The URB Insider

A Quarterly Publication of Underwriters Rating Board

U.S. Supreme Court Term

The U.S. Supreme Court began its 2015-2016 term on October 5, 2015. The Court typically reviews about 75 cases per term. This term includes a variety of different cases.

One case on the calendar is *Fisher v. University of Texas at Austin*. This case first reached the U.S. Supreme Court in 2013. In the first *Fisher* case, the U.S. Supreme Court held that schools' use of race in admissions must be narrowly tailored to further compelling governmental interests. The justices sent the case back to the U.S. Court of Appeals for the Fifth Circuit. On remand, the court found that the university's newly asserted interest in qualitative diversity justified the use of racial preferences. Back before the U.S. Supreme Court, the new diversity rationale will be subject to strict scrutiny review.

Another case on the calendar is *Luis v. United States*. The issue in this case is whether assets that are not tainted from criminal activities may be held from the defendant prior to trial consistent with the Fifth Amendment Due Process Clause, and the Sixth Amendment guarantee of a defendant's right to have assistance of counsel. In another case from 2014, *Kaley v. United States*, the Court held that the tainted assets of a criminal defendant that are traceable to a criminal offense may be held from the defendant before trial, even if they are necessary for defendant to obtain a lawyer.

There are other cases on the docket of the Court this term. Cases of interest will be reported in future editions.◆

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NY Court Of Appeals

Court Examines What Is Trivial Or Significant Defect

The Court of Appeals recently heard three appeals in which they reviewed what is a trivial and what is a significant defect on a sidewalk or stairway in the case of *Hutchinson v Sheridan Hill House Corp*., 2015 NY Slip Op 07578. The common factual and procedural thread among the three appeals is that an individual tripped on a defect in a sidewalk or a stairway, and was injured, but was foreclosed from going to trial because the defect was characterized as too trivial. The Court of Appeals held that the Appellate Division erred in dismissing the complaint in two of the three cases.

On April 23, 2009, plaintiff Leonard Hutchinson was walking on a sidewalk in the Bronx when his right foot caught on a metal object and he fell. He commenced a personal injury action against Sheridan Hill House Corp. (Sheridan). The sidewalk abuts a building owned by Sheridan, which is responsible for maintaining the sidewalk under the Administrative Code of New York. In his testimony, Hutchinson described the metal object as being screwed on the concrete. An employee of Sheridan's counsel visited the sidewalk in December 2010 and photographed and measured the metal object. The object projected between one eighth of an inch and one quarter of an inch above the sidewalk and was approximately five eights of an inch in diameter. Sheridan moved for summary judgment and asserted the defect was trivial and nonactionable and that it was not on notice of the defect. Supreme Court granted summary judgment in favor of Sheridan on the ground that it did not create or have actual or constructive notice of the defect. The Appellate Division affirmed and held that the minor height alone was insufficient to establish a defective condition. Two Justices dissented and reminded the majority that there is no minimal dimension test or per se rule for a defect. Hutchinson appealed and the Court of Appeals affirmed.

On May 2, 2010 Matvey Zelichenko fell while walking down a staircase in the lobby of a residential building in Brooklyn. There were five risers with four step treads made of terrazzo, 12 inches in horizontal depth, each with a one-inch nosing that projects over the riser below. There were handrails on each side. On the second step from the bottom, Zelichenko's right leg got caught when he stepped on a part of the nosing where there was a missing chip. Zelichenko commenced a personal injury action against 301 Oriental Boulevard, LLC., (Oriental) the owner of the building. In his deposition testimony, Zelichenko identified in a photograph the area of the stairway depicting the missing chip. Oriental moved for summary judgment, contending the defect was trivial, nonactionable and it was not on notice of the defect. Each party engaged an engineer to testify about the defect. Plaintiff's engineer disagreed with defendant's engineer about the depth of the chip and found it to be one inch in places.

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Court Examines What Is Trivial Or Significant Defect Cont'd

Plaintiff's engineer won the battle of the experts. Supreme Court denied Oriental's motion, ruling that issues of fact existed as to actual or constructive notice and whether the alleged defect was trivial as a matter of law. The Appellate Division reversed Supreme Court's order and granted Oriental's motion.

