood up and grabbed his jacket with both hands, whereupon Biondo stepped back reflexively, causing Mendolia's weight to fall upon him. He then pushed Mendolia in order to knock Mendolia's hands off the grasp he had on Biondo's jacket. Mendolia testified that the insured Biondo, without provocation or warning, shoved him to the ground. Mendolia fell to the ground after Biondo pushed him. Biondo stated that when Mendolia fell, Biondo bent down to help him, but Mendolia told him to get away, and he immediately withdrew. An ambulance arrived at the scene, and within an hour after the incident, police officers arrived at Biondo's door. Several days later, Biondo was arrested and charged with Assault in the Second Degree. Biondo subsequently plead guilty to reckless Assault in the Third Degree. Biondo was served with a Summons and Complaint in the underlying action in which Mendolia was a plaintiff on or about October 17, 1996. On or about October 18, 1996, Biondo notified his broker of the lawsuit. Travelers received this notice on or about October 21, 1996, over 6 months after the incident. It is undisputed that this was the first notice Travelers had with respect to the claim. On November 18, 1996, (28 days later), Travelers disclaimed coverage on the ground that the subject incident was not a covered "occurrence" under the policy, and also based upon the insured's untimely notice of the incident.

#### A. The "No Occurrence-Intentional Act" Issue

The Court notes that the policy in question does not contain an explicit assault and battery exclusion. The Court of Appeals and the Appellate Divisions have given such exclusions a broad construction, applying a "but-for" test, such that if no cause of action would exist "but for" the assault, the exclusion vitiates coverage irrespective of whether the assault was committed by the insured or an employee of the insured on the one hand, or by a third party on the other. (See, e.g., *Mount Vernon Fire Insurance Co. v. Creative Housing Ltd.*, 88 N.Y.2d 347, 353 [1996]; see also, *Sphere Drake Insurance Co. v. Block 7206 Corp.*, 265 A.D.2d 78 [2d Dept. 2000]; *Silva v. Utica First Insurance Co.*, 755 N.Y.S.2d 433 [2d Dept. 2003]; *Perez-Mendez v. Roseland Amusement and Development Corp.*, 757 N.Y.S.2d 848 [1<sup>st</sup> Dept. 2003]). Likewise, the policy does

not contain a written exclusion for bodily injury "expected or intended by the insured", or similar exclusionary language. (See, e.g., *Utica Fire Insurance Co. v. Shelton, infra*).

Rather, the policy issued by Travelers provided liability coverage in the form of indemnity and defense for "bodily injury or property damage caused by an occurrence", which was defined as "an accident, including exposure to conditions". Thus, Travelers essentially argues that the incident at issue in the underlying personal injury action was not a covered "occurrence" rising from an "accident", but rather, intentional conduct falling outside the parameters of the coverage afforded by its policy. The gravamen of their argument is that the plaintiff-insured, a 53 year-old, 6'1", 210 pound former firefighter, should have reasonably expected, if not known, that when he pushed the 85-year old, 5'6", 118 pound plaintiff Mendolia, there was a substantial probability that the latter would fall and sustain serious injuries.

The standard by which conduct is adjudged to be intentional rather than negligent was enunciated by the Court of Appeals in *Agoado Realty Corp. v. United National Insurance Co.*, 95 N.Y. 2d 141 (2000). In that case, the Court was asked to determine whether the intentional assault and murder of a tenant by an unknown assailant was an "accident", and hence, a covered occurrence under the landlord's policy. The Court of Appeals concluded that

in deciding whether a loss is the result of an accident, it must be determined, *from the point of view of the insured*, whether the loss was unexpected, unusual and unforeseen (*Miller v Continental Ins. Co.*, 40 NY2d 675, 677, *supra* [emphasis supplied]). Moreover, if a coverage exclusion is intended that is not apparent from the language of the policy, it is the insurer's responsibility to make its intention clearly known (*id.*, at 678 [citations omitted]).

