

Firm News 11/15/2006

Allocation/Property Damage; Privilege; Advertising Injury; Late Notice; Claims Handling; Insurer's Right to Approve Settlement/Investment Banking Exclusion; Contractual Indemnification; Executive Protection/Employment Practices Exclusion; Pollution Exclusion; SUM Benefits / Timely Notice; Disgorgement/Breach of Contract; First-Party No-Fault; Common Law Indemnification/Contractual Indemnification; Covenant of Good Faith and Fair Dealing; Uninsured Motorist/Cancellation; Negligent Procurement

Firm News 11/15/2006 Allocation/Property Damage. DECISION OF INTEREST. Second Circuit reverses jury charge given by district court in dispute over existence and allocation of property damage. Case involved excess coverage for remediation costs of pollution over many years. Second Circuit suggests that pro rata allocation is appropriate, although observes that other methods of allocation might be appropriate in different cases. Court finds that property damage occurs so long as things like leaching and migration of contaminants is causing new spread of pollution. Court rejects district court's instruction that property damage ceases at the point no new contaminants are being released into the environment. Court also allows insurer to pursue late notice of occurrence defense after district court erred by finding late notice requires prejudice. *Olin Corp. v. Certain Underwriters at Lloyd's, London*, 2006 WL 3206067 (2d Cir. November 7, 2006). Privilege. DECISION OF INTEREST. Upon review of disputed documents in connection with outside coverage counsel's work in connection with a disclaimer of coverage, court finds that coverage counsel's work predating date if disclaimer does not qualify as protected work product. However, court finds legal analysis predating disclaimer to constitute privileged attorney-client communications to the extent such communications were not disclosed in the disclaimer letter itself. *105 Street Associates, LLC v. Greenwich Ins. Co.*, 2006 WL 3230292 (S.D.N.Y. November 7, 2006). Advertising Injury. Although court finds complaint's single reference to "promotion" of allegedly infringing goods a seemingly "tenuous" basis to find a duty to defend, court finds precedent clearly establishes a duty to defend since reference to promotion fell within scope of policy's definition of "advertising." *Technaoro Inc. v. United States Fid. & Guar. Co.*, 2006 WL 3230299 (S.D.N.Y. November 7, 2006). Late Notice. Court finds notice of claim untimely as a matter of law in connection with an underlying unfair competition suit. In February, insured received letters from plaintiff requesting that insured cease its infringing activity. One such letter included a draft complaint. However, insured did not provide notice until the suit against in July. Court finds delay unreasonable as a matter of law, and that insured was not prejudiced by disclaimer issued in December since case is a not § 3420(d) case. *Technaoro Inc. v. United States Fid. & Guar. Co.*, 2006 WL 3230299 (S.D.N.Y. November 7, 2006). Claims Handling. In a dispute under a marine policy, court denies insurer's motion for summary judgment on statute of limitations grounds. Court finds insurer did not prove as a matter of law that loss occurred one year prior to insured's suit. Also, while court acknowledges that insurer's investigation of claim does not alone provide basis for waiver of limitations defense, fact that claim executive misrepresented that claim was still being considered when counsel had already recommended disclaiming resulted in a waiver of the limitations defense (if loss occurred after date of misrepresentation). *North American Foreign Trading Corp. v. Mitsui Sumitomo Ins. USA, Inc.*, 2006 WL 3240529 (S.D.N.Y. November 7, 2006). Insurer's Right to Approve Settlement/Investment Banking Exclusion. First Department affirms trial court's finding that triable issues of fact existed regarding insured's alleged breach of policy provision prohibiting insured from settling claims or assuming contractual obligations without insurer's consent where trier of fact could find that insured's settlement-in-principle with SEC was not binding. Court sua sponte grants partial summary judgment in favor of insured on insurer's claim that investment banking exclusion barred coverage where court found that allegations that the insured's research analysts were unduly influenced by investment banking concerns is not like the examples of investment banking work listed in the exclusion. *Vigilant Ins. Co. v. The Bear Stearns Co., Inc.*, 2006 WL 3290556 (1st Dept. November 14, 2006). Contractual Indemnification. First Department reverses trial court's denial of site owners' summary judgment motion, and upon renewal, grants owners' motion for contractual indemnification against contractors where there is no evidence of active negligence on the part of either owner. Court finds questions of fact regarding common law indemnification. *Neighborhood Partnership Housing Development Fund v. Blakel Construction Corp.*, 2006 WL 3290571 (1st Dept. November 14, 2006). Executive Protection/Employment Practices Exclusion. First Department reverses trial court's order dismissing the NFL's complaint and declaring that insurer had no duty to compensate the NFL for loss incurred in defending a lawsuit brought by a college football player alleging that the NFL's draft eligibility rule violated antitrust laws. Court holds that the policy's employment practices exclusion is inapplicable as a matter of law because it is limited to claims of employment law violations, not violations of antitrust laws. *National Football League v. Vigilant Ins. Co.*, 2006 WL 3290617 (1st Dept. November 14, 2006). Pollution Exclusion. Third Department modifies trial court's order partially denying insurer's motion for summary judgment dismissing insured's complaint against it seeking coverage for damages caused by oil contamination and clean-up costs after a vehicle struck insured's dwelling. Where policy expressly excluded clean-up costs of extracting pollutants, insurer was liable only for actual damages to structures and personal property on the premises, not for damages due to contamination of the ground and groundwater. *White v. Rhodes*, 2006 WL 3230045 (3d Dept. November 9, 2006). SUM Benefits / Timely Notice. First Department affirms trial court's order

