
Week of May 14, 2008

Disability Insurance

Interim Funding Agreement

Professional Liability - Late Notice/Excess and Surplus Lines

Legal Malpractice Coverage - Late Notice

Late Notice of Occurrence

Reinsurance/Punitive Damages

First-Party Fire Loss

Untimely Disclaimer

Broker Liability

Additional Insured Status/Validity of Disclaimer

Property Coverage

Direct Action

Duty to Procure/Contractual Indemnification

Contractual Indemnification

Common-law Indemnification

Contractual Indemnification/Conflict of Interest

UM Coverage

First-Party No-Fault/Federal Abstention

First-Party No-Fault

Disability Insurance. Second Department affirms lower court's holding that insurer failed to show that claim was time-barred because disability benefits at issue were denied more than six years prior to commencement of action. Court also affirms lower court's allowing plaintiff to assert "bad faith" claim in amended complaint, citing *Bi-Economy Mkt., Inc. v. Harleystown Ins. Co. of New York*, 10 N.Y.3d 187 (2008) and *Panasia Estates v. Hudson Ins. Co.*, 10 N.Y.2d 200 (2008). *Hoffman v. Union Mut. Stock Life Ins. Co. of New York*, 2008 WL 1990293 (2d Dept. May 6, 2008). Interim Funding Agreement. Two insurers in a coverage dispute agreed in open court in the underlying action to settle that action on 50-50 basis without prejudice to their respective coverage positions. After prevailing in the subsequent coverage action, insurer moved for summary judgment enforcing the settlement and to receive reimbursement of its settlement contribution. Second Department affirms lower court's grant of summary judgment ordering reimbursement. Court finds settlement on the record in the underlying action was an enforceable contract that unambiguously anticipated reimbursement, and rejects losing insurer's argument that no reimbursement could be awarded because such a theory of recovery was not pled in the coverage action. *American Bridge Co. v. Acceptance Ins. Co.*, 2008 WL 1990365 (2d Dept. May 6, 2008). Professional Liability - Late Notice/Excess and Surplus Lines. A securities broker was sued in multiple arbitrations for its alleged failure to prevent a broker from bilking investors through a fraudulent investment scheme. Broker's professional liability insurer disclaimed based on broker's alleged knowledge of potential claim prior to the policy period. Insurer brought action for declaratory judgment, and insured counterclaimed to rescind the policies based on insurer's alleged noncompliance with insurance laws. Court holds insured not entitled to rescind the policies. Court states that the laws governing excess and surplus lines insurers are related to supervision of such insurers, and would not have affected the substance of the policy. Court also states that if the policy constituted an unlawful group policy, the applicable laws give enforcement power to the Insurance Department, and do not create private rights of action. Court rejects insured's claim that insurer must provide security under the Insurance Law since insured is not a New York resident. *Quanta Specialty Lines Ins. Co. v. Investors Capital Corporation*, 2008 WL 1910503 (S.D.N.Y. April 30, 2008). Legal Malpractice Coverage - Late Notice. Court grants insurer's motion to dismiss claim for legal malpractice coverage where before policy's inception date, insured firm received a disciplinary notice on behalf of client that stated that firm

