

COMPLEX ISSUES BECOME ROUTINE WITH KNOWLEDGE

For more information contact Kevin Lane: KLane@Sliwa-Lane.com

Newsletter-April 28, 2008

Significant News

In This Issue:

STATE INSURANCE FUND LOSES RIGHT TO CHOICE OF COUNSEL

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<http://www.sliwa-lane.com>

e-mail: KLane@Sliwa-Lane.com

phone: (716) 853-2050

fax: (716) 853-2057

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URGENT: LOSS OF RIGHT TO SELECT COUNSEL-COVERED AND NON-COVERED GROUNDS

STATE INSURANCE FUND LOSES RIGHT TO SELECT COUNSEL BY ADVISING NO COVERAGE FOR CONTRACTUAL CLAIMS

In a case just decided on Friday, the Appellate Division, Fourth Department held that when the State Insurance Fund issues a letter, which states that it will only provide coverage for claims of common law indemnification and will only continue to defend the insured until there is a finding of "grave injury," the State Insurance Fund loses the right to select counsel. This divesting of the right to select counsel is then vested in the insured. Although this case involved a situation where the general liability insurer had denied coverage, the reasoning is the same. That is, once an insurer sets up a situation where there are covered and non covered grounds from its perspective, it loses the right to control the defense.

Due to multiple requests, the decision of the lower level Court is attached hereto.

– By Kevin A. Lane (KLane@Sliwa-Lane.com)

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SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

533

CA 07-02161

PRESENT: SCUDDER, P.J., HURLBUTT, SMITH, AND GORSKI, JJ.

THOMAS JOHNSON, INC., PLAINTIFF-RESPONDENT,

v

MEMORANDUM AND ORDER

STATE INSURANCE FUND, DEFENDANT-APPELLANT.

Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered February 26, 2007 in a declaratory judgment action. The judgment, among other things, granted in part plaintiff's cross motion for summary judgment. It is hereby ORDERED that the judgment so appealed from is unanimously affirmed with costs.

Memorandum: We affirm for reasons stated in the decision at Supreme Court. We add only that defendant's contention that the court has no subject matter jurisdiction over this declaratory judgment action is without merit (see CPLR 3001; cf. *D'Angelo v State Ins. Fund*, 48 AD3d 400; see generally *Hallock v State of New York*, 32 NY2d 599,603).

Entered: April 25, 2008

LAW OFFICES OF SLIWA & LANE

840 MAIN-SENECA BUILDING . 237 MAIN STREET, BUFFALO, NEW YORK 14203
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