Week of July 5

Additional Insured Coverage - Duty to Defend and Priority of Coverage. DECISION OF INTEREST Civil Arson, Contractual Indemnification - General Obligations Law Sec 5-322.1, Contractual Indemnification - General Obligations Law Sec. 5-321, Salvage Yard Exclusion, Negligent Construction Exclusion, Material Misrepresentation, Direct Action - Reinsurance, Arbitration - D&O Insurance, Excess Coverage, Notice of Non-Renewal, Direct Action - Late Notice of Occurrence, UM Arbitration, Common-Law Indemnification/ Contribution, First-Party No-Fault

Additional Insured Coverage – Duty to Defend and Priority of Coverage. DECISION OF INTEREST. Court of Appeals affirms First Department’s holding that duty to defend an additional insured is the same as the duty to defend a named insured, and proof of the named insured’s liability is not required to trigger the duty to defend an additional insured where the underlying complaint sufficiently alleges that the injury arose out of the named insured’s operations. However, court reverses that part of the lower court’s decision holding that the named insured coverage is excess to the additional insured coverage. Court holds that unless the other insurers are parties and the other policies are before the court, a finding regarding priority of coverage cannot be made. B.P. Air Conditioning Corp. v. One Beacon Ins. Group, 2007 WL 1826923 (June 27, 2007). Civil Arson. Third Department affirms bench trial decision in favor of insurer finding that insured under a homeowners policy intentionally started the fire. Court finds insurer carried its burden under the “clear and convincing” standard of proof by submitting evidence that insured made an unusually prompt and in-person premium payment shortly before the fire, that insured moved belongings out of the house shortly before the fire, that insured was in precarious financial position, that insured owed back property taxes, that insured intended to move to another home in Florida, lack of forced entry in home prior to the fire, insured’s absence during the fire, and the presence of accelerants. Maier v. Allstate Ins. Co., 2007 WL 1836661 (3d Dept. June 28, 2007). Contractual Indemnification – General Obligations Law § 5-322.1. In a mesothelioma action, First Department affirms grant of contractual indemnification in favor of power company over contractor that employed plaintiff. Court notes that broad language in contracts was sufficient to indicate parties’ express intent that power company would be indemnified for its own negligence, and that General Obligations Law § 5-322.1 postdated the contract and does not have retroactive effect. Croteau v. A.C. and S., 2007 WL 1815405 (1st Dept. June 26, 2007). Contractual Indemnification – General Obligations Law § 5-321. In an action arising from injuries to the president of a tenant company upon being assaulted on owner’s property, Second Department modifies order to grant tenant company’s motion to dismiss owner’s third-party complaint where the broad indemnity provision in the lease between owner and tenant is unenforceable under General Obligations Law § 5-321 because it was not limited to tenant’s acts and omissions, it failed to make an exception for owner’s own negligence, and it did not limit owner’s recovery to insurance proceeds. Yuen v. 267 Canal Street Corp., 2007 WL 1842201 (2d Dept. June 26, 2007). Contractual Indemnification – General Obligations Law § 5-322.1. In personal injury action where jury verdict apportioned negligence among contractor, construction company, and utility, Second Department reverses order granting utility’s application for contractual indemnification against construction company where jury’s finding that utility’s negligence was a substantial factor in causing the accident and General Obligations Law § 5-322.1 barred utility from seeking contractual indemnification under a broadly-worded provision contemplating full indemnification. Kalinsky v. Square, 2007 WL 1845624 (2d Dept. June 26, 2007). Salvage Yard Exclusion. Second Department reverses summary judgment in favor of insurer in connection with a bodily injury action by an independent contractor against a salvage yard operator. Court finds that exclusion for removal of auto parts in the salvage yard by “any person” could reasonably be interpreted to be limited to customers visiting the salvage yard. Court considers the content of the quotation and binder that preceded the policy. Court also finds that plaintiff was not engaged in removal of parts at the time of the accident. Essex Ins. Co. v. Pingley, 2007 WL 1846821 (2d Dept. June 26, 2007). Negligent Construction Exclusion. Second Department holds that lower court properly denied insured’s motion to renew its opposition to summary judgment, which was granted in favor of insured in connection with a property damage claim. Coverage was denied based on exclusion for negligent construction on or off the insured premises where the damage was caused by negligent excavation of an adjoining property. Insureds later attempted to prove that engineering reports showed that coverage was owed under the collapse hazard. Court holds lower court correctly concluded that insured failed to show that the allegedly new evidence could not have been submitted in connection with the original motions. Schlesinger v. Harleysville Worcester Ins. Co., 2007 WL 1775404 (2d Dept. June 19, 2007). Material Misrepresentation. Second Department reverses summary judgment in favor of insurer and grants summary judgment in favor of insured, declaring that insurer must defend and indemnify insured, landlord of a boat dock, against the claim of the owner of a boat who was allegedly injured climbing from his boat. The court finds that insurer did not meet its burden under Insurance Law § 3105 because it relied on conclusory statements of its underwriter that the policy would have been issued had insured not misrepresented his work as that of a cabinetmaker. Court finds insurer failed to submit sufficiently detailed underwriting proof that the policy would not have been issued. Court also finds that since the survey insurer relied on in determining insured misrepresented his business postdated issuance of the policy, insurer has no basis to prove a misrepresentation. Schirmer v. Penkert, 2007 WL 1775407 (2d Dept. June 19, 2007). Direct Action – Reinsurance. Developer of a construction project sought enforcement of surety bonds directly against a reinsurer where the ceding insurer went into liquidation. Court grants reinsurer’s motion to dismiss. Court-approved reinsurance agreement between the ceding insurer and the reinsurer did not create a “cut-through” provision allowing bond holders to assert a direct action against the reinsurer. Court also holds that Insurance Law provisions requiring inclusion of a cut-through provision in certain reinsurance agreements

