
Week of June 26, 2008

Partial Contractual Indemnification. DECISION OF INTEREST

Subrogation Provisions - Excess Coverage. DECISION OF INTEREST

Redlining. DECISION OF INTEREST

Contingent Commission Agreements. DECISION OF INTEREST

Additional Insured Status. DECISION OF INTEREST

Designated Premises Endorsement - Necessary or Incidental Operations

Maritime Liability Coverage - "Misdirected Arrow" Provision

D&O Liability - Wrongful Acts/Knowledge of Wrongful Acts

Disability Insurance - "Own Occupation" Coverage

Bankruptcy - Asbestos Payouts

Additional Insured Coverage - Employee Exclusion

Builder's Risk - Scope of Coverage

Policy Cancellation/Broker Liability

Duty to Defend

Insurance Law § 3420(d)

Additional Insured Status/ Insurance Law § 3420(d)

Fraud

Coverage by Estoppel

Contractual Indemnification/Common-Law Indemnification

Contractual Indemnification

Contractual Indemnification/General Obligations Law § 5-321

SUM - Resident Relatives

SUM - Failure to Cooperate

First-Party No-Fault

Partial Contractual Indemnification. DECISION OF INTEREST. In connection with a slip-and-fall accident, Fourth Department grants summary judgment dismissing property owner's third-party common law indemnification claim. Court notes that since owner was partially at fault, common law indemnification action was in actuality a contribution action barred by virtue of the owner's settlement with plaintiff. However, court finds lower court erred by dismissing owner's contractual indemnification claim, holding that owner's fault does not disqualify it from seeking partial indemnification. *Buchwald v. Verizon New York, Inc.*, 2008 WL 2390522 (4th Dept. June 13, 2008). Subrogation Provisions - Excess Coverage. DECISION OF INTEREST. In another coverage dispute arising from the September 11 attack on the WTC, excess property insurer claimed that its rights to subrogation take priority over insured's rights of recovery against third parties. Court finds that policies' "Application of Recoveries" clause is not a subrogation clause that would negate the subrogation clause in the primary policy, but is instead a mechanism to allow the insurer to be reimbursed by the amount of any recoveries by the insured following settlement of the loss that reduce the ultimate net loss under the policies. Court holds that under subrogation clause under the primary policy, which the excess policies follow, insurer is entitled to subrogation rights and has priority over the insured's rights of recovery against third parties. Court rejects argument that equitable subrogation requires insurer to withhold pursuing third parties unless and until insurer is made whole by

