



soon as practicable, the documentary evidence fails to resolve all factual issues as a matter of law (see *Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383 [1st Dept 2002]).

Despite XL's contention that the documentary evidence demonstrated that plaintiff knew about the three actions at issue in March, April, and May 2011, and yet did not provide notice to XL until a January 2012 email, the "Prior Notice" exclusion in the U.S. Specialty Insurance Company (USS) policy, which provided primary coverage for these actions, provided that USS could deny coverage if plaintiff notified any of its prior insurance companies (see e.g. *Zahler v Twin City Fire Ins. Co.*, 2006 WL 846352, \*7, 2006 US Dist LEXIS 14263, \*20-21 [SD NY 2006]). Triable issues are also raised by the January 2012 email, which was plaintiff's "notice" of the subject action to XL, and as to the relatedness of the timely claim and three disputed claims.

XL's argument that plaintiff did not ask for consent to incur defense expenses fails if the claims are found to be interrelated and treated as a single claim under the policy. Furthermore, XL's August 9, 2012 letter to plaintiff's broker requesting copies of all fees statements for the subject actions, could be found to be a waiver of its right to object to defense expenses.

In view of the foregoing issues, plaintiff's contention that XL's disclaimer was untimely cannot be decided at this juncture.

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 29, 2014

  
CLERK