The URB Insider

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U.S. Supreme Court

Supreme Court October, 2014 Term

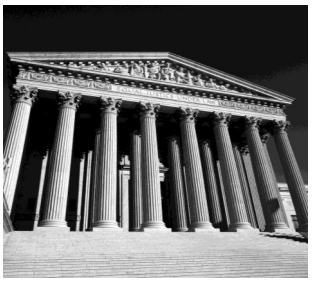
The new term of the Supreme Court of the United States began on October 6, 2014. The term is shaping up to have the justices hear a variety of cases comprised of important issues. The justices will review cases that include issues involving Facebook, taxes, fishing, free speech and accommodation of prisoners' religious exercise. A brief overview of some of the cases follows.

The case involving Facebook, *Elonis v. United States*, is one in which a rapper named Elonis was convicted of making criminal threats resulting from his posts which discussed a variety of violent acts. The case turns on Elonis' intent and if the posts were "true threats".

In *Yates v. United States*, the High Court will determine whether a federal crime law directed at those who would destroy documents applies to shop personnel who shredded fish that were undersized.

In the case of *Reed v. Town of Gilbert, Arizona*, the issue in question is the validity of the town's sign code. The town restricts the size of some signs. The Good News Community Church is challenging the code as an impermissible content-based restriction on speech in violation of the First Amendment.

In *Holt v. Hobbs*, the issue the High Court will review is the right of an incarcerated individual, Gregory Holt, to retain rights under the Religious Land Use and Institutionalized Persons Act that would allow him to retain a half-inch beard to comply with his faith.



The Supreme Court of the United States

In *Heien v. North Carolina*, the High Court will once again address the reasonableness of unreasonable search and seizure.

These are only a few of the cases the High Court will hear. As decisions are rendered and details emerge, more information will be provided.◆

Volume 12, Issue 3

Fall, 2014

In this issue:

N.Y. Court Of Appeals

Plain Terms of Insurance Law § 3420 (d) (2) Not Applicable To Property Damage Claims

In this insurance coverage dispute, plaintiff-respondent KeySpan Gas East Corporation seeks a declaration that defendants-appellants Munich Reinsurance America, Inc., Century Indemnity Company, and Northern Assurance Company of America have a duty to defend and indemnify KeySpan for liabilities associated with the investigation and remediation of environmental damage at manufactured gas plant (MGP) sites formerly owned or operated by plaintiff Long Island Lighting Company (LILCO). Defendants issued excess insurance policies to LILCO that required, as a threshold condition for coverage, LILCO to provide prompt notice of any occurrence that potentially implicated defendants' duty of indemnification.

In 1994, LILCO notified defendants by letter about "environmental concerns" in Bay Shore and Hempstead, the only sites relevant to this appeal. LILCO stated that although no regulatory agencies had commenced action, it was expected action would be forthcoming and the extent of liability, if any, could not be determined. LILCO also notified defendants that a neighbor had brought a property damage claim for environmental damage.

Over the following year, the defendants sent letters to LILCO which reserved their rights and raised coverage defenses, including late notice. The defendants also requested additional information. Susbsequently in 1995 and 1996, LILCO provided supplemental disclosures and advised defendants when the New York State Department of Environmental Conservation served a formal demand requesting that LILCO conduct site investigations, and if necessary, remediate the Bay Shore and Hempstead MPG sites. Defendants did not respond to these disclosures.

LILCO commenced a declaratory judgment action in 1997. In their answers defendants asserted late notice warranting denial of coverage. Defendants later moved for summary judgment based on late notice. Later, defendants were granted summary judgment as to the Bay Shore site but not for the Hempstead site or five others. Except for the Bay Shore site, the court held the reasonableness of LILCO's delay in notifying defendants at its MPG sites raised a question of fact for the jury. The court also rejected LILCO's claim that defendants waived their late-notice defense. Defendants appealed from the Supreme Court order to the extent it denied summary judgment as to the Hempstead site. KeySpan, having been assigned the right to pursue LILCO's claims and added as a new party plaintiff, cross-appeals from the order to the extent it granted summary judgment as to the Bay Shore site.