exhausting its recovery efforts against third parties. *SR International Bus. Ins. Co. Ltd. v. World Trade Center Properties LLC*, 2008 WL 2358882 (S.D.N.Y. June 10, 2008). Redlining. DECISION OF INTEREST. In an appeal arising from the State Insurance Department's denial of Brooklyn Borough President's FOIL requests for Regulation No. 90 reports filed after he became concerned that auto insurers were redlining residents of Kings County, Court of Appeals holds that the Department failed to show by persuasive evidence that the requested records fell within the FOIL exemption for records submitted by commercial entities that contain trade secrets and which if disclosed would cause substantial injury to the competitive position of the enterprise. A concurring opinion agrees with the majority's result on the basis that Regulation No. 90 makes the requested reports public record, but disagrees with the majority that (1) Regulation No. 90 reports are available to the public only if FOIL allows; and (2) that the insurers failed to show that the reports are exempt from FOIL. In the Matter of Marty Markowitz v. Gregory V. Serio, 2008 WL 219882 (June 26, 2008). Contingent Commission Agreements. DECISION OF INTEREST. In attorney general's action against insurer and agent alleging violations of the Donnelly Act, First Department holds that trial court erred in failing to dismiss the attorney general's causes of action for breach of fiduciary duty where insurance agent and customer had no special relationship, thus the agent owed no common-law duty to its customer other than to obtain the policy requested within a reasonable period of time, or to inform the customer that it could not do so. Accordingly, insurance company and agent owed no duty to disclose the existence of contingent commission agreements. *People ex rel. Cuomo v. Liberty Mut. Ins. Co.*, 2008 WL 2445577 (1st Dept. June 19, 2008). Additional Insured Status. DECISION OF INTEREST. In ice rink's action against contractor's insurer seeking a declaration that insurer owed ice rink additional insured coverage in connection with underlying personal injury action, Second Department modifies order to require insurer to provide defense and indemnity to ice rink where contractor was required by oral agreement to name ice rink as an additional insured on its policy and policy contained a blanket additional insured endorsement that included as an additional insured any party by which the contractor was required to name as an insured by "written contract, agreement, or permit." Second Department holds that "written" could reasonably be read to only modify the word "contract," and policy must be interpreted to include as an additional insured any organization that the contractor was required by written or oral agreement to name as an insured. *Superior Ice Rink, Inc. v. Nescon Contracting Corp.*, 2008 WL 2447575 (2d Dept. June 17, 2008). Designated Premises Endorsement - Necessary or Incidental Operations. In connection with bodily injury action arising from an accident at a real estate company's administrative office, one of the company's insurers brought an action against another primary insurer seeking coverage under two policies. Both policies contained a designated premises endorsement that listed properties other than the location of the accident. On a motion to dismiss, court finds the provisions unambiguously do not provide coverage. Court rejects plaintiff insurer's argument that the "necessary and incidental operations" provision of the endorsements would extend to the administrative office managing the listed premises. Court holds that the provision applies only to spatially related premises such as appurtenances, not to business relationships between far removed premises. *Ten Seventy One Home Corp. v. Liberty Mut. Fire Ins. Co.*, 2008 WL 2464187 (S.D.N.Y. June 18, 2002). Maritime Liability Coverage - "Misdirected Arrow" Provision. Concessionaire on a cruise line was a co-assured under the ship's protection and indemnity policy. Concessionaire paid medical and other benefits following the death of an employee, then sought reimbursement under the ship's policy. Court grants summary judgment in favor of the insurer, finding that the co-assured's coverage under the policy is limited under the "misdirected arrow" provision to liability imposed on the co-assured that is properly attributable to the ship. *Trident International Ltd. v. American Steamship Owners Mut. Protection and Indem. Assoc., Inc.*, 2008 WL 2498239 (S.D.N.Y. June 19, 2008). D&O Liability - Wrongful Acts/Knowledge of Wrongful Acts. In connection with bankruptcy of a financial brokerage house following its IPO, excess insurer brought action seeking reimbursement of defense costs it advanced. Insurer argued that warranty letter signed by the insured's former CEO, who was convicted in connection with the insured's collapse, entitled it to deny coverage to all insureds. Court finds that a severability provision in the policy was limited to statements made in the application, and does not apply to the warranty letter, but finds an issue of fact regarding whether the warranty letter applied to the policy at issue rather than the prior year's policy only. Court rejects insurer's argument that unanswered question in the application regarding knowledge of claims is a basis to deny coverage, as insurer waived that defense by issuing the policy without further inquiry. Court also finds an issue of fact whether insurer properly added a knowledge exclusion into the policy at issue where the binder (in effect at the time of the allegedly fraudulent acts) did not include reference to such an exclusion. Court also finds insurer entitled to discovery to prove its claim that the claims at issue were connected to a prior scheme and thus subject to the policy's prior acts exclusion. *Axis Reinsurance Co. v. Bennett*, 2008 WL 2485388 (S.D.N.Y. June 19, 2008). Disability Insurance - "Own Occupation" Coverage. An OB/GYN with two "own occupation" disability policies brought an action for coverage after his claim was denied. On insurer's motion to dismiss, court dismisses insured's claims of breach of the covenant of good faith and fair dealing, since no such claim exists under New York law apart from a breach of contract claim. Court dismisses fraud claim since an allegation that a party to a contract intended to breach the contract is insufficient to plead fraud. Court holds that insured's allegations of claim denial do not, as a matter of law, rise to the level of outrageous conduct to state a claim for intentional infliction of emotional distress. However, court holds that insured sufficiently alleged a claim under General Business Law § 349, even if his claim ultimately proves to be only a private breach of contract claim. *Simon v. Unum Group*, 2008 WL 2477471 (S.D.N.Y. June 19, 2008). Bankruptcy - Asbestos Payouts. Second Circuit Court of Appeals reverses District Court's rejection of bankrupt shipping line's trustee's plan for paying claims of former employees with asbestos-related claims, and finds plan does not violate policies' pay-first indemnification provisions, and that plan appropriately accounts for a setoff the insurer is entitled to in connection with four policies that were not fully paid. *Prudential Lines Inc. v. American Steamship Owners Mut. Protection and Indem. Assoc. Inc.*, 2008 WL 2446140 (June 19, 2008). Additional Insured Coverage - Employee Exclusion. In connection with underlying construction accident suits, contractor's insurer brought action seeking additional insured coverage for the insured under a subcontractor's policy. Subcontractor's policy

