The URB Insider

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Important Cases In New Term

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The United States Supreme Court returned to the bench on October 1 for the new term. The term is reported to be filled with important issues including human rights, the death penalty, affirmative action, same-sex marriage and voting rights. Below are highlights of a few of the cases on the docket.

The High Court opened its term with the case of *Kiobel v Royal Dutch Petroleum*, No. 10-1491. This is a case brought by Esther Kiobel on behalf of her deceased husband and 11 other Nigerians. She sued the foreign oil company contending it colluded with the Nigerian military to silence protestors in the 1990s using torture and death. When the case was first before the High Court, the question was if corporations could be sued for human rights abuses. The question now is if the plaintiff can sue in the United States for this alleged breach of international law on foreign soil.

In addition, the High Court will hear the cases of *Ryan v Gonzales, No.* 10-930 and *Tibbals v Carter*, No 11-218. These are two different death penalty cases which seek to examine the scope of the right to counsel in federal habeous proceedings when the mental competency of the convicted person is in question. The cases look at whether a federal court can put a state prisoner's habeous claim on perpetual hold until the person is competent. Each case presents its own specific question.

Also on the High Court's docket is the case of *Fisher v University of Texas*, No. 11-345, which is about affirmative action in education. Abigail Fisher is a white woman who is the sole remaining plaintiff in this case. She alleges the Equal Protection Clause of the Fourteenth Amendment was violated by the university when she was denied admission in 2008 due to affirmative action. The university takes race into account as one factor, among others, in an effort to provide educational diversity when selecting a class. The university's approach to admissions has previously been upheld by the High Court, however, the ideological mix of the High Court has changed since that time.◆

NY Court Of Appeals

Admiral Ins. Co. v Joy Contrs., Inc.

2012 NY Slip Op 04670 [19 NY3d 448]

Argued April 25, 2012; decided June 12, 2012

Admiral Ins. Co. v Joy Contrs., Inc., 81 AD3d 521, modified.

Editor's Note: The following is the decision of the NY Court of Appeals in the captioned case.

Read, J.

A tower crane operated by defendant Joy Contractors, Inc., collapsed on March 15, 2008 during construction of a luxury high-rise condominium at 303 East 51st Street in Manhattan, killing seven people and injuring dozens, damaging several buildings and destroying one. A tower crane is a type of lifting device which utilizes a vertical mast or tower topped by a horizontal structure that is either fixed (a jib) or moveable up and down (a boom) in an elevated position (*see* 29 CFR 1926.1401). For the period from June 21, 2007 through June 21, 2008, Joy carried a comprehensive general liability (CGL) policy with defendant Lincoln General Insurance Company, with coverage up to $1 million per occurrence and an aggregate limit of $2 million; and a follow-form excess policy with plaintiff Admiral Insurance Company, with limits of $9 million for each loss event and in the aggregate, for a deposit premium of $22,000.

Admiral, which received notice of the crane accident on March 17, 2008, notified Joy of several coverage issues in a reservation-of-rights letter dated March 27, 2008, and requested more information. On April 25, 2008, Admiral sent similar reservation-of-rights letters to Reliance Construction Ltd., doing business as RCG Group Ltd., the general contractor on the project; the tower crane's lessor, New York Crane & Equipment Company, Inc.; and the building's owners/developers.{**19 NY3d at 455}

In its March 27th letter to Joy, Admiral "denie[d] any present obligation" to indemnify Joy because no claims had yet been made or lawsuits brought, and the CGL policy had not been exhausted. Notably, Admiral reserved its right to deny coverage on the ground the accident occurred during "residential construction activities," which are excluded under a provision in the excess policy stating that

"[t]his insurance does not apply to liability, injury or damage of any kind, including costs and expenses, arising out of, resulting from, caused or contributed to by any past, present or future 'residential construction activities' performed by or on behalf of any 'insured' or others.

"For the purposes of this endorsement, 'residential construction activities' means any work or operations related to the construction of single-family dwellings, multi-family dwellings, condominiums, townhomes, townhouses, cooperatives and/or apartments."

Admiral further warned that there might be no coverage "based on . . . inaccuracies . . . identified in [Joy's] underwriting submission, which could render [the excess policy] void and/or be a breach of conditions precedent to coverage." In particular, Admiral claimed that Joy had represented that it specialized in drywall installation, did not carry out exterior work and performed carry out exterior work and performed no work at a level above two stories in height from grade other than drywall interior work, whereas "[b]ased on the information [that Admiral had] to date," Joy was actually the structural concrete contractor, performing work on the building's entire exterior with the tower crane.

