URB INSIDER

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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.

F.Y.I. New FCC Rules Effective July 1, 2005

The Federal Communications Commission's July, 2003 order implementing the Telephone Consumer Protection Act of 1991("TCPA") set forth new and restrictive rules governing transmission of fax advertisements. Although these requirements have twice been postponed, the current date for implementation is July 1, 2005.

These rules eliminate the existing business relationship exception ("EBR") relating to the transmission of faxes. On that date, all unsolicited advertisements by fax will be prohibited, unless the sending party has obtained written consent from the receiving party to send the faxes.

All senders must obtain signed, written authorization before sending any fax advertisement including to existing customers and recipients. If sent without consent, a violation of TCPA has occurred. If consent is obtained ***prior*** July 1, 2005, fax may be used to obtain the consent. On or after July 1, 2005, written consent must be obtained through direct mail, websites or during interaction with customers in the sender's place of business. Consent cannot be obtained by fax or orally. There are limited methods for using e-mail to obtain consent.

All fax messages must also contain the following information on the first page or at the top or bottom of every page: date and time sent; the identity of the individual or business sending the message; the telephone number of the sending machine or individual sending the message

It was expected a bill similar to the Junk Fax Prevention Act of 2004 would be introduced early this year which would restore the EBR exception. If this were to occur, faxes could be sent to persons with whom an existing business relationship exists. However, faxes would be required to include an opt-out provision to allow the receiver to opt-out of any future faxes. To date, the rules have not been postponed. Under the FCPA, recipients of unlawful faxes can recover $500 per fax against the sender which can be tripled for willful violations. We will keep you posted on any developments as we become aware of them.

URB some time ago sent out consent forms to members and subscribers. If any company has not returned the form, please do so prior to June 30, 2005.◆

Regulatory Update on Regulation 182

On April 23, 2005, Regulation 182 (11 NYCRR 221) went into effect. This is an emergency adoption with 10 subparts, that was re-adopted again on May 19, 2005. It imposes requirements on insurers who use credit scoring. Circular Letter No. 2 dated February 25, 2005 provides some guidance regarding compliance with the existing requirements of this emergency adoption. Insurers subject to this regulation must be in compliance as of July 1, 2005.

In particular, this article reviews the aspect of the legislation regarding scoring models. Insurers that use insurance scores to underwrite and rate risks must file their scoring models or other scoring processes with the Superintendent.

Any subsequent revision to the scoring models will require the insurer to file a summary of the revision with the Superintendent within 45 days. A third party may file scoring models on behalf of insurers. A filing by a third party shall clearly identify those insurers on whose behalf the filing is being made and the programs of insurance to which each scoring model will apply. The third party shall provide the Superintendent with name of each insurer's contact person and the person's telephone number. A filing that includes insurance scoring may include loss experience justifying the use of credit information.

Any filing relating to credit information filed and in possession of the Superintendent shall remain the property of the insurer and shall not be subject to any disclosure by the Superintendent. This information is privileged information and is not discoverable or admissible as evidence in a legal action.

Each scoring model filing made with the Superintendent shall include the date upon which the insurer intends to implement a new or revised scoring model or other scoring processes in its underwriting or rating of personal lines insurance policies. (NY S28 §2806; NY R 11 § 221.8 (Reg. No. 182))

Pursuant to the applicable section of the regulation, NY R § 221.8 requires that each scoring model or other scoring processes filing shall include the following information:

1.) The name, version and the edition date of the scoring model;

2.) A detailed description of the credit information and insurance data that were used in the development of the scoring model, including but not limited to the source(s) of the credit information and insurance data, and the time periods associated with such information and data;

3.) A list of all the factors, and the relative importance of such factors, that is used in the scoring model or other scoring processes;

4.) The actual algorithms, computer programs, models, or other processes that is used to produce an insurance score; and

5.) At least three distinct and detailed examples of insurance score calculations using the filing scoring models or other scoring processes.

