The URB Insider

A Quarterly Publication of Underwriters Rating Board

New York Court of Appeals Overturns *K2* Case

On February 18, 2014, the New York Court of Appeals overturned its prior decision in the *K2* case it decided in June, 2013.

At that time, the Court of Appeals essentially held that if a liability insurer breaches the duty to defend its insured, it may not then assert policy exclusions to deny coverage. The decision was viewed as a very bad one throughout the insurance industry and many contended the Court of Appeals had ignored its own precedent in *Servidone Const. Corp. v. Security Ins. Co. of Hartford*, 64 NY2d 419 1985 by issuing the decision.

However, the decision was overturned in *K2 Inv. Group, LLC v. American Guar. & Liab. Ins. Co.*, 2014 NY Slip Op 01102 after the New York High Court granted the insurer's motion for reargument, vacated its prior decision, and reversed the Appellate Division order that had affirmed summary judgment for the plaintiffs.

By way of background, claims for legal malpractice had been brought against American Guarantee by its insured, Jeffrey Daniels, which American, it has since been conceded, refused to defend. Daniels suffered a default judgment and assigned his rights against American to the plaintiffs in the suit against him. Those plaintiffs brought the present case. In response, American relied on two policy exclusions to assert the loss was not covered. The Court of Appeals determined in order to decide the case, they either had to overrule *Servidone* or follow it, and they chose to follow it.

New York State Court of Appeals in Albany, New York.

To see this case that is important to the property casualty insurance industry, right click on the link below and click Open Hyperlink. ◆

http://www.nycourts.gov/reporter/3dseries/2014/2014_01102.htm

Volume 12, Issue 1

Spring, 2014

In this issue:

NY Court of Appeals Sets Aside Two Year Suit Limitations Period When Property Cannot Be Replaced In Two Years

Executive Plaza LLC was the owner of a commercial building that was damaged by fire in 2007. They were insured with Peerless Insurance Company with a policy limit of $1,000,000. An actual cash value claim was made and paid by Peerless, and the insured decided to rebuild the property instead of buying another one. The insured ran into delays during the rebuilding, due to some zoning issues and other changes to the building. The insured was unable to complete the reconstruction until more than two and one half years after the loss, in October 2010.

The policy contained a replacement cost provision that provided no payment be made until the lost or damaged property is actually repaired or replaced, and unless the repairs or replacement are made as soon as is reasonably possible after the loss or damage. The Legal Action Against Us clause provided that there could be no suit against the insurer unless there has been full compliance with all the terms of the insurance and the action is brought within two years after the date on which the direct physical loss or damage occurred.

In 2009, the insured commenced an action against Peerless, which was removed to federal court and dismissed because Peerless argued the insured had not yet spent more than the payment made to them in repairs or to replace the building. When the building reconstruction was complete in 2010, the insured sued again for the amount of coverage held back.

"...The problem with the limitation period in this case is not its duration, but its accrual date..." - New York Court of Appeals
Executive Plaza, LLC v. Peerless Ins. Co., 2014 NY Slip Op 00898.

Peerless moved to dismiss the action brought and the United States District Court held that the suit was barred by the limitations period in the policy. The plaintiff insured appealed the decision to the United States Court of Appeals for the Second Circuit, who didn't decide the case but certified the following question to the New York Court of Appeals:

> If a fire insurance policy contains
> (1) a provision allowing reimbursement of replacement costs only after the property was replaced and requiring the property to be replaced "as soon as reasonably possible after the loss"; and
> (2) a provision requiring an insured to bring suit within two years after the loss;
> is an insured covered for replacement costs if the insured property cannot reasonably be replaced within two years?

The Court of Appeals answered the question in the affirmative by holding that such a contractual limitation period, applied to a case in which the property cannot reasonably be replaced in two years, is unreasonable and unenforceable. The Court opined that it would consider any suit limitations condition that bars a suit for replacement cost coverage for property that cannot be reasonably replaced within two years to be unreasonable and unenforceable. In reading the decision, the problem the Court found, was not with the duration of the limitation period, but its accrual date.

This case has the potential to have a broad impact on settlements by property casualty insurers. To see the case in its entirety, right click on the link below and click Open Hyperlink. ◆

http://www.nycourts.gov/reporter/3dseries/2014/2014_00898.htm

Statutory Employer Defense Reaffirmed By PA High Court

Recently, the Pennsylvania Supreme Court reaffirmed the statutory employer defense in the case of *Patton v. Worthington Associates, Inc.*, No. 32 MAP 2013, The Supreme Court of Pennsylvania, Middle District, March 26, 2014. This is a general contractor liability case in which a subcontractor was injured while doing construction work.

