URB INSIDER

A Quarterly Publication of the Underwriters Rating Board

Fall Term 2008

Fall, 2008

Volume 7, Issue 3

The United States Supreme Court began its fall term in early October. A variety of cases are reported to be on its docket. From what has been reported in various sources, the cases chosen to be heard by the High Court during this term appear to attempt to avoid any cases whose issues may bring turmoil into the election or into the financial markets. It has been reported that cases involving abortion, race or social issues will be put off until a later session.

According to various reports, some of the most significant cases to be presented to the High Court include:

- A case involving limitation of consumer lawsuits under state law lead by drug makers and tobacco companies.
- A case between environmentalists and the navy regarding disagreement of the use of sonar in training exercises that potentially harms marine mammals.
- A case to determine whether anti-discrimination laws at the federal level cover people who allege they faced retaliation after cooperating with an internal investigation by their employer.
- A case that will make an attempt at resolving a punitive damages award to a smoker's widow.
- A case against former Attorney General John Ashcroft and FBI Director Robert Mueller resulting from the treatment of a Pakistani man who claims he was poorly treated when rounded up following the terrorist attacks on the Twin Towers on September 11.

The High Court will also hear a number of criminal cases. These include issues involving the limits of police power to search and arrest suspects without warrants. ◆

In This Issue

Antisubrogation Rule Upheld

This is an appeal from an order of the Supreme Court entered January 18, 2007 in Fulton County, which, upon reargument, among other things, granted defendant's motion for summary judgment on its common-law indemnification claim against third-party defendant. This appeal involves a dispute over the applicability of the antisubrogation rule.

Plaintiff, an employee of third-party defendant, Peter Luizzi & Brothers Contracting, was working on a road paving project that Luizzi had contracted to complete for defendant. Plaintiff sustained serious injuries, resulting in amputation of both his legs, when he was struck on the construction site by a dump truck owned by Luizzi and operated by another Luizzi employee. At the time of the accident, Luizzi was insured by Harleysville Insurance Company under three policies: a commercial general liability policy, a commercial automobile policy, and a commercial liability umbrella policy. Luizzi also had purchased from Harleysville an owners and contractors protective liability policy that named defendant as the insured. The order granting defendant's summary judgment motion for common law indemnification, and denying the third-party defendant's motion limiting the claim to available insurance coverage is affirmed. Under the antisubrogation rule, "[a]n insurer has no right of subrogation against its own insured for a claim arising from the very risk from which the insured was covered." Here the Supreme Court properly held that the rule does not apply because none of the policies provided the third-party defendant with coverage on the indemnification claim. The commercial liability policy excluded coverage for the dump truck. The auto policy excluded coverage for the acts of a co-employee within the course of employment for which workers' compensation was available. Because the commercial liability and auto policies excluded coverage, the umbrella would not be triggered. The owners and contractors policy did not provide coverage because the only insured was the municipal defendant. *Pesta v. City of Johnstown*, 2008 NY Slip Op 06328.◆

Forfeiture of Apportionment

The Second Circuit did not certify to the New York Court of Appeals the question of if a defendant will forfeit the right to obtain a GOL § 15-108 set-off based on equitable apportionment, when the plaintiff is awarded summary judgment but the defendant fails to seek apportionment before a judgment is entered.

In this case of first impression, the Second Circuit determined how New York's Court of Appeals would rule. The Second Circuit held that the right to an apportionment is forfeited with the entry of a judgment on liability, here a summary judgment.

This auto action was brought in the Eastern District of New York based on diversity jurisdiction. Plaintiffs, who were passengers in the lead car, were caused injury when their car was rear-ended by a truck.

The plaintiffs settled with the truck that rear-ended the car they occupied, and plaintiffs moved for liability against the second truck.

However, the remaining defendant sought no equitable apportionment under GOL § 15-108, but instead argued plaintiffs had not met the no-fault threshold.

After the motion for summary judgment of plaintiff on liability was granted, the magistrate entered judgment against the remaining defendant for 10% of plaintiff's damages based on apportionment.

This court vacated the judgment and the case was remitted for a clarification about whether the damage awards included claims for loss of services.

By not moving to amend its answer to assert the defense of apportionment of liability, the Magistrate should not have considered it because the insurer waived its right to do so.