Applying these age-old principles here, we conclude that the murder constitutes an accident for purposes of determining defendant's obligations to its insured. The pleadings in the underlying action set forth a claim of negligent security, demonstrating that the incident was unexpected, unusual and unforeseeable *from the insureds' standpoint*. Thus, the incident is a covered "occurrence" under the express terms of the policy.

(*Agoado Realty Corp., supra*, at 145 [emphasis as in original]).

The Court of Appeals has likewise held that, notwithstanding this rule, and the insured's subjective intent, in a narrow class of acts, such as sexual abuse of children, the injury is so inherent in the nature of the wrongful act as to fall outside the

ambit of covered conduct under policies of insurance. Thus, in *Allstate Insurance Co. v. Mugavero*, 79 N.Y. 2d 153 (1992), the Court held that the sexual assault of children is an act in which cause and effect cannot be separated; to do the act is to necessarily cause the harm which occurs as a consequence, and hence, both the act and the harm are intended as a matter of law, and excluded from policy coverage. (*Mugavero*, *supra* at 160; see, *Board of Education of the East Syracuse-Minoa Central School District v. Continental Insurance Co.*, 198 A.D.2d 816 [4<sup>th</sup> Dept. 1993]; *Public Service Mutual Insurance Co. v. Camp Raleigh*, 233 A.D.2d 273 [1st Dept. 1996]; see also, *RJC Realty Holding Corp. v. Pre Maximus Spa/Salon*, 756 N.Y.S.2d 631 [2d Dept. 2003] [sexual assault by employee of insured]; but see, *Blake v. Daily Bus & Truck Rental*, 299 A.D.2d 441 [2d Dept. 2002] [sexual assault allegedly committed by unrelated third person]).

The Appellate Divisions have appeared to extend this rule to include other types of assaults in which both the act and resulting harm are inherently intentional. (See, e.g., *Green Chimneys School for Little Folk v. National Union Fire Insurance Co.*, 244 A.D.2d 387 [2d Dept. 1997] [sexual harassment, retaliatory discharge, and assault are intentional acts which do not constitute an "occurrence" or an "accident" for coverage purposes]; *Carmean v. Royal Indemnity Co.*, 302 A.D.2d [3d Dept. 2003] [where insured removed knife from pocket, reached across front of vehicle in which he was seated and cut off plaintiff's left ear, act was intentional, precluding coverage]; *Peters v. State Farm Fire and Casualty Co.*, 2003 N.Y. App. Div. LEXIS 6813 [4<sup>th</sup> Dept. 2003] [insured's act of repeatedly swinging a baseball bat, knowingly striking the plaintiff with it, precluded coverage]; *State Farm Fire and Casualty Company v. Torio*, 250 A.D.2d 833 [2d Dept. 1998] [insured's act of firing 18 shots into the direction of a group of people, inflicting five wounds, cannot be considered an "accident"]; *Mattress Discounters of New York, Inc. v. United States Fire Insurance Co.*, 251 A.D.2d 384 [2d Dept. 1998] [assault and battery by plaintiff's employees against employee of Sleepy's within exclusionary language of policy for injuries expected or intended]; *Pennsylvania Millers Mutual Insurance Co. v. Rigo*, 256 A.D.2d 769 [3d Dept. 1998] [intentional conduct occurred when insured approached plaintiff, and, without warning, struck him in the jaw with a closed fist, knocking plaintiff and a woman he was with to the pavement, precluding coverage]).