Worthington Associates Inc. was the general contractor working on a project for a Pennsylvania church. Worthington contracted with Patton Construction Inc., owned and operated by Earl Patton, who is its sole shareholder and only employee.

While at the job site, Patton fell and injured his back in 2001. Patton, along with his wife, commenced an action against Worthington, alleging unsafe working conditions.

Worthington subsequently moved for summary judgment to dismiss the case, contended that it was Patton's statutory employer. As such, it was immune to liability in tort resulting from work injuries. If they were the statutory employer, Worthington would be liable under the state's Workers' Compensation Act. The motion was denied.

At trial, Worthington asserted once again that it was entitled to immunity as a statutory employer. However, the jury determined that Patton was an independent contractor and, as such, Worthington was not entitled to immunity for Patton's injuries. The jury returned a $1.5 million verdict in favor of the plaintiffs. A superior court panel affirmed this award in a divided opinion.

The trial court was asked to decide if Patton was an independent contractor or an employee of Worthington. In doing so, the jurors were instructed on the differences between independent contractors and employees.

Subsequently, the Pennsylvania Supreme Court ruled unanimously to reverse the lower courts' ruling. The Pennsylvania Supreme Court reasoned the issue was one of the appellant being a statutory employer under the Workers' Compensation Act. In reversing the lower court's rulings, the justices found that Patton's relationship with the owner was a derivative one, arising from a conventional subcontract with Worthington. Based on precedent, neither Patton or Patton Construction was an independent contractor, according to the Pennsylvania Supreme Court. As a result of this decision, Worthington is immune from civil liability for Patton's injuries.

To see the case in its entirety, right click on the link below and click Open Hyperlink. ◆

http://www.pacourts.us/assets/opinions/Supreme/out/J-89-2013mo%20-%201017561072085970.pdf?cb=1

Forms In the Works

Here are a few of the forms in progress at Underwriters Rating Board:

- SF Policy Series Update
- FL and SF Roof Surface Actual Cash Value Loss Settlement
- Equipment Breakdown Enhancement Endorsement (For Use With Farmowners Policies)
- Residence Owned In Trust Coverage (For Use With Homeowners Policies)
- Personal Injury Coverage
- Host Liquor Liability Coverage.

2009-2013 Landlords Statistics

Zone	Earned Premium ($)	Actual Incurred Losses (3/2013) ($)	Ratio
1.1	19,421,563	7,467,354	38.4%
1.2	15,408,982	3,860,186	25.1%
1.3	29,263,890	6,932,337	23.7%
1.4	17,035,946	5,336,514	31.3%
1.5	32,249,670	11,212,318	34.8%
1.6	11,960,007	4,711,448	39.4%
1.7	15,410,530	5,842,958	37.9%
1.8	17,967,595	4,195,298	23.3%
1.9	4,079,322	1,704,099	41.8%
2	17,668,548	5,637,109	31.9%
3	2,397,290	576,238	24.0%
	182,863,343	57,475,858	31.4%

Historically, the Landlords line of business is one of the most profitable for URB companies.

Trust Basics

A trust is a legal form of ownership in which property is held by one party for the benefit of another party. The party who creates the trust owns the property at the time and is referred to as the "trustor", "grantor" or "settlor". That party transfers their ownership interest in the property into a trust, managed by a "trustee", who holds the property for the benefit of the "beneficiaries."