NY R 11 § 221.8 also requires that scoring models or other scoring processes in use as of April 23, 2005 and those that insurers start using after April 3, 2005 but prior to August 15, 2005, should be filed with the Superintendent as soon as possible but no later than July 1, 2005

With respect to a scoring model that an insurer intends to start using on or after August 15, 2005, the insurer shall file its scoring model or other scoring processes with the Superintendent at least 45 days prior to use. Summaries of revisions to previously filed scoring models or other scoring processes shall be filed no later than 45 days after its use, but insurers are strongly encouraged to file summaries prior to use.

Furthermore, NY R 11 § 221.8 requires that insurers complete and submit an Insurer Credit Information Compliance Certification along with every scoring model or other scoring processes filing and every summary of revisions. (NY Circular Letter No. 2 (2005)).

All insurers must complete and submit an Insurer Credit Information Compliance Certification in the form prescribed by the Superintendent. This requirement applies to all personal lines insurance filings that use credit scoring in underwriting and/or rating risks. (Reg. No. 182; Circular Letter No. 2 (February 25, 2005)).

The Insurer Credit Information Compliance Certification must be completed by a duly authorized officer of the insurer, who certifies they are knowledgeable with Article 28 of the Insurance Law and Regulation 182 as they are applicable to the use of credit information by an insurer to underwrite and rate personal lines insurance. The officer certifies such use of credit information by the insurer is fully in compliance with the aforementioned law and regulation and that the scoring model or other processes used do not utilize any factors prohibited by the statute and regulation. ◆

Of Note From the Insurance Department

An Opinion of Counsel dated May 18, 2005, was recently issued by the New York State Insurance Department which discusses an insurer's right to cancel for non-payment of additional premium.

The question presented was whether an insurer may cancel the entire insurance policy for non-payment of premium when the annual premium for the original policy already in effect has been paid but the additional premium billed, due to an increase in the amount of building fire coverage, the addition of physical damage coverage to a liability only automobile policy, or the addition of an automobile to an existing automobile policy has not been paid by the insured.

The conclusion offered in the Opinion of Counsel states: "An insurer may cancel the entire insurance policy for non-payment of premium when the annual premium for the original policy already in effect has been paid but the additional premium billed, due to an increase in the amount of building fire coverage, has not been paid. However, the insurer may not cancel the entire automobile policy when the additional premium due is for the addition of physical damage to a liability only policy or the addition of an additional automobile."

For its analysis, the Opinion cites the relevant portions of §3425 and §3426 of the New York Insurance Law with respect to the definition of "nonpayment of premium" and the applicable cancellation and non-renewal provisions, as well as discusses some relevant case law.

To review the Opinion in its entirety, including the underlying facts presented, you may go to the New York State Insurance Department website at http:// www.ins.state.ny.us. ◆

At the Supreme Court

On Monday June 6, 2005, the United States Supreme Court rendered two significant decisions regarding issues of national note.

In the first case, the Court determined that government authorities may prosecute sick people whose doctors prescribe marijuana to ease their pain. The Court concluded that state laws do not protect users from a federal ban on the drug.

This closely watched case was an appeal by the Bush administration in a case involving two California women who use marijuana because they are seriously ill.

The Constitution provides that Congess may pass laws that regulate a state's economic activity that is interstate in nature and crosses state borders. The marijuana in question was grown in California and distributed without charge to patients in California.

In writing the 6-3 decision, Justice John Paul Stevens said there are other legal options for patients, "but perhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress."

California's medical marijuana law, allows people since 1996 to grow, smoke or obtain marijuana for medical needs with a doctor's recommendation. Some other states have similar laws.

In dissent, Justice Sandra Day O'Connor said states should be allowed to set their own rules. But in the Court's decision, Stevens raised concerns about abuse of the marijuana laws. The case is Gonzales v. Raich, Case No. 03-1454.

