



# URB INSIDER

A Quarterly Publication Of Underwriters Rating Board

NY Court Of Appeals

## 1993 World Trade Center Bombing Case Decided

Fall, 2011

Volume 9, Issue 3

Recently, the New York Court of Appeals held that the Port Authority of New York & New Jersey is not liable for the 1993 World Trade Center bombing. The Port Authority of New York & New Jersey runs the airports in New York City and owns the trade center site.

This coordinated litigation arose out of the 1993 bombing by terrorists at the World Trade Center that killed six people, wounded nearly 1,000 and caused property damage. There were 648 plaintiffs who filed 174 actions for injuries sustained in the bombing. A liability verdict resulted from a bifurcated trial that was upheld by Supreme Court, Appellate Division, First Department, after which the matter was returned to Supreme Court for separate damages trials. In the particular case before the Court of Appeals, Antonio Ruiz was awarded \$824,100 in damages. The Court of

Appeals reversed the lower courts' decisions in a 4-3 ruling.

There were two issues in the appeal. First, the Court determined if the Port Authority was performing a governmental or proprietary function in its provision of security at the premises. Second, having found the Port Authority was performing a governmental function, the Court examined if the Port Authority exercised discretion in its security decision-making such that it was entitled to the common-law defense of governmental immunity.

The majority opined in pertinent part that the activities were of a governmental nature, stating, "...even when proprietary functions may be involved, if the essential nature of the governmental agency's injury-causing acts or omissions was a failure to provide security involving police resources—i.e. police protection—

then a governmental function was being performed." *Matter of World Trade Ctr. Bombing Litig.*, 2011 NY Slip Op 06501.

The majority concluded the provision of security for the benefit of a greater populace involving the allocation of police resources constitutes the performance of a governmental function. The majority further concluded the governmental immunity doctrine required that the Port Authority was insulated from tortious liability.

The dissent asserted the Port Authority's status as a government entity did not shield it from liability because the alleged negligence stemmed from proprietary activities taken in its capacity as a commercial landlord.

The terrorists had already been convicted of the bombing.♦

### Index For This Issue:

|                     |     |
|---------------------|-----|
| NY Court Of Appeals | 1   |
| New York Cases      | 2-4 |
| Forms News          | 4   |
| From Pennsylvania   | 5   |
| Case Notes          | 5   |
| From The Department | 6-7 |
| URB Services Corp.  | 8   |

**Editor's Note:** *The material contained in this publication is provided as information only, and is not intended to be construed or relied upon as legal advice in any manner. Always consult an attorney with the particular facts of a case before taking any action. The material contained in this publication was not necessarily prepared by an attorney admitted to practice in the jurisdiction of materials contained in the publication.*



# Vicious Propensity Key To Liability

**Editor's Note:** Below is the decision of the Supreme Court of New York, Appellate Division, Third Department in the case of *Gordon v Davidson*, 2011 NY Slip Op 06157.

Appeal from an order of the Supreme Court (Giardino, J.), entered August 13, 2010 in Schenectady County, which granted defendant's motion for summary judgment dismissing the complaint.

In May 2005, plaintiff Robert Gordon (hereinafter plaintiff) was walking his dog past the home of Peter A. Bliven when Bliven's two dogs, Sheeba and Storm, charged out from the driveway of the house. Before plaintiff was able to chase them away with a stick, Sheeba bit plaintiff's dog and knocked plaintiff to the ground. Plaintiff and his wife, derivatively, commenced this action seeking to recover damages for injuries plaintiff allegedly sustained due to the attack. Upon defendant's motion for summary judgment, Supreme Court dismissed the complaint, finding that defendant

met his initial burden of establishing that Bliven had neither actual nor constructive knowledge that either of his dogs had vicious propensities, and that plaintiffs failed to raise an issue of fact. Plaintiffs now appeal, and we affirm.

We reject plaintiffs' argument that the vicious propensity doctrine is misplaced in this case, and that they are entitled to recover under a common-law negligence theory based upon Bliven's failure to restrain his dogs. "The Court of Appeals has made clear that a cause of action for ordinary negligence does not lie against the owner of a domestic animal which causes injury. Rather, the sole viable claim is for strict liability," which must be established by "evidence that the animal's owner had notice of its vicious propensities" (*Alia v Fiorina*, 39 AD3d 1068, 1069 [2007] [internal citations omitted]; see *Petrone v Fernandez*, 12 NY3d 546, 550 [2009]; *Bard v Jabnke*, 6 NY3d 592, 599 [2006]; *Collier v Zambito*, 1 NY3d 444, 446-448 [2004]). Accordingly, because a

claim sounding in negligence does not lie and plaintiffs have not raised a question of fact regarding whether Bliven had actual or constructive knowledge of any vicious propensities on the part of his dogs, Supreme Court properly dismissed the complaint.

