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URB Forms News	1
Rescission Valid on Innocent Misrepresentation	2
Assault and Battery Exclusion Withstands Scrutiny	4
URB Pays Tribute to Recently Retired Company Executives	6
URB Services Corp. Printing Services	8

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URB Forms News

SF Forms Series Update - Edition 9/16

Groups 1-5 of the SF Forms series were approved by the DFS earlier this Spring. These groups have been released for a sneak preview with an outline of the significant changes to the forms in each group. These forms are not available for adoption yet and will become available when the entirety of the forms series is approved and a companion rate and rule filing has been filed and acknowledged by the DFS.

Groups 6, 7, 8 and 9 have been filed with the DFS and are pending approval. URB expects the last group of forms in the SF series and the SF specialty products to be sent to the DFS soon. URB will keep you posted as to the progress of this forms project.

Other Forms Projects

SF-345 Ed. 9/16 Equipment Breakdown Enhancement Endorsement was recently approved for use by DFS and released for adoption. An SF-345A Equipment Breakdown Enhancement Endorsement known informally as the "power plus" is pending approval at DFS. URB continues to work on an ML home sharing and unmanned aircraft coverage endorsements, as well as a few other miscellaneous endorsements. Work on the LS forms series should commence soon. ◆

Rescission Valid on Innocent Misrepresentation

In this action, *Estate of Gen Yee Chu v Otsego Mutual Fire Insurance Co.*, 2017 NY Slip Op 01536 [148 AD3d 677], to recover damages for breach of an insurance contract, the plaintiffs appeal from a judgment of the Supreme Court, Queens County, entered November 3, 2014, which, upon an order of the same court dated October 7, 2014, granting the defendant's motion pursuant to CPLR 4401 for judgment as a matter of law, made at the close of evidence, is in favor of the defendant and against them dismissing the complaint.

Ordered that the judgment is affirmed, with costs.

On November 8, 1991, the plaintiff Chien Min Chu (hereinafter the plaintiff) and his now-deceased wife, Gen Yee Chu, purchased a three-story house in Woodside, Queens. It is undisputed that the house contained three separate dwelling units, each with its own kitchen, bathroom, and separate entrance. However, the plaintiff alleges that he believed that the house was a legal two-family dwelling based on documents including its certificate of occupancy and real property tax bills. On November 7, 2006, the plaintiff and his wife applied for and obtained a policy of fire insurance from the defendant Otsego Mutual Fire Insurance Company, indicating on their application form that the number of families in the dwelling was two. After the house was damaged by a fire on July 15, 2011, the defendant rescinded its policy on the ground that the plaintiff and his wife had made a material misrepresentation of fact by stating on their insurance application that the house was a two-family dwelling. The plaintiff and his wife subsequently commenced this action to recover damages for breach of the subject fire insurance policy. The action proceeded to trial, and at the close of evidence, the defendant moved pursuant to CPLR 4401 for judgment as a matter of law. The Supreme Court granted the defendant's motion, finding that the defendant had established, as a matter of law, that it would not have insured the premises if it had been aware that it was a three-family dwelling.

"A trial court's grant of a CPLR 4401 motion for judgment as a matter of law is appropriate where the trial court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party" (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]; *see Geeta Temple-Ashram v Satyanandji*, 142 AD3d 1132, 1134 [2016]; *Family Operating Corp. v Young Cab Corp.*, 129 AD3d 1016, 1017 [2015]). In considering such a motion, "the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant" (*Szczerbiak v Pilat*, 90 NY2d at 556).

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Rescission Valid Continued

Applying these principles here, the Supreme Court properly granted the defendant's motion for judgment as a matter of law. In order to establish the right to rescind an insurance policy, an insurer must show that its insured made a material misrepresentation of fact when he or she secured the policy (*see Joseph v Interboro Ins. Co.*, 144 AD3d 1105 [2016]; *Lema v Tower Ins. Co. of N.Y.*, 119 AD3d 657 [2014]). A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented (*see Caldara v Utica Mut. Ins. Co.*, 130 AD3d 665 [2015]; *Lema v Tower Ins. Co. of N.Y.*, 119 AD3d at 657; *Smith v Guardian Life Ins. Co. of Am.*, 116 AD3d 1031 [2014]).

