URB INSIDER

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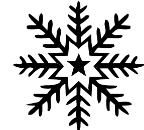
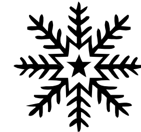
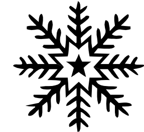
Editor's Note: The material contained in this publication is provided as information only, and is not intended to be construed or relied upon as legal advice in any manner. Always consult an attorney with the particular facts of a case before taking any action.

Congress Acts on TRIA

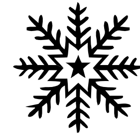


On December 17, 2005, the House of Representatives approved a bill that was previously approved by the Senate to extend the life of the Terrorism Risk Insurance Act. Known as the Terrorism Risk Insurance Revision Act of 2005, this bill reconciled the different versions passed in both the House and Senate. The legislation will be sent to President Bush for his signature for it to become law.

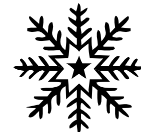




This legislation will keep the federal terrorism backstop in place through 2006 and 2007, but the extension contains some modifications from the original legislation. Some of these modifications are:



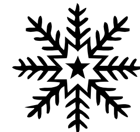
- Coverage will not be as broad. Commercial auto, burglary/theft, surety and professional liability will no longer be covered. Nuclear, chemical, biological and radiological coverage will not be required in property and liability policies.



- The event trigger will increase:
  $5 million in insured losses in 2005

  $50 million in insured losses in 2006

  $100 million in insured losses in 2007

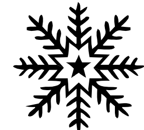


- The deductible for which the industry is responsible will increase:

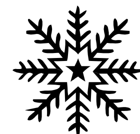
  15 percent in 2005

  17.5 percent in 2006

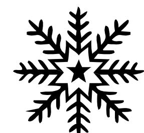
  20 percent in 2007



The version of TRIA that will go before the President for signature will no longer mandate coverage for farmowners multi-peril insurance.



We will begin filing action for compliance once the President has signed the legislation into law and the NAIC has released a model bulletin and/or disclosure. In addition, we await advice from NYSID in the form of a Circular Letter. As soon as this information is available, we shall proceed to file the necessary disclosures and advise you of the status.◆



Non-Cumulation Clause Saves Insurer $600,000

Editor's Note: Below is the sum and substance of the New York Court of Appeals Opinion in Christopher Hiraldo, &c., et al v. Allstate Insurance Company, et al.

In Hiraldo v. Allstate Insurance Company, 2005 NY Slip Op 07830, Allstate Insurance Company issued a $300,000 liability policy for a term of one year. Upon its expiration, the policy was renewed for another year, and then again for a third. Plaintiff Christopher Hiraldo was allegedly exposed to lead paint continuously during the terms of all three policies. The question is whether, if that allegation is true, the available insurance coverage is $300,000 or $900,000.

The clear language of the policies answers the question: the exposure caused only a single loss, and Allstate's liability is limited to $300,000, even though several policies are involved.

Christopher was born on August 21, 1990, and lived with his mother, plaintiff Alexandria Hiraldo, at 156 Norwood Avenue in Brooklyn until November 1993. Plaintiffs allege that Christopher was exposed to lead paint throughout the time he lived in the building, and suffered neurological injuries as a result.

Allstate provided the owners of the building with liability coverage. The first of the policies at issue here took effect on February 15, 1991, and its "policy period" extended for one year. A second one-year policy became effective on February 15, 1992 and a third on February 15, 1993.

Each policy provided $300,000 in liability coverage, and the policies were identical in all other relevant respects. Each policy provided: "This policy applies only to losses which occur during the policy period, as shown on the declarations page." Each also included a so called "non-cumulation clause," as follows: "Regardless of the number of insured persons, injured persons, claims, claimants or *policies* involved, our total liability under Business Liability Protection coverage for damages resulting from one loss will not exceed the limit of liability for Coverage X shown on the declarations page. All bodily injury, personal injury and property damage resulting from one accident or from continuous or repeated exposure to the same general conditions is considered the result of one loss."