Peters, Malone Jr., Kavanagh and Stein, JJ., concur. ORDERED that the order is affirmed, with costs.

## Footnotes

**Footnote 1:** Bliven, who was the original named defendant, died during the pendency of this action and was replaced by the administrator of his estate. ♦



# Question Of Absolute Liability

**Editor's Note:** Below is the decision of the Supreme Court of New York, Appellate Division, Third Department in the case of *Morris v. C & F Builders*, 2011 NY Slip Op 06180.

Appeal from an order of the Supreme Court (Reynolds Fitzgerald, J.), entered October 26, 2010 in Delaware County, which, among other things, partially granted a cross motion by defendant C & F Builders, Inc. for summary judgment dismissing the complaint.

Defendants James Meehan and Rachel Meehan hired various contractors to construct a residence, including defendant George C. Squires, an electrical contractor. Squires, in turn, employed plaintiff, who was injured at the work site when he fell through an opening in the floor where a staircase was to be installed. Plaintiff commenced this action alleging claims of common-law negligence and violations of Labor Law §§ 200, 240 and 241 against, among others, defendant C & F Builders, Inc., the framing contractor on the project. Following joinder of issue and discovery, plaintiff moved for partial summary judgment on his Labor Law § 240 (1) claim, and C & F Builders cross-moved for summary judgment dismissing the complaint and all claims against it. As is relevant here, Supreme Court granted C & F Builders' cross motion to the extent of dismissing plaintiff's Labor Law §§ 200, 240 and 241

claims against it. Plaintiff appeals and we affirm.

There is no question that "the absolute liability imposed upon owners and general contractors pursuant to Labor Law § 240 (1) and § 241 (6) does not apply to prime contractors having no authority to supervise or control the work being performed at the time of the injury" (*Hornicek v William H. Lane, Inc.*, 265 AD2d 631, 631-632 [1999]; see *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]; *Soskin v Scharff*, 309 AD2d 1102, 1104 [2003]). Likewise, liability cannot be imposed under Labor Law § 200 where a defendant lacked "the authority to control the activity bringing about the injury" (*Russin v Louis N. Picciano & Son*, 54 NY2d at 317; see *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Soshinsky v Cornell Univ.*, 268 AD2d 947, 947 [2000]).

Here, C & F Builders was a prime contractor and did not coordinate or supervise the electrical work on the premises. Indeed, both Squires and James Meehan testified that Squires was solely responsible for how the electrical work was done and could come and go as he pleased. Moreover, while it is far from clear that C & F Builders had any workers on the site when plaintiff was injured, plaintiff indicated that they played no role in his work when they were present. Inasmuch as C & F Builders had no control over plaintiff's work and had no duty, contractual or otherwise, to enforce safety

standards at the work site, we agree with Supreme Court that it was entitled to partial summary judgment dismissing plaintiff's Labor Law §§ 200, 240 and 241 claims against it (see *Cook v Thompkins*, 305 AD2d 847, 847-848 [2003]; *Decotes v Merritt Meridian Corp.*, 245 AD2d 864, 866 [1997]; cf. *Paolangel v Cornell Univ.*, 296 AD2d 691, 693 [2002]).

Plaintiff's remaining contentions are rendered academic in light of the foregoing.

Rose, Lahtinen, Kavanagh and Garry, JJ., concur.

ORDERED that the order is affirmed, with costs.

## Footnotes

**Footnote 1:** Supreme Court's denial of a separate summary judgment motion by the Meehans is not at issue on this appeal. ♦



# Multiple Occurrences Provide Pro-Rata Allocation

**Editor's Note:** Below is the decision of the Supreme Court of New York, Appellate Division, Second Department in the case of *Roman Catholic Diocese of Brooklyn v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 2011 NY Slip Op 06554.

