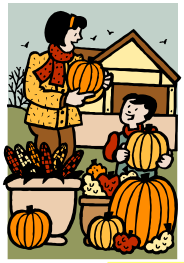

URB INSIDER

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Inside this issue:

Editor's Note: The material contained in this publication is provided as information only, and is not intended to be construed or relied upon as legal advice in any manner. Always consult an attorney with the particular facts of a case before taking any action.

In the Wake of Hurricane Katrina

A couple has sued their insurers, saying the companies have refused to pay for the damage to their home caused by Hurricane Katrina. This lawsuit was filed in Jackson County Chancery Court in Mississippi on behalf of Paul Leonard, a police officer, and his wife, Julie. The suit was brought by Richard Scruggs, a lawyer who is known for extracting generous settlements from tobacco and asbestos manufacturers. Defendants in the suit are Nationwide, Jay Fletcher Insurance Co. and reinsurance companies in Europe and the United States.

In a statement, Richard Scruggs is quoted as saying, "The case will set the precedent for potentially thousands of similar lawsuits that will be filed in a coordinated legal action involving families in Mississippi, Louisiana and Alabama."

According to published reports, the lawsuit states the Leonards bought a homeowner's policy from Nationwide in 2004. The policy included a clause that the Leonards would pay 2 percent of the value of their home in a hurricane deducible. The suit purportedly alleges that on September 12, 2005, without inspecting damage to the Leonards' home, Nationwide sent them a letter denying coverage for their losses. The lawsuit is reported to seek equitable relief under the law, the rewriting of insurance policies and coverage for the Leonards' home and personal property.

But this isn't the first insurance lawsuit filed as a result of Katrina, and it is not likely to be the last. A lawsuit was also filed in September by Mississippi Attorney General Jim Hood.

The question presented in both cases is whether the property damage in Katrina's path was caused by the hurricane's 145 mph winds or a storm surge that sent the Gulf's waters up to 30 feet high that rushed more than a mile inland, beyond the designated flood zones?

When Hood filed his suit against Allstate, State Farm, Nationwide, Mississippi Farm Bureau and some other companies operating in the state, he argued that they should pay for all the Katrina damages, whether caused by wind, wind-driven water or storm surge flooding. Insurers, however, take the position that their policies don't cover floods such as the storm surge that was water pushed by the force of wind. Flood insurance is offered by the federal government.◆

Around the Nation

Insurer Wins $10 Million Reversal of Judgment

On June 18, 2000 Wayne Mathews, a 20 year old college student, and some of his friends had gathered for the evening outside of the Mathews' home in Katy, Texas. At about 10:30 p.m. Wayne's father, Kent Mathews, told Wayne to "wrap it up" and then retired for the night. Wayne, along with his friends, had been drinking. They then built a cross in the driveway and on the front lawn of the Mathews' house. They subsequently took it to the property of Dwayne and Maria Ross, where they burned it.

The Rosses filed a civil lawsuit in Texas state court against Wayne, his parents and Wayne's friends. The case was removed to the U.S. District Court for the Southern District of Texas by the U.S. Attorney's Office. Kent Mathews had a homeowners policy with Allstate Texas Lloyds Insurance Company, which provided a defense to the Mathews under a reservation of rights. Allstate had filed a declaratory judgment action seeking a ruling that it need not indemnify Mathews for any judgment against him or pay for his defense of the case.

The case eventually went to trial against all the defendants except Wayne's mother, who had been dismissed from the case. A jury found Wayne and his friends liable.

The judgment was $10 million dollars in damages. The jury also found Kent Mathews negligent for having allowed his son to use his property. They said, however, that the negligence was not the proximate cause of the cross burning incident. As a result of a motion made by the Rosses, the trial judge amended the judgment to allow Kent Mathews to be held vicariously liable for Wayne's actions. The judge said that Kent knew his son had alcohol problems and should not be trusted.

...the negligence was not the proximate cause of the cross burning incident

Allstate was defending Kent Mathews. Mathews filed a notice of appeal through his Allstate assigned counsel. However, he subsequently assigned all his rights against Allstate to the Rosses, in exchange for their agreement to delay filing writs of execution against his property. Mathews dropped his appeal and fired his Allstate Counsel. Allstate then unsuccessfully sought permission from the trial judge to intervene in the case to pursue the appeal.

