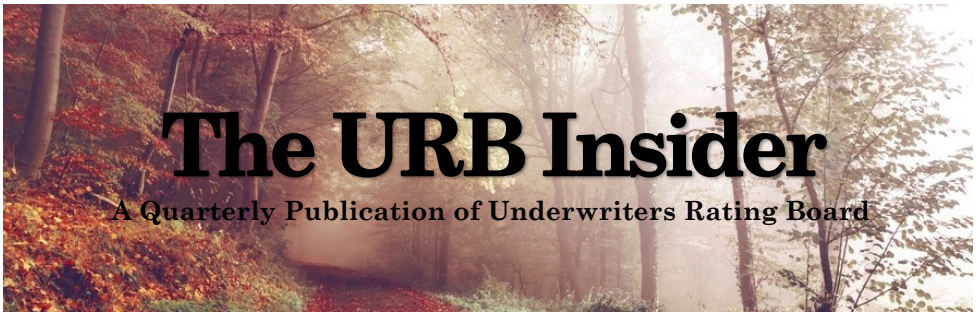

The URB Insider

A Quarterly Publication of Underwriters Rating Board

Volume 14, Issue 3
Fall, 2016

URB FORMS NEWS

Cyber Insurance Endorsement

The Cyber Insurance Endorsement (CL-100 Ed. 4/16) and the Supplemental Declarations Cyber Insurance Endorsement (CL-100S Ed. 4/16) have been approved by the DFS effective November 18, 2016. Additional information about these endorsements and a cyber educational seminar will follow in the near future.

SF Forms Series

URB has started filing the new SF forms series. The forms listed below with an edition date of 9/16 have been submitted to the DFS and await approval:

- Commercial Property Coverage (SF-20)
- Causes of Loss Forms (SF-1 through SF-6)
- Businessowners Coverage (SF-311S, SF-311D and SF-311P)
- Special Multi-Peril Mandatory Endorsement (SF-310)
- Several extender endorsements (SF-513 through SF-520)

Additional SF forms should be submitted within the next few weeks and submissions will continue until the entire SF forms series has been sent to the DFS for approval.

Other Forms

The following have been submitted to the DFS and await approval:

- Residence Held In Trust (ML-22 Ed. 8/16)
- Causes of Loss Forms (FL-1R, FL-2 and FL-2B Ed. 9/16)

Up and Coming Forms Projects- Spring 2017

- LS Forms Series
- ML home business extender endorsement
- ML extender endorsements
- Farm endorsements for emerging exposures
- Unmanned Aircraft endorsement

URB will keep you posted on the status of forms submissions to the DFS and on the status of up and coming projects. ◆

Court of Appeals Reverses Appellate Division on Waiver Issue

In the case of *Estee Lauder Inc. v. OneBeacon Ins. Group, LLC.*, 2016 NY Slip Op 06012 [28 NY3d 960] the New York Court of Appeals recently reversed the 2015 decision of the Appellate Division, First Department to hold the insurer had not waived their late-notice coverage defense.

The Appellate Division had held that OneBeacon waived its right to raise the late-notice affirmative defense because it did not raise it in its disclaimer letter to the plaintiff. The court asserted that the insurer was deemed to have made the waiver as a matter of law because the insurer knew the circumstances relating to the defense of untimely notice and did not dispute it had such knowledge long before it disclaimed in 2002. Based on common-law waiver principles, the court determined in this property damage case, that a ground not raised in the letter of disclaimer could not later be asserted as an affirmative defense.

The high court analyzed the circumstances under the common-law waiver standard, which requires an examination of all the factors. In doing so, the high court concluded that defendants could not have been said to have waived their right to assert the late-notice defense as a matter of law by failing to specifically identify the issue in their disclaimer letters. The high court determined that the defendants identified the late-notice defense in early communications with plaintiff before relying on a reservation of rights in two disclaimer letters.

Under common-law principles, triable issues of fact existed whether defendants clearly manifested an intent to abandon their late-notice defense. As a result, the Court of Appeals reversed the Appellate Division, First Department, and held that the Supreme Court properly granted defendants' motion for leave to amend their answer to assert the late-notice affirmative defense.

Click here to read this case in its entirety. ◆

Landlord Out Of Possession Is Outside Liability

The Appellate Division, Second Department recently decided in the case of *Mendoza v. Manila Bar & Res. Corp.*, 2016 NY Slip Op 04698 [140 AD3d 934] that an out of possession landlord has no liability to a third party for injuries sustained on premises rented by a tenant. Plaintiff, Jolly Mendoza, commenced this action for personal injuries against defendant tenant, Manila Bar & Restaurant Corp. (Manila) and the defendant landlord, Jose Valcarel (Valcarel) alleging she slipped and fell in a single-occupancy bathroom on the premises. The plaintiff alleged that almost the entire bathroom floor was covered with liquid consisting of cleaning solution and water.