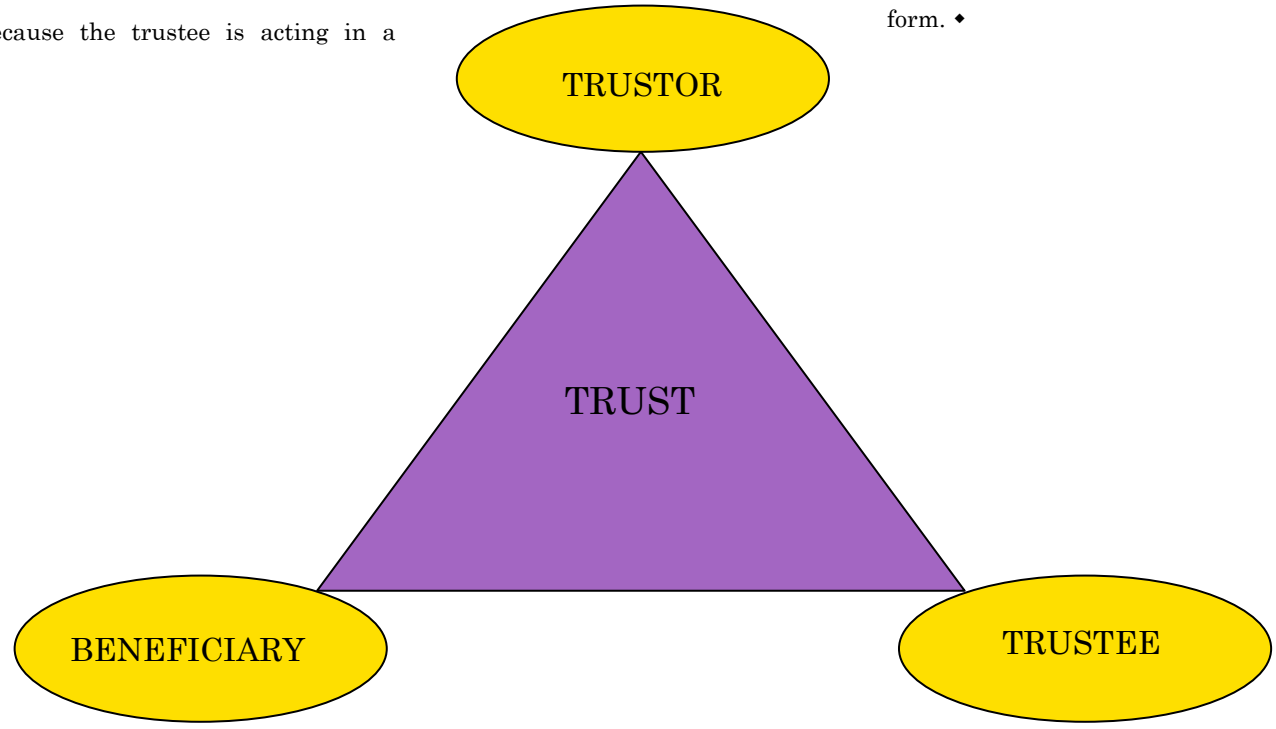
An owner of property who sets up a trust turns over control to the trustee which separates the legal ownership of the property from its equitable ownership.

While the trustee is given title to the property, the trustee's role is to act for the benefit of the beneficiaries because the trustee is acting in a fiduciary capacity. The trustee may be a single person, multiple people, a company or a public entity. The terms of the trust are determined by the trust instrument and any supporting documents such as a will or deed. Trusts must have a stated purpose and are typically created to provide benefits relative to estate planning, protection of assets, or tax planning.

Owners of property can and do have trusts created in which their home, for example, is titled in the name of the trust, and they continue to live in the property. However, at that time, they no longer hold legal title to the property.

There are various methods to accomplish this title change using a trust. When the change is made, it is important the insurer is notified to change the title on the homeowners insurance policy to reflect the new type of ownership of the insured premises. The trustee should be insured on the homeowners policy with some measure taken to protect the occupants of the property, who are usually the party or parties who owned the home and set up the trust.

URB is working on a Residence Owned In Trust form that will assist insurers to make title changes on homeowners policies when owners put their residence in trust. More information coming soon on this new form. ◆



The 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
Jaime Bashaw

We're On the Web!
URBRATINGBOARD.com
E-mail us at:

jean@urbratingboard.com

mary@urbratingboard.com

tim@urbratingboard.com

kim@urbratingboard.com

arthur@urbratingboard.com

jaime@urbratingboard.com

People On the Move And In the News

- **B**est wishes to Stephen Hall of Finger Lakes Fire and Casualty on his retirement as President of the Company. Congratulations to Tom Ball who has succeeded Mr. Hall as President.
- **C**ongratulations to Marvin Achilles who recently retired from Allegany Insurance Company after many years.
- **C**ongratulations to Terry Gras of Otsego Mutual Insurance Company who was awarded Executive of the Year by the Professional Insurance Agents of New York State. The award was presented to Mr. Gras on January 23, 2014 at the annual Metropolitan Regional Awareness Program at the Marriott in New York, New York.◆