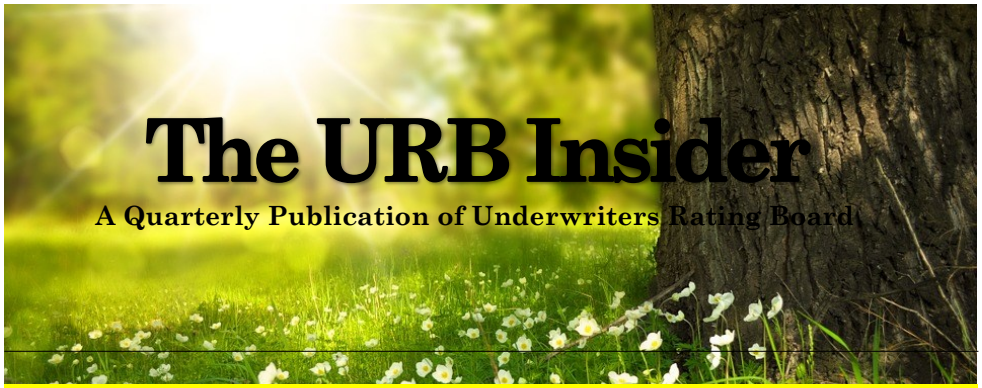


The URB Insider

A Quarterly Publication of Underwriters Rating Board

Volume 16, Issue 2
Spring, 2018

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 the material contained in the publication.

URB FORMS NEWS

SF Forms Series Ed. 9/16

- All the forms in the 2016 SF Forms Series have been approved by the New York Department of Financial Services. URB is continuing to work on the manuals associated with this forms series. These will be released together at a future time.

Other Forms Projects In Progress

- Updating the LS Form Series
- LS Sale and Disposal Liability Forms
- ML and LS Unmanned Aircraft Limited Liability Coverage Endorsements
- ML Home Business
- Agritainment Program in Development
- ML Home Sharing in Development
- Personal Liability on a Commercial Policy in Development
- FL Extender Endorsement in Development

Recently Approved

- Additional Interest ML-38, FL-38 and SF-38 Ed. 6/18◆

COURT UPHOLDS ADDITIONAL INSURED ENDORSEMENT APPLICABLE ONLY FOR VICARIOUS LIABILITY

Editor's Note: In the case of *Tishman Tech. Corp. v Travelers Indem. Co. of Am.*, 2018 NY Slip Op 03471, the Supreme Court, Appellate Division, First Department on May 15, 2018 reversed the lower court to uphold an additional insured endorsement that provided coverage for the vicarious liability of the additional insured. The decision of the Supreme Court, Appellate Division, First Department is below.

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered January 23, 2013, which, to the extent appealed from as limited by the briefs, granted plaintiff BPAC Mechanical Corp.'s motion for summary judgment declaring that defendant Travelers Indemnity Company of America is obligated to defend it in the underlying action, and so declared, and denied Travelers's cross motion for summary judgment declaring that it has no duty to defend or indemnify BPAC in the underlying action, unanimously reversed, on the law, the motion denied, the cross motion granted, and it is declared that Travelers has no duty to defend or indemnify BPAC in the underlying action. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered May 4, 2017, which denied Travelers' motion to reargue, unanimously dismissed, without costs.

The complaint in the underlying action alleges that certain water damage occurred "as a direct and proximate result of the negligence of [BPAC], including its failure to adequately perform all plumbing and mechanical work ...; in failing to supervise and oversee all plumbing work performed by its sub-contractors ...; in failing to hire competent and experienced subcontractors ...; and in failing to provide reasonable protection to prevent damage, injury or loss to [the] Plaintiff's property." The complaint also alleges a separate independent negligence claim against Adria Infrastructure LLC (Adria), BPAC's subcontractor.

The commercial general liability insurance policy issued by Travelers to Adria defines an additional insured as follows: "[t]he person or organization [required to be included as an additional insured, i.e., BPAC] does not qualify as an additional insured with respect to the independent acts or omissions of such person or organization. The person or organization is only an additional insured with respect to liability caused by your [Adria] work' for that additional insured." BPAC does not qualify as an additional insured because its potential liability in the underlying action is for its own independent acts or omissions (see Fireman's Fund Ins. Co. v Travelers Cas. Ins. Co. of Am., 2017 NY Slip Op 31068[U] [Sup Ct, NY County 2017]). In addition, BPAC does not qualify as an additional insured merely by virtue of the fact that there is a separate and independent negligence claim asserted against Adria even if Adria is ultimately found solely liable. BPAC would be an additional insured only if it were vicariously liable for Adria's negligence (id.), a claim that is not asserted in the underlying complaint (see A. Meyers & Sons Corp. v Zurich Am. Ins. Group, 74 NY2d 298 [1989]). Under these circumstances, BPAC is not an additional insured.