Because GOL § 15-108 is an affirmative defense that can be forfeited, the Second Circuit held "that a defendant forfeits its right under § 15-108 to an offset in the amount of the settling co-defendant equitable share if it waits until after a summary judgment on liability that seeks apportionment." *Schipani v. McLeod*, 2006 U.S. Dist.

Additional Insured Duty to Provide Notice

The Appellate Division, First Department of Supreme Court unanimously affirmed, with costs, the order of Supreme Court, New York County which granted defendant's motion to dismiss the complaint and declared it was not required to defend or indemnify plaintiff in an underlying personal injury action. Plaintiff's motion for reargument was denied and unanimously dismissed.

The plaintiff, 1700 Broadway Co., was named as an additional insured on a commercial general liability policy issued by the defendant, Greater New York Mutual Insurance Company. Under the terms of the commercial general liability policy issued by the defendant, plaintiff was required to give defendant notice of a claim or suit as soon as practicable. Absent a valid excuse, the failure to satisfy this notice requirement which is a condition precedent to coverage, vitiates the policy. (*Security Mut. Ins. Co. of N.Y. v. Acker-Fitzimons Corp.*, 31 NY 2d 436, 440 [1972]).

Plaintiff did not serve defendant insurer with notice of the underlying personal injury action until eight months after plaintiff was served with a summons and complaint. Plaintiff has offered no excuse for the delay. Such delay without explanation constituted late notice as a matter of law.

According to the opinion, "The named insured cannot be deemed to have provided timely notice of the lawsuit to defendant on behalf of plaintiff since the notice requirement in the policy applies equally to both primary and additional insureds, and notice provided by one insured in accordance with the policy terms will not be imputed to another." *1700 Broadway Co., v. Greater New York Mutual Insurance Company*, 2008 NY Slip Op 06881, *citing, Travelers Ins. Co. v. Volmar Constr. Co.*, 300 AD 2d 40, 44 (2002).

The court states an exception might exist where two claimants are similarly situated, in other words, where their interests are not adverse to each other. In this case, the plaintiff is an out-of-possession landlord of the premises where the underlying personal injury action took place, who had an interest adverse to the primary insured, the tenant of the premises.

The court distinguishes the *Travelers* case cited by the plaintiff from the case at bar. The court discusses that the focus in the *Travelers* case was on the time the primary insured forwarded the complaint to the insurer. In that case, the primary and additional insured's interests were not adverse when the former was simultaneously served with the summons and complaint in the underlying action. In the current case, the plaintiff, additional insured, and the primary insured were simultaneously served with the summons and complaint, and their interests were adverse at the time the primary insured served defendant with notice of the lawsuit, even though plaintiff and the primary insured had not yet formally made cross claims against each other. *1700 Broadway Co., v. Greater New York Mutual Insurance Company*, 2008 NY Slip Op 06881.◆

Around the Country Newsworthy Notes

- **Ohio**–The Ohio Supreme Court has upheld the nation's first asbestos litigation reform legislation. The impact of the case will be that it will assist sick victims of asbestos exposure to get compensated quickly and fairly for their injuries. Plaintiffs must now provide solid medical evidence of an asbestos-related illness for a lawsuit to proceed.
- **Utah**–The Utah Supreme Court recently ruled that a pharmacy may be held liable in negligence when it continues to fill prescriptions for a drug that has been withdrawn from the market by the Food and Drug Administration.
- **Kansas**– A judge who presided over a jury trial in January that decided the city of Neodesha was not entitled to recover the costs of clean up and contamination damage from an oil refinery has overturned the verdict. In addition to overturning the verdict, the judge concluded that he gave the jury improper instructions. The jury should have been instructed only to determine damages. The judge ordered a new trial on damages.
- **West Virginia**– The West Virginia Supreme Court has been asked to accept an appeal of a nearly $400 million judgment against DuPont. A jury has awarded $130 million to fund a health screen program for 40 years for area residents and there is a punitive damage award of $196 million. The court has been urged to take the appeal on the premise that all punitive damage awards warrant review. ◆

The Long and Short of an Arson Case

Editor's Note: This case may provide insight about necessary investigation to be done by an insurer when seeking to take a coverage position based on an arson defense.