In an action, inter alia, to recover damages for breach of contract and for a judgment declaring that the defendant National Union Fire Insurance Company of Pittsburgh, Pa., is obligated to indemnify the plaintiffs, up to the limits of the subject insurance policies in excess of a \$250,000 self-insured retention, for all costs and expenses incurred in connection with the defense and settlement of an underlying action entitled *N.-L. v Smith*, commenced in the Supreme Court, Queens County, under Index No. 25913/03, the defendant National Union Fire Insurance Company of Pittsburgh, Pa., appeals, as limited by its notice of appeal and brief, from so much of an order of the Supreme Court, Kings County (Solomon, J.), dated March 12, 2010, as denied those branches of its motion which were for summary judgment, in effect, declaring that the alleged acts of sexual abuse in the underlying action constitute multiple occurrences, that the settlement amount and any "additional consideration" are to be allocated on a pro rata basis over seven policy periods, and that the plaintiffs must exhaust a \$250,000 self-insured retention for each commercial general liability policy implicated, and granted those branches of the plaintiffs' cross motion which were for summary judgment dismissing its fourth and sixth affirmative defenses.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, those branches of the motion of the defendant National Union Fire Insurance Company of Pittsburgh, Pa., which were for summary judgment, in effect, declaring that the alleged acts of sexual abuse in the underlying action constitute multiple occurrences, that the settlement amount and any "additional consideration" are to be allocated on a pro rata basis over seven policy periods, and that the plaintiffs must exhaust a \$250,000 self-insured retention for each commercial general liability policy implicated are granted, those branches of the plaintiffs' cross motion which were for summary judgment dismissing the fourth and sixth affirmative defenses of the defendant National Union Fire Insurance Company of Pittsburgh, Pa., are denied, and the matter is remitted to the Supreme Court, Kings County, for the entry of a judgment, inter alia, declaring that the alleged acts of sexual abuse in the underlying action constitute multiple occurrences, that the settlement amount and any "additional consideration" are to be allocated on a pro rata basis over seven policy periods, and that the

plaintiffs must exhaust a \$250,000 self-insured retention for each commercial general liability policy implicated.

In November 2003, Jeanne M. N.-L., individually and as mother and natural guardian of Alexandra L., a minor under the age of 18 years, commenced an action against the plaintiffs herein and against Reverend James Smith, alleging that Smith sexually abused and otherwise assaulted Alexandra. The complaint, as amplified by the bill of particulars, alleged that the sexual abuse commenced "just after" Alexandra's tenth birthday which was on August 10, 1996, and continued until "in or about March to May 2002." The abuse allegedly occurred at different times during the day and week, and at multiple locations. The underlying action ultimately was settled for the sum of \$2,000,000 plus "additional consideration."

The defendant National Union Fire Insurance Company of Pittsburgh, Pa. (hereinafter National), issued three annual commercial general liability (hereinafter CGL) policies to the plaintiffs for the period of August 31, 1995, through August 31, 1998. Nonparty Illinois National Insurance Company issued three annual CGL policies to the plaintiffs for the period of August 31, 1998, through August 31, 2001. Each of the six policies provided insurance with an "each occurrence limit" of \$750,000, and included an endorsement which provided, in part, that the limits for each of the coverages provided by the policy would apply "excess of a \$250,000," per occurrence, self-insured retention (hereinafter SIR). Between 1995-2002, the plaintiffs also maintained umbrella coverage with the defendant Westchester Fire Insurance Company, pursuant to seven annual policies.

In January 2009 the plaintiffs commenced this action against National and Westchester seeking damages for breach of contract and a judgment declaring that National and Westchester were obligated to pay all costs and expenses incurred in connection with the defense and settlement of the underlying action. The plaintiffs sought coverage solely under the National CGL policies and the Westchester umbrella policies in effect between 1995-1996 and 1996-1997. In an order dated March 12, 2010, the Supreme Court, inter alia, denied those branches of National's motion which were for summary judgment, in effect, declaring that the alleged acts of sexual abuse in the underlying action constitute multiple occurrences, that the settlement amount and any "additional consideration" are to be allocated on a pro rata basis over seven policy periods, and that the plaintiffs must exhaust a \$250,000 self-insured retention for each commercial general liability policy implicated, and granted those branches of the plaintiffs'

cross motion which were for summary judgment dismissing National's fourth and sixth affirmative defenses. This appeal by National ensued.

"Where there is on-going and progressive injury that spans many years . . . the question is whether each [triggered] policy is liable for the entirety of [the liability for the injury] or whether each policy is responsible for paying only the portion of the [liability] somehow attributable to the amount of injury during the policy period" (*Olin Corp. v Insurance Co. of N. Am.*, 221 F3d 307, 322, quoting *In re Prudential Lines Inc.*, 158 F3d 65, 84).