The appellate court reversed the trial judge's denial of Allstate's motion to intervene. In the appellate judge's opinion, the insurer had sufficient interest in overturning the judgment against its insured that would not otherwise have been appealed, pointing out that Allstate faced exposure up to the policy limit of $300,000 if it lost the pending declaratory judgment action.

The appellate court further rejected the Ross' argument that Allstate should have intervened sooner. Allstate's interests were being adequately protected by the counsel hired by Allstate to represent Kent Mathews. Once Allstate did intervene, it did so within the time during which a party could have appealed, so the Rosses suffered no prejudice.

On the merits of the appeal, the 5th Circuit reversed the $10 million dollar judgment against Mathews. In doing so, the panel reversed the vicarious liability finding against Kent Mathews.

The panel said, it was the "height of absurdity" to believe that Kent Mathews gave his son permission to use the Mathews' property to build the cross and transport it to the home of the victims, Dwayne and Maria Ross and their two children. "There are no facts in the record suggesting that it was foreseeable to Kent Mathews that his son would commit an act of racial terrorism upon receipt of authority to "wrap things up," the panel said. "Indeed, the jury explicitly found that Wayne's acts were unforeseeable to Kent." The case is Ross et al v. Allstate Texas Lloyds Insurance Co., No. 03-20989. (5th Cir. Sept. 21, 2005).◆

Selected General Liability Classes

Underwriting Corner

Year 2004–1995	Class	Earned Premium	Actual Incurred Losses	Ratio
Restaurants	07001	38,057,053	20,171,258	53.00%
Carpentry NOC	36007	22,931,325	17,641,099	76.93%
Taverns	07003	13,081,361	4,048,873	30.95%
Apartments	01001	6,426,616	1,736,148	27.01%
Painting Decoration Paper	40080	7,023,154	3,199,221	45.55%
Building or Premises NOC	12019	5,020,945	2,066,207	41.15%
Dwelling 1 Family	02001	3,597,196	1,840,467	51.16%
Clubs Lodges NOC	12031	3,029,910	620,139	20.47%
Dry Wall	36009	2,307,584	678,632	29.41%
Service NOC	37052	1,944,432	316,876	16.30%
Roofing	36028	3,781,635	3,515,742	92.97%
Retail NOC	06054	2,875,683	1,423,004	49.48%
Logging & Lumbering	40033	1,112,708	46,569	4.19%
Mason	36020	3,526,312	1,855,724	52.63%
Electrician	36010	2,472,190	1,279,879	51.77%
CPL 2 Family	14003	1,363,811	154,600	11.34%
Janitor & Cleaning Service	36018	5,466,647	1,282,647	23.46%
Plumbing Domestic NOC	36027	1,754,374	194,577	11.09%
Mobile Home Parks	40085	1,392,763	296,722	21.30%
Delicatessen	06026	1,950,637	1,755,896	90.02%
Tile & Stone Installation	37053	952,869	37,700	3.96%
Grocery Retail NOC	06034	1,059,118	731,010	69.02%
HVAC Installation and Repair	37003	1,651,238	206,758	12.52%
Storage Building	12057	844,235	347,111	41.12%
CPL 1 Family	14001	900,038	222,028	24.67%
Dwelling 2 Family	02005	707,388	930,411	131.53%
Welding & Cutting	36033	740,079	45,397	6.13%
Office	06009	1,604,179	180,498	11.25%
NYC CPL	14020	1,056,391	711,321	67.34%
Gasoline Pumps	12037	361,452	97,000	26.84%
Landscape, Gardening	37027	1,669,947	684,111	40.97%
Plumbing Domestic NOC	36026	1,113,404	402,596	36.16%
Mobile Home Parks	40086	1,381,295	897,180	64.95%
Motel w/o Pool or Beach	04006	963.840	276,416	28.68%
Beauty Parlor	12010	723,328	87,190	12.05%

Case Briefs

No Insurable Interest, No Coverage

This litigation involves residential real property that formerly belonged to plaintiff's late parents in Schenectady. As attorney-in-fact for his mother, plaintiff executed a deed conveying the property to himself in 1987. Plaintiff's mother executed a deed and conveyed the property to plaintiff's sister in 1987.

Plaintiff's mother died in 1995 and plaintiff's father died in 1998. Plaintiff obtained a homeowners insurance policy from Nationwide in 1999. Plaintiff's sister asserted title to the property in 2000 and commenced and action to quiet title. By a December, 2000 order plaintiff's deed was declared null and void. Plaintiff did not appeal. He continued to insure the property under the homeowners policy.

