
Week of January 22, 2008

Contractual Indemnification

SUM Coverage/Qualifying Insured Status.

Common-law Indemnification

Policy Ambiguity/Untimely Disclaimer.

Policyholder Dividends

Broker Liability

Additional Insured Coverage

Insurance Procurement Provision

Insured's Duties After Loss

UM Coverage/Notice of Claim

Employee Exclusion

Late Notice of Occurrence/Insurance Law § 3420(d)

Pollution Exclusion/Collapse Exclusion

First-Party No-Fault - Denial Forms

Contractual Indemnification. In an action seeking declaratory judgment regarding ownership of software, First Department affirms order holding that respondents were not required to indemnify plaintiffs for costs and expenses in pursuing the action. In a decision with little analysis, court holds that a promise by respondents to indemnify plaintiffs in an action brought by plaintiffs against respondents is not "unmistakably clear" from the subject agreement. *Van Deventer v. CS SCF Management Limited*, 2008 WL 170429 (1st Dept. January 22, 2008). SUM Coverage/Qualifying Insured Status. In action by the insurer of claimant's employer seeking to stay arbitration of claimant's claim for SUM benefits, First Department remands matter to trial court for a hearing on issue of whether claimant was occupying covered vehicle at the time of the loss. Claimant was not a named insured under the policy, thus he could only be considered an insured for purposes of SUM coverage if he was occupying a covered vehicle. Where parties offered radically different accounts of the facts, the trial court erred in dismissing claimant's petition without a hearing. *Continental Cas. Co. v. Lecei*, 2008 WL 170514 (1st Dept. January 22, 2008). Common-law Indemnification. In injured worker's Labor Law action, Second Department affirms order denying defendant's claims for common-law indemnification where the issues of proximate cause and the alleged indemnitor's role have yet to be determined. *Soltes v. Brentwood Union Free School District*, 2008 WL 191660 (2d Dept. January 22, 2008). Policy Ambiguity/Untimely Disclaimer. In an action by auctioneer seeking coverage for underlying personal injury actions, Second Department affirms order granting auctioneer partial summary judgment. Without discussing the substance of the policy provision at issue, court finds that the disputed policy language is in the nature of a limitation of coverage, rather than an exclusion, and thus not subject to the timely disclaimer requirement of Insurance Law § 3420(d). However, court finds policy ambiguous with respect to coverage auctioneers, construes the ambiguity against the insurer, and holds that the policy affords coverage to the auctioneer and its employee. *Liberty Mutual Fire Ins. Co. v. National Cas. Co.*, 2008 WL 193251 (2d Dept. January 22, 2008). Contractual Indemnification. In an action commenced by a worker injured while altering a condominium, Second Department reverses order denying the complex owners' claim for contractual indemnification against the unit owners. Court holds that the intent to indemnify was not clearly implied by the contract between the parties, but the condominium by-laws were sufficient to impose a duty upon the unit owners to indemnify the complex owners where the by-laws provided for indemnification in favor of the complex owners for personal injury claims arising from the alteration project. *Canela v. TLH 140 Perry Street*, 2008 WL 193296 (2d Dept. January 22, 2008). Policyholder Dividends. In an action by insured seeking to recover a policyholder dividend from its workers' compensation liability insurer after insured cancelled its policy two weeks before insurer decided to issue a dividend, court grants summary judgment in favor of insurer dismissing complaint where policy made clear that insurer's board of directors had the discretion to place restrictions on dividends and insured did not qualify to receive a dividend under the Board's dividend resolution. *Towne Bus. Corp. v. Insurance Co. of Greater New York*, 2008 WL 216070 (Sup. Ct. New York Co. January 18, 2008). Broker Liability. In insured's action against broker, First Department reverses order denying broker's motion for summary judgment and dismisses insured's complaint. Court holds that broker's only obligation with regard to excess coverage under its service agreement with insured was to notify the local excess insurer's office where a loss potentially implicated excess

