
Week of January 1, 2008

Liquidation Procedure/Reinsurance. DECISION OF INTEREST.

Contingent Commissions. DECISION OF INTEREST.

Independent Contractor Exclusion/Additional Insured Status

Additional Insured Coverage.

Common-Law Indemnification/Failure to Procure Insurance/ General Obligations Law.

Contractual Indemnification

UM Arbitration

First-Party No-Fault - Statutory Attorney's Fees.

Liquidation Procedure/Reinsurance. DECISION OF INTEREST. A reinsurer challenged the Liquidation Bureau's handling of certain claims settlements, claiming that the Liquidator's allowance of claims violated its reinsurance contracts. The reinsurer sought to lift the injunction barring claims against the Liquidator based on various allegations that the Liquidator breached the reinsurance contracts by, among other things, failing to provide the reinsurer with notice, access to records, and participation in the defense of claims. Court denies reinsurer's motion to lift the injunction. Court finds that reinsurer failed to establish a likelihood of success of proving it was prejudiced by late notice of claims by the Liquidator. The court makes a similar finding with respect to the reinsurer's claim it was not provided access to the Liquidator's records, and its claim that it was denied association in defense of claims. Court states that the "follow the fortunes" function of reinsurance would be undermined by allowing reinsurers to intervene in the claims handling process. Court also finds that allowing such intervention is contrary to the public interest. Court holds that reinsurers may raise their rights of interposition after the Liquidator settles a claim, but before the court approves the settlement. Court also holds that policyholders have an interest in the matter as a matter of fairness, since the reinsurer's allegations, if true, would mandate a change in liquidation procedures. Court also rules that policyholders are entitled to submit evidence of reinsurer's practices in settling claims as a direct insurer in order to show that the reinsurer itself engaged in the claims handling practices it complains constitute a violation of its reinsurance contracts. Court also examines the original claims handling protocols established under the liquidation order, and determines they must be modified to allow reinsurers adequate opportunity to exercise their right of interposition of coverage defenses. Court orders the Liquidator to submit proposed revisions to the claims handling protocol. Matter of Liquidation of Midland Ins. Co., 2008 WL 151786 (Sup. Ct. New York Co. January 14, 2008).

Contingent Commissions. DECISION OF INTEREST. Attorney General brought an action against broker alleging statutory violations, fraud, and unjust enrichment based on broker's various contingent commission programs. Court grants broker's motion to dismiss, finding that Attorney General failed to plead the allegations against the broker with sufficient particularity. Specifically, the complaint failed to allege specific instances where insureds detrimentally relied on alleged fraudulent statements. Complaint also failed to allege a "special relationship" sufficient to state a claim for breach of fiduciary duty against a broker. Court allows the Attorney General to replead the complaint. People of the State of New York v. Wells Fargo Ins. Services, Inc., 2008 WL 162147 (Sup. Ct. New York Co. January 14, 2008).

Independent Contractor Exclusion/Additional Insured Status. Insured contracted to install a boiler in a commercial building, and then subcontracted installation. An explosion during installation caused injuries. Contractor's insurer disclaimed coverage based on an exclusion for liability arising from the work of independent contractors. Second Department affirms summary judgment in favor of insurer where subcontractor was clearly an independent contractor. Court also affirms summary judgment in favor of subcontractor's insurer where contractor did not qualify as an additional insured under the policy. Court rejects contractor's reliance on a certificate of insurance. Metropolitan Heat & Power Co., Inc. v. AIG Claims Services, Inc., 2008 WL 82621 (2d Dept. January 8, 2008).

Additional Insured Coverage. A defendant in an underlying Labor Law action sued the insurer of one of its subcontractors, seeking additional insured coverage. The court grants summary judgment to the insurer, finding that the contract between the named insured and the additional insured did not require additional insured coverage, as required under the policy's blanket additional insured endorsement. Court rejects putative additional insured's reliance on a certificate of insurance. Court rejects argument that coverage is owed because blanket endorsement was not issued until after the occurrence where insurer did not use any other blanket additional insured endorsements at the time. Public Administrator of Queens v. Two Corners, Inc., 2008 WL 110095 (Sup. Ct. Queens Co. January 8, 2008).

Common-Law Indemnification/Failure to Procure Insurance/ General Obligations Law. Second Department finds lower court erred by awarding summary judgment dismissing a cross-claim for common-law indemnification where parties'

respective fault had yet to be resolved. Court finds lower court also erred in granting summary judgment dismissing the claim for failure to procure insurance, noting that the fact that a contractual indemnification provision in the lease violates General Obligations Law § 5-322.1 does not mean the insurance procurement provision is unenforceable. *Kim v. D&W Shin Realty Corp.*, 2008 WL 82623 (2d Dept. January 8, 2008).

Contractual Indemnification. In a case involving a fall on the premises of a mall, court grants summary judgment to subcontractor that constructed the pedestrian ramp at issue 14 years before. Court finds that contractual obligation to comply with laws and ordinances does not constitute a broad promise to indemnify owner and construction manager for injuries arising out of subcontractor's work. Court observes that contractual indemnification provision in contract is limited to injuries that occur during performance of subcontractor's work. *Luby v. Rotterdam Square, L.P.*, 2008 WL 90178 (3d Dept. January 10, 2008).

Contractual Indemnification. Retailer's property was damaged as a result of a leaking washing machine installed by other building tenants. Finding no evidence that washing machine retailer was negligent, court grants contractual indemnification to retailer against company responsible for installing the machine. *Kermansha Oriental Rugs, Inc. v. Gollender*, 2008 WL 110202 (1st Dept. January 10, 2002).

UM Arbitration. Court dismisses petition to stay arbitration where proceeding was commenced more than 20 days following the demand for arbitration. Court rejects insurer's argument that the demand was deceptive and intended to prevent insurer from contesting arbitrability where insurer failed to submit an affidavit of someone with personal knowledge. *Standard Fire Ins. Co. v. Mouchette*, 2008 WL 82531 (2d Dept. January 8, 2008).

First-Party No-Fault - Statutory Attorney's Fees. Citing case law, court holds that attorney's fees are to be calculated on the basis of each claim, and not based on the aggregate of claims litigated in one action. Court rejects an Insurance Department opinion letter to the contrary. *Trump Physical Therapy, P.C. v. State Farm Mut. Auto. Ins. Co.*, 2008 WL 142326 (Dist. Ct. Suffolk Co. January 10, 2008).