

Week of July 16 2008

Occurrence. DECISION OF INTEREST

Claim Against Insurer in Rehabilitation

Duty to Procure Insurance/Contractual Indemnification.

Employee Exclusion/Material Misrepresentation/Scope of Umbrella Coverage.

Antisubrogation Rule.

Defense Costs - D&O Coverage

Late Notice of Claim.

Priority of Coverage

Contractual Limitations Period/Estoppel/Punitive Damages

Jewelers Block Coverage/Lost Business Income Coverage.

Advertising Injury - Late Notice. Additional Insured Status

Additional Insured Status

Contractual Indemnification.

Contractual Indemnification/Common-Law Indemnification

SUM Arbitration

Occurrence. DECISION OF INTEREST. In insurer's action seeking a declaration that it had no duty to defend or indemnify insured in bodily injury action commenced after insured punched underlying plaintiff in the face, Fourth Department affirms order granting summary judgment for insurer where alleged assault did not constitute an occurrence under the policy. Majority distinguishes this case from *Automobile Ins. Co. of Hartford v. Cook*, 818 N.Y.S.2d 176 (2006), holding that there was no view of the evidence to support a conclusion that insured accidentally or negligently caused the underlying injuries. Two dissenting justices argue that the underlying allegations that the insured negligently served alcoholic beverages to minors gave rise to the insurer's duty to defend insured. *State Farm Fire And Cas. Co. v. Whiting*, 2008 WL 2611996 (4th Dept. July 3, 2008). Claim Against Insurer in Rehabilitation. In judgment creditor's appeal arising from the dismissal of its petition to compel satisfaction of a judgment against an insurer in rehabilitation, Third Department reverses dismissal where the validity of the claim was judicially established and creditor submitted proof that rehabilitator made no effort to negotiate, compromise, or resolve the judgment. *Callon Petroleum Co. v. Superintendent of Ins. of State*, 2008 WL 2682518 (3d Dept. July 10, 2008). Duty to Procure Insurance/Contractual Indemnification. In connection with a bodily injury action commenced by sub-subcontractor's employee, court dismisses owner's and general contractor's claims against sub-subcontractor for contractual indemnification and for breach of duty to procure insurance. Court holds that owner and general contractor were not entitled to rely on subcontractor's contract with sub-subcontractor where the incorporation clause only bound subcontractor to prime contract provisions relating to the manner of work to be performed, and there was no evidence that the sub-subcontractor agreed to procure insurance in favor of the owner or general contractor. *Tarpey v. Koluna Partners, LLC*, 2008 WL 2699459 (Sup. Ct. Queens Co. July 10, 2008). Employee Exclusion/Material Misrepresentation/Scope of Umbrella Coverage. In connection with an underlying bodily injury action arising from injuries suffered by the employee of a subcontractor at a construction site, court grants summary judgment declaring that general contractor's primary insurer had no duty to defend or indemnify general contractor. Policy contained a broad exclusion for injuries to employees of any contractor. Court notes that such exclusions are enforceable, and apply to employees of subcontractors as well as general contractors. With respect to general contractor's umbrella policy, court rejects umbrella insurer's argument that general contractor made material misrepresentations in applying for the policy, i.e., the scope of coverage under the underlying primary policy. Court finds umbrella insurer could not have relied on the alleged misrepresentations since the umbrella policy was issued prior to the primary policy. Court also finds the umbrella policy's schedule of underlying insurance did not sufficiently refer to the underlying primary policy at issue. Court also rejects umbrella insurer's purported practice of matching exclusions with the underlying primary policy, since certain exclusions exist in the umbrella policy but not in the primary policy, and vice versa. However, court finds an issue of fact whether umbrella insurer was timely placed on notice where insured waited 18 months to provide notice, but denies knowledge of the accident. *Alcon Builders Group, Inc. v. U.S. Underwriters Ins. Co.*, 2008 WL 2677253 (Sup. Ct. New York Co. July 1, 2008). Antisubrogation Rule. Second Department reverses lower