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permanently staying arbitration upon finding that insured's notice of her claim for SUM benefits was untimely as a matter of law where insured provided such notice to her insurer sixteen months after insured received notice that tortfeasor's insurer was insolvent. *The Hartford Ins. Co. of the Midwest v. Gamiel*, 2006 WL 3230759 (1st Dept. November 9, 2006). Disgorgement/Breach of Contract. First Department affirms trial court's order declaring insurer had no duty to defend or indemnify insured under a policy providing liability coverage for personal injury or property damage. Where one of the underlying actions related to guardianship and alleged breach of fiduciary duty and the other underlying action sought unpaid legal fees under a theory of breach of contract, neither matter fell within the scope of coverage or constituted damages or loss. *Shapiro v. One Beacon Ins. Co.*, 2006 WL 3231407 (1st Dept. Nov. 9, 2006). First-Party No-Fault. First Department affirms trial court's order denying insurer's motion for summary judgment seeking declaration that healthcare provider was not entitled to payment of assigned no-fault benefits where provider was duly organized medical corporation, insurer offered no proof that provider was fraudulently licensed, and insurer failed to support its contention that provider's employment of licensed nonphysicians violated Business Corporation Law. *Healthmakers Medical Group, P.C. v. Travelers Indemnity Co.*, 2006 WL 3256655 (1st Dept. November 9, 2006). Contractual Indemnification. On municipality's and contractor's cross-appeals of a jury verdict finding both municipality and contractor to be fifty percent liable for personal injuries, Second Department denies contractor's contention that the contractual indemnification provision in favor of the municipality was void and unenforceable where such provision did not violate General Obligations Law § 5-322.1. *Vertsberger v. City of New York*, 2006 WL 3231959 (2d Dept. November , 2006). Common Law Indemnification/Contractual Indemnification. Second Department reverses trial court's order denying personal injury plaintiff's employer's motion for summary judgment dismissing the general contractor's claims for common law indemnification and contractual indemnification where plaintiff did not sustain a grave injury and employer submitted unrefuted evidence that it had obtained a policy of workers' compensation insurance that was in effect at the time of the accident. *Reinoso v. Ornstein Layton Management, Inc.*, 2006 WL 3232177 (2d Dept. November 8, 2006). Covenant of Good Faith and Fair Dealing. Second Department affirms trial court's order denying insurer's motion to dismiss insured's claims that insurer breached its covenant of good faith and fair dealing in connection with a personal injury action brought against the insured. The courts rejects insurer's contention that the insured's action was premature, holding that a declaratory judgment action against an insurer with respect to jural relations is permitted before entry of judgment in the underlying action. *Plaza Restoration, Inc. v. Nationwide Mutual Ins. Co.*, 2006 WL 3232187 (2d Dept. November 8, 2006). Uninsured Motorist/Cancellation. Second Department affirms trial court's order granting the petition to permanently stay arbitration of an uninsured motorist claim where tortfeasor's insurer failed to show that it mailed a final premium bill or complied with the requirements of Vehicle and Traffic Law § 313(1)(a) for cancellation of the policy. *Transcontinental Ins. Co. v. Gibbs*, 2006 WL 3234088 (2d Dept. November 8, 2006). Negligent Procurement. Second Department affirms trial court's order denying insurance broker's motion for summary judgment dismissing the complaint against it alleging negligent procurement of insurance coverage. The broker failed to establish its entitlement to summary judgment where there exists a triable issue of fact as to whether the broker exercised due care in the transaction. *Katz v. Tower Ins. Co. of New York*, 2006 WL 3234646 (2d Dept. November 8, 2006).