Week of September 12

Broker Liability. First Department affirms that part of trial court judgment that denied broker’s motion for summary judgment in case where insured sued broker after insured’s co-op insurer denied coverage for various interior furnishings following a fire. Court finds an issue of fact regarding whether the insured requested the sought-after coverage, and observes that broker allegedly assured the insured that the requested coverage had been obtained. A dissent finds that the insured’s request to make sure the apartment was properly insured was too general to support a cause of action. Hersch v. DeWitt Stern Group, Inc., 2007 WL 2493147 (1st Dept. September 6, 2007).
   Employers Liability Coverage. In a Labor Law case, the plaintiff’s employer was impleaded by the owner and the construction manager. The employer’s primary CGL insurer defended the claim and exhausted its limits in the settlement. The employer’s excess insurer contributed the remaining $1.5 of the settlement. Excess insurer then brought contribution action against the employer’s employer liability insurer. First Department holds that employer liability carrier will owe $1 million if excess insurer can prove that the underlying plaintiff suffered a “grave injury” under the Workers Compensation Law. Although the employer liability policy is unlimited, court limits the excess insurer’s recovery to the $1 million indicated in the policy’s schedule of underlying insurance. Liberty Mut. Ins. Co. v. The Ins. Co. of the State of Pennsylvania, 2007 WL 2493446 (1st Dept. September 6, 2007). Cancellation/Reasonable Excuse for Late Notice/Claimant’s Notice. Insured under a liability policy failed to report a slip-and-fall at its restaurant until it was served with suit. Insurer denied coverage, asserting that the policy was cancelled for nonpayment prior to the occurrence. Insurer also raised late notice. On insurer’s motion for summary judgment, court finds an issue of fact regarding cancellation. Court notes that insurer cannot locate check that was allegedly sent by the insured, and that insurer’s post-cancellation billing and acceptance of payment from insured is inconsistent with a cancellation. Court also finds an issue of fact regarding reasonableness of insured’s failure to report the occurrence since, among other things, victim declined medical treatment and could not be located. Court also finds an issue of fact regarding whether underlying plaintiff timely provided notice to the insurer directly. Tower Ins. Co. of New York v. Lin Hsin Long Co., 2007 WL 2609794 (Sup. Ct. New York Co. August 30, 2007).   D&O – Prior Litigation Exclusion. Court grants, in part, and denies, in part, third-level excess D&O insurer’s motion for summary judgment in a direct action by a trustee in bankruptcy of the insured’s bankruptcy estate. Trustee prevailed in certain actions against company’s officers for breach of fiduciary duty and other violations. Court holds that insurer’s “prior litigation” exclusion was not ambiguous, and applied to exclude coverage for certain claims which the court finds were sufficiently related to claims alleged against the officers in a previous, unresolved action. Court, however, finds that there could be coverage under the policy for underlying claims not yet resolved. Pereira v. National Union Fire Ins. Co. of Pittsburgh, PA, 2007 WL 2509757 (S.D.N.Y. September 5, 2007). Insurance Law § 3420(d) – Excess Insurer. Personal umbrella insurer denied coverage in connection with an auto policy based on late notice. After primary limits were exhausted, insured was left with a $550,000 judgment. In insured’s action against umbrella insurer, court grants summary judgment to insured. Court finds insurer’s 48-day delay in disclaiming to be unreasonable as a matter of law because insurer had sufficient information to disclaim for late notice a month before its disclaimer. McAlpin v. RLI Ins. Co., 2007 WL 2544698 (W.D.N.Y. September 5, 2007). Late Notice/Insurance Law § 3420(d). Court denies insurer’s motion for summary judgment in a dispute over liability coverage in connection with an underlying construction injury claim. Court finds issues of fact regarding when insured actually received notice of the suit where insured’s principal claimed that letters from plaintiff’s counsel were opened by an unauthorized person and not forwarded to him. Court holds that service on the secretary of state does not constitute notice to the insured under the language of the policy. Court also finds an issue of fact whether broker’s mistake in sending notice to wrong insurer should be attributed to insured, or whether insured reasonably relied on broker’s assurances. Court also denies insured’s motion for summary judgment seeking a declaration that insurer’s 34-day late notice disclaimer was untimely in light of the complexity of insured’s own reasons why its notice was not late. 105 Street Associates, LLC v. Greenwich Ins. Co., 2007 WL 2593797 (S.D.N.Y. September 5, 2007).   Late Notice – Wrap-Up Coverage. In a coverage dispute under a claims-made policy procured as part of an OCIP, court grants summary judgment in favor of insurer based on magistrate’s report and recommendation. Insured failed to provide notice prior to expiration of the policy’s extended reporting period. Insured provided notice to its broker, but broker’s notice to insurer was outside of the reporting period. Court rejects argument that insurer undertook the risk of late notice because broker administered the OCIP, finding no proof that broker was insurer’s agent for notice purposes. Court rejects unsupported argument that notice to brokers is a custom and practice in OCIP programs. Southern New Jersey Rail Group, LLC v. Lumbermans Mut. Cas. Co., 2007 WL 2609894 (S.D.N.Y. September 5, 2007).   