The URB Insider

A Quarterly Publication of Underwriters Rating Board

U.S. Supreme Court Wraps Up With Highly Anticipated Decisions

The end of the Supreme Court term in June wrapped up with some highly anticipated decisions with widespread impact on the country at large. These decisions were about a variety of topics but the three most significant decisions were about voting rights, same-sex marriage and insurance for health care.

In the first case, the Supreme Court effectively struck down the core of the Voting Rights Act of 1965 in a 5-4 decision that frees nine states, primarily in the South, to change their election laws without prior federal approval.

In the second case, a divided Supreme Court ruled 5-4 that the Constitution requires that same-sex couples be allowed to marry regardless of the state in which they live. The decision was based on the fundamental right to marry and the equality that must be afforded to gay Americans.

In the third case, the Supreme Court also affirmed in a 6-3 decision the Affordable Care Act, which was signed into law by President Obama. In this challenge, the Supreme Court indicated the law permits the federal government to give nationwide tax subsidies to poor and middle-class people to buy health insurance.

Other cases that were decided at the end of the term involved issues about EPA cost assessments, the Elections Clause, the Oklahoma lethal injection protocol and the mere possession of a firearm as a violent felony.

There were 54 rulings overall in the term, many of which could have lasting implications.

The Supreme Court is now on Summer recess and will return to hear cases in the Fall.◆

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N.Y. Court Of Appeals

Fraudulent Entry Provision Refers To Unauthorized Access Barring Coverage, Says Court

In the case of *Universal Am. Corp., v National Union Fire Ins. Co. of Pittsburgh, PA.,* 2015 NY Slip Op 05516, the Court of Appeals recently examined an insuring agreement for computer systems fraud. The issue examined was if fraudulent entry of electronic data or computer program encompasses losses caused by an authorized user's submission of fraudulent information into the insured's computer system.

The Court of Appeals concluded the insuring agreement was unambiguous and that fraudulent entry referred to unauthorized access into the computer system, not to the content submitted by authorized users. In so concluding, the Court of Appeals affirmed the order of the Appellate Division which denied coverage to the plaintiff.

Universal is a health insurance company that offers a choice of federal-government-regulated alternatives to Medicare, commonly referred to as "Medicare Advantage" plans. These plans allow Medicare-eligible individuals to purchase health insurance from private insurance companies, and those companies are reimbursed by the federal government for services provided to the plans' members. Universal has a computerized billing system that allows health care providers to submit claims directly. The great majority of claims submitted are processed, approved, and paid automatically, without manual review, according to Universal.

Universal made a claim for indemnification under Rider #3 of a financial institution bond issued by National Union to cover losses for services that were not provided but were paid for through the system. The bond insured Universal against various losses, inclusive of certain losses resulting from dishonest and fraudulent acts. The Rider amended the bond to provide indemnification specifically for computer systems fraud.

A few months after obtaining coverage, Universal suffered $18 million in losses for payment of fraudulent services never actually performed. When Universal sought payment from National Union for its post-deductible losses, National Union denied coverage on the ground that the Rider did not encompass losses for Medicare fraud, which National Union described as losses from payment for claims submitted by health care providers.

Universal commenced an action for damages and declaratory relief. Universal moved for summary judgment and National Union cross-moved. Supreme Court denied Universal's motion, granted National Union's motion and dismissed the complaint, concluding that the Rider is not ambiguous and does not extend to fraudulent claims entered into Universal's system by authorized users. The court determined the intended coverage is for unauthorized entry into the computer system by a hacker or through a computer virus.

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Fraudulent Entry Provision Refers To Unauthorized Access Barring Coverage, Says Court Cont'd

The Appellate Division unanimously modified the summary judgment order, on the law, to declare the policy does not cover the loss and otherwise affirmed. The Appellate Court concluded the unambiguous language of the policy does not cover fraudulent content entered by authorized users but manipulation by hackers. The Court of Appeals granted Universal leave to appeal and affirmed the decision of the Court of Appeals.

After determining an insurance agreement is subject to the principles of contract interpretation, the Court of Appeals cited cases to establish unambiguous provisions of a contract must be given their plain and ordinary meaning, which interpretation is a question of law for the court.

Turning to the language of the Rider, the Court of Appeals concluded that it unambiguously applies to losses incurred from unauthorized access to Universal's computer system, and not to losses resulting from fraudulent content submitted to the computer system by authorized users. The Court of Appeals concludes the Rider covers losses resulting from a dishonest entry or change of electronic data or computer program, constituting what the parties agree would be "hacking" the computer system. To read the entire case, please click the link below.◆

http://www.nycourts.gov/reporter/3dseries/2015/2015_05516.htm

Dog Owners Cannot Be Sued For Bicycle Collisions Per Court Of Appeals

In two similar lawsuits decided on the same day, *Doerr v Goldsmith* and *Dobinski v Lockhart*, 2015 NY Slip Op 04752, the Court of Appeals recently ruled that a 2013 decision that permitted a woman to sue the owner of a cow she hit with her van did not apply to domestic pets.