In *Utica Fire Insurance Co. v. Shelton*, 226 A.D.2d 705 (2d Dept. 1996), the subject policy, unlike that at bar, explicitly excluded coverage for bodily injuries which are "expected or intended by the insured". In *Shelton*, the insured punched a police officer in the eye, subsequently pleading guilty to the crime of reckless Assault in the Third Degree. The Court found no coverage for the resulting injury, lacerations to the officer's eye, which could reasonably be expected from the conduct of the insured in

punching the officer in the eye. Citing the Third Department, the Court in *Shelton* held that

"personal injuries or property damages are expected if the actor knew or should have known there was a substantial probability that a certain result would take place" (*County of Broome v Aetna Cas. & Sur. Co.*, 146 AD2d 337, 340). The question is whether the damages "flow directly and immediately from an intended act, thereby precluding coverage", or whether the damages "accidentally arise out of a chain of unintended though expected or foreseeable events that occurred after an intentional act" (*Continental Ins. Co. v Colangione*, 107 AD2d 978, 979). The court must look at the transaction as a whole in determining whether an accident has occurred (see, *McGroarty v Great Am. Ins. Co.*, 36 NY2d 358, 364).

(*Shelton, supra* at 706; see also, *State Farm Fire and Casualty Company v. Torio, supra*).

Similarly, in *Allstate Insurance Co. v. Ruggiero*, 239 A.D.2d 369 (2d Dept. 1997), the insured punched and kicked the plaintiff in the underlying personal injury action in the face. The insured's policy excluded bodily injury "which may reasonably be expected to result from the intentional or criminal acts of an insured person or which are in fact intended by an insured person". The Court held that the incident was not covered, finding that the injuries resulting from the conduct in question were reasonably expected by the insured when he punched and kicked the injured party in the face.

The Court of Appeals has also recently held, however, that not every intentional act results in uninsurable consequences. Thus, in *Slayko v. Security Mutual Insurance Co.*, 98 N.Y. 2d 289 (2002), the insured pointed a shotgun believed to be unloaded at another, and pulled the trigger, because he was "fooling around". When he repeated this reckless, even depraved act, a second time, the gun discharged, the plaintiff was injured, and the insured took measures to staunch the plaintiff's bleeding and summon help. The insured subsequently plead guilty to the crime of reckless Assault in the Second Degree, admitting that he recklessly caused serious physical injury by means of a deadly weapon. In considering an intentional act exclusion for liability "caused intentionally by or at the direction of any insured", the Court reaffirmed that insurable accidental results may flow from intentional causes, holding that, "the general rule remains that 'more than a causal connection between the intentional act and the resultant harm is required to prove that the harm was intended'". (*Slayko, supra* at 293). Because the insured did not intend to injure the plaintiff, and the injury was not "inherent in the nature of the wrongful act", (see, *Allstate Insurance Co. v. Mugavero, supra*), the

intentional act exclusion was found not to apply. (*Id.*; see also *Deetjen v. Nationwide Mutual Fire Insurance Co.*, 2001 NY Slip Op 40439U [Sup. Ct. Kings Co. 2001] [coverage upheld where facts at trial demonstrated that insured manipulated a 9mm handgun while in or entering the living room with plaintiff present, and the gun was either defective or the insured's handling of it was grossly inept, causing a round to discharge and strike the plaintiff]).

In *Jubin v. St. Paul Fire and Marine Insurance Co.*, 236 A.D.2d 712 (3d Dept. 1997), following a verbal confrontation, the insured allegedly grabbed the plaintiff on her side and told her to "lighten up". The plaintiff was not injured and was not touched in any spot that was of a sexual or intimate nature. The Court held that to resolve the issue of whether the harm which resulted was expected or intended by the insured, it looked to the allegations of the complaint in the underlying action, as well as any extrinsic facts known by the insurer:

Here, however, while the complaint alleges that Williams sustained serious and permanent physical injury and extreme emotional distress, the allegations of plaintiff's offensive contact with Williams consist of relatively minor acts. In particular, the complaint alleges only that plaintiff "did so accost, grab, grasp, grope, push, detain and assault ... Williams thereby causing harmful and offensive contact". Where, as here, the complaint in the underlying action can be construed as alleging intentional offensive contact that results in unintended serious harm which is not inherent in the nature of the physical contact, coverage will be sustained (see, *Baldinger v Consolidated Mut. Ins. Co.*, 15 A.D.2d 526, *affd* 11 NY2d 1026). Moreover, the complaint in the underlying action also alleges that the emotional harm to Williams was negligently inflicted and the police incident report suggests that plaintiff did not mean any harm and was "just kidding around", which is sufficient to create a duty to defend under the policy (see, *Merrimack Mut. Fire Ins. Co. v Carpenter*, 224 A.D.2d 894, *lv dismissed* 88 NY2d 1016).