On May 30, 2008, after further investigation, Admiral sent letters to Joy, Reliance, New York Crane and the owners/developers to deny coverage for claims arising out of the accident, based in part upon the residential construction activities exclusion. On June 9, 2008, Admiral brought this lawsuit against these same entities, all of which claim coverage under the excess policy as "additional insureds" within the meaning of the CGL policy, and Lincoln, asserting numerous causes of action and seeking a declaration of no coverage. Admiral and defendants subsequently filed various motions and cross motions, which Supreme Court disposed of in a decision filed on June 25, 2009.{**19 NY3d at 456}

Supreme Court denied Admiral's motion for summary judgment on its cause of action pursuant to the exclusion in the excess policy for residential construction activities, but also denied defendants' motions to dismiss that cause of action.

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The judge observed that although it was "undisputed" that a "condominium tower" was being constructed, there was conflicting evidence as to whether the "building was intended to be strictly residential" or was "mixed-use"; therefore, "there remain[ed] material questions of fact" on this subject, which had not yet been explored in examinations before trial.

Next, the judge dismissed against Reliance and the owners/developers (having granted Admiral summary judgment declaring that New York Crane did not qualify as an additional insured) those causes of action related to Admiral's assertion that Joy made false statements in its underwriting submission. Relying on *Lufthansa Cargo, AG v New York Mar. & Gen. Ins. Co.* (40 AD3d 444 [1st Dept 2007]) and *BMW Fin. Servs. v Hassan* (273 AD2d 428 [2d Dept 2000], *lv denied* 95 NY2d 767 [2000]), Supreme Court opined that "[w]hatever the outcome is as to Joy," with respect to these causes of action,

"any additional insured is provided with the full benefits of . . . coverage. Should it be determined at some later date that Reliance and/or the owners are additional insureds under the excess policy, any of Joy's alleged misrepresentations would have no effect on their coverage" (citations omitted).

As relevant to this appeal, Supreme Court also dismissed Admiral's cause of action asserting that the LLC exclusion in the CGL policy precluded coverage of those owners/developers (all but one of them) that are limited liability companies; as previously touched on, decided that New York Crane was not an "additional insured" under endorsements in the CGL; held that former section 3420 (d) (2) of the Insurance Law, requiring timely written disclaimer of liability or denial of coverage, was not a defense to Admiral's lawsuit; denied motions and cross motions to dismiss Admiral's{**19 NY3d at 457} cause of action seeking a declaration of no coverage on the ground the injuries sustained in the accident did not arise from Joy's acts or omissions; denied motions and cross motions to dismiss Admiral's cause of action seeking a declaration of no coverage as to Joy for claims by its employees in light of the CGL policy's employer's liability exclusion; and denied motions and cross motions to dismiss Admiral's cause of action seeking a declaration of no coverage for bodily injury or property damage arising out of the rendering or failure to render professional services in light of the professional services exclusions in the CGL and excess policies.

In a decision and order entered on February 17, 2011, the Appellate Division modified by declaring that the residential construction activities exclusion was inapplicable, and otherwise affirmed (81 AD3d 521 [1st Dept 2011]). In the court's opinion, "[t]he evidence overwhelmingly indicate[d] that, at the time of the accident, the building was intended to be a mixed-use structure, not a purely residential one" (*id.* at 522). In particular, "[t]his evidence include[d] references to 'storefronts' in various documents, correspondence in which the New York City Department of Buildings confirm[ed] that the building to be constructed [was] a 'mixed use' structure, and the affidavits by two people associated with the project" (*id.*). The Appellate Division rejected the contrary view expressed by Admiral's engineering expert because "he lacked personal knowledge of the project, and his speculative conclusions [were] insufficient to overcome the evidence of mixed-use intent" (*id.*). Upon New York Crane's motion and Admiral's cross motion, the Appellate Division on July 14, 2011 granted leave to appeal, certifying the following question to us: "Was the order of the Supreme Court, as modified by this Court, properly made?"

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The Residential Construction Activities Exclusion

Admiral correctly states that an expert's opinion need not be based upon personal knowledge (*see* Prince, Richardson on Evidence § 7-308; *People v Miller*, 91 NY2d 372, 379 [1998], citing Fisch, New York Evidence § 429, at 280 [2d ed] [an "expert witness may base his opinion on facts which are not within his personal knowledge"]). An expert may instead ground his opinion on facts in evidence, as was the case here (*see Cassano v Hagstrom*, 5 NY2d 643, 646 [1959] ["opinion evidence must be based on facts in the record or personally known to the witness"]). Consequently, the Appellate Division erred by disregarding the affidavit of Admiral's engineering expert on the basis that "he lacked personal knowledge of the project," rendering his conclusions "speculative" (81 AD3d at 522).

