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## Week of October 5, 2006

Firm News 10/5/2006

Topics: Policy Reformation/First-Party Property; Additional Insured Status; Priority of Coverage; Contractual Indemnification; Allocation/Choice of Law; Common-law Indemnification; Broker/Agent E&O; First-Party No-Fault

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**Policy Reformation/First-Party Property.** In a claim for first-party coverage following a fire loss, Fourth Department affirms summary judgment in favor of insured under property insurance policy, reforming the policy to correctly identify the named insured. Policy incorrectly identified the named insured as the former owner, where plaintiff acquired title to the property following the named insured's death and paid the insurance premium. Court observes that the identity of the insured was not a factor in insurer's evaluation of the risk. *Fahrenholz v. Security Mutual Ins. Co.*, 2006 WL 2789858 (4th Dept. September 29, 2006).

**Additional Insured Status.** Fourth Department reverses that part of trial court's order that denied summary judgment on property owner and construction manager's motion seeking additional insured coverage under roofing subcontractor's primary and umbrella liability policies where subcontractor contractually agreed to insure property owner and construction manager. Court declares subcontractor's primary insurer has duty to defend and indemnify owner and construction manager. *Cheektowaga Central Sch. Dist. v. The Burlington Ins. Co.*, 2006 WL 2789156 (4th Dept. September 29, 2006).

**Priority of Coverage. DECISION OF INTEREST.** Fourth Department holds that subcontractor's umbrella policy under which owner and construction manager are additional insureds is excess of primary policy issued to construction manager as named insured, notwithstanding language in the primary policy that purported to make it excess of any other coverage. *Cheektowaga Central Sch. Dist. v. The Burlington Ins. Co.*, 2006 WL 2789156 (4th Dept. September 29, 2006).

**Contractual Indemnification.** Fourth Department rules that trial court erred in denying logging contractor's summary judgment motion dismissing property owner's claim for contractual indemnification pursuant to a contract between the logging contractor and a third contractor where the contract expressly provided that its indemnification provisions "shall not inure to the benefit of anyone not a party to the Contract"; *Mahoney v. Madeira Assocs.*, 2006 WL 2789484 (4th Dept. September 29, 2006).

**Allocation/Choice of Law. DECISION OF INTEREST.** In a choice of law dispute in connection with horizontal and vertical allocation of insured's asbestos liability, First Department determines New Jersey law applies over New York law (resulting in more coverage for insured). "[W]here it is necessary to determine the law governing a liability insurance policy covering the risks in multiple states, the states of the insured's domicile should be regarded as a proxy for the principal location of the insured risk." *Certain Underwriters at Lloyd's, London v. Foster Wheeler Corp.*, 2006 WL 2784244 (1st Dept. September 28, 2006)

**Contractual Indemnification/Common-law Indemnification.** Second Department affirms trial court's denial of summary judgment on construction manager's cross-claim for contractual and common-law indemnification against subcontractor and sub-subcontractor. Subcontractor and sub-subcontractor contracted with the city/owner, not the construction manager. Court finds construction manager failed to establish it was in privity with subcontractor or sub-subcontractor, and that it failed to show it was an agent of the city/owner under the subcontractor's contract with the city/owner. Court also finds construction manager failed to establish entitlement to common-law indemnification against either subcontractor or sub-subcontractor. *Wrighten v. ZHN Contracting Corp.*, 2006 WL 2742361 (2d Dept. September 26, 2006).

**Contractual Indemnification/Common-law Indemnification.** Second Department reverses trial court order and grants summary judgment dismissing apartment owner's claims for contractual and common-law indemnification against contractor in a personal injury action where there was no evidence contractor had any contractual duty to indemnify owner, and where contractor showed that the apartment owner's liability, if any, would be based on its actual wrongdoing in failing to maintain the property and not on vicarious liability for the contractor's conduct. *Corley v. Country Squire Apartments, Inc.*, 2006 WL 2743378 (2d Dept. September 26, 2006).

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Contractual Indemnification. Appellate Term affirms summary judgment dismissing owner-general contractor's third-party contractual indemnification claim. Court observes that only document evidencing contract between owner-general contractor and subcontractor (plaintiff's employer) is a purchase order lacking indemnification language. *Palacios v. Beulah Commons Associates, L.P.*, 1006 WL 2726767 (Sup. Ct. App. Term 1st Dept. September 22, 2006).

Broker/Agent E&O. Second Department affirms ruling that claims against broker/agent were timely, finding that breach of contract claim against broker/agent accrues at time of procurement and issuance of policy at issue. Court rejects argument that cause of action accrued where error constituting alleged breach originally occurred in connection with an earlier policy not at issue. *Neary v. Tower Insurance*, 820 N.Y.S.2d 813 (2d Dept. September 19, 2006).

First-Party No-Fault. Court rules that insurer's letter denying claim based on untimely submission advising claimant that it may submit additional information for denial to be reconsidered satisfies New York State Insurance Regulation requirement that claimants be advised that denials will be reconsidered upon submission of reasonable justification for delay. Court finds regulations do not require particular wording. Court finds for claimant where delay was occasioned by originally submitting claim to wrong carrier since such an excuse expressly contemplated by the New York State Insurance Regulations. *Hempstead Pain & Med Services, P.C. v. Gen. Assurance Co.*, 2006 WL 2738990 (Dist. Ct. Suffolk Co. September 5, 2006).