

Week of March 6, 2008

Punitive Damages/Insurance Law § 2601/Attorney's Fees/General Business Law § 349

First-Party Property - Pollution Exclusion

Homeowners - First-Party Property Coverage

Rain Exclusion/"Efficient Physical Cause."

Additional Insured Coverage

Homeowners Insurance - Business Purposes Exclusion

Common-Law Indemnification/Contractual Indemnification

UM Coverage/Other Insurance/Duty to Cooperate

First-Party No-Fault - Medical Necessity

First-Party No-Fault - Insured Incident

Punitive Damages/Insurance Law § 2601/Attorney's Fees/General Business Law § 349. In a coverage dispute under a homeowners policy brought by the insured, Second Department holds it was error for trial court to allow plaintiff to replead, following disclosure, dismissed claims for punitive damages, damages under Insurance Law § 2601, attorney's fees, and damages under General Business Law § 349. Court holds that no cause of action lies as a matter of law with respect to the first three claims, and that plaintiff failed to allege deceptive practices that impacted the public at large sufficient to allege a claim under GBL § 349. *Kantrowitz v. Allstate Indem. Co.*, 2008 WL 525970 (2d Dept. February 26, 2008). First-Party Property - Pollution Exclusion. Owner of building located in proximity to the WTC submitted a claim for property damage caused by the impact of materials generated from the collapse of the WTC. Insurer paid over \$3 million for the claimed losses, but denied further coverage. Court denies insurer's motion for summary judgment. In connection with an alleged wave of particulates composed of hazardous building materials that traveled through the building, the court finds that the term "contaminant" as used in a pollution exclusion is ambiguous. Court rejects argument that insured's experts use of the word "contaminant" to describe the wave proves that no issue of fact exists regarding the scope of the term. Court holds that the term is ambiguous and its application must be decided by the trier of fact. Court refuses to consider insurer's argument that the policy's corrosion exclusion applies since it was raised for the first time in insurer's reply brief. *Ocean Partners, LLC v. North River Ins. Co.*, 2008 WL 44578 (S.D.N.Y. February 28, 2008). Homeowners - First-Party Property Coverage. Insured brought suit following a fire at the insured property, claiming that insurer improperly failed to pay the "holdback" amount between replacement cost value and actual cash value. Court grants summary judgment to insurer where insured failed to replace the property within 180 days of receiving payment for ACV. Insured intended to replace the property by buying another property, but did not actually do so. Court rejects insured's request for a ruling whether he is required under the policy to live in the replacement property. Court holds that since insured did not purchase a replacement property, ruling on the issue would constitute an improper advisory opinion. Court finds that the claim is superfluous in any event, since insured failed to replace the property within 180 days. *Alloush v. Nationwide Mut. Fire Ins. Co.*, 2008 WL 544698 (N.D.N.Y. February 26, 2008). Rain Exclusion/"Efficient Physical Cause." In insured's action against insurer seeking to recover under its policy for interior property damage and business income losses, First Department modifies order to dismiss insured's complaint where policy was subject to a rain exclusion which barred recovery for losses caused by rain. Appellate Division rejects insured's argument that damage was caused by debris that fell from a neighboring building which clogged its roof drain where the "efficient physical cause" was the rainwater itself. *Kennel Delites, Inc. v. T.L.S. NYC Real Estate, LLC*, 2008 WL 597281 (1st Dept. March 6, 2008). Additional Insured Coverage. In owner's action against sub-subcontractor's insurer seeking additional insured coverage, First Department affirms order granting owner summary judgment where clear language in sub-subcontractor's agreement incorporated the requirement in the subcontract that owner be named as additional insured under subcontractor's general liability and umbrella policies and expressly stated that all insurance requirements were binding on a sub-subcontractor retained by the subcontractor. *Carlisle SoHo East Trust v. Lexington Ins. Co.*, 2008 WL 565341 (1st Dept. March 4, 2008). Homeowners Insurance - Business Purposes Exclusion. In an action by property owner against insurer to recover under homeowners policy for personal property destroyed in a fire, Third Department affirms order in favor of insured after determining that policy provision limiting coverage on personal property used for business purposes was ambiguous. Where insured rented out their property from November to April for the first time, \$2,500 limit to personal property used for business purposes was ambiguous where policy did not define business to include the occasional rental of the property for residential purposes. *Villanueva v. Preferred Mut. Ins. Co.*, 2008 WL 517244 (3d Dept. February 28, 2008). Common-Law Indemnification/Contractual Indemnification. In tenant's third-party action against maintenance contractor arising after an air conditioner failure caused property damage, court holds that it was contractor's sole responsibility under the contract to perform repairs to the air conditioning unit,

regardless of any fault in causing the failure, and landlord was justified in making an emergency repair and seeking reimbursement from tenants under the circumstances. *Street Retail, Inc. v. CVS Fresh Meadows, L.L.C.*, 2008 WL 518146 (Sup. Ct. February 27, 2008). **UM Coverage/Other Insurance/Duty to Cooperate.** In an action by insurer to stay arbitration of a claim for uninsured motorist benefits, Third Department reverses order denying insurer's petition to stay arbitration on grounds that the disclaimer of tortfeasor's insurer was invalid. Court holds that insurer's disclaimer based upon tortfeasor's breach of cooperation was invalid where there was no evidence that tortfeasor knew his insurer was seeking his cooperation since insurer did not contact tortfeasor at his reported addresses. *St. Paul Travelers Ins. Co. v. Kreibich-D'Angelo*, 2008 WL 516813 (3d Dept. February 28, 2008). **First-Party No-Fault - Medical Necessity.** Following a bench trial, court issues judgment in favor of insurer, finding that it carried its burden of proving lack of medical necessity of EMG and NCV studies where two physician experts testified that based on the medical records provided pursuant to the insurer's request for verification, the studies were not medically necessary. Court rejects provider's argument that insurer's experts could not assume that assignor had no prior medical conditions that might be relevant to the issue of medical necessity. Court holds that provider was obligated to produce any relevant records in response to insurer's verification requests. *A.M. Medical Services, P.C. v. Deerbrook Ins. Co.*, 2008 WL 518022 (Civ. Ct. Kings Co. February 25, 2008). **First-Party No-Fault - Medical Necessity.** Court affirms award of \$549, finding that insurer was precluded from raising defense of medical necessity where its denial was not timely sent following receipt of verification. However, court reverses award of \$1,663 and grants summary judgment in favor of insurer where provider provided no evidence to rebut insurer's affirmed peer review report concluding the services were not medically necessary. *Be Well Medical Supply, Inc. v. New York Central Mut. Fire Ins. Co.*, 2008 WL 506180 (Sup. Ct. App. Term February 21, 2008). **First-Party No-Fault - Insured Incident.** Court grants summary judgment in favor of providers where insurer failed to present evidence to raise an issue of fact regarding whether the alleged injuries arose out of an insured incident. *Medical Care G.M., P.C. v. GEICO Ins.*, 2008 WL 539867 (Sup. Ct. App. Term February 27, 2008).