The URB Insider

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URB Nearing Completion of SF Policy Forms Update

As many of you know, URB has been working on an update to the SF forms series and plans to file the updated forms and a new manual in the first quarter of 2015.

The SF forms are the first of the policy forms series to be updated by URB. URB plans to undertake an update of the other forms series in the coming years.

URB chose to start with the SF forms series update because of the many changes in technology that impact coverage, court cases that have impacted the forms and the number of questions received about the forms from our members and subscribers.

Much research has gone into creating a state of the art product that will allow the carriers the choice to build the product they want to offer that is competitive with similar products in the marketplace.

URB has implemented the comments and input we have received from our members and subscribers to formulate the SF forms series update.

In addition to modernizing the forms, they have been streamlined, where possible. Some changes include updated insuring agreements, definitions and exclusions. Modernization has brought about changes in personal injury coverage, crime coverages and how fungus is handled.

With respect to the Businessowners' Policy, there are now three levels of coverage: Preferred, Deluxe and Standard.

Going forward, it is URB's intention to provide information about the changes to the forms series and how it impacts coverage. Once the forms series is approved for use, URB will hold meetings and provide written information about the changes to the forms and the coverages contained in them.

We will keep you posted as filing of the project with DFS comes closer to fruition. We hope to bring you the updated forms series and manual for adoption as soon as possible in 2015, and are excited about the prospect of offering this modernized product for your consideration. ◆

The URB Insider

Winter, 2014

In this issue:

N.Y. Court Of Appeals

Court of Appeals Interprets Noncumulation Clause in Favor of Insurer

In the case of *Hiraldo v. Allstate Ins. Co.*, 5 NY3d 508 (2005), the New York Court of Appeals interpreted what has been termed a "noncumulation" clause that was contained in a series of successively-issued liability insurance policies. The New York High Court held that a person suing for exposure to lead paint during the terms of all the policies could recover no more than one policy limit.

Very recently in another case entitled *Nesmith v. Allstate Ins. Co.*, 2014 NY Slip Op 08217, a nearly identical clause was interpreted by the Court of Appeals. In this case, the clause related to a case where members of different families were successively exposed to lead paint in the same apartment. The Court of Appeals held as they did in *Hiraldo*, that the insurer's maximum total liability is only one policy limit.

The facts of the *Nesmith* case are that in 1991, Allstate Insurance Company issued a policy of liability insurance to the landlord of a two-family house in Rochester. The policy was renewed annually for the years beginning September 1992 and September 1993. It stated on the declarations page a $500,000 limit for each occurrence. It contained the following noncumulation clause:

"Regardless of the number of insured persons, injured persons, claims, claimants or policies involved, our total liability under the Family Liability Protection coverage for damages resulting from one accidental loss will not exceed the limit shown on the declarations page. All bodily injury and property damage resulting from one accidental loss or from continuous or repeated exposure to the same general conditions is considered the result of one accidental loss." *Nesmith,* 2014 NY Slip Op 08217**.**

Felicia Young and her children lived in one of the apartments from November 1992 until September 1993. In July 1993, the Department of Health notified the landlord that one of the children had been found to have an elevated blood lead level and that areas of the apartment were in violation of State regulations governing lead paint. The landlord made some repairs and the Department advised him in August 1993 that violations were corrected.

Subsequently, after the Young family moved out in September 1993, Lorenzo Patterson, Sr., and Qyashitee Davis moved in with their two children. Again, a child was found to have an elevated blood lead level, and the Department of Health sent a letter in December 1994 saying that violations had been found and instructing the landlord to correct them.

In 2004, Young on behalf of her children, and Jannie Nesmith on behalf of the Patterson children, her grandchildren, brought two separate actions against the landlord for personal injuries for lead exposure. Young's claim was settled in 2006 for $350,000, which Allstate paid. In 2008, Nesmith settled her claim pursuant to a stipulation that reserved the issue of the policy limit for future litigation and Allstate paid the remaining $150,000 it claimed was left on the policy. Nesmith subsequently brought the current action against Allstate for a declaratory judgment asserting a separate policy limit of $500,000 applied to each family's claim.

Supreme Court found for Nesmith, saying it could not conclude the children in the two cases were injured by exposure "to the same conditions." The Appellate Division reversed in *Nesmith v. Allstate Ins. Co.*, 103 A.D.3d 190 (2013). The Appellate Division held that, under *Hiraldo*, the renewal of the policy could not

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Court of Appeals Interprets Noncumulation Clause in Favor of Insurer Cont'd

make an additional limit available; that under the plain terms of the noncumulation clause, the number of claims and claimants could not do so either; and that injury to Young's children and Nesmith's grandchildren resulted from "continuous or repeated exposure to the same general conditions," so that the injuries were only one accidental loss. *id.* The Court of Appeals granted leave to appeal.