Next, the Appellate Division relied upon affidavits submitted by defendants, but to the extent these conflicted with the affidavit of Admiral's expert, the court should not have made credibility determinations. Further, evidence presented on the{**19 NY3d at 458} motion and cross motions requires interpretation and factual findings—i.e., whether references in documents to "storefronts" literally mean the entrances to commercial spaces or, as Admiral's engineering expert averred, a construction style, or what various construction drawings denote.

Defendants stress the owners/developers' intent at various times, but intent does not control whether the excess policy afforded coverage. Joy purchased insurance that excluded residential construction activities; if Joy nevertheless was engaged in residential construction, there is no coverage. Contrariwise, there is concededly coverage for construction of a residential building with commercial or retail space (i.e., a "mixed-use" building) because of the endorsement's definition of "residential construction activities." The factual dispute over the nature of the construction in this case can only be resolved with reference to what defendants were actually building (*see e.g. Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 94 [2005] [resolving a dispute as to whether a residential exclusion applied by looking to the construction contract]). In sum, there are material issues of fact in this case as to whether the high-rise building under construction was residential or "mixed-use."

The Causes of Action Related to Joy's Alleged False Statements

Admiral asserted four causes of action seeking relief with respect to the coverage claims of Reliance, New York Crane and the owners/developers, which the lower courts considered to be unaffected by Joy's alleged misrepresentations in its underwriting submission. These causes of action requested rescission of the excess policy (the sixth cause of action) or, in the alternative, its reformation to conform retroactively with such terms as might have been offered if Joy had responded accurately to the questions and inquiries posed to it by Admiral during the underwriting process (the ninth cause of action); a declaration that the excess policy was void, consistent with the policy condition providing for this in the event of fraud and/or misrepresentation by Joy relating to the policy (the seventh cause of action); and a declaration that the claims arising from the crane accident were not within the scope of coverage afforded by the CGL and excess policies (the tenth cause of action).

The lower courts dismissed these causes of action against Reliance and the owners/developers solely on the basis of the Appellate Division's decisions in *BMW Fin. Servs.* and *Lufthansa*{**19 NY3d at 459} *Cargo, AG*. These cases, in turn, relied on *Morgan v Greater N.Y. Taxpayers Mut. Ins. Assn.* (305 NY 243 [1953]) and *Greaves v Public Serv. Mut. Ins. Co.* (5 NY2d 120 [1959]). Notably, however, the insurers in *Morgan* and *Greaves* did not seek rescission—i.e., they made no claim that the policies at issue were void ab initio because of material misrepresentation, as Admiral does here. Instead, we were asked in those cases to interpret provisions of policies that everyone agreed were valid and effective.

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In *Morgan*, for example, we considered whether an assault and battery committed by one insured would preclude coverage under a public liability policy for an innocent co-insured, who was the business partner of the insured who committed the assault. The plaintiff, who held an unsatisfied judgment for damages for personal injuries as a result of the assault, stood in the shoes of the innocent co-insured. We held that coverage was available as

"[t]he proper view of the policy under consideration is that by it [the insurer] has undertaken *separate and distinct* obligations to the various assureds, named and additional . . . In short, since [the insurer] has undertaken separate obligations to each of the assureds, an assault committed by an assured relieves [the insurer] of its obligation to that particular assured but not of its obligations to the other assureds" (305 NY at 249).

The plaintiff in *Greaves* sought coverage for tort claims against him under an automobile liability policy issued to the employer of the employee he allegedly injured. There was no dispute that the plaintiff was an additional insured under this policy. The insurer denied him coverage, though, based on an exclusion for sickness, disease or death of "any employee of the insured" if benefits were payable or required under any workers' compensation law (5 NY2d at 123). The insurer insisted that the word "insured" in the exclusion referred to the named insured employer, and that since the injured employee was entitled to and received workers' compensation benefits, the exclusion applied to foreclose coverage to the plaintiff. Applying the rule of *Morgan*, we held that the exclusion had no effect as to the plaintiff because the injured employee was not his employee, and he was therefore not liable to this individual for workers' compensation benefits.{**19 NY3d at 460}

In the *BMW* case, BMW Financial Services (BMW) leased a vehicle to Khaldoon and Khaled Hassan on the condition that they obtain a policy naming it as an additional insured. Instead, the Hassans persuaded Khaldoon's parents to insure the vehicle under their automobile insurance policy with New York Central Mutual. To that end, the parents represented to the insurance company that they had leased the vehicle from BMW and that Khaldoon was an additional driver residing with them. The policy listed BMW as the owner/lessor of the vehicle and named it as an additional insured. Following the car's theft, New York Central Mutual disclaimed coverage to both the parents and BMW on the ground that the parents had no insurable interest in the car.