(*Jubin, supra* at 713).

The Court finds that the act and resulting injury in the case at bar, while less compelling of a finding of intentional harm than those encompassed by either *Shelton* or *Ruggiero, supra*, is more serious than the incidental contact which resulted in *Jubin, supra*, thereby posing a much closer question.

The verified complaint contains three causes of action, the first sounds in negligence; the second alleges the intentional tort of assault and battery, and demands punitive damages for the

defendant's "willful wanton and reckless act"; and the third is a derivative cause of action on behalf of plaintiff's wife for loss of consortium. The negligence cause of action is crafted in an obvious attempt to place the allegations squarely within the ambit of coverage for unintended consequences of intended conduct:

3. On April 12, 1996 in the County of Queens, State of New York, in the area of 71-21 260<sup>th</sup> Street, Rego Park, the defendant did negligently and carelessly shove the plaintiff Nicholas Mendolia causing him to fall to the sidewalk, thusly sustaining severe personal injuries.
4. That said injuries were the unintentional result of an intentional act.

Biondo and Mendolia furnished divergent versions of what transpired in the underlying incident at their examinations before trial.

In his examination-before-trial, the insured, Biondo, testified that, in response to the plaintiff grabbing his jacket, he stepped back reflexively, and the plaintiff's weight fell upon him. (See, Deposition of Peter J. Biondo, at pp. 10-11). Biondo then pushed the plaintiff with both hands in order to release the plaintiff's grasp on his jacket, at which point Mendolia fell backwards onto the ground. (See, Deposition of Peter J. Biondo, at pp. 10-11). When Mendolia fell, Biondo's first impulse was to bend down to help him, but Mendolia responded by saying "Get away from me, get the gun", and Biondo testified that he immediately withdrew. (See, Deposition of Peter J. Biondo, at p. 13). In his examination-before-trial, plaintiff Mendolia testified that the insured Biondo, without provocation or warning, shoved him to the ground. (See, Deposition of Nicholas Mendolia, at pp. 13, 56, 59).

Biondo subsequently plead guilty to the Class "A" misdemeanor of reckless Assault in the Third Degree. In his plea allocution, he admitted that on April 12, 1996 he recklessly caused physical injury to Nicholas Mendolia. (See, minutes of plea allocution, *People v. Peter Biondo*, docket #96Q016309, Griffin, J., Part AP-6, September 19, 1996).

Travelers characterizes this scenario as a "Davy versus Goliath" situation in which it was all but certain that the insured knew or had to know that, when the physically larger, younger insured pushed the elderly, much smaller plaintiff, severe injury would necessarily result. (See, *Utica Fire Insurance Co. v. Shelton*, *supra*.) While a facially appealing argument, this Court cannot find, as a matter of law, that from the insured's perspective, that the harm that resulted was so entirely to be expected as to render it intentional, or that the injury sustained

was inherent in the nature of the wrongful act. In applying the standard set forth above in *Shelton, supra*, in conjunction with the Court of Appeals' holdings in *Agoado Realty*, and *Slayko, supra*, it appears to the Court that, from the standpoint of the insured, one could perceive the damages to have arisen from a chain of unexpected though expected or foreseeable events which occurred after the intentional act of Biondo in shoving Mendolia to make him release his grip on the insured. Accepting the insured's version, one could characterize the result in this matter as accidental consequences arising from an intentional act. While a close question, this Court holds that, contrasted with cases cited by defendant Travelers in which the injury was found to be inherent in the nature of the wrongful act, (See, *Allstate Insurance Co. v. Mugavero, supra*; *Utica Fire Insurance Co. v. Shelton, supra*), the complaint in the underlying action can be construed as alleging intentional offensive contact which results in unintended serious harm which is not inherent in the act, thereby triggering coverage. (See, *Slayko v. Security Mutual Insurance Co., supra*; *Jubin v. St. Paul Fire and Marine Insurance Co., supra*.) Thus, absent some other exclusion or breach of a policy condition, to be discussed, *infra*, this Court holds that Travelers was obliged to defend and to indemnify the insured for this "occurrence", which fell within the policy definition of an "accident".

