Week of September 21, 2006

Firm News 9/21/2006

Topics: Coverage Arbitration; First-Party No-Fault; Late Notice/E&O; UM Arbitration; Indemnification/Construction Defect; Contractual Indemnification/“Grave Injury”; CGL “Auto” Exclusion; First-Party No-Fault; Auto Policy Exclusion; Bad Faith; Property Coverage/Warranties; Broker E&O; Property Coverage/Valuation; Premium Dispute;Indemnification;General Business Law §349

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Coverage Arbitration. First Department reverses trial court’s granting of a motion to compel arbitration of excess insurer’s claim against insured seeking declaration of no coverage. First Department strictly interprets language of policy’s arbitration clause, which refers only to claims against the insurer, not claims against the insured. Gulf Underwriters Ins. Co. v. Verizon Communications, Inc., 2006 WL 2621039 (1st Dept. September 14, 2006).

First-Party No-Fault. First Department reverses trial court and grants summary judgment to insurers, dismissing action to recover assigned first-party no-fault benefits. First Department finds that claims were timely denied based on insureds’ assignors’ failure to respond to requests for statements regarding the accident and medical treatment. IK Medical, P.C. v. Travelers Prop. Cas. Ins. Co., 2006 WL 2620526 (1st Dept. September 13, 2006).

Late Notice/E&O. Second Department affirms summary judgment in favor of E&O insurer after insurer disclaimed coverage for broker-insured’s 21-month delay in reporting the alleged “wrongful act.” Rael Automatic Sprinkler Co., Inc. v. Schaefer Agency, 2006 WL 2613760 (2d Dept. September 12, 2006).

UM Arbitration. Second Department reverses trial court’s granting of petition to stay arbitration of claim for uninsured motorists benefits. Second Department finds that insured’s failure to submit statement under oath within 90 days of accident was not a condition precedent to coverage since identity of the tortfeasor driver was known. Court also finds insured failed to make a prima facie showing tortfeasor vehicle was insured. Ins. Co. of State of Pennsylvania v. Dentale, 2006 WL 2614291 (2d Dept. September 12, 2006).

Indemnification/Construction Defect. Court finds third-party defendant entitled to summary judgment dismissing contribution and contractual and common law indemnification claims. Court finds third-party plaintiffs failed to produce evidence to rebut third-party defendant’s affidavit showing that it had no responsibilities in connection with the allegedly faulty work. Nassau County v. Richard Dattner Architect, P.C., 2006 WL 2614241 (Sup. Ct. Nassau Co. September 11, 2006).

Contractual Indemnification/“Grave Injury.” Court denies third-party defendant’s motion for summary judgment dismissing contractual indemnification claim. Court finds issue of fact whether site of alleged accident is within area of lease under which third-party defendant had maintenance obligation. However, court dismisses common law negligence claim against third-party defendant due to absence of “grave injury” and unrebutted evidence that plaintiff was employed by the third-party defendant, a “single integrated enterprise.” Page v. Big Sol Manufacturing Co., Inc., 2006 WL 2572063 (Sup. Ct. Richmond Co. September 8, 2006).

Contractual Indemnification. First Department affirms trial court’s denial of third-party plaintiff’s motion for conditional indemnification where there are triable issues of fact regarding whether third-party defendant was sole party at fault and where third-party plaintiff failed to prove its own freedom from negligence. Cuevas v. City of New York, 2006 WL 2506484 (1st Dept. August 31, 2006).

CGL “Auto” Exclusion. Second Department affirms trial court’s grant of summary judgment declaring that insurer must defend and indemnify insured in underlying action. Second Department rejects insurer’s reliance on “auto” exclusion where plaintiff in underlying action was injured by flying rivet while working to convert van owned by insured into an ice cream truck. Second Department finds insured’s failure to submit policy’s definition of “auto” fatal. Guishard v. Gen. Security Ins. Co., 2006 WL 2474735 (2d Dept. August 29, 2006).

First-Party No-Fault. Court finds insurer’s denial untimely, and not tolled by untimely request for verification, where basis of denial relates to medical necessity. However, court finds denial based on fraud in provider/assignee’s licensing not subject to preclusion and finds sufficient evidence of fraud to create issue of fact. Citywide Acupuncture Services, PLLC v. State Farm Mut. Auto. Ins. Co., 2006 WL 2612632 (Dist. Ct., Suffolk Co., 3d Dist. August 29, 2006).

Auto Policy Exclusion. After trial, court finds duty to defend and indemnify defendant, a permissive user, in underlying auto injury case. Insurer disclaimed coverage based on underlying defendant’s residency with the named insured. Court finds, as a matter of fact, that underlying defendant was not a resident of the named insured’s home based on proof that underlying defendant lived in several homes at the time of the accident. Court also finds the policy ambiguous and that insurer failed to sustain burden of proving applicability of exclusions. Deceglie v. State Farm Ins. Companies, 2006 WL 2472674 (Sup. Ct. Suffolk Co. August 28, 2006).

