
Week of February 6, 2008

Additional Insured Coverage/Contribution. DECISION OF INTEREST

Business Auto - Priority of Coverage

Duty to Defend/Coinsurance

Occurrence/Advertising Injury/Designated Premises.

Late Notice

Contractual Limitations Period

Discovery

Forum Selection

Business Auto Coverage - Accident

Contractual Indemnification/General Obligations Law

Common-Law Indemnification

Arbitration Clause

Contractual Indemnification/Common-Law Indemnification

Duty to Defend/Contractual Indemnification

Reasonable Belief in Nonliability

Validity of Disclaimer

SUM Coverage/Notice of Settlement

UM Coverage/Notice of Settlement

First-Party No-Fault - Medical Necessity

First-Party No-Fault - Methods of Proof

Additional Insured Coverage/Contribution. DECISION OF INTEREST. Court rejects defendant insurer's contention that a coverage action brought by a party claiming additional insured status is an equitable contribution action between insurers. Court states that insurer is free to seek an allocation of defense costs between insurers in a separate action, where the insurers are parties. *Turner Construction Co. v. Kemper Ins. Co.*, 2008 WL 312167 (S.D.N.Y. February 1, 2008). Business Auto - Priority of Coverage. Insurers settled an underlying bodily injury action involving a tractor-trailer accident for \$11 million, reserving their rights to litigate priority. One primary insurer contributed \$2 million; another insurer contributed its \$1 million primary limits and \$3 million from an umbrella policy; another umbrella insurer contributed \$4 million (another primary insurer contributing its \$1 million limit did not reserve its rights to litigate priority). Court finds that contract between tractor lessee and lessor was extended past its terms by virtue of the parties' course of performance. Under the language of the lessor's primary policy, coverage was contingent on lessee not being responsible to provide coverage. Since lessee was obligated to provide insurance while lease was in effect, court rules that lessor's primary insurer is not liable under its policy. Court, however, finds that lessor's umbrella policy's exclusion for covered autos leased to others violates the New York Vehicle & Traffic Law, and is unenforceable. Court concludes that lessor's umbrella policy and trailer owner's policy must contribute on same basis where trailer owner's policy, though primary, is excess because the trailer was connected to a non-owned tractor. Court holds that tractor's umbrella policy does not contribute at the level of the other two policies because it does not contain language providing that it will contribute with policies providing coverage on the same basis. Court prorates settlement based on limits, with result that trailer lessor's insurer must reimburse tractor owner's primary insurer for the latter's overpayment, and must reimburse tractor owner's umbrella insurer's \$4 million contribution. *Harco International Ins. Co. v. Arch Specialty Ins. Co.*, 2008 WL 240998 (S.D.N.Y. January 24, 2008). Duty to Defend/Coinsurance. In dispute among three insurers regarding coverage in connection with an underlying action, court clarifies that order finding one of the insurers had a duty to defend did not also include a finding of priority such that the other insurers were no longer obligated to defend. The other insurers had