Click here to read this case in its entirety. ◆

FAILURE TO USE REASONABLE CARE TO MAINTAIN HEAT NETS INSURER SUMMARY JUDGMENT

Editor's Note: In the case of *Stephenson v Allstate Indem. Co.*, 2018 NY Slip Op 02706, [160 Ad3d 1274] on April 19, 2018, the Supreme Court, Appellate Division, Third Department granted summary judgement to Allstate against the insured because the insured failed to use reasonable care to maintain heat. The insured's residence had been unoccupied for well over a year when damage was discovered from water that discharged from a plumbing system after a pipe broke due to the lack of heat. In so holding, the Supreme Court, Appellate Division, Third Department affirmed the order of the court below. The decision of the Supreme Court, Appellate Division, Third Department is below.

Gloria Thornhill (hereinafter decedent) owned a single-family residence in the City of Binghamton, Broome County (hereinafter the premises) that was insured by defendant. In March 2014, the premises sustained significant water damage after a pipe froze and burst. Defendant disclaimed coverage based on several policy exclusions. Decedent commenced this action seeking, among other things, damages for defendant's alleged breach of the insurance contract.[FN1] After discovery was completed, defendant moved for summary judgment dismissing the complaint. Plaintiff opposed the motion and cross-moved for permission to amend the complaint to assert a cause of action against the agent from whom decedent had purchased the insurance policy. Supreme Court granted defendant's motion on the basis that coverage was precluded by an exclusion in the policy for losses caused when a plumbing system freezes while the insured premises are unoccupied and denied plaintiff's cross motion. Plaintiff now appeals.[FN2]

To avoid policy coverage, an insurer bears the burden of establishing that the exclusions or exemptions on which it relies apply in the particular case (*see Dean v Tower Ins. Co. of N.Y.*, 19 NY3d 704, 708 [2012]). The policy at issue excludes coverage for damage caused by "[f]reezing of plumbing, fire protective sprinkler systems, heating or air conditioning systems or household appliances, or discharge, leakage or overflow from within the systems or appliances caused by freezing, while the building structure is vacant, unoccupied or being constructed unless you have used reasonable care to: (a) maintain heat in the building structure; or (b) shut off the water supply and drain the system and appliances." Notably, the exclusion does not apply in every case where a loss is caused by a lack of heat when an insured structure is unoccupied; rather, it applies only when the insurer establishes that the insured failed to "use reasonable care" to maintain the heat during the relevant period.

Many of the material facts relevant to whether the exclusion applies in this case are undisputed, specifically that the premises were unoccupied from December 2013 through March 24, 2014, when the loss was discovered, that the damages were caused by water that was discharged from the plumbing sys-

Continued From Page 3

tem after a pipe broke when it froze as a result of inadequate heat in the premises, and that the water supply was not shut off and the plumbing system was not drained. Thus, the determinative issue is whether decedent used reasonable care to maintain heat in the premises during her absence.

In support of its motion, defendant submitted plaintiff's deposition testimony and a statement that decedent made to defendant's claims investigator showing that decedent left the property unoccupied during the winter months without making any arrangements to have it inspected during her absence to ascertain whether the heating system was functioning. Defendant also submitted the affidavit of an expert witness showing that consumption of natural gas—the fuel used to heat the premises—from December 7, 2013 through February 6, 2014 was insufficient to maintain a level of heat adequate to prevent freezing of the plumbing system. As defendant met its burden of establishing that the exclusion applied here, the burden shifted to plaintiff to raise a triable issue of fact in this regard.

Plaintiff's proof regarding decedent's arrangements regarding maintenance of the property in her absence was limited to the affidavit of Gerald Whitmarsh, who was responsible for lawn mowing and snow removal. Whitmarsh does not aver that decedent asked him to inspect the interior of the premises to confirm whether it was adequately heated, or that he actually entered the premises during the relevant time. His conclusory allegations that the premises were always heated and that he never noticed that the heat was off—which do not specify when those observations may have been made—are insufficient to rebut defendant's showing that decedent made no arrangements to ensure that the heat continued to work during her absence. Plaintiff's argument that defendant was required to prove the cause of the heating system's failure is misplaced because it fails to address the determinative issue of whether decedent used reasonable care to ensure continued operation of the heating system during her absence. We conclude that decedent failed to use reasonable care, as a matter of law, to maintain heat in the premises while it was unoccupied for three months during the winter heating season, because it is undisputed that she did not arrange for inspection of the premises or take any other action to ensure that adequate levels of heat were actually maintained during that time period (*see e.g. Amery Realty Co., Inc. v Finger Lakes Fire & Cas. Co.*, 96 AD3d 1214, 1216 [2012], *lv denied* 19 NY3d 812 [2012]; *Pazianas v Allstate Ins. Co.*, 2016 WL 3878185, *5, 2016 US Dist LEXIS 92796, *13-15 [ED Pa, July 18, 2016, No. 16-2018]; *Jugan v Economy Premier Assur. Co.*, 2018 WL 1432973, *3-4, 2018 US App LEXIS 7218, *8-14 [3d Cir, Mar. 22, 2018, No. 17-2410]). Thus, Supreme Court properly granted defendant's motion. Plaintiff's remaining arguments have been considered and found to lack merit.