included a broad exclusion for injuries to employees of any insured. Court grants summary judgment to defendant insurer, finding exclusion applies and is enforceable. *The Burlington Ins. Co. v. Galindo & Ferreira Corp. Co.*, 2008 WL 2369791 (June 9, 2008). **Builder's Risk - Scope of Coverage.** Contractor hired to complete construction of a new home was insured under a builder's risk policy. The company that owned the project insured the site under a homeowners policy. A fire destroyed the home just prior to completion, and both insurers disclaimed. Court finds the homeowners policy excludes liability arising out of a contractor's operations, and that coverage for the loss properly exists under the contractor's builder's risk policy. Court rejects the insurer's argument that its insured's work was improvement of an existing building. Court finds insurer failed to submit underwriting evidence to support its argument that it charged a premium based on work to an existing building rather than a new build. Court also rejects insurer's alternate argument that coverage should be limited to that portion of the building the insured constructed, finding no policy language to impose such a limitation. *Rhino Excavating Corp. v. Assurance Company of America*, 2008 WL 2513334 (Sup. Ct. Nassau Co. June 11, 2008). **Policy Cancellation/Broker Liability.** Insured's homeowners policy was cancelled for nonpayment, and property was subsequently destroyed by fire. Insured argued that the notice of cancellation did not properly set forth the amount of premium due as required by Insurance Law § 3425, which court rejects based on the evidence. Court finds insurer met its burden of showing the notice of cancellation was properly mailed through the affidavit of an employee with personal knowledge of the mailing. Court also rejects as unsupported insured's argument that he had a special arrangement with his broker under which broker was to inform him of past due premium. *Kaufman v. Leatherstocking Coop. Ins. Co.*, 2008 WL 32369925 (3d Dept. June 12, 2008). **Duty to Defend.** In insureds' action against insurer seeking coverage in connection with an underlying action, Second Department affirms order declaring that insurer has no obligation to defend or indemnify insureds where underlying plaintiff's allegations fell wholly within specific policy exclusions and there was no factual or legal basis upon which insurer might eventually be obligated to indemnify its insureds. *Global Const. Co., LLC v. Essex Ins. Co.*, 2008 WL 245645 (2d Dept. June 17, 2008). **Insurance Law § 3420(d).** In insureds' action against agency alleging breach of a contract to procure insurance arising from a bodily injury action commenced by insured's employee, Second Department affirms order declaring that insurer must provide a defense and indemnification to insured where insurer's five-month delay in issuing a disclaimer was untimely as a matter of law. *Rael Automatic Sprinkler Co., Inc. v. Schaefer Agency*, 2008 WL 2448094 (2d Dept. June 17, 2008). **Additional Insured Status/ Insurance Law § 3420(d).** In a declaratory judgment action, First Department issues a brief decision holding that (1) plaintiff did not qualify as an additional insured where the subject contract did not require named insured to name plaintiff as an additional insured as required by the policy; (2) certificate of insurance did not confer additional insured status; and (3) even if there were coverage, the claim was barred by the policy's employee exclusion. Court rejects plaintiff's argument that insurer's disclaimer, issued 20 days after receiving notice of the claim, was untimely. *ALIB, Inc. v. Atlantic Cas. Ins. Co.*, 2008 WL 2521093 (1st Dept. June 26, 2008). **Fraud.** In a brief decision with little factual background or analysis, First Department affirms order granting defendant brokers' motion to confirm a Special Referee's recommendation to dismiss claims of fraud asserted by former investors in Lloyd's of London in their action alleging that brokers failed to disclose the extent of an insured manufacturer's exposure to asbestos claims. Appellate Division holds that investors were not entitled to a jury trial on the issue of whether their fraud claim was barred by the two-year statute of limitations where investors, with reasonable diligence, could have discovered the alleged fraud well before the controlling two-year period. *George Aldrich v. Marsh & McLennan Companies, Inc.*, 2008 WL 2521368 (1st Dept. June 26, 2008). **Coverage by Estoppel.** In a bodily injury action arising from an accident in an unfinished home, Second Department affirms order denying a motion by builder's insurer seeking dismissal of builder's third-party claims for coverage. Although insurer established that its policy listed coverage only for premises other than the site of the accident, builder raised an issue of fact by submitting testimony of builder's insurance broker that insurer audited the policy after policy had expired and charged the builder a premium for all work associated with the accident site. Broker's testimony raised an issue of fact as to whether insurer may be estopped from denying coverage after it accepted premium payments from the builder after the audit. *Moncrief v. DiChiaro*, 2008 WL 2522078 (2d Dept. June 24, 2008). **Contractual Indemnification/Common-Law Indemnification.** In neighbor's bodily injury action alleging that he was struck when a heavy ladder fell into his yard from a construction site, court grants summary judgment dismissing the complaint against general contractor and owner where plaintiffs failed to submit evidence showing that the alleged condition was attributable to either defendant. Court holds that the issue of whether general contractor was entitled to alternative relief in the form of summary judgment on its indemnification and contribution claims against subcontractors was now moot, but notes that such a determination would have been dependent upon a finding that general contractor was not negligent in causing the accident. *Haupter v. Laurel Development, LLC*, 2008 WL 2485537 (Sup. Ct. Bronx Co. June 17, 2008). **Contractual Indemnification.** In pedestrian's bodily injury action alleging a trip over a pothole in the vicinity of where a crane was being used, Second Department affirms order denying crane lessor's motion for summary judgment on its claim that crane lessee owed it defense and indemnification under the crane rental agreement. Court properly found that lessee owed no such duty where plaintiff's injuries did not arise from the use of the crane and the subject indemnification provision required lessor to indemnify lessee for claims occasioned by the operation or handling of the crane. *Agricola v. City of New York*, 2008 WL 2457911 (2d Dept. June 17, 2008). **Contractual Indemnification.** In bodily injury action arising from alleged slip and fall on ice in a commercial parking lot, First Department affirms order granting property owner conditional summary judgment on its contractual indemnification claim against snow removal contractor where evidence showed that property owner may have retained some control over snow removal operations on the premises. *Garcia v. Mack-Cali Realty Corp.*, 2008 WL 2521099 (1st Dept. June 26, 2008). **Contractual Indemnification.** In a bodily injury action involving a freight elevator, First Department modifies order to dismiss all claims against elevator maintenance company where the elevator service agreement did not include the freight elevator in question and testimony that the maintenance company may have inspected the freight elevator pursuant to the building owner's verbal