This is an appeal from Supreme Court in Albany County of a verdict that convicted defendant of the crimes of arson in the third degree and insurance fraud in the third degree.

Less than two hours after defendant left his home in the City of Albany, a fire was discovered on the second floor. While extinguished relatively quickly, the rear of the building, particularly the kitchen, suffered severe damage. Defendant notified his insurance company of the loss, and following an investigation, was charged for the crimes. Following a jury trial, defendant was convicted and sentenced to an aggregate term of 3 to 10 years in prison. This appeal ensued.

Defendant's primary contention is that his convictions, which rested solely upon circumstantial evidence, are against the weight of the evidence. A determination of whether the verdict is supported by the weight of the evidence requires an independent review by the appeals court of the evidence. The standard is for the court to "weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony." *People v. Richardson*, 2008 NY Slip Op 07178, citing, (*People v. Bleakley*, 69 NY2d 490, 495 [1987], quoting *People ex rel. MacCracken v. Miller*, 291 NY 55, 62 [1943]). Such review does not distinguish between direct and circumstantial evidence. See *People v. Cushner*, 46 AD3d 1121, 1123 [2007], lv denied 10 NY 3d 809 [2008].

There is no dispute the defendant had sole access to the building. Arson investigators concluded that the fire had originated in the northwest corner of the kitchen where several appliances were plugged into a single electrical outlet through the use of a power strip. Both investigators testified they were able to exclude all accidental causes. A subsequent lab report confirmed the presence of a medium petroleum distillate on the baseboard where the fire originated.

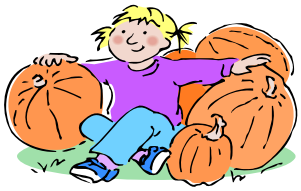
The court concluded when viewing the evidence in a neutral light, the defendant's convictions are not supported by the weight of the evidence.

Both the investigators, including the investigator hired by the insurance company, conceded they were unable to pinpoint the actual cause of the fire. Although they ruled out mechanical sources, they did not have the majority of appliances inspected. They noticed three tripped circuit breakers but did not determine the source of the breakers' failure.

Defendant testified he was in the process of repainting the kitchen at the time of the fire and that he stored a plastic bottle of charcoal lighter fluid in a box near the space heater. One investigator and a forensic scientist testified that the portions of the baseboard where the fire originated tested positive for a medium petroleum distillate, examples of which would include paint thinner and some brands of charcoal lighter fluid. They failed to provide unequivocal testimony excluding paint thinner, turpentine or charcoal lighter fluid as the source of the distillate. Although there was a burn pattern on the floor, subsequent testing of those portions of the floor came back negative for the presence of ignitable fluids.

The court pointed out the record did not support the inference that defendant had a motive to commit arson and although that is not an element of the crime, it could not be ignored. Moreover, the insurance coverage was grossly inadequate to the loss sustained. The value of defendant's personal property lost by the fire exceeded the policy limits by approximately $30,000 and the cost of repairs to the building exceeded his limits by nearly $8,000 according to the insurance company adjuster and nearly $30,000 according to an adjuster hired by defendant. More tellingly, the defendant had not removed his personal possessions from his home prior to the fire and he importuned the firefighters to retrieve from his home the flag that had draped his father's casket.

The court concluded there was a paucity of proof regarding motive as well as a questionable basis for the investigators' conclusion that all accidental causes of the fire had been excluded. The court said, "...we cannot conclude that the evidence was of such weight and credibility as to convince us that the jury was justified in finding the defendant guilty beyond a reasonable doubt." *People v. Richardson*, citing, *People v. Cahill*, 2 NY3d 14, 58 [20003], quoting *People v. Crum*, 272 NY 348, 350 [1936]; see *People v. Clark*, 52 AD 3d 860, 861-862 [2008]. *People v. Richardson*, 2008 NY Slip Op 07178.◆



Serious Injury a Question of Law

This personal injury action arises out of a motor vehicle accident that occurred on February 14, 2004 in Manhattan. The plaintiff, Carolyn Charley, was a front-seat passenger in a vehicle owned and operated by defendant, Bennett Nelson, when it came into contact with a vehicle operated by Margaret Goss, but owned by another party. The New York City police accident report indicates both drivers allege the other ran the red light. Plaintiff declined medical treatment at the scene and sought treatment a few days after the accident.