Here, the plaintiff's own testimony established that his house was structurally configured as a three-family dwelling, and thus, the statement on his insurance application indicating that it was a two-family dwelling was a misrepresentation (*see Almonte v CastlePoint Ins. Co.*, 140 AD3d 658, 659 [2016]; *Lema v Tower Ins. Co. of N.Y.*, 119 AD3d 657 [2014]; *Hermitage Ins. Co. v LaFleur*, 100 AD3d 426, 427 [2012]; *Dauria v CastlePoint Ins. Co.*, 104 AD3d 406, 407 [2013]). Although the plaintiff testified that he believed his house was a legal two-family dwelling, an insurer may rescind a policy if the insured made a material misrepresentation of fact even if the misrepresentation was innocently or unintentionally made (*see Smith v Guardian Life Ins. Co. of Am.*, 116 AD3d at 1032; *McLaughlin v Nationwide Mut. Fire Ins. Co.*, 8 AD3d 739, 740 [2004]; *Curanovic v New York Cent. Mut. Fire Ins. Co.*, 307 AD2d 435, 436 [2003]). Further, the defendant established that the plaintiff's misrepresentation was material through the uncontroverted testimony of its witnesses and documentary evidence, including its underwriting guidelines, which established that the defendant did not insure three-family dwellings, and would not have issued the subject policy if the plaintiff and his wife had disclosed that the house contained three dwelling units (*see Joseph v Interboro Ins. Co.*, 144 AD3d at 1105; *Lema v Tower Ins. Co. of N.Y.*, 119 AD3d at 658; *Hermitage Ins. Co. v LaFleur*, 100 AD3d at 427; *Interboro Ins. Co. v Fatmir*, 89 AD3d 993, 994 [2011]). Thus, there was no rational process by which the jury could have found in favor of the plaintiffs.

Click here to read this case in its entirety.◆

Assault and Battery Exclusion Withstands Scrutiny

Graytwig v Dryden Mutual Insurance Company, 2017 NY Slip Op 03229 [149 AD3d 1424], (decided April 27, 2017) is a Supreme Court, Appellate Division, Third Department cross appeal from a 2016 order of the Supreme Court in Cortland County, which, among other things, granted a motion by defendant, Dryden Mutual Insurance Company, for summary judgment dismissing the complaint against it.

In May 2015, defendant Michael Christian commenced a personal injury action against plaintiff arising from an incident in February 2014, where plaintiff's employee physically removed Christian from plaintiff's bar, causing him to fall. After being advised of the underlying action, defendant Dryden Mutual Insurance Company, plaintiff's insurance carrier, disclaimed any responsibility to defend or indemnify plaintiff based on the insurance policy's assault and battery exclusion. The exclusion, which states that it "is subject to the terms contained in the General Liability Coverage," provides that "[n]otwithstanding anything contained herein to the contrary, . . . this policy excludes any and all claims arising out of any assault, battery, fight, altercation, misconduct or other similar incident," including claims of negligent hiring and supervision.

Thereafter, plaintiff commenced this action against Dryden and Christian seeking a declaration that Dryden is obligated to defend and indemnify plaintiff in connection with Christian's underlying action. Following joinder of issue, Dryden moved for summary judgment dismissing the complaint against it and plaintiff cross-moved for summary judgment. Christian opposed Dryden's motion. Supreme Court found that Christian's claims fell within the assault and battery exclusion, granted Dryden's motion for summary judgment and denied plaintiff's cross motion. Christian and plaintiff cross appeal.

Initially, Christian argues that the terms in the general liability coverage apply, rather than those in the exclusion, as the language providing that the exclusion is subject to the terms in the general liability coverage is controlling over the language that the exclusion applies "notwithstanding anything contained herein to the contrary." The terms of the general liability coverage — in both its definitions of covered occurrences and general exclusions — provide for coverage of bodily injury resulting from intentional acts where only "reasonable force" was used to protect "persons or property." Under these terms, Christian argues that Supreme Court erred in granting summary judgment to Dryden, as a triable issue of fact exists as to whether plaintiff's employee used reasonable force to remove Christian. Notably, in the underlying action, Christian alleged that plaintiff's employee used "excessive and unnecessary force." In the alternative, Christian argues that the terms of the general policy and the exclusion are ambiguous, as the general policy includes coverage for reasonable force and the exclusion precludes coverage where injury results from the acts specified, whether the force used was reasonable or unreasonable.

