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## Week of April 17, 2008

Priority of Coverage. DECISION OF INTEREST

Number of Occurrences

Priority of Coverage/ "Contingent Coverage Exception"/Tractor-Trailers

Failure to Procure Insurance/Certificates of Insurance

Duty to Defend - Exclusions

Late Notice of Occurrence/Employee Exclusion

Antisubrogation Rule

Timeliness of Notice of Occurrence/Reasonable Belief in Nonliability

Broker Liability

Contractual Indemnification/General Obligations Law/Failure to Procure Insurance

Contractual Indemnification

Common-Law Indemnification/Contractual Indemnification

Common-Law Indemnification

Contractual Indemnification/Common-Law Indemnification

UM Coverage/Other Insurance/Duty to Cooperate

UM Coverage

UM Coverage/Timeliness of Proceeding

SUM Coverage

First-Party No-Fault - Fraud

First-Party No-Fault - Tolling for Verification

First-Party No-Fault - Peer Review Reports

First-Party No-Fault - Fraudulent Incorporation

First-Party No-Fault - Untimely Denial of Claim

First-Party No-Fault - Peer Reviews

Priority of Coverage. DECISION OF INTEREST. In a coverage dispute in connection with an underlying construction-related wrongful death action, First Department holds that priority of coverage for owner and construction manager who qualify as additional insureds under contractors' policies is determined not by the contracts between insureds, but by applying the "other insurance" provisions of the insurance policies. Court holds that under the policies, primary policies issued to owner and construction manager as named insureds apply before excess/umbrella policies that provide additional insured coverage. Court rejects argument that applying owner and construction manager's own primary coverage before additional insured coverage under excess/umbrella policies places additional insureds in less favorable position than named insureds. Court finds excess insurers must share pro rata upon exhaustion of all of the primary policies. Court observes that the possibility that primary carriers of named insureds that pay under their policies ahead of excess policies providing additional insured coverage may later pursue subrogation actions for contractual indemnification against contractors does not affect the present priority of coverage analysis. Court also declines to determine the priority of a primary policy issued to one of the subcontractors where the subcontractor did not employ plaintiff and was not named in the complaint, since there has yet to be a basis to determine if the policy provides additional insured coverage. *Bovis Lend Lease LMB, Inc. v. Great American Ins. Co.*, 2008 WL 1063608 (1st Dept. April