court's dismissal of a subrogation action against the owner and manager of a building by the tenant's property insurer. Insurer sought to recover amounts it paid for property damage under tenant's own commercial property policy. Court holds that the antesubrogation rule does not apply to bar the action. Although owner and manager are additional insureds under the tenant's liability policy, they failed to show that the loss was not paid solely pursuant to the tenant's property policy, under which owner and manager are not insureds. *Utica Mut. Ins. Co. v. Brooklyn Navy Yard Dev. Corp.*, 2008 WL 2521271 (2d Dept. June 24, 2008). Defense Costs - D&O Coverage. Affirming an order of the Bankruptcy Court, court holds that insureds under a D&O policy are entitled to payment of defense costs as they are incurred, and insurer may seek recoupment only upon final adjudication of claims if they fall outside of coverage or are excluded. Court finds that exclusions at issue do not expressly provide that insurer may elect to withhold defense costs until final adjudication of the claims. Court notes that in light of the general rule that insurers must pay defense costs as incurred, the exclusions are ambiguous, and insurer failed to submit extrinsic evidence in support of its position. *Axis Reinsurance Co. v. Bennett*, 2008 WL 2600034 (S.D.N.Y. June 27, 2008). Late Notice of Claim. In connection with a complex property damage dispute arising out of a major construction project, a prime contractor and its assignee sought a declaration that the contractor's CGL insurer must provide coverage in connection with project owner's third-party claim. Court finds contractor's seven-month delay in providing notice of claim is unreasonable as a matter of law. Court rejects contractor's proffered excuse that it had a good faith belief it would not be held liable, since such an excuse does not reasonably apply where a claim has been made. Court also rejects argument that lack of knowledge of the existence of a policy excuses late notice. *Travelers Cas. & Sur. Co. v. Dormitory Authority - State of New York*, 2008 WL 2567784 (S.D.N.Y. June 25, 2008). Priority of Coverage. In connection with an underlying judgment in favor of a subcontractor's employee injured on a construction site, First Department holds that the construction manager's own primary policy must respond before the subcontractor's excess policy, notwithstanding the contract between the construction manager and subcontractor obligating the latter to defend and indemnify the former. Court notes that priority of coverage issues are determined by reference to the policies, not underlying contracts between insureds. *Tishman Construction Corp. v. Great American Ins. Co.*, 2008 WL 2649486 (1st Dept. July 8, 2008). Contractual Limitations Period/Estoppel/Punitive Damages. In a suit for allegedly stolen property under a renters policy, court finds an issue of fact whether insurer should be estopped from relying on the policy's two-year limitations period. Court notes insured's affidavit stating that insurer's adjuster turned off his recorder during insured's statement and advised that the claim would be paid. Court also notes that insurer failed to note the policy's limitations period in a letter issued close to expiration of the limitations period, and in its denial letter issued after the limitations period. However, court dismisses insured's claims for unjust enrichment, breach of warranty, fraud, breach of the duty of good faith, and bad faith claims, as all such claims merely restate insured's cause of action for breach of contract. Court also dismisses claim for punitive damages since insured did not allege defendant's conduct was part of an egregious pattern directed towards the public. *Vitrano v. State Farm Ins. Co.*, 2008 WL 2696156 (S.D.N.Y. July 8, 2008). Jewelers Block Coverage/Lost Business Income Coverage. Jewelry manufacturing company made claims against its jewelers block policies and its lost business income policies following the alleged armed robbery of millions of dollars in consigned gold. Jewelers block insurer sought summary judgment, claiming that insured's principal misrepresented how some of the allegedly stolen gold was purchased. Court finds issue of whether insured's owner intentionally misrepresented material information in his EUO is subject to a "clear and convincing" standard of proof, and that the issue is one of credibility for the finder of fact. Jewelers block insurer also moved for summary judgment based on insured's alleged failure to keep sufficient records as required under the policy. Court again finds an issue of fact, noting that a jury could find the omission of the purchase of the gold at issue was explainable and immaterial to the claim. However, court grants jewelers block insurer's motion declaring that the alleged value of labor performed on the allegedly stolen gold is not recoverable under the policy. Court denies motion for summary judgment by lost business income insurer in its entirety. Even though loss of finished stock was excluded from coverage and period of restoration with respect to raw stock is nil (since raw stock could be purchased immediately on the open market), court finds issue of fact regarding period of restoration with respect to loss of income relating to works-in-progress. Court also finds issue of fact regarding whether insured has claim for extra expense relating to higher interest charges resulting from the robbery. *Eurospark Industries, Inc. v. The Underwriters at Lloyds Subscribing to the Risk on Cover No. 97F0071010A*, 2008 WL 2662453 (E.D.N.Y. July 2, 2008). Advertising Injury - Late Notice. In connection with an underlying trade dress infringement suit, insured failed to provide insurer with notice of occurrence despite receiving two "cease and desist" letters from the underlying plaintiff. Nor did insured provide notice of suit, even though complaint contained an express claim for trade dress infringement. Court notes that insured was obligated to provide notice of potential claims, not just actual claims. Court finds that notice of a potential claim should have been given, at the latest, after the underlying complaint was amended to add a claim of trade dress infringement and plaintiff served an interrogatory response setting forth specifics of its trade dress claim. Court finds that the six-month delay from this point to the time notice was given is unreasonable as a matter of law. Court notes that underlying plaintiff's vacillation regarding whether it would ultimately pursue the claim is immaterial to insured's obligation to provide notice (and that, in any event, the vacillations occurred after notice should have been provided). *Professional Product Research Inc. v. General Star Indem. Co.*, 2008 WL 2627612 (S.D.N.Y. June 30, 2008). Additional Insured Status. In site owner's action against insurer seeking a declaration that insurer was obligated to defend and indemnify it as an additional insured in an underlying construction accident case, Second Department affirms order denying summary judgment for owner where insurer's disclaimer encompassed owner's alleged late notice of occurrence and claim, and where owner failed to make a prima facie showing that it provided the notices to the insurer as soon as practicable. *23-08-18 Jackson Realty Associates v. Nationwide Mut. Ins. Co.*, 2008 WL 2669766 (2d Dept. July 8, 2008). Additional Insured Status. In general contractor's action against insurer seeking a declaration that it was entitled to additional insured coverage in connection with an underlying bodily injury action, Fourth Department holds that court erred in granting summary judgment in favor