argued that the decision impliedly determined priority as well. Court does not address priority issue, which, if not otherwise resolved, will require further motion practice. *Wausau Underwriters Ins. Co. v. QBE Ins. Corp.*, 2008 WL 312307 (S.D.N.Y. January 31, 2008). Occurrence/Advertising Injury/Designated Premises. Insured, a costume jewelry wholesaler, was sued for misappropriation and unfair competition by a designer/producer alleging that the insured arranged to have other producers provide it with the designer/producer's designs. Insured brought a third-party action against its CGL insurer, seeking a declaration of insurer's duty to defend and indemnify. Court states that although insurance usually applies to the accidental consequences of intentional acts, there was no occurrence in this case because the economic harm caused by the insured's intentional refusal to return the designer's sample was inherent in the refusal. Court also finds the policy's exclusion for expected or intended property damage applies. Insured also claimed coverage under the policy's coverage for personal and advertising injury. Coverage under the policy would only apply to misappropriation of advertising ideas or style of business. Court rejects argument, noting that New York cases have held that the product itself (here, the designs) does not constitute advertising. Court also finds there is no coverage because the policy applies only to designated premises and projects. Court concludes that claim arises out of insured's New York City showroom, which is a location not listed in the policy. Court states that finding the operations of the New York showroom as "necessary or incidental" to the Florida office would eviscerate the effect of the limitation of coverage to designated premises. Court grants summary judgment to insurer. *Accessories Biz, Inc. v. Linda and Jay Keane, Inc.*, 2008 WL 282269 (S.D.N.Y. January 31, 2008). Late Notice. First Department affirms summary judgment in favor of insurer, finding insurer has no duty to defend or indemnify insured after nine-month delay in providing notice. Court finds insured had no reasonable belief in nonliability where insured was a general contractor whose on-site supervisor was aware of and reported accident on the day it happened, and where underlying plaintiff reported back with his leg in a cast. *Tower Ins. Co. of New York v. Dyker Contractors, Inc.*, 2008 WL 191966 (1st Dept. January 24, 2008). Contractual Limitations Period. In connection with a first-party property damage claim, court enforces policy's two-year limitations period, and dismisses insured's claim for coverage. Court observes that there must be a clear manifestation of intent to relinquish the policy's limitations period for a waiver to occur. Communications or settlement negotiations before or after the limitations period expires is not sufficient. Court rejects insured's claim that damage worsened over time and is therefore timely, finding that the claim was supported only by an inadmissible attorney's affidavit. *Plon Realty Corp. v. Travelers Ins. Co.*, 2008 WL 312154 (S.D.N.Y. February 1, 2008). Discovery. In first-party property damage dispute, court orders insurer to produce documents that the claims representative used to determine actual cash valuation of the loss, including documents from law firm-sponsored seminars that claims representative testified she used to value the loss. *Woodworth v. Erie Ins. Co.*, 2008 WL 281909 (W.D.N.Y. January 31, 2008). Forum Selection. In a coverage dispute where the insured is a Pennsylvania state agency, court upholds Pennsylvania's sovereign immunity and dismisses New York litigation commenced by insurer in favor of Pennsylvania litigation commenced by insured. Court finds that forum selection clause in policy is unenforceable because state agency did not have authority to avoid Pennsylvania law that contract actions involving the state must be heard before Pennsylvania Board of Claims. Court observes that New York courts would not enforce such a clause against a New York agency. *Lumbermens Mut. Cas. Co. v. The Commonwealth of Pennsylvania*, 2008 WL 223274 (Sup. Ct. New York Co. January 24, 2008). Business Auto Coverage - Accident. A commercial bus company was sued for bodily injuries allegedly arising from the chase and attempted arrest of one of the company's drivers following an altercation between the driver and a court security officer. Court grants business auto insurer's motion for summary judgment, declaring that insurer has no obligation to defend or indemnify insured. Without reaching late notice issues, court holds that, as a matter of law, there was not an accident under the policy as the injuries indisputably arose out of a physical altercation with the bus driver. Court also finds that injuries did not arise out of the ownership, maintenance, or use of a covered auto, and that the injuries did not arise out of use of an auto as an auto. *RLI Ins. Co. v. Premier Coach, Inc.*, 2008 WL 282126 (S.D.N.Y. January 25, 2008). Contractual Indemnification/General Obligations Law. In a Labor Law action, court dismisses all claims against owner and general contractor. Court states that since owner and general contractor are free from negligence, contractual indemnification provision in subcontract is enforceable under General Obligations Law 5-322.1 regardless of its language, and grants summary judgment on owner's and general contractor's contractual indemnification claim against subcontractor. Court notes that indemnification is owed regardless whether subcontractor or its sub-subcontractors is ultimately found negligent. *Orellana v. Standard Microsystems Corp.*, 2008 WL 270797 (Sup. Ct. Queens Co. January 28, 2008). Common-Law Indemnification. In a Labor Law action in federal court, contractors sought common law indemnification against a subcontractor. Parties seeking indemnification argued that subcontractor's contractual promise to supervise the work is a sufficient basis to award indemnification, regardless of whether subcontractor actually supervised the work. Court characterizes New York law on the issue as mixed, and predicts the New York Court of Appeals would find that the contractual promise to supervise is a sufficient basis to award indemnification, unless the subcontractor produces evidence that it did not actually supervise the work, and that some other entity authorized to do so supervised the work. Court finds an issue of fact, and denies cross-motions for summary judgment on the issue. *Hernandez v. GPSPDC (New York) Inc.*, 2008 WL 220636 (S.D.N.Y. January 28, 2008). Arbitration Clause. In an action by insurer relating to workers' compensation policies over a number of coverage periods, First Department modifies lower court order and holds that arbitration was proper forum for disputes between insurer and insured concerning retrospective premiums and credits where policies at issue contained clauses providing for resolution of disputes via arbitration. However, disputes relating to subsequent policies that did not contain arbitration clauses mandated the denial of insurer's petition compelling arbitration. *In re National Union Fire Insurance Company of Pittsburgh, PA v. St. Barnabas Community Enterprises, Inc.*, 2008 WL 324104 (1st Dept. February 7, 2008). Contractual Indemnification/Common-Law Indemnification. In an action commenced by a worker injured on a construction site, First Department modifies order and holds that the owner and construction manager should have been granted summary judgment on their claim for contractual indemnification against

