

Firm News 10/26/2006

Common Law Indemnification; Subrogation; Additional Insured Coverage; Reinsurance; Attorney-Client Privilege; Number of Occurrences; First-Party No-Fault; Contractual Indemnification/General Obligations Law; Timeliness of Disclaimer; Ordinance or Law Exclusion; Surety Bond; Duty to Defend; Notice to Excess Carrier

Firm News 10/26/2006

Common Law Indemnification. Second Department affirms denial of summary judgment motion of plowing contractor seeking dismissal of common law indemnification claim. Court finds issues of fact whether plowing contractor improperly performed its duties by piling snow against a walkway. *Vilorio v. Suffolk Y Jewish Community Center*, 2006 WL 2925242 (2d Dept. October 10, 2006). Subrogation. Court observes that New York's collateral source statute (C.P.L.R. § 4545) does not affect health care insurer's subrogation rights to seek recovery of health care costs from tortfeasor, and finds plaintiff/insurer's action to distinguish the insurer's subrogation claims premature since underlying case had not settled. *Mossberg v. The City of New York*, 2006 WL 2956121 (Sup. Ct. Kings Co. October 6, 2006). Additional Insured Coverage. Second Circuit affirms district court's award of summary judgment finding insurer of plowing contractor was obligated to defend and indemnify parking lot owner as an additional insured in connection with a slip-and-fall action. The additional insured provision at issue limited coverage to liability arising out of the contractor's "ongoing operations." The court rejected the argument that coverage did not apply because the accident occurred at a time when the contractor was not on-site and plowing. Court observes New York courts have not adopted "such a narrow definition of 'ongoing operations.'" Court notes that the plowing contractor was obligated to prevent standing water from freezing. *Wausau Underwriters Ins. Co. v. Cincinnati Ins. Co.*, 2006 WL 2990205 (2d Cir. October 18, 2006). Reinsurance. Second Circuit affirms judgment finding that facultative reinsurance certificates follow the form of the reinsured excess policies, and that the aggregate limits of the three-year certificates apply on an annual basis. Court finds that since certificates do not define or refer to aggregate limits in any manner different than how aggregate limits are determined under the policies, the follow-form provision in the certificates requires that the aggregate limit of the certificates must be the same as under the policies. Court rejects argument that the certificates' aggregate limit is a single limit for all three years of the certificate period. *Travelers Cas. & Sur. Co. v. ACE American Reinsurance Co.*, 2006 WL 29990204 (2d Cir. October 18, 2006). Attorney-Client Privilege. DECISION OF INTEREST. Court finds that insurer waived attorney-client privilege of a coverage opinion provided by outside counsel recommending a disclaimer. Court states that insurer put the contents of the letter at issue by disclosing the essence of counsel's advice and by disclosing that counsel proposed the text of the disclaimer. Court observes that the insurer's disclaimer was not based on independent consideration following receipt of advice of counsel, since adjuster stated that he would have followed whatever advice counsel provided. "By revealing the essence of the opinion letter and placing the letter in issue, Mitsui waived the attorney-client communication privilege that would typically shield that document from disclosure." *North American Foreign Trading Corp. v. Mitsui Sumitomo Ins. USA, Inc.*, 2006 WL 2959078 (S.D.N.Y. October 16, 2006). Number of Occurrences. DECISION OF INTEREST. Second Circuit Court of Appeals affirms jury verdicts in September 11 number of occurrences dispute. In first phase of verdict, jury found that nine of twelve insurers and 20 Lloyd's syndicates bound to a single-occurrence coverage form (the court previously found the form provided for a single-occurrence as a matter of law). In the second phase, the jury found that the three insurers that did not bind to the single-occurrence form (and six others that conceded they did not bind to the single-occurrence form) were bound to a form that provided for two occurrences. The court rejected all arguments on cross-appeals, which arguments dealt mostly with various challenges to admissibility of evidence and sufficiency of evidence to support the verdicts. In affirming the two-occurrence verdict, the court also found the word "event" in the definition of occurrence was "not sufficiently unambiguous" because it was susceptible to more than one reasonable interpretation (i.e., that the September 11 attack constituted one or two occurrences). *S.R. International Business Ins. Co., Ltd. v. World Trade Center Properties, LLC*, 2006 WL 2961100 (2d Cir. October 18, 2006). First-Party No-Fault. First Department affirms trial court's order granting summary judgment to health care provider where insurer raised no triable issues of fact to rebut health care provider's prima facie showing that the prescribed statutory billing forms had been mailed and received and that payment of no-fault benefits was overdue. *East Coast Psychological, P.C. v. Allstate Ins. Co.*, 2006 WL 2992479 (1st Dept. October 20, 2006). First-Party No-Fault. First Department reverses trial court's denial of insurer's motion to vacate a prior order entered on default granting insured's motion for summary judgment upon finding that insurer showed potentially meritorious defenses, including the defense that insured was fraudulently incorporated. *Statewide Med. Acupuncture, P.C. v. Travelers Ins. Co.*, 2006 WL 2992560 (1st Dept. October 20, 2006). Contractual Indemnification/General Obligations Law. DECISION OF INTEREST. Court of Appeals affirms an order enforcing an