Here, National established its prima facie entitlement to judgment as a matter of law declaring that the settlement amount and any "additional consideration" are to be allocated on a pro rata basis over seven policy periods. In determining a dispute over insurance coverage, courts must first look to the language of the policy (see *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221). The subject National CGL policies provide, in pertinent part, that: "This insurance applies to bodily injury' . . . only if . . . [t]he bodily injury' . . . is caused by an occurrence" and "[t]he bodily injury' . . . occurs during the policy period." Significantly, the policies provide indemnification for liability as a result of bodily injury occurring during the policy period. Thus, "[p]ro rata allocation under these facts, while not explicitly mandated by the policies, is consistent with the language of the policies" (*id.* at 224).

In opposition, the plaintiffs failed to raise a triable issue of fact. The plaintiffs seek to allocate the settlement amount using the "joint and several" method, pursuant to which an insured may choose any one of the applicable policies it wishes, and demand payment for the entire claim under that single policy, up to the policy limit (see *Olin Corp. v Insurance Co. of N. Am.*, 221 F3d at 322; *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d at 221-222). However, joint and several allocation is inconsistent with the unambiguous language of the National policies providing coverage for bodily injury that resulted from an occurrence "during the policy period" (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d at 224 [emphasis added]; cf. *Olin Corp. v Insurance Co. of N. Am.*, 221 F3d at 323-324). "[C]ollecting all the indemnity from a particular policy presupposes ability to pin an accident to a particular policy period" (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d at 224). Here, however, it cannot be determined to what extent the bodily injury allegedly sustained occurred during a particular policy period.

Continued Next Page ⇒

# Multiple Occurrences Cont'd

Accordingly, the Supreme Court should have granted that branch of National's motion which was for summary judgment, in effect, declaring that the settlement amount and any "additional consideration" are to be allocated on a pro rata basis over seven policy periods (see *Crucible Materials Corp. v Certain Underwriters at Lloyd's London & London Market Cos.*, 681 F Supp 2d 216, 226; *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d at 216, 225; *Serio v Public Serv. Mut. Ins. Co.*, 304 AD2d 167, 172).

National also established its prima facie entitlement to judgment as a matter of law declaring that the alleged acts of sexual abuse in the underlying action constitute multiple occurrences, and that the plaintiffs must exhaust a \$250,000 self-insured retention for each of the two CGL policy implicated. "Occurrence" is defined in the National policies as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." This language does not reflect an intent by the parties to aggregate claims for the purpose of subjecting them to a single policy deductible or SIR (see *Appalachian Ins. Co. v General Elec. Co.*, 8 NY3d 162, 173 n 3; *ExxonMobil Corp. v Certain Underwriters at Lloyd's, London*, 50 AD3d 434, 434-435; *International Flavors & Fragrances, Inc. v Royal Ins. Co. of Am.*, 46 AD3d 224, 226).

"In the absence of a specific aggregation-of-claims provision precisely identifying the operative incident or occasion giving rise to liability, the court must apply the unfortunate events' test (see *Arthur A. Johnson Corp. v Indemnity Ins. Co. of N. Am.*, 7 NY2d 222 [1959]) to determine whether the underlying multiple claims constitute multiple occurrences' under the policy" (*ExxonMobil Corp. v Certain Underwriters at Lloyd's, London*, 50 AD3d at 435). In this regard, courts "must analyze the temporal and spatial relationships between the incidents and the extent to which they

were part of an undisrupted continuum to determine whether they can . . . be viewed as a single unfortunate event—a single occurrence" (*Appalachian Ins. Co. v General Elec. Co.*, 8 NY3d at 174).

Here, the sexual abuse allegedly occurred over a seven-year period, at different times, and at multiple locations. Thus, it cannot be said that there was a close temporal and spatial relationship between the acts of sexual abuse (*id.*). Under the circumstances, National demonstrated, prima facie, that the alleged acts of sexual abuse constituted multiple occurrences (see *Interstate Fire & Cas. Co. v Archdiocese of Portland in Oregon*, 35 F3d 1325, 1331; *Society of Roman Catholic Church of Diocese of Lafayette and Lake Charles, Inc. v Interstate Fire & Cas. Co.*, 26 F3d 1359, 1365; *Safeguard Ins. Co. v Angel Guardian Home*, 946 F Supp 221, 231; *Roman Catholic Diocese of Joliet, Inc. v Interstate Fire Ins. Co.*, 292 Ill App 3d 447, 456, 685 NE2d 932 [1997]). Moreover, where, as here, "multiple policies are triggered and liability is allocated to each, each policy's deductible is applicable" (*Olin Corp. v Insurance Co. of N. Am.*, 221 F3d at 328). In opposition to National's prima facie showing, the plaintiffs failed to raise a triable issue of fact. Accordingly, the Supreme Court should have granted those branches of National's motion which were for summary judgment, in effect, declaring that the alleged acts of sexual abuse in the underlying action constitute multiple occurrences, and that the plaintiffs must exhaust a \$250,000 self-insured retention for each of the two CGL policy implicated.