#### B. The "Late Notice" Issue

The insurance policy at issue, as a condition precedent to coverage, requires that "in case of an accident or occurrence, the insured shall . . . give written notice to us or our agent as soon as it is practical".

It is well settled that when an insurance policy, such as the one here, requires its policyholder to provide prompt or immediate notice of any accident or loss, such notice must be provided within a reasonable time in view of all of the facts and circumstances of the case. (See, *Metropolitan New York Coordinating Council on Jewish Poverty v. National Union Insurance Co.*, 222 A.D.2d 420 [2d Dept. 1995]; *Interboro Mutual Indemnity Insurance Co. v. Fatsis*, 279 A.D.2d 450 [2d Dept. 2001]; *Zadrima v. PSM Insurance Co.*, 208 A.D.2d 529 [2d Dept. 1994]). The duty to give notice arises when, from the information available to the insured relative to the accident, an insured could glean a reasonable possibility of the policy's involvement. (See, *Paramount Insurance Co. v. Rosedale Gardens, Inc.*, 293 A.D.2d 235 [1<sup>st</sup> Dept. 2002]). The failure to provide the carrier with timely notice of a potential claim operates as a condition precedent, and thus, "[a]bsent a valid excuse, a failure to satisfy the notice requirement vitiates the policy". (*Security Mutual Insurance Co. v. Acker-Fitzsimons Corp.*, 31 N.Y.2d 436, 440 [1972]; see also, *Unigard Security Insurance Co. v. North Riv. Insurance Co.*, 79 N.Y.2d 576 [1992]). The insured bears the burden of demonstrating the reasonableness of the

delay. (See, *Zadrima v. PSM Insurance Co.*, *supra* [lack of reasonable excuse for delay of 4 months vitiates coverage]; see also, *Winstead v. Uniondale Union Free School District*, 201 A.D.2d 721 [2d Dept. 1994] [unexplained 4-month delay]; *Paramount Insurance Co. v. Rosedale Gardens, Inc.*, *supra*. [unexplained 7-1/2 month delay]; *Khan v. Convention Overlook, Inc.*, 253 A.D.2d 737 [2d Dept. 1998] [unexplained year and 4 month delay]; *Sayed v. Macari*, 296 A.D.2d 396 [2d Dept. 2002] [almost 3-month delay unreasonable]; *1700 Assocs. v. Public Service Mutual Insurance Co.*, 256 A.D.2d 456 [2d Dept. 1998] [over 6-month delay unreasonable]; *Interboro Mutual Indemnity Insurance Co. v. Mendez*, 253 A.D.2d 790 [2d Dept. 1998] [delay of over one year unreasonable]; *Travelers Indemnity Co. v. Worthy*, 281 A.D.2d 411 [2d Dept. 2001][one-year and three-month delay unreasonable]).

While "a good-faith belief of nonliability may excuse or explain a seeming failure to give timely notice", the insured bears the burden of demonstrating that the delay in giving notice was reasonable under the circumstances. (See, *Security Mutual Insurance Co. v. Acker-Fitzsimons Corp.*, *supra*, at 441; *Vradenburg v. Prudential Prop. & Cas. Insurance Co.*, 212 A.D.2d 913 [2d Dept. 1995]; *Winstead v. Uniondale Union Free School District*, *supra*).