Christopher and his mother sued their landlords for Christopher's injuries, and obtained judgments totaling approximately $700,000. Allstate paid $300,000 into court, and asserted that that payment discharged its liability. Plaintiffs disagreed and brought this action to recover from Allstate the rest of the landlords' obligation. Supreme Court granted summary judgment dismissing the complaint, and the Appellate Division affirmed. The Court of Appeals granted leave to appeal and has affirmed the case.

Christopher's injuries allegedly resulted from "continuous . . . exposure to the same general conditions" and so from "one loss" within the meaning of each policy. Plaintiffs contend, however, that, since the loss occurred during each of three policy periods, and each policy applies "to losses which occur during the policy period," Allstate is liable up to its policy limit under each policy. The Court of Appeals has disagreed.

But for the non-cumulation clause in the policies, this would be a difficult case. Intuitively it does not seem right that an insurer that never issued more than $300,000 in coverage could be liable for $900,000 for a single loss.

Thus, an Appellate Division case involving claims for exposure to asbestos holds that "the limit of liability, where an insurer has issued renewal policies, shall be the policy limits for one policy" (Matter of Liquidation of Midland Ins. Co., 269 AD2d 50, 60 [1st Dept 2000]). Yet this result is also counterintuitive: If each of the successive policies had been written by a different insurance company, presumably each insurer would be liable up to the limits of its policy. Why should plaintiffs recover less money because the same insurer wrote them all? Some courts have held that successive policy limits may be cumulatively applied to a single loss, where the policies do not clearly provide otherwise. (Natl. Union Fire Ins. Co. v. Farmington Cas. Co., 1 Misc 3d 671 [Sup Ct, NY County 2003]; Riley v. United Services Automobile Ass'n., 161 Md App 573, 871 A2d 599 [Ct Spec Apps 2005]).

But here, the policies do clearly provide otherwise. The non-cumulation clause says that "[r]egardless of the number of . . . policies involved, [Allstate's] total liability under Business Liability Protection coverage for damages resulting from one loss will not exceed the limit of liability . . . shown on the declarations page." That limit is $300,000, and thus Allstate is liable for no more. We agree with the recent decisions of three Federal District Court judges, applying New York law interpreting identical policy language, that the non-cumulation clause is fatal to plaintiffs' claim (*see* Bahar v. Allstate Ins. Co., 2004 WL 1782552 [SD NY, Aug. 9, 2004]; Greene v. Allstate Ins. Co., 2004 WL 1335927 [SD NY, June 15, 2004]; Greenidge v. Allstate Ins. Co., 312 F Supp 2d 430 [SD NY 2004]).

The non-cumulation clause in policies can take various forms and may still be held applicable by the courts. Without a strong non-cumulation clause in a policy, it is possible in these types of cases, carriers may be exposed for more than one policy limit in the event of a suit where the plaintiff is exposed to injury beyond the duration of one policy period. This is an important case of which to take note for any insurer who may face exposure from lead claims. ◆

Underwriting Corner

Some Commercial Lines Class Rates

Class Rates Year 2004-2000 Classes	Premium Earned	Actual Incurred Losses As of 3/2005	Ratio
Restaurants w/ Fire Protection	12,341,305	3,648,802	29.57%
Mercantile All Other	6,571,750	2,308,686	35.13%
Bars and Taverns	5,990,354	1,896,619	31.66%
Warehouse All Other	4,173,535	738,609	17.70%
Apartments 5-10 Units	3,063,739	1,577,642	51.49%
Offices and Banks	2,602,942	3,270,381	125.64%
Motor Vehicle Repairing	2,415,136	916,699	37.96%
Clubs NOC	2,377,488	445,211	18.73%
Non-Manufacturing All Other	2,070,945	257,457	12.43%
Restaurants w/o Fire Protection	2,048,686	672,445	32.82%
Habitational All Other	1,895,899	1,014,281	53.50%
Manufacturing All Other	1,551,430	352,277	22.71%
Food Products Including Bakeries	1,211,067	418,309	34.54%
Boarding House 6-10 Boarders	1,121,727	261,239	23.29%
Warehouses Cold Storage	990,246	347,928	35.14%
Apartments 11-30 Units	961,507	609,659	63.41%
Boarding House 11-30 Boarders	798,229	88,710	11.11%
Mercantile Wearing Apparel	636,380	571,911	89.87%
Beauty Parlors	597,385	244,325	40.90%
Motel & Hotels , 11 Units	479,462	454,740	94.84%
Laundries, Other than Self Service	461,791	101,056	21.88%
Manufacturing Furniture & Other Wood Products	418,433	101,396	24.23%
Self Service Laundries & Dry Cleaners	405,782	41,919	10.33%
Housing Developments	392,049	22,752	5.80%