Turning to the plaintiffs' cross motion, the plaintiffs failed to establish their prima facie entitlement to judgment as a matter of law dismissing National's fourth affirmative defense on the ground that National waived that defense pursuant to Insurance Law § 3420(d). National's fourth affirmative defense alleged that "[t]o the extent coverage exists for plaintiffs' claim, it is subject to multiple [SIRs] under the Poli-

cies." The SIRs, which are contained in endorsements, do not implicate exclusions in the policies. Therefore, "the time requirements for disclaiming coverage under Insurance Law § 3420(d) are inapplicable" (*Power Auth. v National Union Fire Ins. Co. of Pittsburgh*, 306 AD2d 139, 140; see *Pav-Lak Indus., Inc. v Arch Ins. Co.*, 56 AD3d 287, 288). Accordingly, the Supreme Court should have denied that branch of the plaintiffs' cross motion which was for summary judgment dismissing National's fourth affirmative defense.

Finally, the plaintiffs failed to establish their prima facie entitlement to judgment as a matter of law dismissing National's sixth affirmative defense. Thus, the Supreme Court should have denied that branch of the plaintiffs' cross motion, regardless of the sufficiency of the opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Since this is, in part, an action for a declaratory judgment, we remit the matter to the Supreme Court, Kings County, for the entry of a judgment, inter alia, declaring that the alleged acts of sexual abuse in the underlying action constitute multiple occurrences, that the settlement amount and any "additional consideration" are to be allocated on a pro rata basis over 7 policy periods, and that the plaintiffs must exhaust a \$250,000 self-insured retention for each CGL policy implicated (see *Lanza v Wagner*, 11 NY2d 317, 334, appeal dismissed 371 US 74, cert denied 371 US 901).

MASTRO, J.P., DICKERSON, CHAMBERS and ROMAN, JJ., concur.

ENTER:  
Matthew G. Kiernan  
Clerk of the Court ♦



## Carrier Not Acting In Bad Faith

Plaintiffs, Erin D. and Jeffrey C. Schmitt instituted an action against their homeowner's insurance carrier, State Farm Fire and Casualty Company, for a breach of contract and bad faith. One issue presented in the partial summary judgment motion was whether State Farm acted in bad faith towards plaintiffs by refusing and continuing to refuse to pay plaintiffs' entire claim.

The insured sustained a water leak in their finished basement on June 8, 2008 caused by a broken water pressure gauge. Mrs. Schmitt believed the loss was the fault of the water authority. Mrs. Schmitt and others attempted to salvage the wet personal property by moving it off the floor, drying the area and laundering some items.

Mrs. Schmitt called her insurance agent on June 10, 2008. An adjuster met with the plaintiffs on June 18, 2008. A property restoration company arrived on June 19, 2008 to provide mitigation and restoration services, as well as remove damaged property. For the most part Mrs. Schmitt observed the process, but did not see everything that was discarded.

State Farm received a claim for \$37,979.61 which Mrs. Schmitt said she told a claim representative was not complete. The carrier determined the actual cash value of the claim after adjustment was \$24,682.91 and made a \$3,000 advance to the insured. State Farm asked the insured to document purchases from 2007 and 2008. Mrs. Schmitt provided documentation of their income and a mortgage satisfaction, but did

not produce the receipts for the purchases since they were destroyed in the loss.

State Farm representatives met with the Schmitts on September 9, 2008. Mrs. Schmitt discussed additional losses for which she provided worksheets and showed photographs. She contended she was told the claim for these items was approved. At the meeting, plaintiff discussed other property losses. After either examining the property or viewing photographs, the representatives advised Mrs. Schmitt to submit a claim. When the claim was subsequently submitted, it amounted to in excess of \$10,000. Mrs. Schmitt claimed she was told no further proof was required because State Farm representatives observed the damaged property or viewed photographs, and the restoration company told State Farm almost everything was a loss. On September 10, 2008 State Farm mailed the Schmitts a check for \$21,682.91 plus a payment for structural repairs.