In the second case, the Supreme Court ruled that foreign cruise lines sailing in U.S. waters must require access to passengers in wheelchairs, expanding the scope of federal disabilities laws.

This 5-4 decision is seen as a victory for disabled rights advocates, who contended that inadequate ship facilities inhibited their right to "participate fully in society."

Justice Anthony Kennedy wrote for the majority and stated, "The statute is applicable to foreign ships in the United States waters to the same extent that it is applicable to American ships in those waters."

The ruling leaves unclear how much the foreign cruise industry will actually have to do because Kennedy also wrote cruise lines need not comply with the ADA to the extent it causes too much international discord or disruption of internal affairs. The case is Spector v. Norwegian Cruise Line, Case No. 03-1388.◆

Case Briefs

No Emotional Distress Damages for Mother

In the case of Jo'Ell Sheppard-Mobley, & c., et al., v. Leslie King, & c., et al., 2005 Slip Op 03892 the Court of Appeals determined whether an expectant mother may recover damages for emotional harm where the alleged medical malpractice caused in utero injury to the fetus, then born alive. The Court of Appeals held that the mother may not recover under the Court's earlier decision in *Broadnax/ Fahey*.

In 1999, plaintiff Karen Sheppard met with defendant Dr. Leslie A. King complaining of lower abdominal discomfort. Dr. King informed her she was pregnant and had large fibroids in her uterus. He advised she was not likely to carry the fetus to term and he advised her to terminate the pregnancy.

Dr. King subsequently referred Sheppard to Dr. Ira J. Spector for a second opinion. Dr. Spector suggested a non-surgical abortion using the drug methotrexate. The drug was administered by Dr. King in the seventh week of pregnancy. The abortion procedure failed, which Sheppard found out about in her 28th week of pregnancy. Sheppard rejected the idea of a late-term abortion and carried the child to term. The infant was born with serious congenital impairments and a lawsuit followed.

The Court of Appeals said the Appellate Division improperly extended the *Broadnax/Fahey* decision by reinstating Sheppard's sixth cause of action for the birth of a live infant with injuries. ◆

Long-Arm Not Long Enough

The Court of Appeals recently determined that long-arm jurisdiction does not exist over a nonresident holding a New York driver's license and car registration for a tort claim arising from an out of state motor vehicle accident. In this case, personal jurisdiction did not exist under CPLR 302(a)(1) because there was an insufficient nexus between plaintiff's personal injury action and any New York transactions. Johnson v. Ward, 2005 NY Slip Op 03696.

On October 12, 1997, plaintiffs allegedly sustained injuries as their vehicle was struck from behind by defendant in New Jersey, while all three individuals were New York residents. At that time, defendant had a New York license and registration, but he later moved to New Jersey and surrendered his New York license.

Plaintiffs commenced this negligence action in Supreme Court, New York County. Defendant moved to dismiss the complaint for lack of personal jurisdiction. Supreme Court granted the motion and dismissed the complaint. The Appellate Division, with one Justice dissenting, reversed and reinstated the complaint.

The Court of Appeals reversed. They concluded that plaintiff's cause of action arose out of defendant's allegedly negligent driving in New Jersey, not from the issuance of a New York license or vehicle registration.◆

Labor Law Not Applicable

Plaintiff, Vanderwiele, was employed by Liberty Pest Control, which contracted with defendant to exterminate cluster flies at its premises. While spraying insecticide on the exterior of the building, he fell from a ladder and injured his back. Vanderwiele v. Steiglehner, 2005 NY Slip Op 03306.

Plaintiff and his wife brought this action alleging Labor Law violations.

Following discovery, the parties moved for summary judgment. Supreme Court granted defendant's cross motion and dismissed the complaint, giving rise to this appeal.

