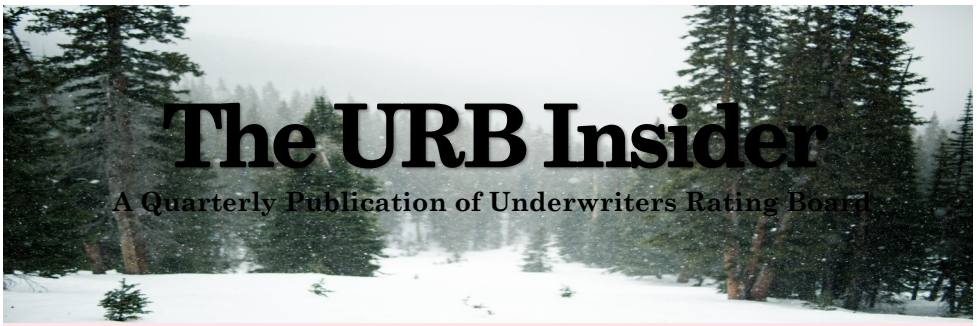

Volume 14, Issue 4
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URB FORMS NEWS

Cyber Insurance Endorsement

As previously announced, the CL-100 Ed. 4/16 Cyber Insurance Endorsement has been approved for use along with the CL-100S Ed. 4/16 Supplemental Declarations.

In follow up to the approval of the endorsement, URB in partnership with Guy Carpenter and NAS Insurance Services will be holding a Cyber Insurance seminar in Syracuse on January 11, 2017 and in Albany on January 12, 2017. More details to follow soon.

Residence Held In Trust Approval

As previously announced, the ML-22 Ed. 9/16 Residence Held In Trust has been approved for use, and the accompanying Bulletin HO-54 has been acknowledged. The endorsement is for use when a personal residence has been titled in the name of a trust. The purpose of the endorsement is to modify the definition of insured to include the trustee who holds legal title to the property once the residence is titled in the name of a trust.

SF Forms Series Update - Edition 9/16

URB continues with filing the new SF forms series. Most recently, endorsements SF-10 through SF-28B were filed for approval with DFS.

Forms SF-20 (Commercial Property Coverage); SF-1 through SF-6 (Causes of Loss); SF-311S, SF-311D and SF-311P (BOP); SF-310 (SMP); SF-500 and SF-513 through SF-520 (various extender endorsements) have previously been filed and are pending approval.

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. ◆

NY APPELLATE DIVISION

Constructive Notice Requires Actual Evidence

In an action entitled *Giantomaso v T. Weiss Realty Corp.*, 2016 NY Slip Op 05972 [142 Ad3d 950] to recover damages for personal injuries, etc., the defendant appeals, from the part of an order of the Supreme Court, as denied its motion for summary judgment dismissing the complaint, and the plaintiffs cross-appeal, from part of the same order as denied that branch of their cross motion which was for summary judgment on the issue of liability.

On December 12, 2011, the plaintiff Frances D. Giantomaso allegedly slipped on ice and fell as she exited the north entrance to a building located on premises owned by the defendant. The injured plaintiff, and her husband suing derivatively, sued to recover damages for personal injuries, alleging negligence. The defendant moved for summary judgment dismissing the complaint, and the plaintiffs cross-moved for summary judgment on the issue of liability based on the doctrine of res ipsa loquitur. By order dated March 6, 2015, the Supreme Court denied both the motion and the cross motion. The Appellate Division, Second Department affirmed the order insofar as appealed and cross-appealed from, on grounds other than those relied upon by the court.

Contrary to the Supreme Court's determination, the defendant, in support of its motion, failed to establish its prima facie entitlement to judgment as a matter of law. The owner of property has a duty to maintain his or her property "in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Basso v Miller*, 40 NY2d 233, 241 [1976]. A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition which allegedly caused the

Continued on next page ▶

Constructive Notice Continued

fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it (*see Mehta v Stop & Shop Supermarket Co., LLC*, 129 AD3d 1037 [2015]; *Campbell v New York City Tr. Auth.*, 109 AD3d 455, 456 [2013]; *Levine v Amverserve Assn., Inc.*, 92 AD3d 728, 729 [2012]).