The Schmitts' claim was then assigned to State Farm's Special Investigative Unit on September 29, 2008. State Farm requested the Schmitts submit to an Examination Under Oath in a letter dated October 2, 2008. Mrs. Schmitt did not attend due to an injury or because she couldn't retain counsel. The Schmitts filed suit against the insurer prior to the EUO being held. The insured claimed she was treated as an adversary by the carrier, not as a policyholder. State Farm filed a motion for partial summary judgment on the bad faith

count and submitted an insurer does not act in bad faith by investigating legitimate issues of coverage.

State Farm also indicated that given the extensive amount already submitted and paid, there was a concern that the additional submission constituted a material misrepresentation.

The crux of plaintiffs' opposition to the partial summary judgment motion was an assertion that State Farm could not offer evidence supporting its suspicion that plaintiffs misrepresented their personal property loss.

The court found that no material issues of fact existed and that a reasonable fact finder could not find that there was no reasonable basis for State Farm's investigation of plaintiffs' supplemental claim.

The court found that State Farm was entitled to judgment as a matter of law on plaintiffs' statutory bad faith claim. It was recommended that the partial summary judgment motion be granted. *Schmitt v. State Farm Ins. Co.*, No. 09-1517, U.S. District Court for the Western District of Pennsylvania, 2011 U.S. Dist. LEXIS 105834 (W.D. Pa. August 12, 2011) (Lenihan, J.), adopted in *Schmitt v. State Farm Ins. Co.*, No. 2:09cv1517, U.S. District Court for the Western District of Pennsylvania, 2011 U.S. Dist. LEXIS 105836 (W.D. Pa. Sept. 19, 2011) (Cercone, J.) ♦



## Case Notes From Around The Country

**Connecticut**—A teenager must pay restitution for damage caused at an unauthorized house party, according to the Connecticut Supreme Court. The teen did not personally cause the damage, but was at the house party where the vandalism was caused without permission of the homeowner.

**Maine**—A former nursing student has been awarded \$300,000 in a lawsuit she filed against the nursing school that expelled her after she complained a male instructor sexually harassed her. She was dismissed in 2008 for violating the code of conduct at a school that operated a program in South Portland, Maine. She filed a complaint with the Maine Human Rights Commission. She was expelled about a week after the school was notified. The instructor was dismissed in 2008, citing no job available.

**Massachusetts**—A court in Massachusetts upheld an exclusion in a commercial lines policy that required the restaurant owner to maintain a fire suppression system. The restaurant sustained a fire six years ago after the restaurant owner failed to upgrade his fire suppression system. He must also return a \$15,000 advance from his insurer, according to the appeals court.

**Michigan**—In a 4-3 decision, the Michigan Supreme Court recently held that the state has no obligation to maintain a northern Michigan trail and dismissed the lawsuit of a woman who suffered back injuries when her off-road type vehicle hit a partially buried board. The majority of the court stated that Little Manistee Trail is not a road or a highway; a designation needed for the state to maintain the trail.

**Montana**—The family of an 18-year-old pitcher who was killed by a baseball hit with an aluminum bat has been awarded \$850,000 by the Montana Supreme Court. The pitcher faced a batter using a Louisville Slugger model CB-13 aluminum bat. He pitched a hard ball and the batter hit the ball back hard. He was hit in the head because he did not have enough time to move out of the way, according to the evidence at trial. The pitcher's lawyers argued the bat was unreasonably dangerous. The jury held that the bat was not designed defectively, but was in a defective condition due to the company's failure to warn of the enhanced risks of its use. The jury's decision upheld the earlier ruling of a lower court. ♦

**Editor's Note:** Below is the text of an opinion issued by the Office of General Counsel regarding Cancellation Notification to Both an Agent and a Broker.

### OGC Op. No. 11-06-03

The Office of General Counsel issued the following opinion on June 21, 2011 representing the position of the New York State Insurance Department.

**Re: Cancellation Notification to Both an Agent and a Broker**

#### Questions Presented:

Must an insurer that cancels an insurance policy in accordance with N.Y. Ins. Law § 3425 (McKinney 2007 and Supp. 2011) provide cancellation notices to all insurance agents and brokers that may be within the chain of producers of a particular policy?

#### Conclusion:

No. In addition to providing a cancellation notice to the insured, pursuant to Insurance Law § 3425, an insurer need only provide a cancellation notice to the authorized insurance agent or broker that the insured designates to receive information on the insured's behalf.

#### Facts:

The inquirer states that he represents an authorized property/casualty insurer. He asks whether the insurer must send a cancellation notice to both an insurance broker and an insurance agent in instances where an insurance broker has procured the policy and places it through an insurance agent.