On March 30, 2010 Maureen Adler was injured in a fall on the interior staircase of the apartment building where she lived. In her deposition testimony she recalled she was walking down the stairs when her right foot got caught in a big clump in the middle of the stair. This was a protrusion of some sort in the step tread which had been painted over. Adler commenced a personal injury action against QPI-VIII LLC., and Vantage Management Services, LLC., the owner and manager of the building. Adler's counsel photographed the protrusion and Adler acknowledged that the photographs fairly and accurately depicted the stairway. Adler testified that the stairway was illuminated by a 60-watt light bulb, that she was probably looking down as she descended the stairs, she did not recall any dirt or debris on the stairs and they were not slippery or cracked. She said she was very familiar with the stairway and had seen the clump on previous occasions. The building superintendent testified he had not noticed any uneven surface on the stairs prior to Adler's accident nor received any complaints. The stairs had been painted some three or four years before the date of the accident. Defendants moved for summary judgment dismissing the complaint, asserting that the alleged defect was trivial, nonactionable and that they had not created the defect and did not have actual or constructive notice of its existence. They relied on Adler's photographs as well as the deposition transcripts; but did not produce any measurements or other dimensions of the clump. Supreme Court denied the motion, ruling that defendants had failed to establish as a matter of law that they neither created the alleged defect nor had actual or constructive notice of it, or that the defect was trivial. The Appellate Division reversed and granted the motion, ruling that the defect was trivial as a matter of law and did not possess the characteristics of a trap or nuisance and was not actionable. The plaintiff failed to raise a triable issue of fact and the Appellate Division did not pass on the issue of notice. Adler was granted leave to appeal and the Court of Appeals reversed.

In making its decision in these cases, the Court of Appeals discussed the principles set forth in *Trincere v County of Suffolk*, 90 NY2d 976 (1997) where the Court held that there is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth to be actionable and that granting summary judgment exclusively on the dimensions of the defect is unacceptable. *Trincere* requires that a holding of triviality be based on all the facts and circumstances of the case, not size alone. To read the case in its entirety, please click on the link below.◆

http://www.nycourts.gov/reporter/3dseries/2015/2015_07578.htm

NY Case

Notice Important To Disclaim Coverage

In this Appellate Division, First Department case entitled *Endurance Am. Specialty Ins. Co. v Utica First Ins. Co.*, 2015 NY Slip Op 07329, the court obligated the insurer to defend and indemnify plaintiffs in the underlying action after Supreme Court, declared that the insurer had no such duty.

There was an accident on October 16, 2011 in which an employee of defendant CFC Contractor Group, Inc., allegedly suffered injuries in the course of his work. The employee commenced an action against plaintiff Adelphi Restoration Corp., among others, to seek recovery for his injuries.

Adelphi commenced a third-party action against CFC seeking contribution, common-law indemnification, contractual indemnification, damages for breach of contract to procure insurance, and reimbursement of attorney's fees and costs in current in defending the employee's action.

The Utica policy contained an additional insured endorsement conferring additional insured coverage on entities for which CFC was required to procure insurance for the date of loss. The Utica policy also contained an exclusion for bodily injuries sustained by an employee of any insured, or by contractors or employees of contractors "hired or retained by or for any insured." There was additional insured coverage triggered when there was a written contract and when the claim arose out of the insured's work; however coverage did not apply to any employee of any insured.

Adelphi concedes the employee exclusion precludes coverage to it and to CFC, however, Adelphi contends the timing of Utica's disclaimer precludes Utica from denying it coverage.

Notice was first received by Utica on November 16, 2011 from Rockville Risk Management, the third-party administrator for plaintiff Endurance American Specialty Company, Adelphi's insured. Utica informed CFC that it was denying coverage for the accident in a letter dated November 21, 2011. Utica cited the employee exclusion. Utica did not inform Adelphi directly of the denial but sent Rockville a copy of this letter.

Rockville, on behalf of Endurance and Adelphi tendered its defense and indemnity to Utica in a letter dated May 10, 2012 and noted the CFC contract with Adelphi. Another tender letter was sent on November 20, 2012. On January 25, 2013, Rockville, on behalf of Adelphi, sent Utica a copy of the contract that triggered the blanket endorsement. Utica received the letter on January 28, 2013 and responded to Adelphi on January 29 that the employee exclusion precluded coverage.

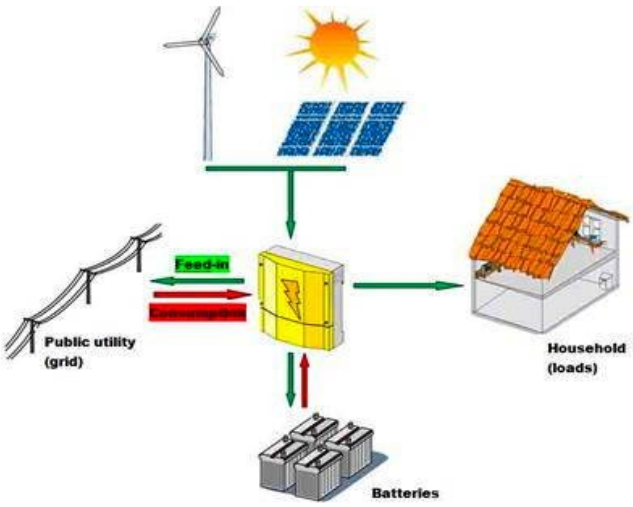
Utica's disclaimer of November 21, 2011 to its named insured, defendant CFC, did not constitute notice to the additional insured, Adelphi, under Insurance Law Section 3420(d)(2). The court does a further analysis based on Section 3420(d)(2) and applicable case law why Utica should have disclaimed immediately upon knowing the applicability of the employee exclusion. To read the case in its entirety, please click on the link below.◆

http://www.nycourts.gov/reporter/3dseries/2015/2015_07329.htm

Solar Panels Insurance Coverage

Solar panels are becoming more prevalent in our daily lives. More people are attaching them to the buildings that house their businesses and to their residences. Many people put them on the lawn or elsewhere on their property. These solar panels, officially known as "photovoltaic (PV) systems", serve a great need for renewable energy. However, the issue of insurance coverage for the solar panels as well as its availability is complicated. While the insurance market for these solar panels is rapidly emerging and evolving, there is still a long way to go to have a thorough understanding of the insurance coverage needed for solar panels.