of the general contractor. The lower court properly determined that the general contractor was an additional insured on policy issued to cable installation subcontractor, but insurer raised issues of fact regarding whether general contractor was entitled to defense and indemnity for injuries sustained by the employee of another subcontractor at the site. *KMAPS Corp. v. Nova Cas. Co.*, 2008 WL 2612026 (4th Dept. July 3, 2008). Contractual Indemnification. In connection with a window washer's bodily injury accident, First Department affirms summary judgment dismissing property lessee's third-party contractual indemnification claim against window washer's employer as barred by Workers' Compensation Law § 11 where lessee did not have an indemnification agreement with employer and there were no allegations of grave injury. *Ferluckaj v. Goldman Sachs & Co.*, 2008 WL 2727259 (1st Dept. July 15, 2008). Contractual Indemnification. In roofer's bodily injury action against owner and general contractor, Third Department affirms summary judgment awarding owner summary judgment on its third-party contractual indemnification claim against roofer's employer and the subcontractor that hired it, but reverses summary judgment on general contractor's indemnification claims against those same parties. Trial court properly granted summary judgment to owner where it was undisputed that owner's liability was entirely vicarious, but erred in granting summary judgment to general contractor where issues of fact existed with respect to general contractor's active negligence in causing roofer's injuries. *McKeighan v. Vassar College*, 2008 WL 2682486 (3d Dept. July 10, 2008). Contractual Indemnification/Common-Law Indemnification. In a products liability bodily injury action, court dismisses manufacturer's contractual indemnification claim against company that distributed the product in light of the fact the parties had no contractual indemnification agreement. Court holds that it cannot decide the manufacturer's claim for common law indemnification where the issue of fault for the plaintiff's injuries is unresolved. For the same reason, court denies distributor's motion for summary judgment on its cross-claim for common law indemnification against manufacturer. *Adeyinka v. Yankee Fiber Control, Inc.*, 2008 WL 2695943 (S.D.N.Y. July 8, 2008). SUM Arbitration. Insurer brought petition to permanently stay arbitration in connection with claim of insured's employee based upon employee's alleged failure to abide by certain provisions of the policy. Third Department affirms order denying insurer's petition, holding that insurer was not entitled to rely on policy terms to stay the arbitration where insurer failed to provide employee with the subject policy and employee was not otherwise aware of the cited terms. *Hartford Fire Ins. Co. v. Fell*, 2008 WL 2609331 (3d Dept. July 3, 2008).