Guided by these principles, plaintiff-insured Biondo bears the burden of proving that his delay in reporting the incident to the defendant was excusable. (See, *Winstead v. Uniondale Union Free School District*, *supra*; *White v. City of New York*, 81 N.Y.2d 955, 957 [1993]; *Security Mutual Insurance Co. of N.Y. v. Acker-Fitzsimons Corp.*, *supra*; *Eveready Insurance Co. v. Levine*, 145 A.D.2d 526 [2d Dept. 1988]).

It is beyond dispute that Biondo knew of the accident and that Mendolia had been taken by ambulance to the hospital on the day that it occurred, April 12, 1996. Biondo cannot reasonably argue that the injuries suffered by plaintiff Mendolia in the main action were so trivial as to justify a reasonable belief that no liability could arise. On the contrary, his testimony, which is corroborated by that of the plaintiff in the underlying action, tends to support the conclusion that the plaintiff suffered injuries serious enough to require hospitalization, (see, e.g., *Zadrima v. PSM Insurance Co.*, *supra*; *Winstead v. Uniondale Union Free School District*, *supra*), as well as the conclusion that the aggression itself was serious enough to warrant the intervention of the police and criminal charges to be brought. No ordinarily prudent person could reasonably have felt immune from potential civil liability under the attendant circumstances of this case. (See generally, *Allstate Insurance Co. v. Grant*, 185 A.D.2d 911 [2d Dept. 1992]; *Greater New York Insurance Co. v. Farrauto*, 158 A.D.2d 514 [2d Dept. 1990]). Where, as here, there is no excuse or mitigating factor proffered for the delay in notification, the issue of the reasonableness of the delay poses a legal question for the court. (See, *The Travelers*

*Insurance Co. v. Volmar Construction Co., Inc.*, 300 A.D.2d 40 [1st Dept. 2002]). Applying the above authority to the facts at bar, this Court holds that, as a matter of law, plaintiff Biondo has failed to set forth any reasonable justification for his failure to notify the insurance carrier of the subject incident for over six months, and has accordingly, failed to sustain his burden of demonstrating that his six-month delay in providing notice to Travelers was reasonable.

### C. The "Timely Disclaimer" Issue

Having resolved that the notice condition was unreasonably violated by the insured, the Court looks to the timeliness of Travelers disclaimer based upon that breach of the policy condition.

It is well settled that an insurance carrier will be estopped from disclaiming coverage based on an exclusion in the policy where it fails to give written notice of disclaimer "as soon as is reasonably possible" after the insurer first learns of the accident or of grounds for disclaimer of liability or denial of coverage. (See, *Insurance Law* § 3420[d]; *Varella v. Am. Transit Insurance Co.*, 2003 N.Y. App. Div. LEXIS 7352 [2d Dept. 2003]; *McGinnis v. Mandracchia*, 291 A.D.2d 484 [2d Dept. 2002]; *Mount Vernon Fire Insurance Co. v. Gatesington Equities*, 204 A.D.2d 419 [2d Dept. 1994]; *Blee v. State Farm Mutual Automobile Insurance Co.*, 168 A.D.2d 615 [2d Dept. 1990]; *Zappone v. Home Insurance Co.*, 55 N.Y.2d 131 [1982]). This rule applies even if the insured or the injured party has in the first instance, as here, failed to provide the insurance carrier with timely notice of the accident or claim. (See, *Prudential Prop. & Cas. Insurance v. Persaud*, 256 A.D.2d 502 [2d Dept. 1998]; *Matter of Interboro Mutual Indemnity Insurance Co. v. Rivas*, 205 A.D.2d 536 [2d Dept. 1994]; *Matter of State Farm Mutual Automobile Insurance Co. v. Cote*, 200 A.D.2d 622 [2d Dept. 1994]; *Allstate Insurance Co. v. Centennial Insurance Co.*, 187 A.D.2d 690 [2d Dept. 1992]; *Kramer v. Interboro Mutual Indemnity Insurance Co.*, 176 A.D.2d 308 [2d Dept. 1991]).