Case Briefs

Scaffold Law Applies During Lunch Break

Commonly referred to as the Scaffold Law, Section 240 of New York's Labor Law was held applicable to a building façade repair worker's fall from a sidewalk bridge erected over a sidewalk at a construction site. This was true even though the worker was on lunch break at the time of the accident, according to Supreme Court, Appellate Division, First Department in the case of Morales v. Spring Scaffolding, Inc., 2005 N.Y. Slip Op 07479.

The sidewalk bridge was constructed and used by the building façade repair workers as a staging area, for storage of equipment, for mixing cement, and as an entryway onto the scaffolding.

In holding for the worker, the court reasoned that even if the worker was on a break at the time of the accident, he would have had to return to the scaffold, which was stored on the bridge.

New York's scaffold law provides for absolute liability of owners, contractors and their agents who direct or control work from a height and as a result of this statute, parties who come under its control have a non-delegable duty to provide safety equipment including but not limited to safety hats, belts, hoists, pulleys and stays to employees who are at work on job sites. McKinney's Labor Law §240. ◆

Building Not Unoccupied Under Policy Meaning

A building damaged by fire was not "unoccupied property" within the meaning of the controlling insurance policy, according to a recent ruling issued by the Supreme Court, Appellate Division, Fourth Department in Gallo v. Travelers Property Cas., 2005 N.Y. Slip Op 07156.

This property policy excluded coverage for loss caused by vandalism to buildings that are unoccupied for 60 consecutive days immediately before the date of this loss which is the subject of the law suit.

However, the insured was able to establish that one person had used the building's storefront as an outpost for his political campaign during the same month as the date of the loss which resulted from the fire.

The insured was also able to establish that another person used the building's basement and the garage to store and perform maintenance on equipment for a landscaping business and was at the building on a daily basis for two to three years preceding the date of loss.◆

Estoppel Results From Insurer Failure to Inquire

In the case of Philadelphia Indem. Ins. Co. v. Horowitz, Greener & Stengel, LLP, ___ F.Supp.2d ___, 2005, the district court for the Southern District of New York held an insurer was estopped from claiming, or had waived right to claim, that its professional liability insurance policy was void. The insurer contended it had not received supplemental forms explaining the insured's affirmative answer to a question posed on the renewal application which asked if the insured knew of any potential claims. The insurer also contended that this omission constituted a material misrepresentation.

Despite the insured's truthful affirmative answer that they knew of such a claim, the insurer issued the policy without making further inquiry.

The court held that where upon the face of an insurance application, a question appears to be not answered at all, or to be imperfectly answered, an insurer waives the want or imperfection in the answer by issuing the policy without making inquiry. ◆

Special Use Must Contribute To Defect

The defendants appeal this personal injury action from an order of the Supreme Court, Kings County, which denied their respective motions for summary judgment dismissing the complaint and cross claims.

The infant plaintiff was injured when the front wheel of the scooter he was riding struck an alleged defect in the sidewalk. The alleged defect was located in a portion of the sidewalk which provides access to the appellants' common driveway, which constituted a special use (see Tedeschi v. KMK Realty Corp., 8 AD3d 658.

Where a sidewalk is adjacent to but not part of the area used as a driveway, the plaintiff bears the burden of proof on a motion for summary judgment of showing that the special use of the sidewalk contributed to the defect (see Ivanyusshkina v. City of New York, 300 AD3d 544). However, if the defect is in the portion of the sidewalk used as a driveway, "the abutting landowner, on a motion for summary judgment, bears the burden of establishing that he or she did 'nothing to either create the defective condition or cause the condition through' the special use of the property as a driveway" (Katz v. City of New York, 18 AD3d 818, 819, quoting Burger v. City of New York, 297 AD2d 770, 771. If the weight of traffic on the driveway could have been a concurrent cause of the defect, the motion for summary judgment should be denied. See Katz v. City of New York, *supra*.