Two cyclists, Wolfgang Doerr, and Cheryl Dobinski brought lawsuits to recover damages after hitting into dogs. Doerr was injured in a 2009 accident when he collided with a shepherd mix on Central Park's Bicycle Loop Road. Dobinski was injured when she fell from her bike while trying to avoid two German shepherds that ran into the road.

In the *Doerr* case, the Court of Appeals said the order of the Appellate Division should be reversed and defendant Goldsmith's motion for summary judgment dismissing the complaint granted, and the certified question answered in the negative. In the *Dobinski* case, the Court of Appeals said the order of the Appellate Division should be affirmed. The outcome in both cases as a result of the Court of Appeals decision is that the cyclists could not sue the owners because the court felt constrained to reject plaintiffs' negligence causes of action against defendants arising from injuries caused by defendants' dogs. To read the entire case, please click the link below.◆

http://www.nycourts.gov/reporter/3dseries/2015/2015_04752.htm

Insurer Has Right To Investigate Before Disclaimer

In the case of *Imperium Ins. Co. v Utica First Ins. Co*., 2015 NY Slip Op 05643, the Supreme Court, Appellate Division, Second Department, decided an action pursuant to New York Insurance Law Section 3420(a)(2) to recover the amount of an unsatisfied judgment against the defendant's insured. The plaintiff appeals from an order of the Supreme Court, Westchester County which effectively converted the defendant's motion pursuant to CPLR 3211(a) to dismiss the complaint into a motion for summary judgment. The court granted the motion.

This case resulted from a 2005 accident at a jobsite. Imperium insured the owner and general contractor. Imperium sought additional insured coverage from Utica First, who they claimed insured the employer of the injured claimant. However, Imperium provided no proof of their claim.

Utica undertook an investigation and after 36 days, Utica obtained a statement from its insured declaring the injured party was not their employee. Within a matter of days, Utica disclaimed coverage to its insured and all additional insureds based on an employee exclusion in the policy. Imperium paid a large settlement and sought to recover from Utica, arguing an investigation wasn't needed to assert an employee exclusion.

The court disagreed with Imperium. The court held that the defendant insurer established, prime facie, that it provided written notice of disclaimer of coverage to the plaintiff in a reasonable time and the delay was related to a prompt, diligent and necessary investigation to determine the relationship of the parties in the underlying action and whether an employee exclusion in the relevant insurance policy excluded coverage. To read the entire case, please click the link below.◆

http://www.nycourts.gov/reporter/3dseries/2015/2015_05643.htm

SF Forms Series Update

URB continues to work on the SF Forms Series Update as the summer progresses. As a result of the Forms Meeting held on May 5, 2015 at URB, a great deal of input was received and in depth suggestions, questions and issues have been brought up regarding the base SF forms that are being updated.

As a result, URB is going over all the input received and where necessary reviewing the forms and making further revisions in line with the information.

At this time, we continue to review and revise the base forms and the BOP program.

We expect to continue to progress and bring you more information in future issues of the URB Insider.

If you have any input, suggestions or questions about the update to the SF form series, please contact us at URB. ◆

N.Y. Supreme Court Appellate Division

Burden Shifts to Insured In Seeking To Apply Exception To Exclusion

In *Copacabana Realty, LLC v Fireman's Fund Ins. Co.*, 2015 NY Slip OP 06106, the plaintiff appealed an order of the Supreme Court, Suffolk County, which granted the motion of the defendant, American Automobile Company for summary judgment declaring it is not obligated to provide insurance coverage to the plaintiff. The Supreme Court, Appellate Division, Second Department affirmed the decision of the Supreme Court and remitted the matter for entry of a judgement declaring that the defendant insurer is not obligated to provide insurance to plaintiff for loss to property.

Plaintiff sustained loss to property and the insurer denied the claim based on an exclusion that is not discussed in the case. In discussing the case, the court pointed out that to determine a dispute over insurance coverage, the court first looks to the language of the policy. The court further discusses that although the insurer has the burden of proving the applicability of an exclusion, it is the insured's burden to establish the existence of coverage from an exception to an exclusion.

The defendant, American Automobile Insurance Company established its prime facie entitlement to judgment as a matter of law by demonstrating the applicability of an exclusion in the plaintiff's policy. In opposition, the plaintiff failed to raise a triable issue of fact regarding the applicability of an exception to the exclusion.

As such, the appellate court found that the Supreme Court properly granted the insurer's motion. Because the plaintiff was unable to establish the exception to the exclusion, declaratory relief was properly granted such that insurance coverage was denied. To read the entire case, please click the link below.◆

http://www.courts.state.ny.us/reporter/3dseries/2015/2015_06106.htm

Cyber Liability Form Project Update

In addition to working on the SF Forms Series Update this Summer, URB is working on preparing a Cyber Liability Endorsement in partnership with Guy Carpenter and NAS to be filed in the near future with the New York Department of Financial Services.

Many of the URB insurers have expressed an interest in writing cyber liability coverage. This endorsement will provide the form necessary for insurers to offer the coverage.