Arguing that his equipment was similar to that used to power wash building surfaces, plaintiffs contend that plaintiff's work was a form of commercial cleaning, an activity protected under Labor Law §240 (1). (See Vernum v. Zilka, 241 AD2d 885, 886 [1997]). The Appellate Division, Third Department, was unpersuaded. They said in response, "the critical inquiry in determining coverage is what type of work the plaintiff was performing at the time of injury. Panek v. County of Albany, 99 NY2d 452, 457 [2003], quoting Johnson v. Solow, 91 NY2d 457, 465 [1998] . ◆

Notice Critical To Liability

Plaintiff Elaine M. Uhlinger, a bus monitor was injured when she fell on the steps outside one of defendant's schools. Plaintiff and her husband commenced an action. The parties moved for summary judgment. Supreme Court denied the cross motion of plaintiff on liability and granted defendant's motion based on the lack of notice of any dangerous condition. Plaintiffs appealed.

Liability for a slip and fall may not be imposed upon a landowner unless there is evidence that the landowner knew or, in the exercise of reasonable care, should have known that icy conditions existed, yet failed to correct the situation within a reasonable time (see Orr v. Spring, 288 AD2d 663 [2001]. This standard merely iterates that a landowner defendant must have constructive notice of the dangerous condition, namely that the condition "was visible and apparent and existing for a sufficient period of time prior to the accident to permit defendant to discover it and take corrective action." Boyko v. Limowski, 223 AD2d 962, 964 [1996]; see Robinson v. Albany Hous. Auth., 301 AD2d 997, 998 [2003]).

There was no actual notice here. To prove a lack of constructive notice, defendant offered proof from its custodial crew regarding its regular procedure of snow removal. Defendant does not keep records of the weather conditions or its snow or ice removal actions.

Plaintiffs submitted affidavits including those from plaintiff and a meteorologist. These were sufficient to create questions of fact about constructive notice and time to correct the condition. Uhlinger v. Gloversville Enlarged School District, 2005 NY Slip Op 04649.◆

Intentional Act Exclusion Application

This case is an appeal from an order which declared that plaintiff had no duty to defend or indemnify defendant John Rafferty in the underlying personal injury action, and from another order which granted plaintiff's motion for summary judgment dismissing defendant Robert Carman's counterclaim for no-fault benefits.

On March 5, 2002, defendant, John Rafferty, plaintiff's insured and defendant, Robert Carman, were fighting next to Rafferty's car. Rafferty got into his car, parked in front of a garage door. Carman placed himself in front of the door and a friend stood behind the car. Rafferty accelerated and drove into Carman, injuring his leg.

It is now well settled that there exists "a narrow class of cases in which the intentional act exclusion applies regardless of the insured's subjective intent" (Slayko v. Secuity Mut. Ins. Co., 98 NY2d 289, 293 [2002]).

In Progressive Northern Ins. Co. v. Rafferty, NY Slip Op 03096 the Appellate Division, Third Department, was unpersuaded by defendants who appeal contending that Rafferty only "lightly" stepped on the accelerator intending only to scare Carman, not injure him. The court found summary judgment was properly granted.◆

Sole Cause Reviewed by Court of Appeals

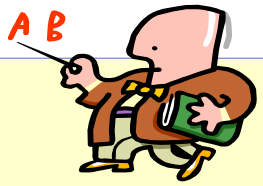
Plaintiff, who was employed as a helper by an elevator company was assigned with a mechanic to do work in an elevator motor room located four feet above the roof level of a building. Montgomery v. Federal Express Corp. 2005 NY Slip Op 02363.

Upon arrival, plaintiff found the stairs that had previously led from the roof to the motor room had been removed. There was no ladder in the immediate vicinity, but ladders were available at the job site.

Rather than go and get a ladder, the plaintiff and mechanic climbed to the motor room by standing on an inverted bucket. When he left the motor room plaintiff jumped down to the roof, injuring his knee in the process.