Valcarel moved for summary judgment dismissing the complaint and all cross claims against him, and sought summary judgment on his cross claim for common-law indemnification and his purported cross claims for contractual indemnification and breach of contract to procure insurance. Supreme Court denied the motion and Valcarel appealed.

The Appellate Division, Second Department, held that the Supreme Court should have granted that branch of Valcarel's motion which was for summary judgment dismissing the complaint and all cross claims asserted against him. The court reasoned that an out-of-possession landlord can be held liable for injuries that occur on their premises only if the landlord has retained control over the premises and is contractually or statutorily obligated to repair or maintain the premises, or has assumed a duty to repair or maintain the premises by virtue of a course of conduct. Valcarel established that he was an out-of-possession landlord with no contractual obligation and that he did not endeavor to perform maintenance nor owed any duty to plaintiff. No triable issue of fact was raised.

In light of the Appellate Division, First Department decision that the Supreme Court should have grated the branch of Valcarel's motion for summary judgment dismissing the complaint and all cross claims, his contentions concerning his cross claim for common-law indemnification against Manila were rendered academic.

Click here to read this case in its entirety. ◆

The Insurance Industry Talent Gap

"Honey, time marches on and eventually you realize it is marching across your face." This quote from Dolly Parton's character in the movie *Steel Magnolias* has nothing to do with insurance but it is an apt metaphor for anyone that refuses to adapt to change and anticipate their future needs. Right now is the perfect time to ask what your company is doing to prepare for the future before time marches right past you.

One of the biggest threats facing an insurance carrier's future is not competition, it is the talent gap. With an aging workforce industry wide, it is expected that 25% of all insurance professionals will retire in the next 5-10 years.

In addition to the potential shortage of in-house talent, a quarter of insurance agents will be gone by 2018. This figure comes from a 2014 McKinsey & Co. report which also states the average insurance agent was 59 years old at the time it was published. Based on these figures a study from MarshBerry believes in order to offset the losses due to retirement, three agents need to be hired for every agent currently employed. The bottom line is that it is going to be very difficult to sell your product if there is no one available to sell it.

Let's face it, insurance is not, and never has been seen as a particularly exciting industry. Before we sell ourselves short, the insurance field does possess many qualities the next generation of employee will find attractive and these qualities are what need to be emphasized during the recruiting process.

Job recruiting website monster.com has compiled what they believe are the six traits millennials find most important in a new employer. In no particular order, these traits are ethics, environmental practices, work-life balance, (company) profitability, diversity, and reputation. Some of these are qualities most well established insurance companies can already brag about, but others may require some minor adjustments in corporate culture. What is most interesting about the list aside from salary not being on it, is five out of the six items have something to do with a company's image or culture. Work-life balance was the only one that had anything to do with the employee personally, which should really say something about what today's prospective employee values.

There are ways beyond the classifieds to fulfill a carrier's changing needs. Many companies are making big efforts to reach out to students in hopes that it helps them realize not only is insurance an industry that wants them, but also one they want to be a part of. Developing programs for well-rounded internships, and forming relationships with high schools, colleges and recruiting agencies are all a good start. Some industry organizations are sponsoring students to attend meetings and conferences. This is a way for them to see what really goes on in the industry, get an opportunity to be exposed to different companies, and give those companies a chance to interact with someone that has a potential interest in the industry.

The time to act on future recruitment is now. Given that so many are set to retire, there is an opportunity to pass down knowledge to the next generation. As we know, it takes years to cultivate a quality employee. Insurance is not the only industry facing a talent gap though. In the coming years there will be a talent war among all the industries facing their own shortages, so the insurance industry can act now or compete later. ◆

Liability Investigations

Liability claims, whether for property damage or bodily injury, can often times turn out to be the most complicated and frustrating type of investigation for an insurance carrier. Sometimes the only evidence available is the insured and claimant engaged in a match of he said/she said. In times like these it's important to take a step back and refer to the elements of negligence to evaluate the claim in a logical manner. The elements are duty owed, duty breached, causation and damages.

Duty owed is the obligation recognized by laws requiring a person to conform to a certain standard of care to protect others against an unreasonable and foreseeable risk of harm. Depending on the circumstances, this can constitute common law duty of care, a statutory duty or precedent established by case law.

Duty breached is the failure of that person to conform to the standard of care owed.