coverage. Since there was no dispute that the agent made this contact, insured was not entitled to bring contractual indemnification, negligence, and breach of fiduciary duty claims. *Columbia Energy Group v. Fisher*, 2008 WL 151402 (1st Dept. January 17, 2008). Contractual Indemnification. In personal injury action arising from a worksite accident, First Department modifies an order granting architect's claim for contractual indemnification against general contractor to deduct from such award the legal fees incurred in pursuing architect's contractual indemnification claims. Under the applicable contract, the architect was only entitled to indemnification for legal fees attributable to claims arising out of its work, not for claims for contractual indemnification. *Fuller-Mosley v. Union Theological Seminary*, 2008 WL 151526 (1st Dept. January 17, 2008). Additional Insured Coverage. In an action by general contractor's insurer against subcontractor's insurer seeking a declaration that subcontractor's insurer was obligated to defend and indemnify general contractor in an underlying personal injury action, First Department modifies trial court's order and denies motion by subcontractor's insurer to dismiss complaint. In a decision with little analysis on the issue, court concludes that an issue of fact exists as to whether the subject contract required the subcontractor to name general contractor as an additional insured. *Insurance Co. of New York v. Central Mut. Ins. Co.*, 2008 WL 133985 (1st Dept. January 15, 2008). Insurance Procurement Provision. In an action declaring the parties' rights under a commercial lease, in a decision with little factual background or analysis, Second Department affirms portion of order declaring that plaintiff must reimburse defendant for payment of insurance premiums where the parties' lease clearly established the defendant's right to procure insurance and bill the plaintiff for the premiums. *Ultra Flex Packaging Corp. v. I.J. Litwak Realty Ltd. Partnership*, 848 N.Y.S.2d 880 (2d Dept. January 15, 2008). Insured's Duties After Loss. In an action by insured auto repair shop seeking a declaration that insurer owed a duty to reimburse the insured for value of an automobile stolen from insured's property, Second Department reverses order denying insurer's motion for summary judgment where insured breached a policy provision regarding the insured's duties after a loss. Insurer showed that repair shop paid the owner of the stolen vehicle for the loss without the prior notice to the insurer and insured failed to rebut this showing. *R. Ferraro Collision, Inc. v. Universal Underwriters Ins. Co.*, 2008 WL 140765 (2d Dept. January 15, 2008). UM Coverage/Notice of Claim. In an action by insurer to stay the arbitration of a claim for uninsured motorist benefits, Second Department affirms order granting insurer's petition where plaintiff insurer established that the disclaimer of claimant's insurer was invalid where claimant could not be held to have breached their obligation to provide their insurer with timely notice of claim where there was no evidence to show that claimant was ever properly served with the underlying summons and complaint. *Allstate Ins. Co. v. Berger*, 2008 WL 141730 (2d Dept. January 15, 2008). Employee Exclusion. In contractor's action seeking a declaration that insurer was obligated to provide contractor with defense and indemnity for a claim arising from injury sustained by contractor's employee, court grants insurer's motion for summary judgment on the basis that contractor is not entitled to coverage for the loss pursuant to the employee exclusion where employee's claims fell squarely within the unambiguous language of the exclusion. *Superior Contracting & Restoration, Inc. v. U.S. Liability Ins. Co.*, 2008 WL 170690 (E.D.N.Y. January 17, 2008). Late Notice of Occurrence/Insurance Law § 3420(d). In a dispute between insurer and insured over coverage for injuries to a guest on insured's boat, court grants insurer's motion for summary judgment where insured, who had driven the injured guest to the emergency room the day of her injuries, failed to notify insurer about the incident until seven months later. Court rejects insured's claim that he had a reasonable belief in nonliability where the record showed that insured was aware of the seriousness of the injuries the guest sustained while on insured's boat. Court further rejects insured's claim that notice to his insurance broker satisfied the requirement that the insured notify his insurer. Court further rejects insured's argument that insurer was precluded from disclaiming based upon its untimely disclaimer because Insurance Law § 3420(d) does not apply to policies issued in connection with ocean-going vessels. *DeGeorge v. ACE American Ins. Co.*, 2008 WL 180786 (S.D.N.Y. January 17, 2008). Pollution Exclusion/Collapse Exclusion. In an action by insured building owners to collect proceeds for property losses arising from the September 11, 2001 attacks, court denies insurer's motion for summary judgment seeking a declaration that coverage is barred by the policy's pollution exclusion and collapse exclusion. The trier of fact must decide the application of the pollution exclusion because the word "contaminate" is so broad as to be ambiguous. The collapse exclusion does not apply because the Second Circuit Court of Appeals had previously ruled that the efficient cause of the damage was the building's contact with the particulate cloud, not the collapse of the twin towers. *Ocean Partners, LLC v. North River Ins. Co.*, 2008 WL 142863 (S.D.N.Y. January 14, 2008). First-Party No-Fault - Denial Forms. In an action to recover assigned first-party, no-fault medical payments, court denies provider's and insurer's cross-motions for summary judgment. Court rejects provider's argument that insurer's denial form should be disregarded because the denial form omitted information required by the regulations where provider failed to lay proper evidentiary foundation to introduce the denial forms. Court further denies insurer's motion for summary judgment where insurer failed to show that its denial was on the prescribed form or that its denial form complied with insurance regulations. *Elmont Open MRI & Diagnostic Radiology, P.C. v. Geico Ins. Co.*, 2008 WL 162145 (Dist. Ct. Nassau Co. January 18, 2008).