#### Analysis:

Insurance Law § 3425 governs cancellation of certain property/casualty insurance policies. Insurance Law § 3425(h)(3) provides in pertinent part:

A copy of every notice of cancellation, reduction of limits, substitution of policy form, elimination of coverages, conditioned renewal or of intention not to renew, including the reasons therefor, or a summary of such notice, shall be mailed, delivered or transmitted to the insured's authorized agent or broker within seven days of the time such notice is mailed to the named insured.

Accordingly, a copy of every notice of cancellation must be mailed, delivered or transmitted to the insured's authorized agent or broker within seven days of the time such notice is mailed to the named insured. Here, you ask whether an insurer must send a cancellation to both an insurance agent and broker where a broker procures a policy governed by Insurance Law § 3425 and places it through an agent.

In an Office of General Counsel ("OGC") opinion dated April 16, 1990, the OGC addressed the same question with respect to commercial lines policies cancelled

pursuant to Insurance Law § 3426. There, the inquirer asked whether the notification requirements to cancel an insurance policy under Insurance Law § 3426 impose on the insurer the obligation to notify all brokers or agents who may be within the chain of producers of a particular policy or only the broker or agent designated on the policy to be cancelled. In reply, the opinion states:

We note that there is no definition of the word "authorized" in the statute. The Department interprets the insured's authorized agent or broker to be the agent or broker that the insured designates to receive information on its behalf. The purpose of this requirement is for the insured to be advised as soon as possible by the agent or broker that it chose to procure insurance. The agent or broker that the insured actually and directly authorized to service its insurance needs would presumably be most interested in retaining business from the client by providing the most effective consultation. Usually, such licensee would also be the individual listed on the policy as the authorized agent or broker but in those cases where a number of licensees have been engaged in the particular insurance transaction, the only agent or broker the law requires the insurer to notify is the licensee that the insured chose to do business with. The insurer must establish in its underwriting practice the necessity of obtaining the identity and address of the insured's authorized agent or broker in order to be in compliance with the notification requirements of Section 3426. In those cases where the insured terminates the relationship with the licensee, the successor licensee chosen by the insured to handle the account would have to make his or her identity known to the insurer or its agent in order to receive notification under § 3426. *See id.*

Both Insurance Law §§ 3425(h)(3) and 3426(b) and (c), which set forth the notification requirement for cancellation, state that the cancellation notice be sent to the "authorized agent or broker." Given that there is no definition of "authorized" in Insurance Law § 3425, the Department would take the same position with respect to that statute as it did in the April 16, 1990 opinion regarding Insurance Law § 3426.

Accordingly, in addition to providing a cancellation notice to the insured, an insurer need only provide a cancellation notice to the authorized insurance agent or broker that the insured designates to receive information on its behalf.

For further information, you may contact Senior Attorney Sapna Maloor at the New York City office. ♦



**Editor's Note:**  
For more Opinions  
of the Office of  
General Counsel,  
go to the  
Department's  
website. Since  
October 3, 2011  
the Insurance  
Department website  
information is  
relocated to the  
Department of  
Financial Services  
[www.dfs.ny.gov](http://www.dfs.ny.gov).



# OGC Opinion No. 11-07-01

**Editor's Note:** Below is the text of an opinion issued by the Office of General Counsel regarding Disclosure of Entertainment and Merchandise Provided to Producers as Compensation.

## OGC Op. No. 11-07-01

The Office of General Counsel issued the following opinion on July 8, 2011, representing the position of the New York State Insurance Department.

### Re: Disclosure of Entertainment and Merchandise Provided to Producers as Compensation

#### Question Presented:

When disclosing compensation pursuant to Regulation 194, must an insurance producer itemize entertainment and merchandise received from an insurer, or may the producer provide a reasonable estimate?

#### Conclusion:

When disclosing compensation pursuant to Regulation 194, an insurance producer must itemize entertainment and merchandise received from an insurer as compensation, if the value of the items is known at the time disclosure is required. If the value is not known, a producer must instead provide a reasonable estimate of the value of such compensation and a description of the circumstances that may determine the receipt and value of such compensation.

#### Facts:

A marketing representative of an insurer occasionally entertains insurance agents and provides agents with certain merchandise, such as "shirts, lunches, pens, [and] pads." The marketing representative asked whether an insurance producer must itemize entertainment and merchandise received from an insurer as compensation or whether the producer may provide a reasonable estimate when disclosing pursuant to Regulation 194.