In support of its motion, the defendant failed to demonstrate that it lacked constructive notice, as it failed to submit any evidence as to when, prior to the subject accident, the area of the north entrance where the alleged slip and fall occurred was last inspected or cleaned (*see James v Orion Condo-350 W. 42nd St., LLC*, 138 AD3d 927 [2016]; *Rogers v Bloomingdale's, Inc.*, 117 AD3d at 933; *Herman v Lifeplex, LLC*, 106 AD3d at 1050; *Mahoney v AMC Entertainment, Inc.*, 103 AD3d at 856; *Birnbaum v New York Racing Assn., Inc.*, 57 AD3d at 599).

In support of that branch of their cross motion which was for summary judgment on the issue of liability, the plaintiffs relied on the doctrine of res ipsa loquitur. To rely on that doctrine, a plaintiff must show that "(1) the event is of the kind that ordinarily does not occur in the absence of someone's negligence; (2) the instrumentality that caused the injury is within the defendants' exclusive control; and (3) the injury is not the result of any voluntary action by the plaintiff" (*McCarthy v Northern Westchester Hosp.*, 139 AD3d 825, 827 [2016]; *see Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]; *States v Lourdes Hosp.*, 100 NY2d 208, 211-212 [2003]; *Kambat v St. Francis Hosp.*, 89 NY2d 489, 494-495 [1997]; *Bunting v Haynes*, 104 AD3d 715, 716 [2013]; *Dos Santos v Power Auth. of State of N.Y.*, 85 AD3d 718, 721 [2011]). The doctrine of res ipsa loquitur permits an inference of negligence to be drawn solely from the happening of an accident (*see Morejon v Rais Constr. Co.*, 7 NY3d at 209). Since the circumstantial evidence allows but does not require the jury to infer that the defendant was negligent, res ipsa loquitur evidence does not ordinarily or automatically entitle the plaintiff to summary judgment, even if the plaintiff's circumstantial evidence is unrefuted (*see id.*). Click here to read this case in its entirety. ◆

Carrier Justified In Rescinding

In an action to recover damages for breach of contract and negligence in the case of *Joseph v. Interboro Ins. Co.*, 2016 NY Slip Op 08050, the plaintiffs appeal from an order of the Supreme Court which granted the separate motions of the defendants Interboro Insurance Company and Karis & Karis, Inc., for summary judgment dismissing the complaint and denied their cross motion to strike the pleadings of those defendants.

The plaintiffs are the owners of residential property located in Brooklyn. Prior to purchasing the premises, the plaintiffs' mortgage broker, Raymond McKayle of NRF Funding Corp., informed them that they needed insurance in order to close. McKayle, on the plaintiffs' behalf, contacted an insurance broker, Chris Karis, of the defendant Karis & Karis, Inc., to procure a homeowners' insurance policy based upon representations the plaintiffs made in their loan application that they would occupy the premises as their primary residence. Based on the information provided by McKayle, Karis completed an application for insurance, which said that the premises would be occupied by the plaintiffs as their primary residence. The plaintiffs signed the application, and thereafter, on the date of closing, a homeowners' insurance policy was issued by the defendant Interboro Insurance Company. After a fire occurred at the premises, Interboro discovered that the plaintiffs did not occupy the premises as their primary residence and rescinded the policy, contending that the plaintiffs, through a material misrepresentation, induced Interboro to issue a policy that it normally would not have issued. The plaintiffs then commenced this action, to recover damages for breach of contract and negligence. The Supreme Court granted the separate motions of Interboro and Karis & Karis for summary judgment dismissing the complaint as asserted against each of them and denied the plaintiffs' cross motion, inter alia, for summary judgment on the complaint insofar as asserted against those defendants. The plaintiffs appeal.

Continued on next page ▶

Carrier Justified Continued

The Supreme Court properly granted Interboro's motion for summary judgment dismissing the complaint. "To establish the right to rescind an insurance policy, an insurer must show that its insured made a material misrepresentation of fact when he or she secured the policy" (*Interboro Ins. Co. v Fatmir,* 89 AD3d 993, 993-994; *see Novick v Middlesex Mut. Assur. Co.,* 84 AD3d 1330, 1330; *Varshavskaya v Metropolitan Life Ins. Co.,* 68 AD3d 855, 856; *Zilkha v Mutual Life Ins. Co. of N.Y.,* 287 AD2d 713, 714).