It is the insurance carrier's burden to explain the delay in notifying the insured or injured party of its disclaimer, (see, *Hartford Insurance Co. v. County of Nassau*, 46 N.Y.2d 1028 [1979]), and the reasonableness of any such delay must be determined from the time the insurance carrier was aware of sufficient facts to disclaim coverage. (See, *Ward v. Corbally, Gartland & Rappleyea*, *infra*; *Farmers Fire Insurance Co. v. Brighton*, 142 A.D.2d 547 [2d Dept. 1988]). Stated another way, the reasonableness of the carrier's delay in disclaiming coverage should be judged from the time that the carrier had "sufficient facts to issue a disclaimer", (*Mount Vernon Fire Insurance Co. v. Unjar*, *supra*), and the burden of explaining any delay in disclaiming is on the carrier, (see, *Hartford Insurance Co. v. County of Nassau*, *supra* at 1030; *Matter*

of *Blee v. State Farm Mutual Automobile Insurance Co.*, supra at 616). Although the issue of whether a notice of disclaimer has been sent "as soon as is reasonably possible" is usually a question of fact, it may be determined as a matter of law where "there is absolutely no explanation for the delay provided by the insurer". (See, *General Accident Insurance Co. v. Villani*, 200 A.D.2d 711 [2d Dept. 1994]; *Hartford Insurance Co. v. County of Nassau*, supra, at 1030).

Courts have not hesitated to find a delay in disclaiming coverage unreasonable as a matter of law, (see, e.g., *Varella v. American Transit*, supra [delay of over 3 months unreasonable]; *Mount Vernon Fire Insurance Co. v. Gatesinton Equities, Inc.*, supra [2-month delay unreasonable]; *Prudential Property & Casualty Insurance v. Persaud*, supra [unexplained delay of over 2 months unreasonable]; *General Accident Insurance Co. v. Villani*, supra [unexplained 6-1/2 month delay unreasonable]; *Blee v. State Farm Mutual Automobile Insurance Co.*, supra [delay of more than 6 months unreasonable]), particularly where, as here, the basis for the disclaimer was apparent on the face of the insured's notification. (See, e.g., *City of New York v. Investors Insurance Company of America*, 287 A.D.2d 394 [1<sup>st</sup> Dept. 2001] [3-1/2 month delay in disclaiming unreasonable where insured's failure to provide timely notice was plain from the face of the pleadings sent with the insured's demand letter]; *McGinnis v. Mandracchia*, 291 A.D.2d 484 [2d Dept. 2002] [85-day delay unreasonable]; *City of New York v. Northern Insurance Co.*, 284 A.D.2d 291 [2d Dept. 2001] [2-month delay unreasonable]; *Ward v. Corbally, Gartland & Rappleyea*, 207 A.D.2d 342 [2d Dept. 1994] [2-month delay unreasonable]; *Uptown Whole Foods, Inc. v. Liberty Mutual Fire Insurance Co.*, 302 A.D.2d 592 [2d Dept. 2003] [57-day delay unreasonable]). In this Court's research of reported matters, as little as 30 days in disclaiming coverage has been held to be unreasonable as a matter of law under Insurance Law §3420(d) where late notice, the sole ground upon which the insurer disclaimed coverage, was obvious from the face of the notice of claim and accompanying complaint, without the need for further investigation on the insurer's part. (See, *West 16<sup>th</sup> Street Tenants Corp. v. Public Service Mutual Insurance Co.*, 290 A.D.2d 278 [1<sup>st</sup> Dept. 2002]). The issue of the reasonableness of delays in disclaiming coverage has been decided on a case-by-case basis. The Second Department has found delays in disclaiming of under two months and approximately 43 days, to be reasonable where necessary steps were taken by the insurer to investigate the claim. (See, *Farmbrew Realty Corp. v. Tower Insurance Co.*, 289 A.D.2d 284 [2d Dept. 2001] [under 2 months' delay warranted]; *Brooklyn Hospital Center v. Centennial Insurance Co.*, 258 A.D.2d 491 [2d Dept. 1999] [43-day delay not unreasonable]). An insurer's delay of less than one month in issuing a disclaimer was similarly held to be reasonable under the circumstances in *Kramer v. Estate of Leitman*, 269 A.D.2d 567 (2d Dept. 2000). The Third Department has declined to adopt a bright-line rule that any delay of 30 days or