Plaintiff commenced this action in February, 2005 alleging she sustained a serious injury as defined in Insurance Law § 5102(d). Defendants Goss and Conroy, who owned the vehicle driven by Goss, moved for summary judgment dismissing the complaint after issue was joined on the ground that plaintiff failed to meet the serious injury threshold. The motion court granted the motion and dismissed the complaint against the moving defendants, holding that the plaintiff "failed to demonstrate an inability to perform substantially all of the material acts that constituted her usual and customary duties for 90 of the 180 days following the accident [and] offers contradictory reasons for her cessation or gap in treatment."

Plaintiff testified she stopped treatment because she could no longer afford it. Plaintiff appealed and the Appellate Division, First Department, affirmed.

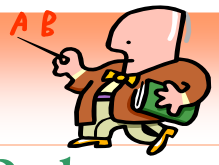
In its analysis, the court discusses the Court of Appeals perspective on this issue. The Court of Appeals has often stated that the "legislative intent underlying the No-Fault law was to weed out frivolous claims and limit recovery to significant injuries" (*Toure v. Avis Rent-A-Car Sys.*, 98 NY2d 345, 350 [2002], *quoting, Dufel v. Green*, 84 NY2d 795, 798 [1995]). The Court of Appeals has rejected the contention that the question of whether a plaintiff has sustained a serious injury is always a question of fact for the jury and, instead, has held that the issue of whether a claimed injury falls within the statutory definition of a serious injury is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (*Licari v. Elliott*, 57 NY2d 230, 237 [1982]; *Rubensccastro v. Alfaro*, 20 AD3d 436, 437 [2006]).

Once the proponent of a motion for summary judgment has set forth a prima facie case that the injury is not serious, the burden then shifts to plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that he/she did sustain such an injury, or that there are questions of fact as to whether the purported injury was "serious" (*Toure*, 98 NY2d at 350; *Cortez v. Manhattan Bible Church*, 14 AD3d 466 [2005]). Moreover, "even where there is medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury such as a gap in treatment, an intervening medical problem or a preexisting condition summary dismissal of the complaint may be appropriate." *Charley v. Goss*, 2008 NY Slip Op

In Pennsylvania Policy Exclusions Examined

On August 19, 2001, Calvin Easley sustained injuries in an accident while operating a taxi cab owned by the Yellow Cab Company. Easley made a claim against the negligent driver and received the policy limits. Easley then filed an underinsured motorist claim with the taxi company's carrier but he was denied coverage. The denial was based on the "regularly used, non-owned vehicle" and "use for hire" exclusion clauses.

The trial court granted the carrier's motion but denied Easley's cross motion. Easley then filed an appeal, contending the exclusions are invalid because they provide a more restrictive definition of an underinsured motorist vehicle than the broad coverage required by the Motor Vehicle Responsibility Law. The Court of Common Pleas agreed with Easley that UIM must be offered to an insured, but UIM benefits need not be paid under exclusions that do not violate public policy. The court disagreed with Easley that the insurer's exclusions are at odds with the broad coverage required, that the exclusions apply only when there is a passenger and because his possession of the taxi was for less than 24 hours. The judgement was affirmed. *Nationwide Assurance Company v. Calvin Easley*, 2008 PA Super 240. ◆



New York Adopts Prejudice Rule

New York has now joined a number of other states that apply a prejudice requirement when it comes to denying coverage for late notice of claim. Currently, at common law in New York, insurers are permitted to disclaim coverage on late notice without proving the carrier has been prejudiced by the delay.

Currently, New York's rule permits a standard that presumes prejudice resulting from late notice of claim to an insurer. The insurer is required to provide timely notice of claim as a condition precedent to coverage. Unless the insured can provide a valid excuse for late notice, then there is no coverage under the policy.

But on July 21, 2008, Governor David Paterson signed into law amendments to Section 3420 of the insurance law that will change how this issue is dealt with when the changes go into effect on January 17, 2009.

