

Firm News 11/22/2006

Fraudulent Proofs of Loss; SUM Arbitration; Contractual Indemnification; First-Party No-Fault; Additional Insured Status; Duty to Defend/Additional Insured; SUM/Waiver and Estoppel; Contractual Limitations Period; Broker E&O

Firm News 11/22/2006

**Fraudulent Proofs of Loss.** Second Circuit affirms trial court's refusal to grant insurer summary judgment where although insured indisputably submitted an inaccurate proof of loss in a property claim, fraudulent intent and materiality presented issues of fact. *Christophersen v. Allstate Ins. Co.*, 2006 WL 3307395 (2d Dept. November 14, 2006). **SUM Arbitration.** Second Department reverses trial court's granting of insurer's petition to permanently stay a SUM arbitration. Court finds insured's timely notice to arbitrate complied with CPLR § 7503(c) even if did not contain all the information for SUM arbitrations required by AAA rules. Accordingly, insured's failure to file for a stay within 20 days of the notice barred its petition. *Govt. Employees Ins. Co. v. Castillo-Gomez*, 2006 WL 3234184 (2d Dept. November 8, 2006). **Contractual Indemnification.** Second Department interprets a standard AIA construction contract to require indemnification broader than that under common law. Court finds excavation contractor obligated to indemnify owner for property damage arising out of contractor's work, and not just damage arising from contractor's own negligence. Alternatively, court finds sufficient evidence of contractor's negligence for the damage. A dissent finds the contract does not extend to damage not arising from contractor's negligence, and finds insufficient proof of negligence. *Watral & Sons, Inc. v. OC Riverhead 58, LLC*, 2006 WL 3306937 (2d Dept. November 14, 2006). **First-Party No-Fault.** Following a bench trial, courts enters judgment in favor of provider. Court finds insurer failed to produce evidence that an independent contractor provided the services at issue. Court finds fact that bills did not indicate relationship between the plaintiff provider and the treating physician did not compromise plaintiff's prima facie proof of entitlement to payment. *Carothers v. Travelers Ins. Co.*, 2006 WL 3350658 (Civil Ct. Kings Co. November 2, 2006). **First-Party No-Fault.** Court finds insurer entitled to discovery regarding medical necessity and fraudulent billing because insurer timely denied plaintiff's claims. Plaintiff's counsel acknowledged receipt of insurer's denial within 20 days of an IME. *Commitment Medical Care, P.C. v. State Farm Ins. Co.*, 2006 WL 3256528 (Sup. Ct. App. Term November 9, 2006). **First-Party No-Fault.** Second Department affirms summary judgment in favor of provider where provider submitted a bill with signed certified mail return receipt and affidavit of billing by third-party biller. Insurer's failure to timely object to adequacy of claim form or seek verification of assignment constituted a waiver of those defenses. *Hospital for Joint Diseases v. Travelers Property Cas. Ins. Co.*, 2006 WL 3307269 (2d Dept. November 14, 2006). **Additional Insured Status.** In a Labor Law case, Second Circuit affirms district court's grant of insurer's motion to dismiss coverage claims of owner and general contractor claiming additional insured status under subcontractor's policy. Owner and contractor were not named as additional insureds under policy, nor qualified as additional insureds under any policy provision. Court observes that, under New York law, such entities do not qualify as third-party beneficiaries of the policy. *Madeira v. Affordable Housing Foundation, Inc.*, 2006 WL 3302839 (2d Cir. November 14, 2006). **Contractual Indemnification.** In a Labor Law case, Second Circuit implicitly acknowledges validity of partial indemnification by enforcing an indemnification agreement that indemnified owner and general contractor for subcontractor's negligence where owner and general contractor were also partially negligent. Also, court finds agreement sufficiently definite where only the insurance and indemnification parts were in writing. *Madeira v. Affordable Housing Foundation, Inc.*, 2006 WL 3302839 (2d Cir. November 14, 2006). **Duty to Defend/Additional Insured.** Fourth Department holds that trial court erred in denying in its entirety insurer's motion for summary judgment seeking a declaration that insurer had no duty to defend and indemnify the City of Niagara Falls in an underlying personal injury action against the City and the City's contractor. The court determines that insurer owed a duty to defend City as an additional insured where the underlying allegations of negligence against the City brought the claim within the embrace of the policy, but such duty ended on the date on which the order was granted absolving the City of liability. Insurer is relieved of its duty to indemnify the City inasmuch as the City was absolved of liability in the underlying action. *City of Niagara Falls v. Merchants Ins. Group*, 2006 WL 3334488 (4th Dept. November 17, 2006). **Contractual Indemnification.** Fourth Department reverses trial court's order dismissing the third-party complaint seeking contractual indemnification and claiming breach of contract to procure insurance. Third party