10, 2008). Number of Occurrences. In a coverage dispute in connection with property damage claims arising from insured's installation of chemical resin into water pipes and injection of aircraft lubricant, First Department applies "unfortunate events" test to find that definition of occurrence does not support aggregating individual claims to apply a single deductible. Court rejects argument that manufacture and sale of insured's products constituted a single occurrence, and finds each installation/injection constituted a separate exposure. *ExxonMobil Corp. v. Certain Underwriters at Lloyd's, London*, 2008 WL 1722456 (1st Dept. April 15, 2008). Priority of Coverage/"Contingent Coverage Exception"/Tractor-Trailers. In a decision issued upon reconsideration, court determines priority of coverage in connection with an \$11 million settlement of an underlying auto accident involving a tractor-trailer. Dispute involved tractor lessor's \$2 million primary policy, tractor lessor's \$5 million umbrella policy, tractor lessor's \$15 million excess policy, trailer lessor's \$1 million primary policy, and trailer lessor's \$10 million umbrella policy. Court holds that trailer lessor's primary policy does not owe coverage because the lease indicated lessee would provide coverage, and policy contained a "contingent coverage exception" that removes coverage where lessee was obligated to provide it. Court finds that although written lease expired prior to the occurrence, it was extended by the parties' continued performance. Court also holds that trailer lessor's umbrella policy does not apply based on exclusion for liability arising out of covered autos leased to others. Court notes the exclusion does not violate the Vehicle & Traffic law because it is an excess policy. Court also finds driver is not insured under trailer lessor's umbrella policy because policy provides insureds do not include persons to whom an automobile is leased, and only extrinsic evidence of undefined term "automobile" is that term includes tractor-trailers. In absence of coverage under trailer lessor's policies, court determines order of coverage for settlement is tractor lessor's primary policy, followed by tractor lessor's umbrella policy, followed by tractor lessor's excess policy. *Harco National Ins. Co. v. Arch Specialty Ins. Co.*, 2008 WL 1699755 (S.D.N.Y. April 9, 2008). Failure to Procure Insurance/Certificates of Insurance. In connection with a Labor Law action, First Department holds that a certificate of insurance produced by construction manager was sufficient to create an issue of fact in failure to procure insurance action against it, but insufficient to prove coverage as a matter of law. *Long v. Tishman/Harris*, 2008 WL 938467 (1st Dept. April 8, 2008). Duty to Defend - Exclusions. Second Department affirms summary judgment in favor of insurer, finding it had no duty to defend insured in underlying action alleging common-law fraud and racketeering. Court holds that allegations fell within plain meaning of unspecified exclusions. *Eisenberg v. Anavil*, 2008 WL 963003 (2d Dept. April 8, 2008). Late Notice of Occurrence/Employee Exclusion. In connection with a separate construction accident bodily injury claim, court grants default judgment to liability insurer seeking declaration upholding its disclaimer based on late notice of occurrence and exclusion for injuries to employees or contractors of the insured. Insured, which did not answer complaint, failed to provide notice of the occurrence for eight months. Court also holds exclusion would apply in any event since underlying plaintiff was an employee or contractor. *Tudor Ins. Co. v. RAL Industrial, Inc.*, 2008 WL 977195 (E.D.N.Y. April 9, 2008). Antisubrogation Rule. In a coverage dispute arising from a fire loss on commercial business property, Third Department affirms summary judgment in favor of tenant's CGL and business property insurer and dismisses owner's cross-claim seeking a declaration that (1) it is entitled to coverage under tenant's CGL policy; and (2) that antisubrogation rule barred insurer from bringing claims against owner for faulty sprinkler system. Owner was not entitled to additional insured coverage under the tenant's CGL policy where the policy excluded property owned by the insured. Court holds that antisubrogation rule is inapplicable since CGL policy did not provide coverage for the loss and owner was not added to the business property policy, thus owner could not be considered an insured. *Insurance Corp. of New York v. Cohoes Realty Associates, L.P.*, 2008 WL 879295 (3d Dept. April 3, 2008). Timeliness of Notice of Occurrence/Reasonable Belief in Nonliability. In restaurant insurer's action seeking a declaration that it owed no obligation to defend or indemnify any party in relation to a slip and fall accident on restaurant property, First Department reverses order and grants summary judgment in favor of insurer. Where insurer did not receive notice of occurrence until ten months after accident, trial court erred in finding that an issue of fact existed regarding the timeliness of insured's notice where insured knew of claimant's injuries immediately, offered claimant assistance after the fall, and received letters from claimant's attorney. Trial court also erred in finding triable issues of fact regarding the reasonableness of claimant's delay in providing notice to insurer where claimant's attorney sent two letters to the restaurant and failed to otherwise investigate the identity of the restaurant's carrier. A dissent argues that claimant's efforts were not inadequate as a matter of law. *Tower Ins. Co. of New York v. Lin Hsin Long Co.*, 2008 WL 895747 (1st Dept. April 3, 2008). Broker Liability. In insurer's action against broker for failing to deliver policy to insured, First Department affirms summary judgment in favor of broker where there was no evidence that insurer entrusted broker with delivering the policy or that the insurer authorized the broker to represent it for any other purpose. *Continental Casualty Co. v. AON Risk Services Companies, Inc.*, 2008 WL 895944 (1st Dept. April 3, 2008). Contractual Indemnification/General Obligations Law/Failure to Procure Insurance. In an action for workplace injuries to an employee of a power plant's maintenance contractor, court denies cross-motions for summary judgment on plant's contractual indemnification claim against contractor, finding issues of fact regarding negligence. Court, however, notes that if plant is determined to be negligent, indemnification would be barred by General Obligations Law § 5-322.1. Court also denies contractor's motion to dismiss breach of contract to procure insurance claim where certificate of insurance reflects contractor may have not obtained sufficient workers' compensation insurance limits. *Komulainen v. Montenay Power Corp.*, 2008 WL 919645 (E.D.N.Y. March 31, 2008). Contractual Indemnification. In bodily injury action arising from a passenger's fall in an airport, court awards contractual indemnification to airline against security company. Court rejects security company's argument that airline entitled only to out-of-pocket expenses since it has its own insurance coverage. Court notes security company's argument confuses remedies for a breach of contract to procure insurance versus the claim at issue, which is for indemnification. *Pacitti v. Delta Air Lines, Inc.*, 2008 WL 919634 (E.D.N.Y. April 3, 2008). Common-Law Indemnification/Contractual Indemnification. In a Labor Law action, First Department dismisses indemnification claim by alleged lessee liable under the statute against building services contractor. Court holds plaintiff did not suffer a "grave