The amendments impose a prejudice requirement for insurers to establish a late notice defense and introduces a direct action provision on behalf of third parties against insurers in these limited circumstances.

New York Insurance Law Section 3420, as amended, will permit an insurer to disclaim coverage based on late notice when it has prejudiced the insurer. The burden of proof to establish prejudice is determined by when notice is made. If the delay notification is made within two years after the time required on the policy, the burden of proof is on the insurer. When the notice is delayed beyond two years, the burden shifts to the insured or the injured third-party claimant that the insurer has not been prejudiced by the delay.

The law does establish an irrefutable presumption of prejudice when notification is made subsequent to when the insured's liability is determined by a trial court, arbitration panel or after the insured has settled the claim.

Prejudice, as defined in the new legislation means, "material impairment of the insurer's ability to investigate or defend the claim." Material, however, is not defined. In other contexts, materiality has been construed to mean the insurer would take a different action if they knew of the information prior to making a decision. As a practical reality, this requirement may mean insurers will have to prove actual prejudice. It may prove to be challenging for insurers to meet this standard.

Not only is there a prejudice requirement, but there is also an amendment to Insurance Law Section 3420 that permits a third-party claimant in a personal injury or wrongful death action to file a declaratory judgment suit against the insurer when a denial of coverage by the insurer is based on late notice. No such right exists on behalf of the third-party claimant when the insured or insurer brings the declaratory judgment within 60 days of the denial and the third-party is named in the suit.

These components of the legislation must be reflected in policy forms issued on or after the effective date of the legislation of January 17, 2009. The legislation does not apply to claims made policies. The legislation will also require a response from a liability insurer within 60 days in response to a request by a third-party claimant in a personal injury or wrongful death action whether the insured maintained a liability policy in effect at the time of the occurrence and to provide the limits available from the policy.

The provisions apply to all liability policies issued or renewed on or after January 17, 2009. Thus, any circumstance which occurs involving late notice prior to that time, would be treated under the common law principles in place.

The New York State Insurance Department has issued a DRAFT circular letter which provides some proposed guidance regarding the amendments. Look for the issuance of the final version of this Circular Letter.

URB has filed an amendatory endorsement, NY-STAT-1 Ed. 9/08, for approval with the Insurance Department. This will be a mandatory form on applicable policies to implement the necessary language changes to the Suit Against Us clause and Notice provisions, in order for the language to comply with the statutory amendments. Parts of the statute require this language be included in policies when the statute becomes effective. However, the DRAFT Circular Letter which has been previewed indicates that policy language shall be deemed to comply with the statute as of the effective date, even if the amendatory language is not actually included in the policy.

URB will follow up with the Department on the status of approval for the statutory endorsement and advise the companies as soon as approval is re-

A Matter of Opinions...

The Office of General Counsel at the New York State Insurance Department periodically issues Opinions of Counsel on various issues of importance to insurers. Below is a synopsis of some recently issued opinions that may be of interest to property casualty insurers.

On July 1, 2008, the Office of General Counsel issued an opinion regarding recovery under an automobile insurance policy for loss of fetus.

There were two questions presented. The first one is may a woman seek damages in excess of $25,000 under a $25,000/$50,000 per person/per occurrence automobile insurance policy for injuries that she sustained in a motor vehicle accident caused by the insured, in addition to the loss of a fetus for which the insurer already has agreed to pay the maximum under the policy limits? The second question is if the woman gives birth prematurely as a result of an automobile accident caused by the insured and the baby dies shortly thereafter as a proximate cause of the accident, may a duly appointed representative of the decedent bring an action to seek damages against the policy on behalf of the decedent who is survived by distributes who suffered pecuniary loss as a result of the infant's death?

The opinion concluded "no" in answer to the first question and "yes" in answer to the second question, when the child is born alive.

Regarding the first question, the inquirer is asking whether the loss of fetus will serve to trigger recovery on behalf of two people under the policy and then the inquirer is asking if the policy will double if the baby is born alive and then subsequently dies at the hospital. The inquirer reported that the baby may have drawn a breath prior to dying.