This Court has previously addressed, and rejected, similar arguments pertaining to a policy in which, with language identical to plaintiff's policy, the assault exclusion began, "notwithstanding anything contained herein to the contrary" (*Handlebar, Inc. v Utica First Ins. Co.*, 290 AD2d 633, 633 [2002], *lv denied* 98 NY2d 601 [2002]). Here, in applying *Handlebar*, Supreme Court properly found that the terms of the exclusion controlled over those

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Assault and Battery Continued

in the general liability coverage, as "language such as a 'notwithstanding' provision 'controls over any contrary language' in a contract" (*Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc.*, 112 AD3d 78, 83 [2013], quoting *Handlebar, Inc. v Utica First Ins. Co.*, 290 AD2d at 635; *see Bank of New York v First Millennium, Inc.*, 607 F3d 905, 917 [2d Cir 2010] ["This Court has recognized many times that under New York law, clauses similar to the phrase '[n]otwithstanding any other provision' trump conflicting contract terms"]). Thus, as the "notwithstanding" provision controls over the language that the exclusion is subject to the general liability coverage, the terms of the general policy remain in full force and effect "*except as altered by the words of the endorsement*," and no ambiguity results (*County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628 [1994] [emphasis added]; *see Handlebar, Inc. v Utica First Ins. Co.*, 290 AD2d at 635).

Finally, Christian asserts that the assault and battery exclusion does not apply because the underlying action alleges acts of negligence. We disagree. "[I]f no cause of action would exist but for the assault, the claim is based on assault and the exclusion applies" and the fact that an insured might be liable under a theory of negligence does not change this (*Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d 347, 350-352 [1996]; *see Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 471-473 [2005]; *U.S. Underwriters Ins. Co. v Val-Blue Corp.*, 85 NY2d 821, 823 [1995]). An insurer that disclaims coverage does not need to provide a defense when it can "demonstrate that the allegations of the [underlying] complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, *in toto*, are subject to no other interpretation" (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]; *accord RSVT Holdings, LLC v Main St. Am. Assur. Co.*, 136 AD3d 1196, 1197 [2016]; *see Sportsfield Specialties, Inc. v Twin City Fire Ins. Co.*, 116 AD3d 1270, 1274 [2014], *lv denied* 23 NY3d 909 [2014]).

Here, the record supports Supreme Court's finding that there is no material dispute as to the relevant facts. In the underlying action, Christian alleged that plaintiff's employee "attack[ed]," "push[ed]" and "assault[ed]" him. As described in the sworn statements of Christian and various witnesses, the incident at issue occurred when plaintiff's employee ejected Christian from plaintiff's bar by placing him in a headlock and pushing him out on to an icy sidewalk where he fell and struck his head. Multiple witnesses allegedly saw plaintiff's employee pick Christian up and carry him to the exit, apparently while in the headlock. Plaintiff's employee also admitted in a sworn statement to police that he placed his left arm "over and behind" Christian, took him to the exit and pushed him outside and that he could not tell if Christian then "slipped or he never had his footing." As it is readily apparent that Christian's claim is based upon an assault for which coverage is precluded, and the exclusion also specifically precludes coverage for claims of negligence arising out of an assault or similar misconduct, it is clear that Dryden met its burden (*see Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d at 352; *Sportsfield Specialties, Inc. v Twin City Fire Ins. Co.*, 116 AD3d at 1275; *Handlebar, Inc. v Utica First Ins. Co.*, 290 AD2d at 635; *compare M.J. Frenzy, LLC v Utica Natl. Ins. Group*, 309 AD2d 566, 567 [2003]). Accordingly, Supreme Court properly granted summary judgment to Dryden. In light of this determination, the parties' remaining contentions have been rendered academic.