In 2000, the premises were vandalized while not occupied, prompting plaintiff to file a claim. Nationwide determined plaintiff did not own the property and his sister maintained insurance on the property. Nationwide denied coverage based on no insurable interest. Plaintiff commenced an action against Nationwide in Supreme Court which granted defendant, Nationwide, summary judgment.

On plaintiff's appeal, the Supreme Court, Appellate Division, affirmed. They said, "No contact or policy of insurance...shall be enforceable except for the benefit of some person having an insurable interest..."Cassadei v. Nationwide Mutual Fire Insurance Company, 2005 N.Y. Slip Op. 97628. ◆

No Coverage For Independent Negligence

In a commercial general liability policy, a vendor's endorsement issued to a manufacturer of sideloader forklifts covered only personal injury claims arising from a defective product. It did not cover a personal injury claim caused by the vendor's independent acts of negligence.

There was no dispute between the parties that the vendor's negligence and not any defect in the manufacturer's product, caused the accident in which a forklift operator sustained brain injuries. But the vendor's endorsement covered vendors "only with respect to Bodily Injury or Property Damage arising out of" the manufacturer's products "which are distributed, sold, repaired, serviced demonstrated, installed or rented to others".

The Court of Appeals concluded that the coverage for bodily injuries "arising out of the manufacturer's products" meant injuries arising out of defects in the products, rather than the vendor's negligence. The Court also held the phrase, "which are distributed, sold, repaired, serviced demonstrated, installed or rented to others," was to be read to describe the vendor's activities with respect to the manufacturer's products, and not to indemnify the vendor for its negligent performance of those activities." Raymond Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 2005 N.Y. Slip Op. 05453. ◆

Court of Appeals Clarifies Serious Injury Standard

In three separate cases, the Court of Appeals has clarified the scope of a "serious injury" under the No Fault Law when it comes to soft-tissue injuries such as herniated disks.

Summary dismissal of the complaint may be appropriate in these cases. This is true even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury, such as a gap in treatment, an intervening medical problem or a pre-existing condition.

For instance in one of these cases, the injured plaintiff did not provide an explanation as to why he failed to pursue any treatment for his injuries after the initial six month period, and did not address the effect of his kidney disorder on the injuries he claimed resulted from the motor vehicle accident. In this circumstance, the Court of Appeals held that summary dismissal of his complaint was correctly granted. Pommells v. Perez, 2005 N.Y. Slip Op. 03277.

Note: Serious injury is defined in Section 5102(d) of the New York Insurance Law. ◆

No Notice, No Landlord Negligence

In December 2002, plaintiff's daughter suffered personal injuries when she was bitten by a bit bull owned by defendant, Noreen Lamberty. Defendant, Darrel Ellinwood is the owner/ landlord of the premises where Lamberty resided.

Plaintiff commenced this action alleging, inter alia, that Lamberty and Ellinwood either had actual or constructive notice of the dog's vicious propensities. Ellinwood successfully moved for summary judgment, prompting an appeal. The appellate court said the motion was properly granted.

A landlord may be liable for the attack by a dog kept by a tenant if the landlord has actual or constructive knowledge of the animal's vicious propensities and maintains sufficient control over the premises to require the animal to be removed or confined. (See Strunk v. Zoltanski, 62 N.Y.2d 572, 575 [1984]; Mulhern v. Chai Mgt., 309 A.D.2d 995, 996 [2003], lv denied 1 N.Y.3d 508 [2004]).

Ellinwood established that he rarely came to the residence, did not know about this dog and had no knowledge of the dog's vicious propensities. Lamberty's deposition corroborated Ellinwood's statements. Plaintiff maintained that Ellinwood should have had knowledge of the dog because the neighbors knew about it and there was a "Beware of the Dog" sign posted by Lamberty.

The appellate court said the fact that others may have had notice of the dog's allegedly vicious nature does not establish that Ellinwood, who at most visited the premises once a year, and who received no complaints from neighbors, was similarly on notice. Smedly v. Ellinwood, 2005 N.Y. Slip Op. 97532.◆

Intentional Acts Not Covered By Policy

In February 2002, defendant, Alfred S. Cook shot and killed Richard A. Barber (decedent) after a disagreement. Decedent had entered Cook's home without permission, and Cook who was armed with a handgun, retreated to his bedroom to retrieve a shot gun and then returned to the living room. There the fatal confrontation occurred.