had failed to timely assert claim, among other alleged derelictions. Court dismisses as immaterial the fact that at the time the complaint was received, firm knew the client's claim could still be brought in court rather than arbitration. *Citak & Citak v. The St. Paul Travelers Cos.*, 2008 WL 1882660 (S.D.N.Y. April 28, 2008). Late Notice of Occurrence. Court grants summary judgment in favor of insurer, holding that insured store's five-month delay in providing notice of a slip-and-fall accident on its premises is unreasonable as a matter of law. Court rejects insured's claim of a reasonable belief in nonliability where store personnel were aware of the accident, issued an incident report, and witnessed the customer being taken to the hospital by ambulance. *Kaesong Corp. v. United National Specialty Ins. Co.*, 2008 WL 1902684 (E.D.N.Y. April 25, 2008). Reinsurance/Punitive Damages. Court sustains punitive damages award against an insurer the jury found to have fraudulently induced a reinsurer into entering into contracts. Court holds that "public harm" requirement for a punitive damages claim for tortious breach of contract does not apply to cases involving fraud in the inducement. Court finds jury had sufficient evidence to find that insurer's conduct justified punitive damages given the insurer's concealment that the facility was facultative-obligatory and not purely facultative. *AXA Versicherung AG v. New Hampshire Ins. Co.*, 2008 WL 1849312 (S.D.N.Y. April 22, 2008). First-Party Fire Loss. Jury previously determined that insurer failed to prove its arson defense. Jury calculated actual cash value and replacement cost of the property, but concluded that insured had not met its burden of justifying its failure to repair or replace the property as a condition of replacement cost recovery. Insured brought the current action seeking a declaration that insurer is now obligated to pay "holdback" for replacement cost coverage upon replacement of the building. Court holds action barred by *res judicata*, since insured did bring an action for replacement cost coverage in the prior action, albeit on a different theory. Court also finds action barred by policy's two-year limitations period. *O&E Growers, Inc. v. Selective Ins. Co. of America*, 2008 WL 2003783 (W.D.N.Y. May 7, 2008). Untimely Disclaimer. In a coverage dispute arising from an underlying construction site injury action, Second Department modifies order to declare that insurer was obligated to defend and indemnify general contractor in underlying action where insurer's 6-week delay in issuing its late notice disclaimer was untimely under Insurance Law § 3420(d). *Tex Development Co., LLC v. Greenwich Ins. Co.*, 2008 WL 2065983 (2d Dept. May 13, 2008). Late Notice of Occurrence. In a coverage dispute arising from an underlying Labor Law action, Second Department reverses order and declares that insurer is not obligated to defend or indemnify contractor where insurer presented evidence showing that contractor's one year delay in providing notice of the occurrence was unreasonable as a matter of law. *Scordio Const., Inc. v. Sirius America Ins. Co.*, 2008 WL 2066034 (2d Dept. May 13, 2008). Broker Liability. In insured business owner's action against agent for failure to provide sufficient liability coverage after insurer denied claim for damaged equipment, Third Department modifies order and grants agent's motion for summary judgment dismissing the complaint where the insured alleged that agent misrepresented the extent of coverage procured. Court holds that alleged misrepresentations occurred prior to the issuance of policy documents and insured is conclusively presumed to know the contents of an insurance policy. *Catskill Mountain Mechanical, LLC v. Marshall and Sterling Upstate, Inc.*, 2008 WL 1969721 (3d Dept. May 8, 2008). Additional Insured Status/Validity of Disclaimer. In an action by golf resort owner's insurer seeking a declaration that it was entitled to additional insured coverage under subcontractor's policy in connection with golfer's slip and fall on deck built by subcontractor, Third Department affirms order denying motion by subcontractor and its insurer seeking to dismiss complaint. Court rejects subcontractor's argument that owner and general contractor were not additional insureds on its policy limited to liability from ongoing operations where there was no evidence that work was in progress at the time of the accident. Deposition testimony and a punch list gave rise to fact issues regarding whether work was ongoing. Supreme Court properly denied insurer's alternative argument that it owed no duty to owner and general contractor on the basis of their late notice where insurer failed to timely disclaim to general contractor and owner on this basis. *One Beacon Ins. v. Travelers Property Cas. Co. of America*, 2008 WL 1969750 (3d Dept. May 8, 2008). Property Coverage. In a decision with little analysis or factual background, Second Department holds that trial court properly granted summary judgment in favor of insured on the issue of liability where insured demonstrated that insurance policy exclusions did not clearly and unambiguously apply to the subject loss. *Pioneer Tower Owners Ass'n v. State Farm Fire & Cas. Co.*, 2008 WL 1987267 (2d Dept. May 6, 2008).