Click here to read this case in its entirety.◆

URB Pays Tribute to Recently Retired Company Executives

Robert (Bob) Baxter of Dryden Mutual Insurance Company located in Dryden, New York recently retired as Chief Executive Officer. Bob served as a commissioned officer in the United States Air Force from 1968 until 1973. After leaving the military, he started his insurance career at Allstate Insurance Company as a personal lines trainee and worked his way up to senior underwriter. After Allstate, Bob went to Reliance Insurance Company where he became an underwriting manager before getting promoted to marketing manager for all lines of business in Ohio. He next went to The Hartford Insurance Group as regional office marketing manager and then National Grange Mutual Insurance Group as regional marketing manager. He then worked at General Accident Insurance Group as branch manager before joining Dryden Mutual. He has served as Chief Executive Officer of Dryden Mutual since 1994. Bob is a graduate of the University of Rochester with a bachelor's degree in English literature and a minor in economics.

Bob feels the greatest asset at Dryden Mutual is the employees, and his greatest professional accomplishment has been radically transforming the financial results of Dryden Mutual over the past 23 years. In 1993, Dryden Mutual wrote over $10.3 million in premium with a surplus of over $7.1 million. In 2016, Dryden Mutual wrote $62 million in premium with a surplus of $130 million.

Bob and his wife Sandy have three grown children. He hopes to spend more time with his family during retirement. Immediately after formally retiring, Bob became a product development consultant to the company.◆

John D. Reiersen of Kingstone Insurance Company located in Kingston, New York retired as

Executive Vice President at the end of 2016. John's 52-year career in insurance began when he joined the New York State Insurance Department as a Junior Insurance Examiner Trainee on June 11, 1964. John ended a 25-year career at the Department with his last role as Chief Examiner in the Property and Casualty Insurance Bureau. In 1989, John joined the Robert Plan Corporation in a senior executive position and served from 1990-2000 as President of Eagle Insurance Group. John was elected President of Commercial Mutual Insurance Company (now Kingstone Insurance since 2009) in 1999 and Chief Executive Officer in 2001.

John served in this role until 2011 when he took the job of Executive Vice President. John is a graduate of Brooklyn College with a Bachelor of Science in Accounting. He holds the professional

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URB Pays Tribute Continued

designations of Chartered Property Casualty Underwriter (CPCU), Certified Financial Examiner (CFE) and Certified Insurance Examiner (CIE).

John has filled a variety of roles during his career to accomplish genuine success. John is proudest of rescuing Commercial Mutual and building it into a very successful company from 2001 through 2011. The company wrote $8 million in premium with a surplus of $1.5 million in 2002. In 2016, Kingstone Insurance wrote over $103 million in premium with a surplus of over $49 million. He credits the employees of Kingstone Insurance as its greatest strength with an excellent team dedicated to providing outstanding customer and producer service.

John grew up in Brooklyn, New York and moved to Port Jefferson in 1971, where he still resides with Jeanie, his wife of over 50 years. John and Jeanie have two grown children and five grandchildren. In his retirement, John plans to continue traveling the world. In addition, John has been elected President of the Independent Agents and Brokers Foundation by the Independent Agents and Brokers of Suffolk County. John plans to focus his efforts on attaining the goal of the Foundation which is to raise $1,250,000, in order to finance an insurance major at the School of Business of Stony Brook University. John will remain on the Board of Directors of Kingstone Insurance.◆

Thomas R. Ruane, known to his colleagues as Tom, retired in February as President of Security Mutual Insurance Company located in Ithaca, New York. Tom joined Security Mutual in November 1973 and became President in 1991. Tom has been in the insurance business since he began his career at New York Mutual Underwriters on February 29, 1972. New York Mutual Underwriters is a joint underwriting association that is 50 percent owned by Security Mutual. Prior to working at New York Mutual Underwriters, Tom spent a short time working for a sporting goods store after graduating from college. Tom is a graduate of Niagara University with a bachelor's degree in economics and minors in theology and philosophy. He holds the Chartered Property Casualty Underwriter designation (CPCU) and also has his New York P&C agent license and his P&C broker license.

Tom is proud of the company's growth during his tenure and the Security Mutual team that has worked so hard to make it happen. The company wrote $15.9 million in premium with a surplus of over $45.7 million in 1991. In 2016, Security Mutual wrote over $42.1 million in premium with a surplus of over $55.7 million.

Tom was born in Ithaca, New York, where he still resides with his wife, Donna Augustine. Tom and Donna have two grown children and four grandchildren. In his retirement, Tom plans to continue traveling the world, playing golf and spending time with his family. Tom will serve as the Chairman of the Board at Security Mutual.◆

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