Cook was indicted for a number of crimes and acquitted on the basis of justification that Barber attacked Cook.

Thereafter, the administrator of decedent's estate resumed prosecution of a wrongful death action commenced against Cook shortly after the shooting. Cook sought coverage under his homeowner's policy.

The plaintiff insurer moved for summary judgment that Cook's shooting of decedent was not a covered occurrence under the policy and that, in any event, it fell within the policy's expected or intended exclusion. Cook cross moved. Supreme Court denied plaintiff's motion and partially granted Cook's motion. On appeal, the court held the facts and Cook's admission established that Cook intended the result of the bodily injury to the decedent. As a matter of law, Cook's actions were not covered. Automobile Insurance Company of Hartford v. Alfred S. Cook, 2005 NY Slip Op. 97160.◆

Tenant Failed to Establish Landlord Negligence

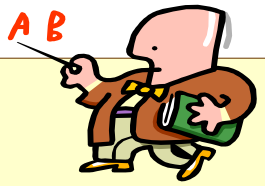
The tenant of a building tripped on a beer bottle at 5 a.m. while descending the steps of the dwelling where he resided.

In testimony, the tenant acknowledged that the bottle was not on the steps at 8:30 p.m. the night before.

Furthermore, there was no evidence offered to indicate that the landlord was notified of any debris that night or that the bottle was present for a sufficient period of time that employees would have sufficient time to discover and remedy the problem.

As such, the Court of Appeals held the tenant failed to raise a triable issue of fact whether the landlord had constructive notice of a dangerous condition in the stairwell. Rivera v. 2160 Realty Co., L.L.C. 2005 N.Y. Slip Op. 02574.

Note: Actual or constructive notice of a problem or defect is the basis upon which plaintiff could show landlord was negligent. ◆



The What and Who of Petroleum Spill Liability

A great many claims are generated annually from petroleum spills and cost insurers a great deal of expense in adjustment, defense and indemnity costs. Some carriers are fortunate enough to have an applicable pollution exclusion, But if a pollution exclusion does not apply and there is coverage on a policy for these types of losses, they can be complex to handle.

Fundamentally, two types of claims arise from petroleum spills that create investigation and litigation issues in claim departments. The first type that can present issues is a claim for clean up costs from a governmental agency. In New York, the agency charged with this responsibility is the Department of Environmental Conservation. The second type that can be problematic is a claim for damage or injury to a third party resulting from the petroleum spill.

In New York, these types of claims are governed by Article 12, Section 181 of the Navigation Law. NY CLS Nav §181, which is commonly referred to as The Oil Spill Act. In pertinent part, the Navigation Law states, "Any person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained, as defined in this section. In addition to cleanup and removal costs and damages, any such person who is notified of such release and who did not undertake relocation of persons residing in the area of the discharge in accordance with paragraph (c) of subdivision seven of section one hundred seventy-six of this article, shall be liable to the fund for an amount equal to two times the actual and necessary expense incurred by the fund for such relocation pursuant to section one hundred seventy-seven-a of this article."

As the law states, this statute imposes strict liability otherwise known as liability without regard to fault. The title given to spillers under this statute is "responsible party." No evidence of negligence is needed for a responsible party to be liable. As set forth in the statute, the only defenses that may be raised by a person responsible for a discharge are: "an act or omission caused solely by (i) war, sabotage, or governmental negligence or (ii) an act or omission of a third party other than an employee or agent of the person responsible, or a third party who act or omission occurs in connection with a contractual relationship with the person responsible, if the person responsible establishes by a preponderance of the evidence that the person responsible (a) exercised due care with respect to the petroleum concerned, taking into consideration the characteristics of petroleum and in light of all relevant facts and circumstances; and (b) took precautions against the acts or omission of any such third party and the consequences of those acts or omissions..."

The statute goes on to read, "These defenses shall not apply to a person responsible who refuses or fails to (a) report the discharge, or (b) provide all reasonable cooperation and assistance in clean up and removal activities undertaken on behalf of the fund by the department. In any case where a person responsible for a discharge establishes by a preponderance of the evidence that a discharge and the resulting cleanup and removal costs were caused solely by the act or omission of one or more third parties described above, the third party

Petroleum Spill Liability Cont'd

shall be treated as the person or persons responsible for the purposes of determining liability under this article.