In *Hiraldo*, one child had lived in the building three years with three successive Allstate policies in place. Under *Hiraldo*, Nesmith did not and could not argue that the annual renewals of the landlord's policy increased the limits of coverage, observed the Court of Appeals. In addition, the Court of Appeals stated the noncumulation clause is equally clear in saying "number of injured persons" "claims" and "claimants" makes no difference. *Nesmith v. Allstate Ins. Co.*, 2014 NY Slip Op 08217. Nesmith's only argument was that the alleged injuries to Young's children and Nesmith's grandchildren were separate losses because they did not result "from continuous or repeated exposure to the same general conditions." *id.*

The Court of Appeals rejected that argument. It was stated that Young's children and Nesmith's grandchildren were exposed to the same hazard, lead paint, in the same apartment. *id.* The judges observed that perhaps they were not exposed to exactly the same conditions; but to say that the "general conditions" were not the same would deprive the word "general" of all meaning. Nesmith made no claim, and there was nothing in the record to infer, that a new lead paint hazard had been introduced into the apartment. The only conclusion the High Court could draw was that the landlord's remedial efforts were not wholly successful, and the same general conditions of lead continued to exist. As such, the Court of Appeals affirmed the decision of the Appellate Division. To read the complete case, click the link below. ◆

Nesmith v Allstate Ins. Co. (2014 NY Slip Op 08217)

URB Releases ML-46A Personal Injury Coverage

URB recently released the ML-46A Ed. 7/14 Personal Injury Coverage endorsement that was approved for use with a disposition date of November 26, 2014. Along with the ML-46A, URB released HO-53, which is the bulletin associated with the filing.

This form is placed in the optional section of the URB manual and it is for use with Homeowners, Manufactured Homeowners and Farmowners policies.

This is a modernized version of the personal injury coverage currently available. The form may be used to add personal injury coverage or to modify personal injury coverage contained in an extender endorsement.

One of the most substantial changes in the form is that the new form accounts for the fact that personal injury can now take place through technology, not just through spoken words or traditional written language. The exclusions have also been modernized to reflect technological changes of how personal injury can occur today. There are limitations on coverage resulting from electronic chat rooms, bulletin boards, gripe sites, social media or other electronic forums that an insured hosts or owns, or has the control or authority to update, and also from cyberbullying, among other exclusions in the endorsement.

URB plans to file a similar FL Personal Injury Coverage endorsement for approval in the near future. ◆

Drones: A New Risk On The Rise For Insurers

It's not a scene out of the science fiction movie, unmanned aircraft systems (UAS), otherwise known as drones, are a reality of the modern world in which we live. In fact, they will most likely become a big part of our 21st century existence. Certainly the growth of public, commercial and personal applications using drones present market opportunities for insurers, as well as increased risks to consider when insuring the exposures brought about by drone use.

According to the Federal Aviation Administration website, there are three types of UAS operations: Public, Civil and Model Aircraft. This article focuses on Model Aircraft and some of the related risks and insurance implications related to their use.

Recreational use of airspace by model aircraft is covered by FAA Advisory Circular 91-57, which generally limits operations for hobby and recreation to below 400 feet, away from airports and air traffic, and within sight of the operator. This circular clarified that it applied only to modelers and specifically excludes its use by persons or companies for business purposes.

In June, 2014, the FAA published a Federal Register notice providing guidance on its interpretation of the statutory general rules for model aircraft in the FAA Modernization and Reform Act of 2012 that was signed on February 14, 2012. The FAA issued this interpretation because of the many inquiries received regarding the scope of the special rule for model aircraft in section 336 of the FAA Modernization and Reform Act of 2012 and the FAA's enforcement authority over model aircraft as affirmed by the statute.

In Section 336, Congress confirmed the FAA's long-standing position that model aircraft are aircraft. Under the terms of the Act, a model aircraft is defined as "an unmanned aircraft" that is (1) capable of sustained flight in the atmosphere; (2) flown with visual line of sight of the person operating the aircraft; and (3) flown for hobby or recreational purposes." See Section 336 (c). Section 331(8) of the Act defines an unmanned aircraft as "an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft." Congress' definition of model aircraft is consistent with the FAA's existing definition of aircraft as "any contrivance invented, used, or designed to navigate, or fly in, the air." 49 U.S.C. 40102; see also 14 C.F.R. 1.1.