indemnification provision in a commercial lease obligating tenant to indemnify landlord where such provision was coupled with an insurance procurement provision. The court held that an indemnification clause requiring tenant to indemnify landlord for "any" accident on the premises unless caused solely by landlord's negligence evinced the parties' unmistakable intent to indemnify, and the sophisticated parties' use of insurance to allocate the risk of liability to third parties between themselves did not violate General Obligations Law § 5-321. Court declines to overrule controlling Hogeland decision. *Great Northern Ins. Co. v. Interior Constr. Corp.*, 2006 WL 2970545 (Court of Appeals October 19, 2006). Timeliness of Disclaimer. First Department affirms trial court's denial of insurer's motion for summary judgment in an action alleging insurer's wrongful denial of a property loss claim. Insurer was not entitled to summary judgment on grounds that insured failed to provide timely notice or that insurer was denied a meaningful opportunity to inspect the premises where record showed that insured notified insurer of loss shortly after emergency measures were taken and insurer failed to raise notice defense until more than three years after receiving insured's notice. Court finds insurer's delay constituted waiver of its late notice defense. *151 East 26th Street Assocs. v. QBE Ins. Co.*, 2006 WL 2974176 (1st Dept. October 19, 2006). Ordinance or Law Exclusion. First Department affirms trial court's order granting summary judgment in favor of insurer where insured's claim for damage to gas pipes and risers that occurred during statutorily mandated testing fell squarely within the policy's Ordinance or Law Endorsement which specifically excluded losses relating to integrity testing of gas and plumbing systems. *Park City Estates Tenants Corp. v. Gulf Ins. Co.*, 2006 WL 2975629 (1st Dept. October 19, 2006). Surety Bond. First Department affirms order awarding surety proceeds of construction contract that public authority paid to contractor that it should have paid to surety pursuant to surety's indemnity agreement with contractor. First Department ruled that damages were not limited to the amount sought in surety's original notice of claim and that the assessment court properly permitted surety to amend its pleadings to conform to the evidence. *American Safety Cas. Ins. Co. v. New York City Sch. Constr. Auth.*, 2006 WL 2947463 (1st Dept. October 17, 2006). Duty to Defend. First Department affirms trial court's order granting insured's motion for partial summary judgment declaring that insurer is obligated to defend insureds in an action alleging negligence, intentional conduct, and breach of contract. The court held that the insurer owes a duty to defend where the underlying complaint seeks recovery on theory of negligence, thus it alleges conduct falling within the policy's coverage and insurer has failed to show that all allegations fall solely and entirely within policy exclusions. *Bravo Realty Corp. v. Mt. Hawley Ins. Co.*, 2006 WL 2947641 (1st Dept. October 17, 2006). Notice to Excess Carrier. Second Department affirms trial court's order denying cross motions for summary judgment on the issue of whether excess insurer was obligated to provide coverage in an underlying personal injury action. The court found triable issues existed where the complaint contained only "vague and generalized allegations of injury" and the record was unclear if the insured became aware of plaintiff's injuries prior to receiving plaintiff's bill of particulars. A lengthy dissent rejected the insured's position that it timely notified its excess insurer where the record was devoid of evidence that the insured made a deliberate determination regarding its duty to notify prior to its actual notice, the record showed the insured's knowledge of the insured's injuries prior to its receipt of plaintiff's bill or particulars, and insured's nine-week delay was untimely as a matter of law. *Morris Park Contracting Corp. v. National Union Fire Ins. Co. of Pittsburgh*, 2006 WL 2961102 (2d Dept. October 17, 2006). Common-law Indemnification. Second Department held that trial court erred in granting snow removal contractor summary judgment dismissing defendant retailer's cross-claim for common law indemnification where issue of fact was created by contractor's testimony that he was responsible for plowing the retailer's entire parking lot and that contractor determined where salting and sanding were necessary. *Hites v. Toys "R" Us, Inc.*, 2006 WL 2961153 (2d Dept. October 17, 2006). First-Party No-Fault. District Court granted insured's motion for summary judgment declaring insured's entitlement to no-fault benefits where insured established that insurer received insured's bill for an MRI and denied the insured's claim five months later. The court noted that untimely denial of claim will not preclude a lack of coverage defense on grounds that the alleged injury did not arise out of an insured incident, but held that EUOs annexed to insurer's opposition papers failed to establish the insurer's claim that the accident at issue was a staged event. *Bronx Expert Radiology, P.C. v. Allstate Ins. Co.*, 2006 WL 2988379 (N.Y. Dist. Ct. October 13, 2006).