less in issuing a disclaimer is reasonable as a matter of law. (See, *Hess v. Nationwide Mutual Insurance Co.*, 273 A.D.2d 689 [3d Dept. 2000]).

"The question whether a disclaimer has been issued with reasonable promptness is, in all but extreme cases, a question of fact". (*Murphy v. Hanover Insurance Co.*, 239 A.D.2d 323, 324 [2d Dept. 1997]; see also, *Colonial Cooperative Insurance Co. v. Desert Storm Construction Corp.*, 757 N.Y.S.2d 894 [2d Dept. 2003]; *Astoria Chemists v. Travelers Indemnity Co. of Connecticut*, 278 A.D.2d 349 [2d Dept. 2000]; *Lancer Insurance Co. v. T.F.D. Bus Co.*, 286 A.D.2d 375 [2d Dept. 2001]; PJI 4:79).

In the case at bar, the insurer has offered an explanation for its 28-day delay in disclaiming coverage. According to the affidavit of Travelers' claim supervisor, Travelers first notice of the claim was received on October 21, 1996, via a "First Report of Loss" dated October 18, 1996, along with a copy of the Summons and Complaint in the underlying action. (See, affidavit of Lorraine Greco, at pp. 1-2) A claim representative was assigned the next day, October 22, 1996. The insured was subsequently contacted for further information. (See, affidavit of Lorraine Greco, at pp. 1-2). On October 23, 1996, coverage counsel was consulted, and on October 30, 1996 (10 days after receipt of the claim), coverage counsel tentatively advised that coverage should be disclaimed because the incident did not constitute an "occurrence", and based on late notice. (See, affidavit of Lorraine Greco, at p. 3). Counsel requested a copy of the policy, along with "additional information necessary to provide a formal written opinion". (See, affidavit of Lorraine Greco, at p. 3). After counsel forwarded a proposed draft of the disclaimer letter to Travelers claims office, a letter disclaiming coverage was sent to the insured on November 18, 1996, 28 days after first notice and 18 days after counsel's tentative opinion that coverage should be disclaimed.

This Court finds that, while the delay in disclaiming of 28 days was not unreasonable as a matter of law, it can also not be considered reasonable as a matter of law. (See, *Murphy v. Hanover Insurance Co.*, *supra.*) The timely-notice basis for disclaiming coverage was readily apparent, both from the face of the notice of claim provided by the insured, and the accompanying complaint, without the need for further investigation on the insurer's part. A preliminary coverage determination that a disclaimer should issue was made by coverage counsel within 10 days. The insurer does not adequately explain the reason for the balance of the delay of 18 days, and the Court finds that it is for a jury to resolve the issue of whether, given the apparent nature of the basis for disclaiming, the 28-day period Travelers took to disclaim, was reasonable or not.

Accordingly, the motion by the defendant for an Order granting

summary judgment dismissing the complaint as against it, and for the issuance of a declaration that Travelers is not obligated to defend or to indemnify Peter Biondo, the defendant in a pending action entitled *Nicholas Mendolia and Josephine Mendolia v. Peter J. Biondo* is DENIED; and the cross-motion by the plaintiff Peter Biondo for an Order granting summary judgment on his complaint, and for the issuance of a declaration that Travelers is obligated to defend and to indemnify Peter Biondo, the defendant in a pending action entitled *Nicholas Mendolia and Josephine Mendolia v. Peter J. Biondo* is similarly DENIED.

Dated: August 5, 2003

---

JANICE A. TAYLOR, J.S.C.