Egan Jr., J.P., Clark, Mulvey and Aarons, JJ., concur. Ordered that the order is affirmed, with costs.

Footnote 1: After the action was commenced, decedent died and plaintiff, her son, was substituted as plaintiff.

Footnote 2: Plaintiff abandoned any argument with respect to the denial of his cross motion by failing to address that issue in his brief on appeal (*see Brown v Government Empls. Ins. Co.*, 156 AD3d 1087, 1088 n 1 [2017]).

Click here to read this case in its entirety.◆

FRAUDULENT STATEMENTS BY ONE INSURED AND FAILURE TO TIMELY FILE PROOF OF LOSS CAUSE LOSS OF COVERAGE

Editor's Note: In the case of *Otsego Mut. Fire Ins. v Dinerman*, 2018 NY Slip Op 03101, On May 1, 2018, The Supreme Court, Appellate Division, First Department granted the declaratory judgment action of Otsego Mutual Fire Insurance Company against its insureds after it was discovered that Sally Dinerman requested reimbursement for living expenses that she did not incur. As a result, her rights under the policy were terminated. Her spouse, Ira, still had rights under the policy, but he did not file a timely proof of loss, which also prevented him from being entitled to coverage. The decision of the Supreme Court, Appellate Division, First Department is below.

Order and judgment (one paper), Supreme Court, New York County (Arthur F. Engoron, J.), entered April 28, 2017, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment declaring that defendant Sally Dinerman violated the "Misrepresentation, Concealment or Fraud" condition of the homeowners' insurance policy issued by plaintiff, rendering the policy void in its entirety as to her and, other than as to fire insurance coverage, as to her husband, defendant Ira Dinerman, and declaring that Ira Dinerman's failure to file a timely proof of loss is an absolute defense to his claim for fire insurance coverage; declaring that plaintiff has no obligation to defend or indemnify Sally Dinerman or Ira Dinerman under the policy in connection with pending or future subrogation actions; and awarding plaintiff a sum of money as against Sally Dinerman; and denied Ira Dinerman's motion for summary judgment, for leave to amend his answer, and to reform the policy, except to make it comply with Insurance Law § 3404(e), unanimously affirmed, without costs. Order, same court and Justice, entered September 15, 2017, which, to the extent appealed from as limited by the briefs, denied Sally Dinerman's motion for leave to renew, unanimously affirmed, without costs.

Plaintiff established prima facie that defendant Sally Dinerman (Sally) violated the misrepresentation, fraud and concealment provision of the homeowner's insurance policy it issued to her, that her violation was willful and intentional, and that, accordingly, the policy was properly voided as to her and she is liable to plaintiff for amounts paid thereunder (*see Saks & Co. v Continental Ins. Co.*, 23 NY2d 161, 165 [1968]; *Latha Rest. Corp v Tower Ins. Co.*, 38 AD3d 321 [1st Dept 2007], *lv denied* 9 NY3d 803 [2007], *cert denied* 552 US 1010 [2007]).

In opposition, Sally argues that any misrepresentations were not material given the de minimus amount at issue. However, that she managed to defraud plaintiff of only a relatively small amount of money before her wrongful conduct came to light does not lend itself to the conclusion that she otherwise intended to stop submitting receipts for "reimbursement" of living expenses that she did not incur. Further plaintiff should not be penalized for its diligent detection of Sally's fraudulent scheme.

Defendant Ira Dinerman's (Ira) motion to reform the policy was properly determined. Under Insurance Law § 3404(e), Ira's fire insurance coverage was not voided by his wife Sally's fraudulent acts. However, as to liability coverage, the policy was properly enforced against him as written (*see Lane v Security Mut. Ins. Co.*, 96 NY2d 1, 6 [2001]). Contrary to his argument, the policy is not ambiguous; its language has a "definite and precise meaning, unattended by danger of misconception" (*see Selective Ins. Co. of Am. v County of Rensselaer*, 26 NY3d 649, 655 [2016]).