request was too vague to raise an issue of fact as to liability. *Remekie v. 740 Corp.*, 2008 WL 2492261 (1st Dept. June 24, 2008). Contractual Indemnification/General Obligations Law § 5-321. In a brief decision with little factual background or analysis, First Department affirms order granting summary judgment against third-party defendants conditioned on a finding of liability against third-party plaintiffs. Given that the parties are sophisticated commercial entities and that third-party defendants were obligated to procure insurance under the subject lease, the indemnification provision does not violate General Obligations Law § 5-321. *Jenrette v. Green Acres Mall*, 2008 WL 2445865 (1st Dept. June 19, 2008). Contractual Indemnification. In a bodily injury action arising from a construction site injury, Third Department affirms order denying contractor's contractual indemnification claim where parties had no formal written contract at the time of the accident, subsequent contract did not include any language indicating that terms were to be retroactively applied, and there was no evidence of a longstanding relationship or that the prior indemnification agreement constituted a blanket relationship. *Lafleur v. MLB Industries, Inc.*, 2008 WL 2446201 (3d Dept. June 19, 2008). SUM - Resident Relatives. Insurer brought petition to permanently stay arbitration in connection with claim of minor hit struck by an uninsured vehicle. Named insured did not marry the minor's father until after the accident. Insurer argued that minor was therefore not a resident relative of the named insured's spouse for purposes of coverage, even though father was a listed driver on the policy. Court dismisses petition, finding the father an insured under the policy, and determining that his minor son lived with both his father and his mother under a joint custody agreement. *Allstate Ins. Co. v. Moreno*, 2008 WL 2497083 (Sup. Ct. Suffolk Co. June 5, 2008). SUM - Failure to Cooperate. In connection with a petition to permanently stay SUM arbitration, Second Department holds that tortfeasor's insurer properly disclaimed for failure to cooperate where insured could not be located after a diligent search and provided false information in his application. Court also notes that insurer's failure to serve a disclaimer on the driver of the insured's vehicle did not affect validity of the disclaimer since the driver gave a false address. *Allstate Ins. Co. v. Gardaner*, 2008 WL 2390065 (2d Dept. June 10, 2008). First-Party No-Fault. Court reverses summary judgment in favor of provider, finding its employee affidavit lacked sufficient personal knowledge of practices and procedures to lay a foundation for the admission of the claim documents. However, court also denies insurer's motion for summary judgment, finding that its IME report failed to address the necessity of the supplies provided. *Alur Medical Supply, Inc. v. Country-Wide Ins. Co.*, 2008 WL 2497035 (Sup. Ct. App. Term June 12, 2008). First-Party No-Fault. Summary judgment motion properly denied where its officer's affidavit lacked sufficient personal knowledge of practices and procedures to lay a foundation for the admission of the claim documents. Insurer's motion for summary judgment properly granted where its peer review report established that the supplies at issue were not medically necessary, with no evidence in rebuttal. *Vista Surgical Supplies, Inc. v. American Protection Ins. Co.*, 2008 WL 2497023 (Sup. Ct. App. Term June 12, 2008).