Direct Action. In injured party's suit against defaulting tortfeasor's insurer to recover an unsatisfied judgment, Second Department affirms order denying injured party's summary judgment motion where there was no evidence that insurer was previously notified of the underlying action they commenced against the insured as required by Insurance Law 3420(a)(2). *Gongolewsky v. Empire Ins. Co.*, 2008 WL 2066616 (2d Dept. May 13, 2008). Duty to Procure/Contractual Indemnification. In building owner's and building manager's third-party suit against elevator maintenance company arising from an alleged tripping accident involving elevator passenger, Third Department holds that owner and manager were entitled to summary judgment on their claims for contractual indemnification from maintenance company where service agreement was comprehensive and exclusive and there was no evidence that owner and manager were on notice of any defect. Maintenance contractor was not entitled to summary judgment on its claim that owner and manager had breached a duty to procure insurance in favor of maintenance contractor where service agreement superseded prior contract imposing this duty. *Kelly v. Newmark & Co. Real Estate, Inc.*, 2008 WL 2050816 (3d Dept. May 15, 2008). Contractual Indemnification. In an action for personal injuries sustained in a fall in front of tenant's restaurant, First Department affirms order denying owner's motion for summary judgment on its claim for contractual indemnification from tenant where fact issues existed regarding owner's and tenant's negligence. *Cook v. Consolidated Edison Co. of NY, Inc.*, 2008 WL 1946742 (1st Dept. May 6, 2008). Common-law Indemnification. In a personal injury action commenced by insured subcontractor, Second Department modifies order to deny summary judgment to property owner in its third-party action for common-law indemnification against plaintiff's employer and lessee. Owner was not entitled to summary judgment where relative culpability, if any, had not yet been determined. *Markey v. C.F.M.M. Owners Corp.*, 2008 WL 2066581 (2d Dept. May 13, 2008). Contractual Indemnification/Conflict of Interest. In connection with an construction accident suit, First Department previously affirmed disqualification of insurer-retained attorney who brought a third-party

action against a company (the construction manager) owned by the same individual who owned the third-party plaintiff property manager and partially owned the third-party plaintiff owner. Following settlement of the first-party action, insurer retained new counsel to recommence the action against the construction manager. First Department affirms denial of defendant's motion to dismiss. Court finds no conflict of interest since new counsel did not previously represent the individual, and because the company that owns the property is not wholly owned by the individual, meaning the individual need not be called as a witness. *Willard J. Price Associates, LLC v. Stateside Construction, LLC*, 2008 WL 1902425 (1st Dept. May 1, 2008). UM Coverage. In an action by insurer to stay the arbitration of a claim for uninsured motorist benefits, First Department affirms order granting insurer's petition where bus did not qualify as an uninsured motor vehicle notwithstanding that policy insuring bus had a large deductible and owner became insolvent. *Lancer Ins. Co. v. Lackraj*, 2008 WL 1970656 (1st Dept. May 8, 2008). UM Coverage. In an action by insurer to stay the arbitration of a claim for uninsured motorist benefits, Second Department reverses order and grants insurer's petition after concluding that the tortfeasor was not an uninsured motorist where tortfeasor's policy limits were not less than the bodily injury limits of the petitioner's policy. *Automobile Ins. Co. v. Ray*, 2008 WL 2066484 (2d Dept. May 13, 2008). First-Party No-Fault/Federal Abstention. In federal action in which two insurers seek recovery of \$7.2 million in radiology services that were allegedly fraudulently billed by several no-fault providers, court denies providers' motion for court to abstain from the case. Providers based their motion on the fact that they have commenced a parallel declaratory judgment action against the insurers in state court. Court holds abstention not warranted since, among other factors, state case does not involve the state's administration of the no-fault law, because federal action seeks damages and not just a declaratory judgment, and because the federal action seeks recovery for a time frame not included in the state action. *State Farm Mut. Auto. Ins. Co. v. Schepp*, 2008 WL 1994856 (E.D.N.Y. May 8, 2008). First-Party No-Fault. After trial, court finds that testimony of president of provider's billing company was insufficient to lay foundation for admission of the claim form that incorporated medical information from records not offered into evidence. Court holds billing company representative had no personal knowledge of provider's business practices and procedures, and that form that incorporates hearsay documents is not non-hearsay simply because the billing company routinely incorporates such hearsay into its own records. *Second Medical, P.C. v. Auto One Ins. Co.*, 2008 WL 1946990 (Civ. Ct. Kings Co. May 2, 2008).