injury" under the Workers' Compensation Law, and that lessee was a stranger to the contract between the building owner and building services contractor, and thus cannot claim contractual indemnification. *Ferluckaj v. Goldman Sachs & Co.*, 2008 WL 961532 (1st Dept. April 10, 2008). Common-Law Indemnification. In a products liability action, First Department holds distributor of allegedly defective parking lift may pursue common-law indemnification cross-claim against alleged manufacturer of the defective component. *Reyes v. Harding Steel, Inc.*, 2008 WL 1722204 (1st Dept. April 15, 2008). Contractual Indemnification/Common-Law Indemnification. In personal injury action arising from a slip and fall on ice, Second Department affirms order dismissing the complaint insofar as asserted against the snowplow contractor and denying snowplow contractor's motion to dismiss owner's cross-claims for common-law indemnification. Dismissal of plaintiffs' claims against snowplow contractor was appropriate where contractor's limited contractual undertaking to provide snow removal services did not render it liable in tort for third party's personal injuries and plaintiffs failed to raise a question of fact regarding their detrimental reliance on contractor's services. Trial court properly denied snowplow contractor's motion to dismiss owner's cross-claim for common-law indemnification since questions of fact existed regarding whether the accident resulted from contractor's failure to fulfill its contractual duties. *Wheaton v. East End Commons Associates, LLC*, 2008 WL 879019 (2d Dept. April 1, 2008). Contractual Indemnification/Common-Law Indemnification. In worker's personal injury action against owner, lessee, and general contractor arising from a construction site accident, court denies lessee's and owner's motions for summary judgment seeking contractual and common-law indemnification from general contractor. Lessee and owner failed to make out a prima facie case for common-law indemnification by submitting proof of general contractor's negligence or authority to supervise and control. Lessee failed to establish its entitlement to contractual indemnification where it did not show that it was free from negligence and that its liability, if any, was solely vicarious. *Rey v. Ridamaset, LLC*, 2008 WL 918300 (Sup. Ct. Queens Co. March 31, 2008). Contractual Indemnification/Common-Law Indemnification. In worker's personal injury action against construction manager and general contractor arising from a construction site accident, court denies construction manager's motion against subcontractor for contractual defense and indemnity where construction manager failed to submit proof that accident arose from subcontractor's negligence. Construction manager was not entitled to summary judgment on its claims that subcontractor failed to procure liability insurance where subcontractor submitted proof that it procured the insurance required under the subcontract. *Maternik v. Edgemere By the Sea Corp.*, 2008 WL 1056916 (Sup. Ct. Kings Co. March 31, 2008). UM Coverage/Other Insurance/Duty to Cooperate. In an action by insurer to stay arbitration of an uninsured motorist benefits claim, Second Department reverses order denying insurer's petition after a framed issue hearing on whether the vehicle of the alleged tortfeasor was insured at the time of the alleged accident. Court holds that evidence adduced at framed issue hearing was insufficient to enforce the disclaimer of alleged tortfeasor's insurer based upon tortfeasor's lack of cooperation. The only evidence to support the disclaimer was an affidavit of an investigator that lacked personal knowledge of insurer's efforts to locate the tortfeasor. *Country-Wide Ins. Co. v. Henderson*, 2008 WL 1054957 (2d Dept. April 8, 2008). UM Coverage. In an action by insurer to stay arbitration of a claim for uninsured motorist benefits, Second Department reverses order granting insurer's petition and remits the matter for a framed issue hearing and a new determination of the petition. In a decision with little factual background or analysis, court concludes that claimant was in an uninsured vehicle at the time of the accident and that the trial court should have conducted a hearing to determine whether the claimant was an "insured" within the meaning of the policy. *Travelers Ins. Co. v. Bynum*, 2008 WL 1123997 (2d Dept. April 8, 2008). UM Coverage/Timeliness of Proceeding. In an action by insurer to stay arbitration of an uninsured motorist benefits claim, Second Department reverses order denying claimant's motion to dismiss the proceeding as time-barred. Court holds that trial court erred in finding that claimant's notices of intention to arbitrate were defective because they contained an incorrect policy number where claimant produced an insurance card specifying the same policy number contained in the notices. Claimant's evidence gave rise to an issue of fact regarding whether her notices triggered the running of the 20-day period of CPLR 7503(c). *State Farm Automobile Insurance Co. v. Williams*, 2008 WL 1130298 (2d Dept. April 8, 2008). UM Coverage. In an action by insurer to stay arbitration of a claim for uninsured motorist benefits, Second Department affirms order denying insurer's petition after a framed issue hearing. In a decision with little factual background or analysis, court concludes that insurer of alleged tortfeasor demonstrated that its insured was provided with a notice of intent to cancel that complied with the time limitations set forth in Banking Law § 576(1)(a). *AutoOne Ins. Co. v. Zanders*, 2008 WL 902512 (2d Dept. April 1, 2008). SUM Coverage. Five injured passengers sought SUM benefits under driver's policy after other vehicle's SUM limits were exhausted. Second Department affirms insurer's petition to permanently stay arbitration where the limits of other vehicle's policy were not less than the SUM benefits under driver's policy, thus the SUM endorsement in driver's policy was not triggered. *Allstate Ins. Co. v. Rivera*, 2008 WL 918828 (2d Dept. April 1, 2008). First-Party No-Fault - Fraud. In an action by insurer against two providers originally alleging fraud and RICO claims, among others, court issues amended decision upon reconsideration reinstating insurer's claims for fraudulent billing. Suit arose out of alleged scheme by chiropractor to use licensed physicians to set up fraudulent medical service corporations in order to obtain no-fault benefits. Court agrees with insurer that no-fault statute does not preempt insurer's right to seek recoupment of fraudulently billed payments even though insurer waived fraud as a defense in connection with the original payment of the claims. Despite providers' claim that such a rule would be a "bizarre paradox," court finds New York decisions support insurer's argument and are consistent with public policy of preventing fraudulent claims. *Allstate Ins. Co. v. Valley Physical Medicine & Rehabilitation, P.C.*, 2008 WL 942574 (E.D.N.Y. March 31, 2008). First-Party No-Fault - Tolling for Verification. Court holds that insurer is entitled to receive requested NF-3 form, and submission of substantially similar information not on the prescribed form does not cause insurer's 30-day period to pay or the claim to begin to run. Since provider had yet to provide the prescribed NF-3 form, claim dismissed as premature. *All-Boro Medical Supplies, Inc. v. Progressive Northeastern Ins. Co.*, 2008 WL 1724014 (N.Y. Civ. Ct. April 11, 2008). First-Party No-Fault - Peer Review Reports. Summary judgment in favor of provider affirmed where physician peer review reports submitted by

