

Disability Income Policy - "Total Disability" Workers Compensation Lien/Antisubrogation Rule Contractual Indemnification Late Notice of Claim Contractual Indemnification/Common-Law Indemnification Earth Movement Exclusion Broker/Agent E&O First-Party Property B Maintenance of Heat Condition Additional Insured Coverage/Timeliness of Disclaimer Malpractice Coverage B Late Notice Insurer Fraud Contractual Indemnification Pollution Exclusion UM Coverage First-Party No Fault B Timely Denial

Disability Income Policy - "Total Disability". DECISION OF INTEREST. Court of Appeals affirms Appellate Division order finding that insured orthopedic surgeon did not qualify for benefits under a disability income policy. The Court of Appeals holds that the subject policy definition of "total disability" is not ambiguous, and under that definition, the insured failed to raise an issue of fact whether his hip injury left him "unable to perform the substantial and material duties" of his job where the record evidence established that the insured renders second opinions, performs IMEs, and serves as an expert witness. *White v. Continental Ca. Co.*, 2007 WL 4165127 (Ct. App. November 27, 2007).

Workers Compensation Lien/Antisubrogation Rule. DECISION OF INTEREST. Primary and excess insurers settled a Labor Law claim under an OCIP. Thereafter, insureds brought suit against workers' compensation insurer seeking to extinguish its lien, as well as "fresh money" for plaintiff's expenditures in securing the settlement. Insureds claimed that since workers' compensation carrier was the same company that issued the primary coverage under the OCIP, that antisubrogation rule prohibited it from taking lien. Court rejects argument, finding that antisubrogation rule does not apply since workers compensation carrier's right to a lien is established by statute, and because the rule does not apply to two policies insuring different risks. Court also rejects insureds' argument that they were assigned plaintiff's rights under the release where release did not include language assigning plaintiff's rights to seek apportionment of expenditures. *Romano v. Whitehall Properties, LLC*, 2007 WL 4105723 (Sup. Ct. Kings Co. November 19, 2007).

Contractual Indemnification. In a Labor Law case, Fourth Department affirms denial of owner's third-party claim for contractual indemnification against subcontractor that employed plaintiff, observing that issues of fact existed regarding whether the alleged contract was signed and in effect. *Willard v. Thomas Simone & Son Builders, Inc.*, 2007 WL 3318059 (4th Dept. November 9, 2007).

Late Notice of Claim. In an action by car wash against its insurer seeking coverage for an underlying personal injury action, Second Department reverses order granting summary judgment in favor of car wash and enters an order declaring that insurer owed no duty to defend and indemnify where car wash knew of accident on December 2, 2003 and, without any excuse, delayed until March 16, 2004 in giving notice of the claim. *Evangelos Car Wash, Inc. v. Utica First Ins. Co.*, 2007 WL 4127808 (2d Dept. November 20, 2007).

Contractual Indemnification/Common-Law Indemnification. In commercial cleaner's negligence and Labor Law action against store in which cleaner was injured, Second Department affirms order denying store leave to renew its cross-motion for summary judgment on its third-party claim for contractual indemnification against cleaner's employer. Court holds that the new information submitted in support of store's motion, namely the terms of the maintenance service agreement between store and cleaner's employer, did not warrant a different outcome where the indemnity clause provided for indemnification of store for cleaner's negligence and issues of fact existed regarding cleaner's negligence in causing the accident. *Hageman v. Home Depot U.S.A., Inc.*, 2007 WL 4127693 (2d Dept. November 20, 2007).

Earth Movement Exclusion. In homeowners' action against its insurer for breach of the insurance contract after insurer denied homeowners' claim for damages due to cracks in their walls and basement floor, Second Department holds that trial court erred in denying the insurer's motion for summary judgment where insurer demonstrated that the policy exclusions for earth movement and settling clearly and unambiguously applied to the property loss and all experts agreed that the damage was caused by earth movement and settlement. *Labate v. Liberty Mutual Ins. Co.*, 2007 WL 4183024 (2d Dept. November 27, 2007).

Broker/Agent E&O. Second Department affirms summary judgment in favor of insured against broker/agent for failure to procure insurance. Court rejects broker/agent's argument that the requested coverage was issued once the final policy was issued. Court finds that the binder predating the policy failed to include the requested coverage. Court also rejects broker/agent's argument that it cannot be liable because it was acting for a disclosed principal, i.e., the insurer. Court finds issue of fact regarding whether insurer is liable to insured, depending on whether the broker/agent's negligent acts were done in broker/agent's capacity as agent. Court finds insurer's motion for summary judgment on its contractual indemnification claim against broker/agent was properly denied where there are issues of fact regarding whether insurer properly trained broker/agent's employees to use insurer's submission system. Court holds that broker/agent's motion for summary judgment on its common law indemnification claim against insurer should have been granted. *Bedessee Imports, Inc. v. Cook, Hall & Hyde, Inc.*, 2007 WL 4183060 (2d Dept. November 27, 2007).