Section 336 prohibits the FAA from promulgating any rule or regulation regarding the model aircraft if the following are met:

- The aircraft is flown strictly for hobby or recreational use;
- The aircraft is operated in accordance with a community-based set of safety guidelines and within the programming of a nationwide community-based organization;
- The aircraft is limited to not more than 55 pounds unless otherwise certified through a design, construction, inspection, flight test, and operational safety program administered by a community-based organization;
- The aircraft is operated in a manner that does not interfere with and gives way to any manned aircraft; and
- When flown within 5 miles of an airport, the operator of the aircraft provides the airport operator and the airport air traffic control tower with prior notice of the operation.

Based on the language of the statute, any aircraft meeting the statutory definition and the requirements above, would be exempt from future FAA rulemaking action specifically regarding model aircraft. Model aircraft that do not meet these requirements are unmanned aircraft and as such are subject to all existing and any future FAA rulemaking actions.

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The notice provides some examples of flights that could be conducted as a hobby or recreation flight and other types of flights that would not be hobby or recreation. Flying a model aircraft at the local model aircraft club would be hobby or recreation, whereas receiving money for demonstrating aerobatics with a model aircraft would not be considered as such. Taking photographs with a model aircraft for personal use would be hobby or recreation, but a realtor using a model aircraft to photograph property that he is trying to sell and using the photos in the property's real estate listing would not be hobby or recreation. Using a model aircraft to move a box from point to point without any kind of compensation would be hobby or recreation, but delivering packages to people for a fee would not be hobby or recreation. Viewing a field to determine whether crops need water when they are grown for personal enjoyment would be hobby or recreation, but doing so as part of commercial farming operations would not be hobby or recreation.

The law is clear that the FAA may take enforcement action against model aircraft operators who operate their aircraft in a manner that endangers the safety of the national airspace system. In the notice, the FAA explains that this enforcement authority is designed to protect users of the airspace as well as people and property on the ground. The FAA is also developing a plan to work with the law enforcement community to help them understand the FAA's rules for unmanned aircraft systems, as well as the special statutory rules for model aircraft operators, so they can more effectively protect the public.

The more widespread use of model aircraft will have a discernable impact on exposures covered by insurance. Most prevalent will be the personal injury claims that arise from invasion of the right to privacy. Moreover, there will also be the increased incidence of damage to both real and personal property on a first and third-party basis, and bodily injury to third parties should the drone injure another person.

Whether or not there is coverage for such claims will depend on what forms are on the policy and whether it is a first-party personal property claim or a third-party liability claim for bodily injury, property damage or personal injury. For example, aircraft is a covered cause of loss on the 1999 version of the ML-1, ML-2, ML-3 and ML-5. Drones that are model aircraft are personal property. On the ML liability forms, there is an exclusion for liability resulting from the ownership, operation, maintenance, use, occupancy, renting, loaning, entrusting, supervision, loading or unloading of aircraft, except for bodily injury to a person while performing duties as a domestic employee. There is, however, an exception to the exclusion that says: this exclusion does not apply to model airplanes. As such, liability coverage for model aircraft drones is not excluded.

On the FL forms, aircraft is only an optional cause of loss under the extended coverage on the 1992 edition of the FL-1R, but it is a covered cause of loss on the 1992 edition of the FL-2 and is listed as a covered cause of loss on the 2000 edition of the FL-3. Drones that are model aircraft are personal property. The 1992 FL-CPL contains the same exclusion for aircraft liability as do the ML liability forms, along with the same exception for model airplanes. As such, liability for model aircraft drones is not excluded.

One aspect of drone use that warrants serious consideration when it comes to coverage is invasion of the right to privacy. Not all URB policies contain personal injury coverage and such coverage would be required to cover invasion of the right to privacy from a model aircraft drone.

The next couple issues of The URB Insider will further explore the emerging issues created by drones. URB is researching any forms changes related to drones, and we will keep you updated on this topic.◆

No Fracking In New York

Governor Cuomo met with his cabinet on December 17th, during which time Department of Environmental Conservation (DEC) Commissioner Joe Martens and Acting State Department of Health (DOH) Commissioner, Dr. Howard Zucker spoke about the future of hydraulic fracturing in New York.

There has been a moratorium on hydraulic fracturing in New York for several years while the issue was studied. DEC originally was involved and then the Department of Health became involved to determine if the process is safe.

Dr. Zucker said he would not recommend the high-volume hydraulic fracturing in New York. Zucker discussed a variety of impacts that result from the process. He pointed out there is a lack of longitudinal studies to prove or disprove the health effects of hydraulic fracturing, and he made a personal decision. He stated, "Would I live in a community with HVHF (high-volume hydraulic fracturing) based on the facts I have now? Would I let my child play in the school field nearby, or my family drink the water from the tap or grow their vegetables in the soil? After looking at a plethora of reports...my answer is no."