Ira's failure to file proof of loss, either within

Continued from page 5

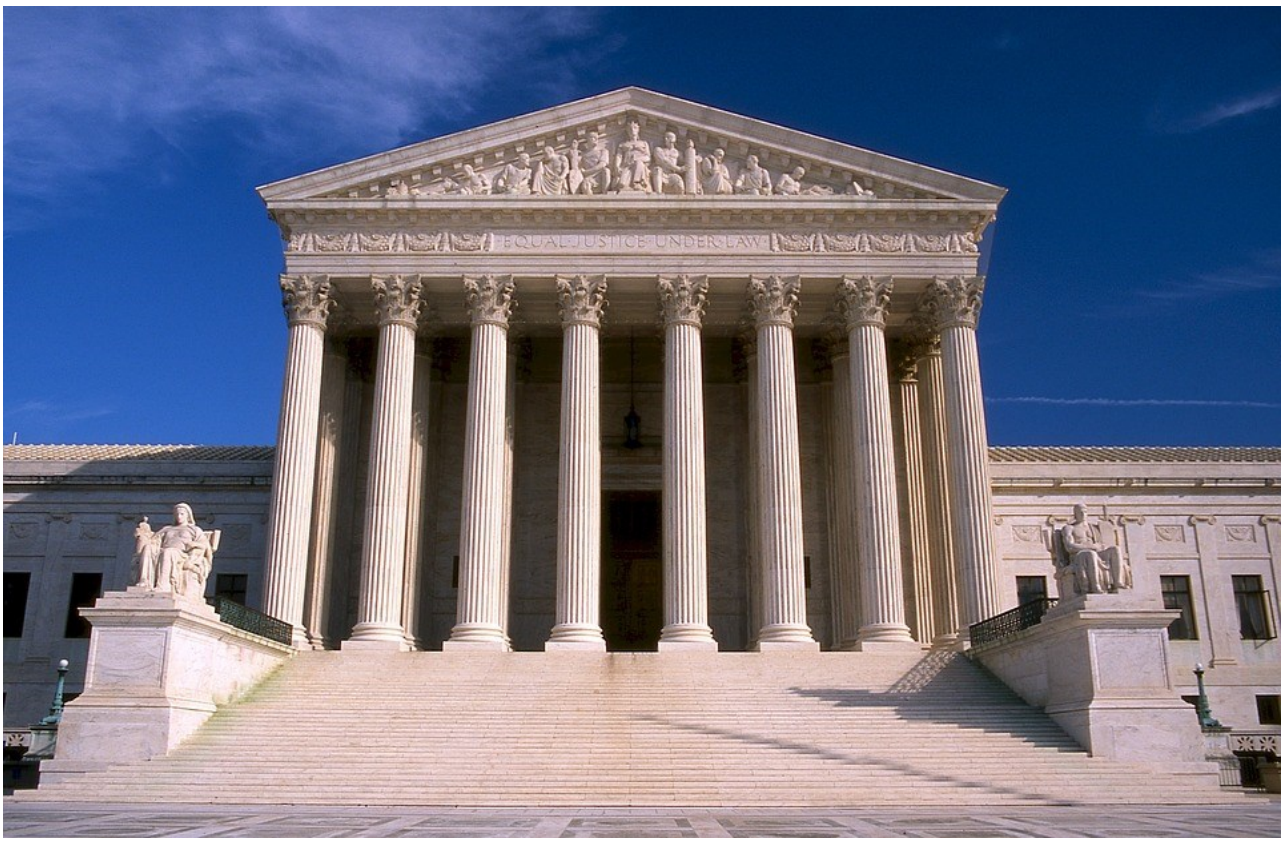
the time specified in plaintiff's demand or otherwise, is a complete defense to any claim for coverage (*see Anthony Marino Constr. Corp. v INA Underwriters Ins. Co.*, 69 NY2d 798 [1987]; *Igbara Realty Corp. v New York Prop. Ins. Underwriting Assn.*, 63 NY2d 201 [1984]; Insurance Law § 3407[a]). Sally's two proofs of loss cannot be deemed to have been submitted "for the benefit of all" (*Della Porta v Hartford Fire Ins. Co.*, 118 AD2d 1045, 1047 [3d Dept 1986]), given her sworn statement in each that no person other than she had a right, title, claim to, or interest in the lost property or insurance proceeds (*cf. Kenneth v Nationwide Mut. Fire Ins. Co.*, 2007 WL 3533887, *10-11, 2007 US Dist LEXIS 83973, *29-33 [WD NY, Nov. 13, 2007]).

Ira's proposed amendments to his answer do not overcome these barriers to coverage.

The new facts offered on Sally's motion for leave to renew do not change the prior determination (CPLR 2221[e][2]).

We have considered Sally's and Ira's remaining arguments and find them unavailing.

Click here to read this case in its entirety.◆



The URB Insider

Published quarterly for friends and affiliates of Underwriters Rating Board

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