---

defendant's documentary evidence did not conclusively establish a defense to the claims. *Sciavetti v. A & L, Inc.*, 2006 WL 3334496 (4th Dept. November 17, 2006). SUM/Waiver and Estoppel. Fourth Department finds that trial court properly granted municipality's motion for summary judgment in action for SUM coverage brought on behalf of the estate of a sheriff employed by the municipality who was killed in the line of duty. Court finds that municipality's New York Municipal Insurance Reciprocal policy's liability coverage excludes coverage for municipality's employees, and because policy does not include SUM coverage. Court finds municipality's attorney's incorrect admission that SUM coverage existed did not waive municipality's right to deny the existence of such coverage, or estop it from doing so since coverage did not exist. *Ward v. County of Allegany*, 2006 WL 3334963 (4th Dept. November 17, 2006). SUM. Fourth Department unanimously affirms trial court's order granting motion for summary judgment by named insureds' child in action for SUM coverage for injuries in a dirt bike accident. Insurer denied the SUM claim based on an exclusion providing that SUM coverage does not apply to injuries incurred while occupying a vehicle owned by the insured. Fourth Department holds that insurer failed to establish a triable issue of fact regarding whether plaintiff owned the dirt bike where insurer did not submit any evidentiary proof to controvert plaintiff's evidence that he was not the owner of the vehicle. *Waltz v. Masullo-George*, 2006 WL 3335196 (4th Dept. November 17, 2006). Contractual Limitations Period. Fourth Department unanimously affirms trial court's order granting insurer's motion for summary judgment dismissing insureds' complaint on grounds that insureds failed to commence action for first-party homeowners coverage within the two-year limitations period provided in the policy. "It is well settled that parties to a contract may agree that a lawsuit must be commenced within a shorter period than that prescribed by law." *Blonar v. State Farm Ins. Co.*, 2006 WL 3335458 (4th Dept. November 17, 2006). Broker E&O. Third Department affirms trial court's order granting broker's motion for summary judgment dismissing the complaint against it. Broker procured a policy for an owner of commercial property that required an inspection of the property. After broker and insurer were unable to reach owner's contact person, the policy was cancelled as a result of owner's refusal to allow inspection. The court holds that owner's negligence, breach of contract, and negligent misrepresentation claims against broker were without merit where broker procured an acceptable policy on owner's behalf and owner failed to prove that a special relationship existed between the owner and the broker. *Thompson & Bailey, LLC v. Whitmore Group, Ltd.*, 2006 WL 3313765 (3d Dept. November 16, 2006). Contractual Indemnification. First Department reverses trial court's order dismissing all claims against mall owner in a personal injury action arising from a slip and fall on mall property. Court holds that issues of fact existed surrounding whether custodial services contractor was contractually obligated to indemnify mall owner, whether the mall owner or the contractor was negligent, and whether any such negligence fell within the scope of the contract. *Alexander v. New York City Transit*, 2006 WL 3314608 (1st Dept. November 16, 2006).