Ownership, Maintenance, or Use Exclusion. In a coverage dispute arising from a personal injury action occurring when insured injured himself while converting his van into a Mr. Softee ice cream truck, the Court of Appeals affirms order awarding plaintiff’s cross-motion for summary judgment declaring that insurer was obligated to defend and indemnify insured holding that conversion work did not constitute “maintenance” for purposes of the application of the ownership, maintenance, and use of an auto owned by the insured. “The work performed by the insured plaintiff did not constitute ‘maintenance’ of an auto. ‘Maintenance,’ as that term is used in an insurance policy, means performance of work on ‘an intrinsic part of the mechanism of the car and its overall function.’ Riveting metal to a van in furtherance of its conversion to an ice cream truck aids in transforming the auto’s function, an activity distinct from ‘maintenance.’ Guishard v. General Sec. Ins. Co., 2007 WL 2592414 (September 11, 2007).   Contractual Indemnification. In a personal injury action arising from a trip and fall on a public sidewalk outside a subway station, Second Department modifies trial court order denying motions for summary judgment by two defendant transportation

authorities seeking the dismissal of the complaint and cross-claims against them. Where one transportation authority was not a party to a lease with the municipality, the transportation authority could not be held liable to the municipality for contractual indemnification. However, where the second transportation authority was a party to a lease with the municipality that imposed duties to repair damage to sidewalks and to indemnify the municipality, the second transportation authority was not entitled to summary judgment where it did not demonstrate that it did not create the dangerous condition alleged. Vikhor v. City of New York, 2007 WL 2669232 (2d Dept. September 11, 2007).   Employee Exclusion. In an action by insured seeking a declaration that insurer was obligated to defend and indemnify it in a personal injury action arising from a construction accident, Second Department reverses order denying insurer’s motion for summary judgment. Appellate Division holds that trial court erred in finding that a policy exclusion barring coverage for employees of subcontractors injured in the course of employment conflicted with a policy endorsement providing coverage to employees of subcontractors so long as the named insured obtained a certificate of insurance from the subcontractor. The endorsement imposed a supplemental condition to coverage, but did not purport to create coverage that was otherwise barred by the exclusion. Makan Exports, Inc. v. U.S. Underwriters Ins. Co., 2007 WL 2669894 (2d Dept. September 11, 2007).   Untimely Disclaimer – Insurance Law § 3420(d). In insured’s declaratory judgment action against insurer seeking a defense and indemnification in an underlying action, Second Department affirms trial court order denying insurer’s motion for summary judgment. In a decision with little analysis, Appellate Division holds that “Supreme Court properly found that the appellant’s 43-day delay in disclaiming coverage in the instant case was unreasonable as a matter of law.” Delphi Restoration Corp. v. Sunshine Restoration Corp., 2007 WL 2670193 (2d Dept. September 11, 2007).   Contractual Indemnification. In seven related actions seeking to recover for personal injuries arising from a fire in an apartment building owned by defendant housing authority, Second Department reverses order denying summary judgment to carpet retailer on its cross-claims for contractual indemnification against carpet installer where it was alleged that (1) the carpet installer removed a self-closing mechanism on a door which caused build-up of heat, and; (2) the height of the carpet interfered with injured parties’ escape from the building. Appellate Division holds that retailer was entitled to summary judgment where indemnification provision in its contract with installer clearly obligated the installer to indemnify the retailer in actions arising from the installation of carpet. Barnes v. New York City Housing Authority, 2007 WL 2670292 (2d Dept. September 11, 2007).   First-Party No-Fault – Timely Denial. In an action to recover no-fault medical payments, Second Department reverses summary judgment in favor of provider on certain claims where insurer sufficiently demonstrated that it timely requested additional information and provider filed its summons and complaint two months before insurer was required to pay or deny the subject claim. Mount Sinai Hospital v. Chubb Group of Insurance Companies, 2007 WL 2669819 (2d Dept. September 11, 2007).   First-Party No-Fault. In an action to recover no-fault medical payments, court denies provider’s motion and insurer’s cross-motion for summary judgment where both motions were supported by attorney’s affidavits that did not reflect personal knowledge and did not constitute evidence in admissible form. Court further states that, even if proof was in admissible form, motion and cross-motion would still be denied where fact issues existed surrounding whether the alleged accident was staged and whether insured failed to cooperate. KOI Medical Acupuncture v. State Farm Ins. Co., 2007 WL 2584324 (Dist. Ct., Nassau Co. September 10, 2007).