The Appellate Division modified the Supreme Court order by denying summary judgment on the Bay Shore site and vacating the declaration, and otherwise affirmed. The court held that LILCO failed, as a matter of law, to provide timely notice under the policies of environmental contamination at both the Bay Shore and Hempstead MGP sites. The court declined to award summary judgment because of issues of fact that remained as to whether defendants waived their right to disclaim based on late notice by failing to timely issue a disclaimer. The Appellate Division granted defendants leave to appeal, certifying to the Court of Appeals the question of if the Appellate

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Plain Terms of Insurance Law § 3420 (d) (2) Not Applicable To Property Damage Claims Cont'd

Division order was properly made.

Defendants argued that the Appellate Division wrongly applied the strict timeliness standard from Insurance Law § 3420 (d) (2) in considering whether defendants waived their right to disclaim coverage of LILCO's environmental damage claims. Although the Appellate Division did not cite the section in its decision, the court essentially recited the statute's disclaimer requirement when it stated that defendants had an "obligation" to disclaim coverage based on late notice "as soon as reasonably possible after first learning of the ...grounds for disclaimer." The Court of Appeals agreed with the defendants that this was error.

Insurance Law § 3420 (d) (2) provides: "If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant."

The Court of Appeals indicated, "by its plain terms, § 3420 (d) (2) applies only in a particular context: insurance cases involving death and bodily injury claims arising out of a New York accident and brought under a New York liability policy", *KeySpan Gas E. Corp. v Munich Reins. Am., Inc.*, 23 NY3d 583, citing, *Preserver Ins. Co. v Ryba*, 10 NY3d 635. As a result, the Court of Appeals held the Appellate Division erred when it held defendants had a duty to disclaim coverage as soon as reasonably possible because the environmental contamination claims at issue do not fall in the scope of Insurance Law § 3420 (d) (2).

To read the entire decision from the Court of Appeals in *KeySpan Gas E. Corp. v Munich Reins. Am., Inc., 23 NY3d 583*, click the link provided below.◆

KeySpan Gas E. Corp. v Munich Reins. Am., Inc. (2014 NY Slip Op 04113)

Recently Released Forms

- ML-342 Ed. 7/14—Underground Utility Line Endorsement
- LS-45 Ed. 4/14—Clergyperson Professional Liability

Legislative Update

The Governor recently acted on the bills below:

- S5077—**Examinations Before Trial—**This legislation permits a non-party deponent's counsel to participate in the deposition of their client. Counsel for the non-party may object on behalf of their client.
- S6617B– **Community Risk and Resiliency Act**– This legislation requires State agencies to take into consideration future physical climate risks caused by sea level risk, storm surges or flooding when the state issues permits, provides funding and makes regulatory decisions. This legislation takes effect 180 days after the enactment, on March 21, 2015.

Upcoming December 31st TRIA Expiration Leaves Unanswered Questions

The Terrorism Risk Insurance Act (TRIA) was originally enacted in late 2002 as a temporary program in response to the September 11, 2001 terrorist attacks. This was needed because although private insurers made payouts related to the 2001 events, the private insurance industry indicated that the cost of future terrorism was too unpredictable for the industry to bear.

The program was subsequently extended in 2005 for two years with not too many changes to its provisions. In 2007, The Terrorism Risk Insurance Extension Act (TRIPRA) extended TRIA another seven years and made additional changes to the provisions of the original statute.

At a fundamental level, TRIA and TRIA, as amended, provides the ability for the federal government to participate in insuring certified acts of terrorism as defined in the statute. For the covered commercial lines of business, insurers must make the coverage available as mandated by the statute. The insurer must make a conspicuous disclosure regarding the cost of terrorism coverage and the availability of the federal program. Insurers must absorb a deductible before accessing a portion of the co-share of the federal back-stop. The current TRIA extension is scheduled to expire on December 31, 2014, at the end of this year.