BMW sought coverage under the policy, and the Appellate Division held that BMW, as the owner of the vehicle, had an insurable interest for which the insurer provided coverage and therefore it was irrelevant that the principal insureds had misrepresented their own interest. Thus, in *BMW* the insurer was aware of the subject matter of the insurance (the car) and BMW's interest in it, and specifically agreed to insure that interest. Indeed, the policy listed BMW as the owner/lessor and as an additional insured.

In *Lufthansa*, Lufthansa Cargo (Lufthansa) was named as an additional insured under a commercial insurance policy issued to Century Motor Leasing, with which Lufthansa contracted for trucking services (*see* 2006 NY Slip Op 30678[U] [2006]). Century had represented to the insurer that a driver who had a previous conviction for driving while intoxicated would not be driving for Century. In fact, though, this driver drove the truck and was injured in a single-vehicle accident. He sued Lufthansa, alleging that it was negligent in loading the truck. In a memorandum decision, the Appellate Division opined that even though the policy was void as to Century on account of its misrepresentation, " 'each individual additional insured . . . must be treated as if separately covered by the policy and indeed as if he . . . had a separate policy of his own' " (*Lufthansa*, 40 AD3d at 445, quoting *Greaves*, 5 NY2d at 124). As in *BMW*, Lufthansa was named in the policy as an additional insured.

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In short, in both *BMW* and *Lufthansa* the named insureds' misrepresentations did not deprive the insurer of knowledge of or the opportunity to evaluate the risks for which it was later asked to provide coverage—i.e., the risk of damages arising {**19 NY3d at 461} from automobile theft (*BMW*) and accident (*Lufthansa*). Further, both BMW and Lufthansa were named as additional insureds on the relevant policies as separate parties so their interests were known to the insurers.

This is in no way comparable to what happened here, accepting Admiral's allegations about Joy's misrepresentations to be true, as we must on these motions. Admiral evaluated the risk of, and collected a premium for, providing excess insurance for interior drywall installation, not the obviously much greater risk presented by exterior construction work with a tower crane at a height many stories above grade. And as Admiral puts it, the only additional insureds it "could have contemplated would [have been] entities associated with projects on which [Joy] was performing interior drywall work and . . . the risk associated with them would [have been] limited to liability caused by acts or omissions of [Joy] in performing drywall work."

While *BMW* and *Lufthansa* are thus distinguishable from *Greaves* and *Morgan*, we do not endorse their holdings to the extent they may be read to extend the holding of *Morgan* and *Greaves* to cases where an insurer seeks rescission (*see e.g. Sirius Am. Ins. Co. v Burlington Ins. Co.*, 81 AD3d 562, 563 [1st Dept 2011] [even if a contractor not named in the insurance policy as a named or additional insured demonstrates a triable issue of fact as to whether it was a covered insured under the policy, this "would have been unavailing as the policy was void ab initio on account of material misrepresentations made by (its insured) in the application process to procure the insurance"]). As Admiral points out, the lower courts' decisions dismissing its sixth cause of action seeking rescission as against all defendants except Joy illogically "leaves in place [the excess policy] to be enforced by other parties even if [this policy] ultimately is rescinded. In effect, these other parties [would be] permitted to rely on the terms of a policy that . . . may be deemed never to have existed to create coverage" in the first place. In short, "additional" insureds, by definition, must exist in addition to *something*; namely, the named insureds in a valid existing policy.

Finally, neither *Morgan* and *Greaves* nor *BMW* and *Lufthansa* addressed (much less preclude) claims, as asserted here by Admiral, for reformation or for declarations based on an express policy condition regarding fraud or misrepresentations, or the scope of coverage properly afforded under a policy. Thus, Admiral's other claims related to Joy's alleged misrepresentations in its underwriting submission (the seventh, ninth and{**19 NY3d at 462} tenth causes of action) are properly interposed against Reliance and the owners/developers as well as against Joy.

Remaining Issues

Finally, we conclude, solely for the reason put forward by Supreme Court, that the LLC exclusion does not foreclose coverage of those owners/developers that are limited liability companies: the CGL policy's language is ambiguous as to whether the exclusion precludes from coverage any limited liability company not shown as a named insured in the CGL policy's declarations (Admiral's view) or only limited liability companies (if any) acquired or formed during the contract period (the position taken by the owners/developers); consequently, this provision should be construed in the owners/developers' favor. We have reviewed and consider to be without merit the other arguments pressed by defendants on this appeal.