DEC Commissioner Joe Martens then said the DEC will now complete the SEQR process by publishing a final study by early next year. He followed up by saying, "I will issue a legally binding finding statement prohibiting HVHF in New York…"

This decision was arrived at after several years of study, including 4500 hours of labor.

Governor Cuomo indicated in his earlier remarks during the meeting that he would be bound by whatever the experts decided. ◆

Congress Concludes Session Without Extending TRIA

Intense negotiations to extend the Terrorism Risk Insurance Act that is set to expire on December 31, 2014 failed when Congress left without reauthorizing the statute.

The House of Representatives had passed a bill but the Senate was unable to overcome an objection about an unrelated issue.

There was thought to be an agreement worked out by Senator Chuck Schumer and Congressman Jef Hensarling, but that was not to be the case.

The Congress is leaving for the year, which means after December 31 insurers cannot rely on the government's promise of possible assistance in the event of a terrorist attack for lines of business covered under the Terrorism Risk Insurance Program.

Senators have indicated that coming up with a new bill will be a priority when the new Congress arrives in January. At this time, there is no interim legislation that will extend TRIA until a new bill is passed.

What that means is insurers will have to determine how to handle their communications with insureds who have already received early 2015 renewals with TRIA documents on policies that are no longer accurate starting January 1, 2015.

In New York, there are no terrorism exclusions allowed. They only exist to the extent that an insured refused coverage after an insurer met the make available requirement under TRIA.

URB is looking into this issue of TRIA expiring by reaching out to DFS, and will keep its members and subscribers updated as to any guidance or information we can obtain regarding the TRIA documents being on policies for the future. ◆

Homeowners 2009-2013 Results Less Superstorm Sandy and Hurricane Irene

5 Year Total Homeowners	Earned Premium	Actual Losses as of March, 2014	Ratio	Number of Structures
Zone 1.1	69,371,331	30, 484,300	43.94%	117,015
Zone 1.2	19,575,668	8,859,012	45.26%	36,682
Zone 1.3	61,832,017	28,834,873	46.63%	113,577
Zone 1.4	55,050,440	27,970,182	50.81%	99,210
Zone 1.5	33,825,255	19,913,918	58.87%	55,686
Zone 1.6	33,224,877	17,131,847	51.56%	58,999
Zone 1.7	34,841,733	17,851,369	51.24%	40,831
Zone 1.8	17,765,192	10,262,988	57.77%	25,486
Zone 1.9	27,504,577	18,325,733	66.63%	36,050
Zone 2	13,836,150	6,586,215	47.60%	23,273
Zone 3	12,935,331	6,223,867	48.12%	12,742
Zone 4	33,808,587	15,898,781	47.03%	27,969
Zone 5	546,989	35,991	6.58%	1,196
Zone 6	8,550,474	2,100,898	24.57%	6,671
Zone 7	41,022,830	14,509,925	35.37%	30,644
Zone 8	5,373,253	3,527,413	65.65%	4,614
Zone 9	51,126,458	30,784,516	60.21%	41,733
Zone 10	67,485,690	28,122,513	41.67%	50,584
Totals	587,676,852	287,424,342	48.91%	782,962
Less 2012 Superstorm Sandy	Earned Premium	Actual Losses as of March, 2014	Ratio	Number of Structures
Zone 4—Queens	26,541,395	9,796,378	36.91%	22,103
Zone 7—Kings	31,921,127	9,466,116	29.65%	23,993
Zone 9—Nassau	39,730,044	17,252,143	43.42%	32,775
Zone 10—Suffolk	52,385,730	16,957,717	32.37%	39,865
Less 2011 Hurricane Irene and 2012 Superstorm Sandy	Earned Premium	Actual Losses as of March, 2014	Ratio	Number of Structures
Zone 1.7	21,050,989	9,834,987	46.72%	25,029
Zone 1.9	16,635,717	7,870,198	47.31%	22,246

Note: This information was compiled from the URB's Statistical Reports. The Earned Premium came from report BQ and the losses were compiled from accident year reports.

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Coming in the next issue of The URB Insider will be a look at Solar Panels and related insurance issues.

Upcoming Events At URB

URB will be holding a subscribers meeting in the Spring of 2015 . This meeting will be an updated version of the forms meetings we have previously held for many years. More information and a survey to determine what you would like to talk about will be sent to you in the new year.

Best wishes from URB for a Happy Holiday Season and all the best in the New Year!