"A representation is a statement as to past or present fact, made to the insurer by, or by the authority of, the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof" (Insurance Law § 3105[a]; *see Morales v Castlepoint Ins. Co.,* 125 AD3d 947, 948). "A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented" (*Interboro Ins. Co. v Fatmir,* 89 AD3d at 994; *see* Insurance Law § 3105[b]; *Novick v Middlesex Mut. Assur. Co.,* 84 AD3d at 1330; *Varshavskaya v Metropolitan Life Ins. Co.,* 68 AD3d at 856). To establish materiality as a matter of law, the insurer must present documentation concerning its underwriting practices that show that it would not have issued the policy if the correct information had been disclosed in the application (*see Interboro Ins. Co. v Fatmir,* 89 AD3d at 994; *Schirmer v Penkert,* 41 AD3d 688, 690-691).

Here, Interboro established its prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that the plaintiffs' application for insurance contained a misrepresentation regarding whether the premises would be owner occupied and that it would not have issued the subject policy if the application had disclosed that the subject premises would not be owner occupied (*see Morales v Castlepoint Ins. Co.,* 125 AD3d at 948; *James v Tower Ins. Co. of N.Y.,* 112 AD3d 786, 787; *Interboro Ins. Co. v Fatmir,* 89 AD3d at 993-994).

In opposition, the plaintiffs failed to raise a triable issue of fact. The plaintiffs admit that, at the time the application was completed, they did not intend to occupy the premises. Thus, contrary to the plaintiffs' contentions, although the application was completed prior to closing and prior to the inception of the policy, the representation that the premises was an owner-occupied primary residence established, in effect, a material misrepresentation of a then existing fact that the premises would be owner occupied, which was sufficient for rescission under Insurance Law § 3105 (*see Morales v Castlepoint Ins. Co.,* 125 AD3d at 948; *see also Brown v Lockwood,* 76 AD2d 721).

The Appellate Division, Second Department affirmed the decision of the Supreme Court.

Click here to read this case in its entirety. ◆

Holiday Hazards

The holidays are filled with hazards, but there are ways to minimize your exposure to ensure your celebration is merry and full of cheer.

Every year there is always the gift that makes the news for its dangerous nature. Some that come to mind are exploding hoverboards, drones, foul-mouthed dolls, and perennial favorites like bb guns and trampolines. World Against Toys Causing Harm (WATCH) is a Massachusetts based non-profit corporation that seeks to educate consumers on toy safety. They offer information on safety alerts, product recalls, safety tips, and a 2016 "10 Worst Toys" list that mainly consists of toys that pose choking or strangulation hazards. Their website www.toysafety.org may be worth a look before buying for small children.

On the same subject of the previously mentioned hoverboards that were so popular last year, fire hazards are a real concern every holiday season. When the hoverboards started catching fire, the response from the experts blamed it on faulty batteries in cheap knockoffs. The batteries may have been faulty, however, later in 2016 top-of-the-line Samsung smartphones started lighting pockets on fire. The only conclusion to take away from here is be careful with where you store items containing lithium-ion batteries, and be mindful of not leaving them plugged in charging unattended when they do not need to be charged.

Once the hazardous toys have been eliminated, all there is left to do is kick back in front of the fire, right? Not exactly. Before lighting up the yule log think back to the last time you had that chimney inspected by a Certified Chimney Sweep. If you burn with any sort of frequency in the winter and it has been more than a year, you will want to get your chimney cleaned and inspected. There are more than 25,000 chimney fires causing $125 million in damages ever year which is all perfectly preventable with a clean chimney and a safe fire.

With a clean chimney and a clear conscience, you can relax with your eggnog and hot toddies. Keeping an eye on how much your guests are drinking can be a difficult task while hosting your annual holiday party, but as the host you could be held liable if they cause injury or property damage while intoxicated. Make sure to provide lots of food and have an ample supply of non-alcoholic drinks available. Another option is to put the alcohol away after a certain time. If you know guests to have a drinking problem, additional measures may need to be taken like collecting keys at the start of the evening or not serving alcohol at all. This applies to company parties as well.

The holidays are a busy time for any household with lots of people coming and going. If you ordered something through Amazon Prime you know the UPS guy will be there in 2 days with your package. If you have a neighbor who always drops a plate of cookies every year on Christmas Eve, you know they will be stopping by. If you are hosting a party… you get the idea. During this season you are going to have visitors both expected and unexpected and it is your responsibility to make sure the outside of your house has the walkways clear of snow and ice and your decorations are hung with care. When you have guests inside, make sure things like that loose handrail or that pesky bit of loose carpet at the top of the stairs gets fixed before someone unfamiliar with it gets hurt. These hazards can cause serious injuries you can be held liable for, and injury claims between family members can get particularly nasty. ◆

The URB Insider

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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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