Week of March 13, 2008

Consent to Settle. DECISION OF INTEREST.

Rescission - Material Misrepresentation/Waiver and Estoppel/Reformation.

Discovery Disputes - Business Interruption Coverage.

Disclaimers - Excess Coverage.

Duty to Defend.

Contractual Indemnification.

Timeliness of Disclaimer.

Common-Law Indemnification.

Disability Insurance/Duty to Cooperate.

Common-Law Indemnification/Contractual Indemnification.

Untimely Notice/Reasonable Belief in Nonliability.

First-Party No-Fault - Medical Necessity.

Consent to Settle. DECISION OF INTEREST. Bear Stearns was insured under a $10 million primary professional liability policy with a $10 million self-insured retention and two "follow-form" excess policies providing $40 million in coverage. The primary policy required the insurer's consent to settle claims in excess of $5 million. Following claims by the SEC, NASD, and NYSE of various improprieties, Bear Stearns requested consent to settle from the insurers three days after executing a settlement agreement with the authorities. Court of Appeals holds that the policy's consent to settlement provision is unambiguous, and that Bear Stearns breached the provision as a matter of law. Court notes that by the time Bear Stearns requested consent for the settlements, it had nothing further to do to conclude the settlements, and the terms of the settlement were not made subject to insurers' approval. Vigilant Ins. Co. v. The Bear Stearns Cos., Inc., 2008 WL 656260 (Ct. App. March 13, 2008). Rescission - Material Misrepresentation/Waiver and Estoppel/Reformation. After a security employee of insured restaurant allegedly murdered a patron, insurer sued insured for a declaration voiding restaurant's liability policy based on a material misrepresentation. In its application, insured answered "no" to question regarding whether insured employed security personnel. Court finds insurer proved as a matter of law the materiality of the misrepresentation where its underwriting evidence established that it would not have issued the policy without an assault and battery exclusion had insured answered "yes" to the question on the application regarding whether insured hired security personnel. Court rejects argument that application questions were ambiguous. Court also rejects insured's argument that its broker was responsible for any misrepresentations, holding that broker was acting within the scope of its authority as agent for insured, even if insured did not sign the application and the application was submitted without notice to the insured. However, court finds issue of fact whether insurer waived right to seek rescission by continuing to accept premiums in light of insurer's earlier inspection that revealed that insured employed security personnel. Court also finds issue of fact regarding insurer's claim that the policy should be reformed to include the assault and battery exclusion based on unilateral mistake, which requires proof of fraudulent concealment by insured. National Specialty Ins. Co. v. 218 LaFayette Corp. LLC, 2008 WL 629994 (S.D.N.Y. March 10, 2008). Discovery Disputes - Business Interruption Coverage. Insurer issued business interruption coverage to clothing stores located in the mall at the World Trade Center, which insured claimed were uniquely favorable locations. Insured brought suit to resolve the proper length of the restoration period under the policy. Ruling on discovery disputes, court finds that a disputed e-mail regarding pre-suit claim strategy exchanged among insurer personnel, including in-house counsel, was not protected by attorney-client privilege as it did not constitute a request for or the giving of legal advice. However, court finds that substantial parts of the e-mail are within scope of federal work product doctrine because the e-mail was written in anticipation of litigation. Insured also sought to protect its CEO from deposition based on his lack of personal knowledge. Court permits insurer to depose CEO first by written questions, without prejudice should the answers demonstrate a valid basis for oral deposition. Retail Brand Alliance, Inc. v. Factory Mut. Ins. Co., 2008 WL 622810 (S.D.N.Y. March 7, 2008). Disclaimers - Excess Coverage. Plaintiff in an underlying auto accident requested coverage from tortfeasor's husband's insurer. Insurer disclaimed. Subsequently, underlying plaintiff made a second demand for coverage from the husband's insurer, this time seeking excess coverage. Second Department holds that the insurer's second disclaimer, which was based on the same exclusion as the first disclaimer, did not render the first disclaimer untimely. Braun v. One Beacon Ins. Co., 2008 WL 607494 (2d Dept. March 4, 2008). Duty to Defend. Insured lawyer was sued by a third party in connection with his representation of co-defendant client. Professional liability insurer defended under a reservation of rights, but brought action seeking declaration that it has no obligation to defend insured.