Typically, cyber liability coverage is written on a claims-made basis but such coverage has been approved in New York by attaching it to or integrating it with an occurrence based policy. URB will propose to endorse the coverage on a BOP or Commercial Package Policy.

We will keep you posted in future editions of the URB Insider with progress on this project. ◆

Solar Panels—Risky Or Rewarding?

There is a great deal of talk these days about renewable sources of energy, and one of the greatest sources of the discussion is about solar panels. Before discussing the other implications of solar panels, it is beneficial to discuss the risks and possible returns of solar panels.

Solar panels can be attached directly to a roof or as a separate freestanding structure on property. Either type of installation can present issues but an argument can be made that placing the panels on the roof may present more issues than when the tiles are freestanding.

At one time, attaching anything to a roof was unheard of because the purpose of the roof was to protect the house. Now because of the great solar panel craze, the roof has a whole new purpose to hold the panels, create energy and possibly even generate revenue for the owner of the property.

Since the roof has other purposes than to hold solar panels, it is critical to determine the integrity of the roof structure prior to any placement of the panels on it. The integrity of the roof should be examined by a structural engineer prior to any such placement.

Any owner who plans to put the panels on the roof should be aware that the risks of changes in roof loading, wind uplift, drainage, resistance to nature's elements and combustibility change if the solar panels are on the roof.

Most important to safeguard against is the increased risk of fire. Any debris on the roof under the solar panels is a fire hazard.

Any nearby trees should be trimmed to minimize contact with panels and damage. If panels are actually installed, the wiring should be periodically checked for any evidence of damage or chewing by wildlife.

Before making a decision to have solar panels placed on a roof, owners should hire a competent professional structural engineer licensed in their area to look at all these issues. If the roof is not able to handle the load, perhaps mounting the panels as related structures is a better alternative.

Once a decision is made to obtain the solar panels because the installation will work, other issues to discuss include the cost of owning or leasing the solar panels, benefits, insurance implications and sources of coverage and maintenance.

In the upcoming editions of the URB Insider these issues will be discussed including the insurance implications of solar panels. ◆

Mid-Hudson Cooperative Insurance Company Adds To Staff

Mid-Hudson Cooperative has announced two recent additions to their staff that they would like to share with URB Insider readers. They are Chris Decker, Claims Manager and Ryan Zielinski, Marketing Representative.

Here is what Chris Decker has to say in his own words about joining Mid-Hudson:

"As the new Claims Manager I come to Mid-Hudson Cooperative with over 25 years' experience in the Property & Casualty industry. I look forward to the new challenges and meeting the expectations of our customers/ policyholders. Communication is important to any Claims Departments success. My objective is to produce a high level of care, concern, and compassion for others.

It's my expectation that my work will be rewarding, challenging, and meaningful. The keys to my success will be being dependable, reliable, showing openness, follow-through, attentiveness, supervision, documentation, and following the Mid-Hudson policies and procedures. While doing these things I will be successful and so will Mid-Hudson Cooperative."

Mid-Hudson would like to introduce Ryan Zielinski, as well, by saying: Ryan recently joined Mid-Hudson Cooperative in May, as our newest Marketing Representative. He is new to the insurance industry but shows a lot of excitement for the opportunity to join our team. Ryan graduated from Castleton State College, in Vermont, with a Bachelor's degree in Marketing & Management in 2013. While attending Castleton, he was a part of the baseball program, in which he excelled with multiple accolades and records for his program.

With his sports oriented background, Ryan shows a lot of drive to learn the industry and what it has to offer. He plans to attend the University of Albany in the Fall, to start his Master's program. With a fresh outlook on the industry, Ryan is striving to build relationships with whomever he meets. He looks forward to gaining experience and absorbing all the knowledge he can.

His current role is an underwriting assistant for personal lines, to build some experience in the industry. The role will transition into a Marketing Representative, assisting Roy Denny, for both Mid-Hudson Cooperative Insurance Company and Claverack Cooperative Insurance Company. ◆

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Coming soon in The URB Insider will be a look at Solar Panels and related insurance issues.

From Pennsylvania

Recently, the Pennsylvania Superior Court made a ruling in the asbestos case of *Sterling v. P&H Mining Equipment, Inc*., 1006 EDA 2014 (Pa. Super. Ct. April 17, 2015). The Superior Court affirmed the ruling of the Court of Common Pleas of Philadelphia when it granted summary judgment in favor of defendant P&H Mining due to plaintiff, Norman Sterling's failure to provide the required standard of proof in the case. The court noted when evaluating plaintiff's evidence in an asbestos case for summary judgment, the frequency, regularity, proximity standard derived from a prior case, *Eckenrod v. GAF Corp*, 544 A.2d 50 (Pa. Super. 1988) is applied. Although the court articulated this is not a rigid standard, it can be used as an aid in distinguishing cases in which the plaintiff can produce sufficient evidence. In this case, there was insufficient evidence the plaintiff inhaled asbestos from his work for defendant.◆