The Oil Spill Act is a broad statute. Landowners are particularly vulnerable to liability under the Oil Spill Act for the acts of third parties, including tenants. It also affects large oil companies, owners, lessees, drivers of cars, homeowners with oil tanks, and owners of office buildings or shopping centers with parking lots from which oil-tainted run off may be expected. Any discharge of petroleum is covered. Discharge is broadly defined in the Oil Spill Act to include any intentional or unintentional action or omission resulting in the releasing of petroleum into the waters of the state or onto the lands from which it might flow or drain into those waters. Nav. Law § 172(8).

A person can be liable for a discharge of petroleum merely because of such person's ownership of property where an oil spill occurred even if the spill occurred before such person acquired the property. White v. Long, 85 N.Y.2d 564.

If a landowner has the ability to control a tenant's activities on its property and has reason to believe that a tenant would create an oil spill, the landowner will be liable for cleanup costs as a discharger under the Navigation Law. However, a landowner will not be liable for a midnight dumper since the landowner cannot control the events resulting from the discharge. State v. Green, 96 N.Y.2d 403. The Navigation Law was amended in 2003 to clarify the extent to which a discharger may raise the acts or omissions of a third party as a defense. Nav. Law § 181(4). Any party relying on an indemnity should make sure the indemnity specifically covers liability arising under the Navigation Law.

Any person liable for a discharge must notify DEC within two hours of the discharge. Nav. Law § 175. Notice should be given to any persons adversely affected by the discharge to avoid, or at least reduce, the risk of premises liability and other tort claims.

Any person responsible for the discharge shall immediately undertake to contain it. Nav. Law § 176(1). The DEC may undertake the clean up or direct the discharger to do so. DEC may bring a claim for recovery against a discharger for six years from when DEC makes a payment. A person threatened by the discharge may also clean it up with DEC approval.

If there is more than one discharger, they can enter an agreement among themselves for the clean up. Once clean up is complete, a covenant not to sue from DEC should always be sought, in order to protect the rights of the parties who conducted the clean up.

Each discharger should give notice and proof of loss to its insurers. But, most insurance policies contain exclusions for pollution of a gradual nature whichare generally enforceable.

The pollution exclusion (based on a URB form) has been successfully enforced in State of New York v. Capital Mutual Insurance Company, 213 A.D.2d 888, which is a Supreme Court, Appellate Division, Third Department decision rendered on March 16, 1995 and still cited today. The court held that the pollution exclusion stated "in clear and unambiguous terms that the policy does not apply to liability resulting directly or indirectly from the discharge of pollutants into or upon land." Id.◆

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Editor/Creator: Kimberly Davis, Esq., CPCU
Contributor this Issue:
Timothy Curren, CPCU

We're On the Web!
urbratingboard.com
E-mail us at:
jean@urbratingboard.com
mary@urbratingboard.com
tim@urbratingboard.com
kim@urbratingboard.com

At the Court of Appeals

Court Holds No Cameras Statute Constitutional

The New York Court of Appeals has held that Section 52 of New York's Civil Rights Law, which bans audio-visual coverage in most courtroom proceedings, does not violate the Federal or State Constitution.

Court Television Network, filed a complaint against the State of New York, seeking a declaratory judgment that Civil Rights Law §52 was unconstitutional. The suit alleged that it denied the right of access to trials guaranteed by the First Amendment of the United States Constitution and Article I, Section 8 of the New York Constitution. The premise of the suit was that most states permit televised trials and that the evidence supporting access to information for the general public outweighed any problems of having cameras in the courtroom.

Under the United States Constitution, the media possesses the same right of access as the public, so they may report what people in attendance have seen and heard. Section 52 of the Civil Rights Law does not prevent the press from attending trials and reporting on the proceedings, it only prevents them from bringing cameras in the courtroom. Neither the federal or state constitutions require or provide for televised trials.

The New York courts have previously held that the right of the press to attend trials is the same as that of any citizen. The Court noted that in New York, the decision whether or not to permit cameras in the courtroom is a legislative one. Beginning in 1987, the New York Legislature has, on four occasions, temporarily permitted certain broadcasts. Under Judiciary Law § 218, the Chief Judge of the State could authorize an experimental program. The Legislature reviewed findings and reports on audiovisual equipment in the courtroom, all of which recommended them, and rejected the recommendations. Courtroom Television Network LLC v. State of New York, 2005 N.Y. Slip Op. 05120. ◆