At this time, there is no solution in response to the looming deadline of the statutory expiration. There is no agreement in Congress as to what will be done and both houses differ on their proposed approaches. The fundamentals of the two approaches are set forth below.

Senate (S2244)

- Seven year reauthorization
- Increases insurers co-share to 20%
- No change to program trigger
- No separation of NBCR
- Bipartisan agreement has already passed the Senate

House (H.R. 4871)

- Five year reauthorization
- Separation of NBCR
- Increases program trigger for non-NBCR by $100 million up to $500 million
- Increases insurers co-share for non-NBCR to 20%
- Establishes a voluntary small insurer opt-out provision
- No bipartisan agreement to pass in House of Representatives

There is no way to know what Congress will do with this issue. The possibilities are that TRIA will be renewed with changes, TRIA will be renewed without changes or TRIA will be allowed to lapse. Further uncertainty exists as to when the renewal will take place, if in fact, it does take place. Congress returns on November 12.

That brings into question in New York the uncertainty of renewing policies covered by TRIA that have an effective date of January 1, 2015. Because of the statutory notice periods involved for conditional or non-renewal, policyholders may be entitled to notice of changes prior to the time the government gives the information to insurers in order to make the necessary changes.

Insurers should be aware of the looming deadline and consider their options regarding any required notice to policyholders, particularly for those commercial lines policies covered by TRIA with renewal dates that are upcoming on January 1, 2015. As more information becomes available, URB will keep you posted regarding any changes to TRIA. If policy forms changes become necessary, URB will make the new forms available to URB insurers. ◆

URB Insurers Score Big In Annual PIA Survey

The results of the Professional Insurance Agents (PIA) annual Company Performance Survey for 2014 are out and URB insurers scored BIG!

The PIA Company Performance Survey asks independent insurance agents to rate the companies with which they do business on 20 performance items. These include claims handling, products and pricing, underwriting, technology and marketing support.

Among the top 10 performers in New York, URB Insurers included: Otsego Mutual Fire Insurance Co., Sterling Insurance Co., Associated Mutual Insurance Co., Kingstone Insurance Co. and Security Mutual Insurance Co.

Otsego Mutual Fire Insurance Co., came out on top in the survey with a number one ranking. Comments

about Otsego's practices include that they adjust claims promptly and have clear and honest communications.

Second on the list of top performers is Sterling Insurance Co. It is recognized in the survey that Sterling is dedicated to the agency system and they have easy, intuitive technology.

Associated Mutual Insurance Co., came in fourth on the annual list of top ten performers. They were recognized for resolving issues quickly, as well as listening and responding quickly to agents, and underwriter knowledge, among others.

Sixth on the list of top performers is Kingstone Insurance Co. Included in the comments are that they have competitive pricing and competitive compensation.

Security Mutual Insurance Co., is listed as the number eight top performing company on the list. They were mentioned for being flexible when warranted.

Mid-Hudson Cooperative Insurance Co., is also mentioned favorably in the comments section of the survey.

For more information about the survey, please visit the PIA website at www.pia.org/.◆

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Case Notes Around The Country

- The Connecticut Supreme Court has clarified the procedural requirements applicable to the Malfunction Doctrine in products cases. When the plaintiff pleads only specific defects, the malfunction doctrine is not applicable as an alternative way to defeat a motion for summary judgment.
- Ohio—A woman is suing an Illinois sperm bank for sending sperm from a black donor. She is seeking $50,000 in damages.
- Pennsylvania—A split in the federal courts has been resolved. Manufacturing defect and implied warranty claims are not viable against pharmaceutical and medical device companies. This leaves negligence as the only cause of action against these companies in Pennsylvania.◆