does not create a direct cause of action. Jurupa Valley Spectrum, LLC v. National Indem. Co., 2007 WL 1862162 (S.D.N.Y. June 29, 2007). Arbitration – D&O Insurance. D&O insurer issued separate policies to two distinct companies that would subsequently become jointly controlled. One policy contained an arbitration provision, the other did not. In connection with a settled derivative action, court rejects insured’s argument that insurer must arbitrate claims under both policies because the claims are related. Court holds that since the policy at issue did not contain an arbitration clause, insurer cannot be compelled to arbitrate, regardless of the arbitrability of a related claim under a different policy. National Union Fire Ins. Co. of Pittsburgh, PA v. Vector Group, Ltd., 2007 WL 1893730 (S.D.N.Y. June 29, 2007). Excess Coverage. In a long-running coverage dispute in connection with environmental liabilities, court grants summary judgment dismissing excess London insurers where insured provided no evidence that the London policy provided coverage in the absence of primary coverage, and where insured failed to allege liability in excess of the attachment point of the London policy even if there were coverage. Crucible Materials Corp. v. Aetna Cas. & Sur. Co., 2007 WL 1827473 (S.D.N.Y. June 22, 2007). Notice of Non-Renewal. Court grants summary judgment to insurer in connection with a claim for fire damage to a commercial property. Court finds insurer properly issued a non-renewal notice under Insurance Law § 3426(e) based on a change in the type of coverage, and was not obligated to issue a second notice as an “alternative renwal” under the statute. Court also observes that even if the policy were not properly non-renewed, the non-renewal was issued more than the length of two policy periods prior to the loss, and extending coverage that long under the statute would be unreasonable. Court also finds policies as written did not cover the part of the premises that suffered the loss. Canora Family, Inc. v. Universal Underwriters Ins. Co., 2007 WL 1789017 (S.D.N.Y. June 20, 2007). Direct Action – Late Notice of Occurrence. In an action by injured party against the insurer of the contractor who constructed the steps on which plaintiff fell, First Department affirms insurer’s motion for summary judgment dismissing injured party’s complaint seeking to collect on a default judgment it obtained against contractor. Where insurer received first notice of accident more than seven years after the occurrence and disclaimed coverage on late notice grounds within two weeks of such notice by letter to the contractor and plaintiffs’ counsel, First Department rejects injured party’s argument that disclaimer was effective only against the contractor. Insurer complied with the requirements of Insurance Law § 3420(d) by sending a copy of the disclaimer to the injured party. Schlott v. Transcontinental Ins. Co., Inc., 2007 WL 1839811 (1st Dept. June 28, 2007). UM Arbitration. In an action by insurer to permanently stay arbitration, First Department reverses order denying the stay, finding that trial court erred in finding that the additional respondent insurer effectively cancelled its policy where it failed to show that it filed a copy of the notice of cancellation with the DMV within thirty days of the effective date of the cancellation, as required by Vehicle and Traffic Law § 313(2)(a). Progressive Classic Ins. Co. v. Kitchen, 2007 WL 1839898 (1st Dept. June 28, 2007). Common-Law Indemnification/Contribution. In a personal injury action arising from a parking lot slip and fall on ice, Second Department modifies trial court order to grant snow removal contractor’s and snow removal subcontractor’s motions to dismiss property owner’s and tenant’s contribution claim where owner and tenant failed to show that contractor and subcontractor owed them a duty of care independent of its contractual obligations or that they owed a duty of care to the insured plaintiff. Contractor and subcontractor were also entitled to dismissal of owner’s and tenant’s common-law indemnification claim upon showing that the accident was not due solely to negligent performance or nonperformance of any act solely within the contractor’s and subcontractor’s province. Roach v. AVR Realty Co., LLC, 2007 WL 1841318 (2d Dept. June 26, 2007). First-Party No-Fault. In an action to recover first-party no-fault benefits, court reverses order denying provider summary judgment where insurer failed to raise any triable issues of fact to rebut plaintiff’s prima facie showing of entitlement to summary judgment. Where it was undisputed that insurer failed to deny the subject claims within thirty days, it was precluded from asserting statutory defenses and defendant failed to present any evidence to support a defense based on lack of coverage. Inwood Hill Medical P.C. v. Utica Mut. Ins. Co., 2007 WL 1888452 (Sup. Ct. App. Term July 2, 2007). First-Party No-Fault. In an action to recover assigned first-party no-fault benefits, court modifies trial court order to deny provider’s motion for summary judgment where provider’s proof of mailing was insufficient and insurer established that its denials were based upon a founded belief that the alleged injuries did not arise out of an insured incident by providing the transcripts of examinations under oath of several persons involved in the incident that contained numerous statements that were “implausible on their face.” East Acupuncture, P.C. v. Electric Ins. Co., 2007 WL 1835563 (Sup. Ct. App. Term June 25, 2007). First-Party No-Fault. In an action to recover first-party no-fault benefits, court holds that provider is entitled to summary judgment where insurer’s affidavit detailing office mailing procedure did not reflect personal knowledge that the insurer complied with such policies with respect to the subject denial letters. New York Hosp. Medical Center of Queens v. Liberty Mutual Ins. Co., 2007 WL 1805771 (Dist. Ct. Nassau Co. June 21, 2007).