Causation connects the breach of duty to the resultant damages. Causation refers to causation in fact and proximate cause. Both types of causation must apply. Differing standards apply to how causation in fact is determined such as the "but for" test or the "substantial factor" test. Proximate cause goes beyond simply determining the cause of the injury but instead looks at legal causation. Legal causation is determined by foreseeability of the party doing the harm.

The last element of negligence are the damages. There must be some actual damage that can be displayed monetarily.

Let's take a look at an example. The claimant (plaintiff) is walking past the insured's (defendant's) house, trips on the sidewalk and sprains an ankle. The claimant says he walks past here often and the sidewalk has been a hazard for a long time. The insured denies any problem with the sidewalk and says he maintains his house better than any of his neighbors. The insured says the claimant has financial problems and is looking to turn a minor injury into a payday.

Before any liability determination is made, in an investigation it's important to remember two things. The first is that New York is a pure comparative jurisdiction, meaning even if the plaintiff is 90% responsible for their own injuries and the defendant is 10% responsible, plaintiff can still recover that 10%. The second is that the burden of proof is always on the plaintiff to prove negligence against the defendant and it's your investigation that will either confirm or refute those allegations.

After your investigation is complete you determine the elements of negligence as follows:

Duty Owed: Does the insured owe a duty to the public at large to maintain the sidewalk? Per the rules and regulations established by the municipality where the insured lives, is the insured responsible for maintaining the section of sidewalk in front of their property? Does the municipality contribute to the maintenance of the sidewalks? Is there a defect in the sidewalk? Is it substantial or minimal? Did the insured have actual or constructive notice of the defect? Is there proof of such notice and if so, what is it?

Continued on next page ▶

Liability Investigations Continued From Page 5

Duty Breached: Even though the insured and claimant disagree on the condition of the sidewalk, your scene investigation shows the section of the sidewalk in front of the insured's house is raised up 3 inches creating the tripping hazard that injured the claimant.

As the property owner, the insured should have been aware of the tripping hazard and also of his duty to maintain the sidewalk. While at the scene you spoke with a neighbor who said the sidewalk has been in this condition for well over a year.

Causation in fact: If the "but for" test applies, it must be determined if "but for" the insured's failure to maintain the sidewalk, the plaintiff would not have sustained injury. If the "substantial factor" test is in place, it must be determined if the insured's conduct is a substantial factor in bringing about the harm. Proximate Cause: It was foreseeable by the insured that his failure to fix his hazardous section of sidewalk resulted in the claimant's injuries.

Damages: The claimant had multiple doctor's visits, did physical therapy, lost time at work, and suffered increased child care costs. There is also a claim for pain and suffering.

In a situation like the example it's fairly clear the insured is liable for the claimant's injuries. Before evaluating the claim there is some additional information that needs confirmation. What time of day did the claimant fall, and if it was at night are the street lights operational? What were the weather conditions? How often does the claimant walk past the location of his alleged injury? How aware of the hazard should the claimant have been and should he have taken more precautions? What was the claimant doing when he fell? Was he talking on the phone, texting, walking a dog or anything else that would have taken away his focus? What kind of footwear was the claimant wearing? Determine the claimant's pre-loss physical condition. Did the claimant walk unassisted and have any pre-existing injuries? Request medical records as needed. Was the claimant on any medication at the time of injury? Were there any witnesses?

The answers to these questions may help determine what percentage of liability the insured bears so that you may ultimately work toward a fair and efficient resolution of the claim. ◆

URB Combined Companies Average Homeowners Policy Value 2015

Zone	Overall	RC Overall $	ACV Overall $
1.1	161,020	175,973	102,252
1.2	178,237	199,081	119,152
1.3	176,160	196,202	102,689
1.4	186,096	204,533	114,331
1.5	164,700	189,011	100,010
1.6	181,255	204,142	109,575
1.7	247,420	257,406	155,051
1.8	217,188	230,794	151,510
1.9	214,463	227,867	100,907
2	177,793	207,614	106,638
3	362,132	363,546	78,750
4	368,621	375,635	136,251
5	80,000	332,501	48,409
6	427,433	431,062	316,875
7	445,638	455,591	81,000
8	413,334	416,459	192,501
9	360,455	361,519	182,501
10	358,540	359,935	204,376

Editor's Note: If your company submits statistics to URB and you would like to have your numbers, please contact URB.

The URB Insider

Published quarterly for friends and affiliates of Underwriters Rating Board

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As a not for profit insurance rate service organization, Underwriters Rating Board has a history of over 75 years of continuous service to the insurance industry. Our aim is to be recognized as a pro-active, market driven supplier of a broad array of individualized services to insurers. The long term personal and professional relationship between URB and its member companies is its greatest asset.

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