First-Party Property B Maintenance of Heat Condition. Fourth Department affirms summary judgment in favor of insured against insurer on insurer's claim for coverage for damage caused by freezing pipes. Freezing pipes are a covered peril under the policy so long as insured took reasonable measures to maintain sufficient heat in the insured building. Court grants motion based on insured's deposition testimony that heat was maintained in the building on the date of the loss, even though insurer submitted documents from the electric company showing that no electricity was being delivered to the property at the time. Court rejects insurer's argument that insured's theft of electricity does not constitute reasonable efforts to maintain heat where the argument was raised for the first time on appeal. *Gallo v. Midstate Mut. Ins. Co.*, 2007 WL 4144928 (4th Dept. November 23, 2007).

Additional Insured Coverage/Timeliness of Disclaimer. First Department reverses summary judgment declaring insurer obligated to defend and indemnify plaintiff as an additional insured where there are ambiguities in the blanket additional insured endorsement (although court does not specify what those ambiguities are). Court also notes ambiguities arise from the fact that certificate of insurance proffered by plaintiff postdates the occurrence. Court also finds issue of fact regarding timeliness of disclaimer, observing that proof that named insured's receipt of plaintiff's letter of representation does not establish the date of notice to the insurer.

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The City of New York v. General Star Indem. Co., 2007 WL 4111141 (1st Dept. November 20, 2007). Malpractice Coverage B Late Notice. Second Department reverses denial of insurer's motion for summary judgment, and declares insurer has no duty to defend or indemnify insured lawyers in malpractice action based on late notice of claim. Insureds did not provide notice of claim until refusal to vacate default judgment against their client was upheld on appeal. Court observes that insureds should have placed insurer on notice of claim, at the latest, when trial court in underlying action refused to vacate the default. Court finds insureds offered no reasonable excuse for late notice. Reznick v. Zurich North American Specialties, 2007 WL4125809 (2d Dept. November 20, 2007).

Insurer Fraud. A purported class of livery drivers sued an insurance broker, a TPA, and several insurers alleging that defendants engaged in fraudulent scheme to accept insurance premium down payments from the drivers for policies issued to sham corporations, and then cancelled the policies for lack of payment. Court grants motions to dismiss by the TPA and the insurers. Court finds that allegations of fraud are without merit where the insurers, and thus the TPA, as well, were assigned by the NYPIA to issue the policies, and that NYPIA received the down payments. Court finds insurers could not have committed the fraudulent acts alleged because they complied with all NYPIA rules. Court also rejects negligence, fiduciary duty, and General Business Law '349 claims. Court notes that the plaintiffs themselves agreed to have the insurance applied for by sham corporations, and that objective of doing so was to avoid higher New York City insurance rates. Peralta v. Figueroa, 2007 WL 4104122 (Sup. Ct. Kings Co. November 14, 2007).

Contractual Indemnification. Court approves and accepts magistrate's report in a contractual indemnification dispute arising out of a Labor Law claim. Court finds that third-party plaintiffs are entitled to execute their judgment for contractual indemnification against third-party defendant. Court rejects third-party defendant's argument that it is under no obligation unless and until third-party plaintiffs pay more than their respective shares of fault. Court notes that third-party defendant's argument is premised on tort principles of contribution, not contractual indemnification, where no such requirement applies unless otherwise agreed to, and that third-party plaintiff's right to recover arose when they secured judgment against third-party plaintiff. Madeira v. Affordable Housing Foundation, Inc., 2007 WL 4116580 (S.D.N.Y. November 16, 2007).

Pollution Exclusion. Court grants insurer's motion for summary judgment declaring it has no duty to defend or indemnify the purported additional insured in connection with a DEC letter advising plaintiff of its responsibility for the costs of remediating PCB contamination. Court finds that DEC's letter contains no language or allegations to support the argument that a dry well contaminated with PCBs from leaking drums is within the "sudden and accidental" exception to the pollution exclusion. Court also finds no extrinsic evidence of a sudden and accidental discharge where drums were intentionally placed into the dry well or outside. In a related opinion, court denies plaintiff's motion for reconsideration of prior decision granting summary judgment to other insurers. Court cites same lack of extrinsic evidence of a sudden and accidental discharge. Emerson Enterprises, LLC v. Crosby, 2007 WL 4118299 (W.D.N.Y. November 14, 2007) and 2007 WL 4118360 (W.D.N.Y. November 14, 2007).

UM Coverage. Second Department affirms order permanently staying arbitration of a claim for uninsured motorist benefits where claimant's insurer demonstrated that the insurer of the alleged uninsured vehicle did not properly effectuate a nonrenewal prior to the accident. In the Matter of State Farm Mut. Ins. Co. v. Noble, 2007 WL 4182234 (2d Dept. November 27, 2007).

First-Party No-Fault B Timely Denial. In an action to recover no-fault medical payments, Second Department reverses summary judgment in favor of provider where provider submitted evidence demonstrating that insurer received proof of the claims and failed to pay the bills or issue a denial of claim form, but insurer raised an issue of fact whether benefits were overdue by submitting evidence that provider sent the billing forms more than 45 days after the last date of medical service. New York & Presbyterian Hosp. v. American Transit Ins. Co., 2007 WL 4182229 (2d Dept. November 27, 2007).