The Court of Appeals agreed with the Appellate Division, that since ladders were readily available, plaintiff's "normal and logical response" should have been to go get one. Plaintiff's choice to use a bucket to get up, and then jump down, was the sole cause of his injury, and he is therefore not entitled to recover under Labor Law §240 (1). (Blake v. Neighborhool Hous. Servs. of N.Y. City,1 NY3d 280 [2003]). ◆

SCHOLASTICALLY SPEAKING...



BY PROFESSOR I.M. SMART

The Implications of Additional Insureds

Editor's Note: The contents of this article are derived from materials prepared for a presentation on The Implications of Additional Insureds given by Kimberly Davis at the Finger Lakes Conference on June 22, 2005.

There are four types of policies where additional insured issues are prevalent. They are personal lines homeowners policies and commercial lines general liability, workers compensation and contractual policies.

The issues to consider with regard to placing additional insureds on personal lines insurance policies include lease requirements, applicable statutory provisions, case law construction, and all of these factors taken in conjunction with the policy forms being used for the particular situation.

The beginning point for any discussion of additional insureds is actually a question: Is an Insured an Insured? The answer here begs the question. That is to say, What's In a Name? On insurance policies, the named insured has the rights to notice under the policy and has the incumbent responsibilities. An insured has coverage but usually obtains that coverage through the definition of an insured in the policy. An insured is not entitled to notice under the policy nor does an insured have many of the responsibilities of the named insured. An additional insured is added by endorsement and usually by request. An additional named insured has many of the same rights and responsibilities in some circumstances as the named insured but these rights and responsibilities can be construed as illusory. The only named additional insured with greater rights than the named insured is a mortgagee.

Regarding title, it is important to ascertain that the party insuring the property actually has an insurable interest.

With respect to a lease of premises, it is important to review the entire lease, not simply the insurance clause. Lease

requirements may include a hold harmless agreement, an indemnity agreement or both. A hold harmless agreement attempts to relieve one party from liability for damages arising from the leased premises. An indemnity agreement, usually requires the lessee to pay damages for which the landlord becomes legally liable to a third party. The agreement may include a defense cost obligation.

When an insured dies and title is transferred via will, the legal representative of the estate becomes an insured. The owner may also put the title of the property in a life estate or trust.

Section 5-321 of the General Obligations Law prohibits lease agreements that indemnify a lessor for their own negligence. These agreements are against public policy.

The definition of insured in the ML-20 will be a starting point for who is an insured and who is and can be an additional insured. URB additional insured forms in the homeowners context are the ML-41, ML-41A, ML-315, M:-315A, ML-316, and the ML-316A, all of which have several versions. With these forms it is significant to note that many of them only provide coverage to the additional insured for vicarious liability.

Comparing another bureau's forms, they use a combination of definitions and endorsements to add additional insureds on to their policies.

Issues to consider with regard to placing additional insureds on commercial lines insurance policies include the type of entity being insured as to legal formation, the classes of insured to cover, contractual obligations which may include hold harmless and indemnity agreements, applicable statutory provisions, the case law and forms.

There are four basic type of business entities which can seek to be insureds and thus additional insureds on commercial policies of insurance. They are sole proprietorships, partnerships, corporations and limited liability companies.

A sole proprietorship involves a person doing business in their own name and they bear personal liability for the business and personally received any profits.

A partnership is like a sole proprietorship with two or more persons working together.

A corporation is a separate legal entity whose owners bear no personal liability.

continued next page

Implications of Additional Insureds Continued

A limited liability company is a mixed type of organization.

The classes of insureds to review when determining who can be an additional insured on a commercial policy include officers and directors, managers and employees. As a general matter, most forms intend to cover officers and directors for liability resulting in the scope of their responsibilities as officers and directors. The courts have not always enforced this view. Managers are usually covered for liability resulting within the scope of their duties as managers. Employees most generally are covered for liability arising in the scope of their employment. These general rules may be modified by using a variety of forms.