The analysis draws on §§ 5104(a) and § 5102(d) of the Insurance Law to answer the questions posed. The analysis indicated there first must be a serious injury as defined in the law. Secondly, the analysis indicated the death of a fetus qualifies as a serious injury. As a separate matter, the analysis does point out that the courts have consistently rejected wrongful death actions brought on behalf of a stillborn fetus. However, if the baby is born alive and dies shortly thereafter, the baby is a covered person under the policy.

Also on July 1, 2008 the Office of General Counsel issued an opinion regarding a property damage release.

The question presented was whether the submitted release complied with § 216.6 of N.Y. Comp. Codes R. & Regs. tit. 11, Part 216 (2003) (Regulation 64).

The conclusion reached is that the release submitted complies with 11 NYCRR §216.6(g).

Of significance in the analysis is that the opinion cites the regulation which states in part, "...No insurer shall require execution of a release on a first or third-party claim that is broader than the scope of settlement." The opinion states that the draft release is limited to known property damage, and sets forth an area in which to describe the claim with specificity.

On July 21, 2008, the Office of General Counsel issued an opinion regarding the names of insurers in advertisements.

There were two questions presented. The first was if an insurance company may use its brand name in an advertisement for its licensed affilitated insurance companies without also listing them in the advertisement. The second question posed was must an adverisement, which uses the insurance company's brand name, also list the insurance companies, if the advertisement is to be placed in a national publication rather than a New York publication or other advertising targeting New York residents.

The opinion concludes the answer to the first question is "no" and the answer to the second question is "yes." In so concluding that the answer to question one is no, the opinion states that an entity that uses only an unauthorized trade name in advertisement for its licensed insurance companies does business without a license in violation of N.Y. Ins. Law § 1102(a) (McKinney 2006). Such a practice also could constitute a violation of Insurance Law § 2122(a), as well as an unfair or deceptive trade practice under Article 24 of the Insurance Law. In concluding that the answer to the second question is yes, the opinion states that the insurance law and regulations promulgated thereunder require that the names of all insurers be included in any advertisement targeting New York residents, even if the advertisement is placed in a national publication. However, the Department has recognized certain limited exceptions relating to advertisements that call attention to unauthorized insurers.

To view any or all of these opinions in their entirety, visit the Department website at www.ins.state.ny.us, where opinions published since the year 2000 may be reviewed. ◆

URB Insider
Published Quarterly by
Underwriters Rating Board
2932 Curry Road
Schenectady, N.Y. 12303
Phone: 518-355-8363, Fax: 518-355-8639
Published for friends and affiliates of URB
Editor/Creator: Kimberly Davis, Esq., CPCU
Proof Editors: Mary Shell, CPCU; Jean French, CPCU

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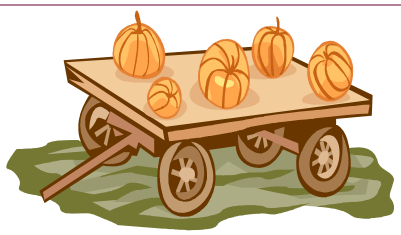
Forms Update

The URB has obtained approval of forms for a new streamlined Condominium program which will be introduced to you in the near future. The rates are pending approval. URB will keep you posted on this program when further information is received from the Department. ◆

Legislative Update

- The Governor recently vetoed a No-Fault Reimbursement bill which would have eliminated the ability of New York insurers to decline reimbursement when an insured is injured as a result of operating a motor vehicle in an intoxicated condition.
- An Audits of Liquidation Bureau statute mandates that the Superintendent submits a yearly financial statement to the Insurance Department and the Legislature.
- Livery Driver Benefit Fund legislation defines when livery drivers from certain downstate areas are employees or independent contractors. It also creates a fund for workers compensation for independent contractors.
- The Worker Adjustment and Retraining Notification Act (WARN) amends the Labor Law of New York State to require private sector employers of 50 or more employees (not including part-time employees) to provide at least 90 days notice to affected employees, the New York State Labor Department and local workforce partners in the event of a mass lay off, relocation or plant closing.
- Unemployment Insurance Information Privacy legislation brings confidentiality of unemployment records into compliance with Federal law.
- The Governor vetoed the Childhood Lead Poisoning Primary Prevention and Safe Housing Act of 2008 that was designed to reduce the number of children poisoned by lead.

The effective dates of the enacted statutes vary.



Autumn 2008