subcontractor, notwithstanding that the indemnification requirement was embodied in an agreement executed after the accident in question, as they submitted competent, uncontroverted proof to show that the agreement was actually entered into before the accident date and that the parties intended that it apply as of when it was entered into. First Department also finds that the owner and construction manager should have been granted summary judgment on their claim for common-law indemnification against subcontractor where owner and subcontractor were free from active negligence and subcontractor had direct control over the work. *Tighe v. Hennegan Const. Co.*, 2008 WL 304919 (1st Dept. February 5, 2008). Contractual Indemnification. In an action commenced by a worker injured while working on a project for the State, Fourth Department affirms order denying State's motion for summary judgment seeking contractual indemnification from worker's employer where State failed to establish as a matter of law that it was not itself negligent and that any liability on the part of the State for worker's injuries was vicarious only. *State v. Santaro Industries, Inc.*, 2008 WL 274917 (4th Dept. February 1, 2008). Duty to Defend/Contractual Indemnification. In an action commenced by an employee of third-party defendant subcontractor injured while working on a construction site, Fourth Department affirms order denying subcontractor's motion to assume the owner's defense based on the indemnification provision in the contract between owner and subcontractor. Court rejects subcontractor's argument that the defense of the underlying action should be controlled by the entity bearing the actual risk of loss. Where subcontractor was not an insurer and owner was not an insured, the general rule was inapplicable that a liability insurer has a right to control the defense against its insured based on the right of the insurer to protect its financial interests. *Staats v. Wegmans Food Markets, Inc.*, 2008 WL 274961 (4th Dept. February 1, 2008). Reasonable Belief in Nonliability. In an action by insured seeking a declaration that insurer owed a duty to defend and indemnify him in underlying personal injury action, First Department reverses order and grants insurer's motion for summary judgment where insured failed to raise a triable issue of fact whether its belief in its nonliability was reasonable so as to excuse its eight-month delay in notifying insurer of the occurrence where insured was notified of the injuries within three days of the occurrence and the insured knew that injured party was taken away in an ambulance. *York Specialty Food, Inc. v. Tower Ins. Co. of New York, Inc.*, 2008 WL 251812 (1st Dept. January 31, 2008). Contractual Limitations Period. In an action by insured seeking to recover benefits allegedly due under excess insurance policy, court grants insurer's motion for summary judgment where policy provided for a three-year limitations period for claims against insurer. Court rejects insured's argument that six-year statutory limitations applied where six-year period was a maximum limitations period, not a minimum, and policy's legal action clause bound insured to three-year period. *Albany Medical Center v. Preferred Life Ins. Co. of New York*, 2008 WL 271710 (Sup. Ct. Albany Co. January 31, 2008). Validity of Disclaimer. In a decision with little factual background and analysis, Second Department affirms order denying insurer's motion for summary judgment in an action by insurer seeking a judgment that it was not obligated to defend and indemnify certain institutions in an underlying personal injury action. Insurer did not establish its burden of establishing entitlement to judgment as a matter of law where it presented no competent evidence to show the validity of its disclaimer. *Guideone Ins. Co. v. Evangelical Lutheran Bethlehem Congregational Church*, 2008 WL 257467 (2d Dept. January 29, 2008). Validity of Disclaimer. In an action to enforce a judgment against an insurance company, Second Department affirms an order granting summary judgment to insurer where unspecified coverage issues could have been raised in prior action that was disposed of on the merits. *Abraham v. Hermitage Ins. Co.*, 2008 WL 258167 (2d Dept. January 29, 2008). SUM Coverage/Notice of Settlement. In an action by insurer to stay arbitration of a claim for uninsured motorist benefits on grounds that claimant failed to notify insurer of its settlement with other driver, court cites policy condition requiring that insured shall not settle with any negligent party without written consent such that insurer's rights are impaired. Court then refers matter to a hearing on the issue of whether insurer's rights were impaired. *Metlife Auto & Home v. Zampino*, 2008 WL 254122 (Sup. Ct. Nassau Co. January 29, 2008). UM Coverage/Notice of Settlement. In an action by insurer to stay arbitration of a claim for uninsured motorist benefits, Second Department reverses order and holds that insurer did not impermissibly attempt to raise new factual issue regarding physical contact in its reply papers where insurer was merely responding to allegations, made for the first time in insured's opposition, that a hit-and-run driver was involved in the accident. Physical contact is a condition precedent to arbitration of a UM claim and there should have been a framed issue hearing on the issue of whether there was physical contact between the insured vehicle and the alleged hit-and-run vehicle. *Nationwide Mut. Fire Ins. Co. v. Thomas*, 2008 WL 257390 (2d Dept. January 29, 2008). First-Party No-Fault - Medical Necessity. In an action to recover first-party, no-fault medical payments for acupuncture treatments, court holds that insurer's IME doctor who concluded that claimant's symptoms had resolved did not make out insurer's prima facie case of lack of medical necessity where doctor's testimony made no mention of the applicable generally accepted medical/professional standards and the plaintiff's departure therefrom. *American Chinese Acupuncture, P.C. v. State Farm Mut. Auto Ins. Co.*, 2008 WL 314848 (N.Y. City Civ. Ct. February 6, 2008). First-Party No-Fault - Methods of Proof. Provider attempted to prevail on claim at trial by presenting insurer's responses to notice to admit regarding identity and delivery of documents and nonpayment, with no other evidence and with no witnesses. Court notes growing frequency of this tactic, and trial courts' divided response as to providers' ability to prevail without other evidentiary proof. Court rejects insurer's argument that provider's notice to admit questions were improper because they went to the heart of the matters being litigated. However, court finds provider did not establish prima facie case because it failed to append the documents at issue to the notice to admit. *Prime Psychological Services, P.C. v. Auto One Ins. Co.*, 2008 WL 237653 (Civ. Ct. Bronx Co. January 28, 2008).