Accordingly, the order of the Appellate Division should be modified, without costs, in accordance with this opinion and, as so modified, affirmed, and the certified question answered in the negative.

Chief Judge Lippman and Judges Ciparick, Graffeo, Smith, Pigott and Jones concur.

Order modified, etc. ◆

NY Case Briefs

Public Adj Bur., Inc. v Greater N.Y Mut. Ins. Co., 2012 NY Slip Op 06262 [98 AD3d 894] (Decided on September 25, 2012)—The Appellate Division, First Department, has ruled that a New York public adjustment company that didn't adjust the claim, may still be entitled to a contingency fee. The court found that because of the "otherwise recovered" language in the retainer, adjustment of the claim by the company was not a condition precedent to its recovery of a fee. However, the court held that whether the public adjuster performed valuable services presented a question of fact.

New York Hosp. Med. Ctr. of Queens v Microtech Contr. Corp., 2012 NY Slip Op 06287 [98 AD3d 1096] (Decided on September 26, 2012)—A four-judge panel of the Appellate Division, Second Department, has ruled a contractor who did not discover two workers were illegal immigrants can nevertheless claim the protection of the New York Workers' Compensation Law against the owner, who made an indemnification claim.

Kregg v Maldonado, 2012 NY Slip Op 06454 [98 AD3d 1289] (Decided on September 28, 2012)—The Appellate Division, Fourth Department, reversed an order granting discovery of the injured party's internet postings including Facebook and MySpace entries. The plaintiff objected to such disclosure on the grounds of relevance and burden, contending that the request was a fishing expedition.

Regulatory Note:

The Department of Financial Services has addressed the out of date reference to the Insurance Department in the consumer advisory paragraph required by Regulation 64.

The consensus rule is titled: Notice of Consolidated Proposed Consensus Rulemaking to Correct Out-of-Date Hyperlinks and References as a Result of the Consolidation of the New York State Insurance and Banking Departments Into a New Department of Financial Services .

The 45-day comment period ended on September 1, 2012.

This consensus rule should be in final adoptions soon.

For more information, see the DFS website at: www.dfs.ny.gov. ◆

From Pennsylvania

A law recently passed in Pennsylvania that affects the insurance industry enables the Pennsylvania Insurance Department to modernize its regulatory abilities.

Act 136 of 2012, was signed into law by Governor Corbett and will assist the commonwealth in the global insurance market.

"With international leaders calling for greater regulatory rapport among the world's financial service regulators, these measures add to our pivotal role in being a world-class insurance regulator," said Insurance Commissioner Michael Consedine. "Our state's insurance market place is very diverse and this new law allows us to act as the group supervisor for any international insurance group that is Pennsylvania-based or has substantial connections here."

The new law will also allow the Department to better assess the enterprise risk involved with the holding company system and will permit regulators to weigh the financial impact upon all the insurers within a group's structure. In addition, the law will permit the Department to do a better evaluation of a reinsurer's financial strength. Based on its financial strength, a certified reinsurer will be eligible for reduced collateral requirements. Thus, this will reduce the cost of reinsurance to companies in Pennsylvania who are ceding their risk to a reinsurer. For more information, visit the Pennsylvania Insurance Department at www.insurance.pa.gov. ◆

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Around The Country

Connecticut—A Connecticut Appellate Court has held that extrinsic evidence is admissible in deciding a party's intent for determining, in a historical context, what insurance policy was intended to be purchased. There was a dispute about whether the plaintiff purchased uninsured/underinsured motorist coverage with a conversion coverage. The Declarations Page was unclear as to what was purchased, and the court found the policy language to be ambiguous. To resolve the ambiguity, the court joined with other jurisdictions which allow the use of extrinsic evidence.

Kansas—As a result of a challenge from a hospital records worker to the cap on non-economic damages, a State Supreme Court has ruled Kansas will continue to limit pain and suffering to $250,000 in personal injury lawsuits.

Georgia—The Georgia Supreme Court recently ruled that a worker who unintentionally shot a co-worker can be sued in civil court because his actions were outside the scope of his duties. This is true even though his employer treated the incident as a workers' compensation claim. The High Court decided if it would apply a landmark workers' compensation case titled *Ridley v. Monroe*, 256 Ga. App 686 (2002) in which it was held if a worker receives benefits for an on-the-job injury, the worker cannot sue a fellow co-worker who was responsible for the accident. ◆