“Grave Injury.” First Department reverses trial court’s granting of summary judgment dismissing contribution/indemnification claims against third-party defendant. First Department finds that third-party defendant failed to meet its prima facie burden of proving injury not “grave” with competent admissible evidence. Third-party defendant argued that plaintiff’s deposition testimony was insufficient to establish “grave injury” by competent medical evidence. Plaintiff testified at deposition that he suffered total loss of use of his left foot due to removal of a nerve and resulting permanent foot drop. Altonen v. Toyota Motor Credit Corp., 2006 WL 2434979 (1 st Dept. August 24, 2006).

First-Party No-Fault. Plaintiff’s motion for summary judgment seeking assigned first-party no-fault benefits denied based on submission of inconsistent affidavits of treating physician. Booth Chiropractic & Acupuncture PLLC v. State Farm Mut. Auto. Ins. Co., 2006 WL 2535672 (Sup. Ct. App. Term August 22, 2006).

Bad Faith. Court grants partial award of attorneys fees against insurer pursuant to admiralty law. Court finds insurer did not deny fire loss claim under maritime policy in bad faith because insurer’s agent may have withheld information from insurer, particularly since agent was potentially liable to insurer for failing to advise insurer of facts related to claim. However, court finds insurer engaged in bad faith through “thorough-going sham” of creating false documents and providing false testimony regarding reduction of limits. One Beacon Ins. Co. v. Old Williamsburg Candle Corp., 2006 WL 2623244 (S.D.N.Y. September 13, 2006).

Property Coverage/Warranties. Court grants summary judgment in favor of insured in claim for coverage for loss to boat. Court finds that “lay up” warranty requiring boat to be laid up “ashore” during specified times of the year unambiguously meant boat was required to be dry docked, and that insured was in violation of warranty at time of loss. Court observes that breaches of warranties in maritime policies need not be material to disclaim coverage. Cunningham v. Insur. Co. of North America, 2006 WL 2568464 (E.D.N.Y. August 31, 2006).

Broker E&O. Court dismisses insured’s contract claim against broker for failure to procure adequate coverage as time barred where policy was originally obtained more than six years prior to suit. Court finds intervening automatic renewals irrelevant to the limitations analysis. Court also rejects applicability of “continuous treatment” doctrine to insurance brokers. Court, however, denies summary judgment to broker on insured’s negligence claim. Court finds insured alleged acts of negligence in broker’s procurement of the insurance distinct from broker’s contractual obligations, e.g., misleading insured regarding coverage and failing to alert insured of warranty.   Court finds negligence claim accrued when loss suffered or when insurer denied claim, not at the time of the broker’s procurement of the policy. Cunningham v. Insur. Co. of North America, 2006 WL 2568464 (E.D.N.Y. August 31, 2006).

Property Coverage/Valuation. In business property loss case, court finds issue of fact regarding whether policy limits coverage on a scheduled or blanket basis. Court states that court is to determine whether insurance policy language is ambiguous such to allow submission of extrinsic evidence of parties’ intent, and that rule of contra proferentem inapplicable where each party submits extrinsic evidence. Court denies insured’s claim for reformation based on insured’s failure to plead the facts of mutual mistake with particularity. Core-Mark International Corp. v. Commonwealth Ins. Co., 2006 WL 2501884 (S.D.N.Y. August 30, 2006).

Premium Dispute. Court rejects workers compensation insurer’s motion for summary judgment in action seeking retrospective premiums. Court finds insufficient evidence that retrospective premium agreement was entered into, and insufficient proof of amounts due and paid under the alleged agreement. Potomac Ins. Co. of Illinois v. Richmond Home Needs Services, Inc., 2006 WL 2521283 (S.D.N.Y. August 30, 2006).

Indemnification. Court denies reconsideration of order denying motion to allow filing of a third-party complaint. Court determines that, for purposes of allowing third-party action, defendants failed to state claims for contribution or indemnification in federal copyright infringement action based on lack of contract and lack of allegations that proposed third-party defendants acted with knowledge of infringing conduct. Yash Raj Films (USA) v. Kumar, 2006 WL 2463532 (E.D.N.Y. August 24, 2006).

General Business Law § 349. Court grants auto insurers’ motion to dismiss GBL § 349 claims made by assignees of first-party no-fault benefits. Court cites cases holding that insurance disputes are private contractual disputes that lack the impact to state a claim under the statute. Court finds that fact that several hundred claims at issue does not satisfy “consumer-oriented” element of GBL § 349. Court also dismisses GBL § 349 claim on grounds that complaint fails to alleged deceptive practices with specificity. Perfect Dental, PLLC v. Allstate Ins. Co., 2006 WL 2552171 (E.D.N.Y. August 31, 2006).