#### Analysis:

Regulation 194 was promulgated on January 25, 2010, and went into effect on January 1, 2011. That regulation: 1) regulates the acts and practices of insurers and insurance producers with respect to transparency of compensation paid to producers and their role in insurance transactions in this State, and 2) protects the interests of the public by establishing minimum disclosure requirements relating to the role of producers and the compensation paid to producers. 11 NYCRR 30.1(a) and (b).

Regulation 194 requires producers to disclose to the purchaser "whether the . . . producer will receive compensation from the selling insurer . . . based in whole or in part on the insurance contract the producer sells." 11 NYCRR 30.3(a)(2). (Italics added.) Compensa-

tion that is not based, in whole or in part, on the sale of an insurance contract does not need to be disclosed. "If the purchaser requests more information about the producer's compensation . . . the producer shall disclose . . . a description of the nature, amount and source of any compensation . . . received." 11 NYCRR 30.3(b)(1).

If the amount of the compensation to be disclosed by the producer is known, the producer may state the amount of compensation in a number of different ways. Circular Letter No. 18 (2010) (the "Circular Letter") provides the following examples:

- A producer's known compensation may be described as the total dollar amount expected to be received based in whole or in part on the sale.
- A producer's known compensation may be described as the total amount expected to be received based in whole or in part on the sale stated as a percentage of one year of premium.
- A producer's known compensation may be described as a percentage of the total premium paid over the expected duration of the policy or contract, for policies lasting for a number of years with a greater portion of the compensation received in the early years that the policy is in effect.<sup>1</sup>

The Circular Letter does not preclude a producer from disclosing the amount of compensation received from the sale of insurance in other ways from those explicitly suggested therein. Therefore, a producer could itemize the amount of compensation if the amount is known.

If, however, the amount of compensation is not known at the time of disclosure, the producer must disclose "a description of the circumstances that may determine the receipt and amount or value of such compensation" and "a reasonable estimate of the amount." 11 NYCRR 30.3(d)(1) and (2). In order to meet the requirement that the producer disclose "a reasonable estimate" of the amount of unknown compensation, the producer may estimate the amount in a number of different ways. The Circular Letter again provides examples:

- A producer may estimate the unknown compensation as a reasonable range of percentages of premium based on the amount of such compensation the producer has received on the sale of similar policies in prior years.
- A producer may estimate the unknown compensation as a reasonable range of dollar amounts based on the amount of such compensation the producer has received on the sale of similar policies in prior years.
- When a producer's unknown compensation

received based on the sale of similar policies in prior years is not readily available or calculable, the producer may use an estimate provided by the insurer and based on the average amount of such compensation paid to producers per dollar of premium for similar policies in prior years.

- For life insurance policies, annuity contracts, long-term care insurance policies and disability income insurance policies, a producer may estimate the unknown compensation as an addition range of percentages of the total premium paid over the average duration of the policy or contract in accordance with the paragraph discussing life insurance policies and annuity contracts under Section 303.3(b) above.
- A producer who works exclusively for one insurer may estimate unknown compensation by stating all such compensation the producer receives in a given year as a percentage or range of percentages of the producer's total yearly compensation.

A producer that receives "items like shirts, lunches, pens, pads," and other merchandise as well as entertainment as compensation based in whole or in part on the sale of insurance contracts must disclose such compensation pursuant to § 30.3(b) of Regulation 194.<sup>2</sup> However, whether a producer must provide the precise value of entertainment and merchandise received from an insurer as compensation or may provide a reasonable estimate of such value depends on whether the amount of compensation is known at the time Regulation 194 requires disclosure. If the producer knows the amount of compensation then the producer must disclose such amount and is permitted to do so in any of the ways suggested by the Circular Letter, by itemizing or by some other acceptable method. If the producer does not know the amount of compensation, the producer must disclose "a reasonable estimate" of the amount of such compensation.

For further information you may contact Assistant Counsel Jared Wilner at the New York City Office.

<sup>1</sup>Such disclosure only pertains to life insurance and must state (1) the expected duration used (which must take account of the appropriate mortality and termination rates for the kind of policy sold), and (2) that most compensation is paid in the first year if such is the case, or that most of the compensation is paid in the first 5 years if such is the case. Circular Letter No. 18 (2010).

<sup>2</sup>"Compensation does not mean tangible goods with the insurer name, logo or other advertisement and having an aggregate value of less than \$100 per year per insurer." 11 NYCRR 30.2(a). ♦



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;  
Arthur Adams, CPCU; Ann Popkoski

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