Just as it is important to review the lease and statutory requirements in personal insurance situations, it is important to review an applicable lease and/or contract in commercial situations, as well. Leases in commercial situations are usually much more complex and should be reviewed carefully and perhaps by counsel, if possible.

The statutory provisions applicable to commercial insurance additional insureds situations include Section 5-322.1 of the General Obligations Law. In the construction arena, this statute invalidates a covenant, promise, agreement or understanding that indemnifies or holds harmless the promise for their own negligence and makes such situations void and unenforceable as against public policy.

Two other statutes play a role in an additional insureds situation in commercial lines insurance.

The first statute is Section 240(1) of the Labor Law. This portion of the Labor Law is referred to in common parlance as the "scaffold law." This is so because all owners, contractors and their agents who are erecting, demolishing, repairing, altering, painting, cleaning or pointing of a building or structure are required to furnish or erect or cause to be furnished or erected for the performance of labor scaffolds and other devices...

This is important because many times an insured who is in the construction business as a contractor is asked to put another contractor on their policy as an additional insured. With the absolute liability of Section 240(1) of the Labor Law, it is possible to be legally obligated to pay on behalf of another.

The status of additional insureds is also affected by Section 11 of the Workers Compensation Law which defines "grave injury." Since 1996 when this statute was modified, it is no longer possible to sue an employer in a third-party action unless the worker sustains a grave injury. As a result, many general contractors have experienced increased frequency of claims because the employer cannot successfully be brought into the suit.

One case found in the commercial arena is worth mentioning. That case is Itri Brick & Concrete Corp. v. Aetna Cas. & Sure. Co. (1997) 89 NY2d 786, 658 NYS2d 903, 680 NE2d 1200 reargument den 90 NY2d 1008 and reargument den 90 NY2d 1008. In this case, the Court of Appeals barred enforcement of an indemnity agreement between a general contractor and a subcontractor when the general contractor was found partially negligent. This was an action for injury by an employee of the subcontractor in which the agreement contemplated full indemnity of the general contractor.

The definition of insured in the LS series form being used will be a starting point for who is an insured and who is and can be an additional insured. URB LS forms that can add additional insureds are: LS-19, LS-20, LS-20A, LS-21, LS-22, LS-22A, LS-23, LS-24, LS-24A and LS-25.

With these forms it is significant to note that many of them only provide coverage to the additional insured for vicarious liability.

Comparing other bureau's forms, they use a combination of definitions and endorsements to add additional insureds on to their policies.

Placing additional insureds on personal or commercial insurance policies presents a whole host of complicating issues. When looking to put additional insureds on policies, be sure to remember that a certificate of insurance without more does not confer coverage. Moreover, if the lease requirement or contract violates applicable statutes, such coverage cannot be provided as it violates public policy. An understanding of what your insured needs for the additional insured before you write any policy is prudent and the policy should be constructed accordingly. ◆

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Recently Approved URB Forms

Some of the URB forms recently approved for your use are listed below with a brief description of the form.

- **Umbrella Program (9/03) - UMB-1, UMB-11, UMB-21, UMB-31, etc.**

Consists of four types, the Commercial, Personal, Commercial Farm and Personal Farm Umbrellas along with ancillary forms. Can be placed over primary coverage(s) in the same line of business as the particular Umbrella policy chosen.

- **ML-347 (3/04) - Capped Mold Endorsement**

Provides for $20,000 cap on mold remediation except on the perils of fire and lightning.

- **ML-363 (1/05) - Limited Professional Liability**

Provides coverage as an endorsement to ML-10 and ML-10F.

- **LS-42, LS-42A, LS-43 (5/05) - Products Completed Operations Forms**

Revisions to the 9/02 edition of these forms.

- **ML-344 (6/05) - Additional Spoilage Options**

Removes the cap for consequential losses under extensions of coverages on page 2 of form ML-345 and replaces it with the amount listed.

If you are interested in any of these forms or have questions about their use, please contact us. ◆