Insured argued that the complaint alleged that he was retained to perform legal services on behalf of client. Insurer argued that the claims against insured were not based on the provision of legal services, but for alleged participation in co-defendant client's scheme to defraud. Underlying action against insured was settled without payment, leaving only the issue of whether insurer was entitled to reimbursement of defense costs. Court grants insured's motion, finding that complaint sufficiently alleged the provision of legal services for purposes of the duty to defend under the policy. Court also rejects argument that exclusion for liability as an officer or director applies because underlying complaint alleged lawyer was a de facto officer of the client's companies. American Guarantee and Liability Ins. Co. v. Moskowitz, 2008 WL 612083 (Sup. Ct. New York Co. February 28, 2008).   Contractual Indemnification. In connection with a slip-and-fall accident, court grants owner conditional contractual indemnification against tenant restaurant in the event the tenant is held liable for a vendor's alleged injuries from slipping on the wet stairs of a service entrance. Rojo v. Picholine Restaurant Corp., 2008 WL 623834 (Sup. Ct. Bronx Co. March 5, 2008).   Timeliness of Disclaimer. In city's action against contractor's liability insurer seeking indemnity after judgment was entered against city in underlying personal injury action, First Department affirms order finding that triable issues of fact existed regarding the timeliness of insurer's disclaimer and whether insurer conducted its investigation promptly, diligently, and in good faith where insurer asserted its late notice defense 92 days after receiving the city's summons and complaint and insurer claimed that it needed time to investigate the 10-year old claim. City of New York v. Welsbach Elec. Corp., 2008 WL 638382 (1st Dept. March 11, 2008).   Common-Law Indemnification. In an action by insured against auto insurer to recover damages for breach of contract after valet lost insured's vehicle, Second Department modifies order to deny insurer's claim for common-law indemnification against valet where there existed no separate duty owed by the valet to the insurer. Whether insurer may recover in subrogation against valet was improperly raised for the first time on appeal. Vetland v. FX Enterprises I, Ltd., 2008 WL 657263 (2d Dept. March 11, 2008).   Disability Insurance/Duty to Cooperate. In insurer's action against insured alleging breach of a disability insurance policy, court grants summary judgment in favor of insurer where insured failed to provide additional requested medical records after insurer's orthopedic consultant determined that insured's existing records did not support a finding of total disability. Court rejects insured's argument that his belief that his attorneys would provide the necessary information gave rise to an adequate explanation for his failure to comply with his disclosure obligations. Paul Revere Life Ins. Co. v. Cahn, 2008 WL 612727 (S.D.N.Y. March 4, 2008).   Common-Law Indemnification/Contractual Indemnification. In worker's personal injury action arising from a slip and fall on a worksite due to the build-up of debris, First Department affirms order dismissing general contractor's third-party claims for contractual and common-law indemnification against electrical subcontractor where general contractor hired and supervised the cleaning crew at the worksite, electrical subcontractor had no duty to supervise the cleaning crew, and there was no evidence that subcontractor created the hazard or was otherwise negligent. Paltie v. Marquise Construction Corp., 2008 WL 668574 (1st Dept. March 13, 2008).   Untimely Notice/Reasonable Belief in Nonliability. In an action by insured seeking a judgment declaring that insurer owed insured a defense and indemnification in an action alleging a trip and fall on insured's property, Second Department reverses order finding that insured's 19-month delay in notifying insurer was based on a reasonable belief in her nonliability where insured received a claim letter which clearly stated that the injured party had retained an attorney for the purpose of pursuing a claim against insured. Under these circumstances, insured's failure to investigate was unreasonable. Donovan v. Empire Ins. Group, 2008 WL 669906 (2d Dept. March 11, 2008).   Common-Law Indemnification. In partygoer's personal injury action alleging illness after attending a dinner prepared by defendant caterers and served at defendant's facility, Second Department affirms order denying facility's motion for summary judgment. Facility was not entitled to dismissal of all claims against it where it was responsible for proper storage and service of the food. Facility was not entitled to summary judgment on its cross-claims for common-law indemnification where it failed to establish its own lack of negligence. Shani Amit v. Hineni Heritage Center, 2008 WL 669974 (2d Dept. March 11, 2008).   First-Party No-Fault - Medical Necessity. In an action to recover assigned first-party, no-fault medical payments, court grants order awarding summary judgment in favor of provider where insurer failed to meet its burden of showing that the services were not medically necessary. Although insurer presented evidence from a peer review, missing from the reviewing doctor's testimony was any mention of the applicable generally accepted medical/professional standard and the provider's departure therefrom. Cambridge Medical, P.C. v. Government Employees Ins. Co., 2008 WL 615035 (N.Y. City Civ. Ct. March 5, 2008).