The lack of familiarity with the technology behind solar panels, no available loss data and lack of information about products, makes it difficult for insurers to know what to offer and at what price . There is a perceived risk of higher exposure in the insurance industry when an insured has solar panels on their building or property. Moreover, it is significant for an insurer to know whether an insured with solar panels has an obligation to insure the solar panels. This can be done by becoming familiar with the terms of the contract between the insured and the provider of the solar panels.



In general, non-residential solar panel installations require more types of insurance than residential applications. Which insurance is needed will be determined by who is purchasing the system and their role as it relates to the solar panel system.

For system owners, non-residential solar panel installations may require property, general liability and environmental risk insurance. In geographic areas subject to natural disaster, other additional coverage for earthquakes or hurricanes may be needed.

A typical general liability policy that covers the policyholder for death or injury to people or damage to property owned by third parties would respond on behalf of the system owner, if the solar panels caused such injury or damage to a third party. Rooftop installations carry higher damage exposure than solar panels mounted elsewhere on the property.

Property insurance covers damage to or loss of property for the property owner.

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Solar Panels Insurance Coverage Cont'd

In the case of a solar panel installation, the manufacturer's warranty will provide some limited coverage from failure and defects. The owner of the solar panels will need protection from further risks to the solar panel such as destruction or theft of the panel components.

Where natural disasters present a greater exposure to a solar panel installation, additional coverage may be needed from endorsements or another policy.

Environmental risk insurance will indemnify the owner of the solar panels for environmental damage from pollution and for harm to others resulting from it. There are a variety of policies which include coverage for unknown pollution and liability, business interruption, transportation claims, transfer of risk for existing pollution claims, cost stopgap for clean up and restoration and development of known polluted sites.

Landowners will be subject to varying risks depending on the requirements of the contract, which will determine what insurance they need.

Residential solar panel systems can typically be covered by a homeowners policy.

As this emerging issue continues to evolve, the URB Insider will continue periodically to contain articles on this subject and the developments related to it.◆

From The URB Forms Catalog

URB has many different forms available to serve a variety of product needs. Some of the forms you may want to adopt for use are:

- ML-342 Ed. 7/14 Underground Utility Line Endorsement—this form provides coverage for direct physical loss to underground utility line covered property that is caused by an underground utility line occurrence at the insured premises.
- ML-185 Ed. 12/05 Automatic Inflation Protection—during the term of the policy, Coverages A, B, C, and D will be increased on the annual renewal date by the average percentage change factor of the construction cost index used in the company's current replacement cost estimator. A similar form is available for use with policies in the FL and SF forms series.
- ML-124 Ed. 8/13 Roof Surface Actual Cash Value Loss Settlement (Windstorm or Hail)—the Replacement Cost Provision does not apply to a roof surface loss caused by windstorm or hail and repair or replacement will be made at actual cash value. A similar form is available for use with policies in the FL and SF form series.◆

URB Combined Companies
Average Homeowners Policy Value For 2014

Zone	Overall ($)	RC Overall ($)	ACV Overall ($)
1.1	155,602	170,250	101,669
1.2	175,943	198,098	118,339
1.3	169,854	195,251	100,438
1.4	188,389	199,815	117,200
1.5	158,642	177,892	100,915
1.6	173,888	194,967	105,517
1.7	242,026	247,433	149,500
1.8	213,161	224,442	145,947
1.9	209,205	221,033	101,429
2	164,702	196,065	106,623
3	345,521	346,198	138,000
4	357,491	357,833	231,000
5	82,501	198,750	51,750
6	415,947	419,480	312,501
7	425,586	431,094	78,750
8	398,068	401,819	302,501
9	354,694	355,548	186,251
10	345,355	347,046	198,930

Editor's Note: If your Company submits statistics to URB and you would like to have your Company's numbers computed, please contact URB.

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Forms Update

- The SF Forms continue to be a work in progress. URB has updated the base forms from the input received at the forms meeting in May, 2015 and the changes are under review.
- The Cyber Liability Endorsement has been submitted to the reinsurer with URB's formatting input and questions. We hope to hear back from the reinsurer in a short time and that filing will follow shortly thereafter.
- The commercial lines exclusion for drones is in the works and we hope to have it filed for approval within the next 30 days.◆