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insurer contained computerized physician's signature, rather than actual, affirmed signature. *Vista Surgical Supplies, Inc. v. Travelers Ins. Co.*, 2008 WL 962637 (2d Dept. April 8, 2008). First-Party No-Fault - Fraudulent Incorporation. In a decision with little factual background or analysis, Appellate Term modifies order to deny insurer's motion for summary judgment without prejudice. A dissenting opinion argues that the provider's claims should have been dismissed due to the fraudulent incorporation of the provider as previously established by the testimony of the incorporator in prior litigation. *Multiquest, P.L.L.C. v. Allstate Ins. Co.*, 2008 WL 943026 (Sup. Ct. App. Term April 3, 2008). First-Party No-Fault - Untimely Denial of Claim. In an action to recover assigned first-party, no-fault medical payments, First Department reverses order granting summary judgment in favor of provider where insurer raised a triable issue of fact regarding whether it issued a timely denial of claim form based upon lack of medical necessity. *Countrywide Ins. Co. v. 563 Grand Medical, P.C.*, 2008 WL 895828 (1st Dept. April 3, 2008). First-Party No-Fault - Peer Reviews. In the appeal of an action to recover assigned first-party, no-fault medical payments, Second Department affirms summary judgment in favor of provider where insurer's peer review reports submitted in opposition were not subscribed or affirmed pursuant to CPLR 2106. *Vista Surgical Supplies, Inc. v. Travelers Ins. Co.*, 2008 WL 1026571 (2d Dept. April 8, 2008).