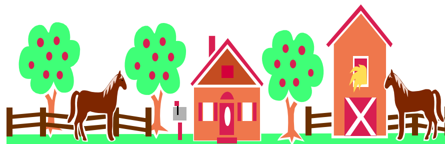
In this case, the appellants failed to meet their burden of establishing that their special use of the sidewalk did not contribute to the alleged defect (see Dos Santos v. Peixoto, 293 AD2d 566, 567). Summary judgment was properly denied. Adorno v. Joslyn Carty, et al., 2005 N.Y. Slip Op 09050.◆

Insured Premises Definition Narrowly Construed

The issue presented in this appeal is the meaning of the words "arising out of" in an "uninsured premises" exclusion contained in a homeowners policy.

A child was injured while left in the insured's care when the child was kicked by a horse in the barn located across the street from the insured's house. The house was insured on a homeowner's policy issued by the defendant, but the barn was not insured under the policy.

The Court of Appeals held in Maroney v. New York Cent. Mut. Fire Ins. Co., 2005 N.Y. Slip Op 07865 that the injury did not occur at a location insured by the homeowner's policy, even though the care of the child commenced at the house. The Court of Appeals held that "arising out of" includes use of the premises. The Court reasoned there was no causal connection between the injury and the insured premises.



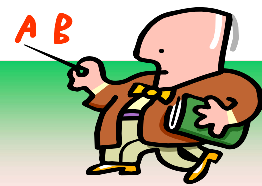
The Court of Appeals opined that the child's injury was causally related to the purpose for which the uninsured premises was being used, which was the care and boarding of horses in the barn and stable. ◆

Constructive Notice Essential to Liability

Plaintiff commenced this negligence action alleging that she was injured when she slipped and fell on a clear substance on the floor of defendant's store. Defendant moved for summary judgment, which was granted, and plaintiff appeals. Plaintiff argues her allegation of a recurring condition was sufficient to raise a question of fact as to whether defendant had constructive notice of the condition.

Defendant met its initial burden establishing that it had no constructive notice by using plaintiff's own deposition testimony.

Plaintiff attempted to establish constructive notice by submitting the affidavit of defendant's former store manager. He stated he recalled occasional puddles of water on the floor when he arrived for work in the morning. He does not identify where these occasional puddles occurred, or state he observed them at the time of day of plaintiff's fall, his statements fail to show anything but a general awareness that a potentially dangerous condition might exist. (see Piacuaadio v. Recine Realty Corp., 84 NY2d 967, 969). Summary judgment was proper. Cochetti v. Wal-Mart Stores, Inc. 2005 N.Y. Slip Op 09168.◆



The Nature of Various Business Entities

A business may be owned by various methods, such as a corporation, an LLC, a partnership, and a sole proprietorship. The nature of the ownership and the definition of who is an insured under the company's insurance policies will determine who has coverage when a loss is sustained.

Corporation (including Subchapter S) - The corporation is a separate entity and carries with it limited liability protection for its owners, known as stockholders. It has perpetual life and is a tax paying entity. Double taxation is one disadvantage as earnings are taxed at the entity level and then taxed again when distributed to the stockholders as dividends.

A corporation is formed by filing Articles of Incorporation with the Secretary of State. Shares of stock are issued to the shareholders, bylaws are adopted, and a board of directors is elected. The board of directors manage the corporation and appoint officers to operate the business. Statutory requirements include regular director and shareholder meetings be held, minutes of those meetings be kept, and any decisions made at those meetings be formalized in the form of written resolutions.

The Subchapter S corporation is formed by making a special IRS election. When properly made and maintained this election allows the flow-through taxation treatment similar to that which partnerships and LLCs enjoy. An S corporation is limited to 75 owners which cannot be corporations, nonresident aliens, general or limited partnerships, pension plans, charitable organizations or certain trusts. An S corporation cannot own more that 80 percent of the stock of other corporations and may not be part of an affiliated group.

Limited Liability Company - A limited liability company, known as an LLC, is a hybrid form of doing business that combines characteristics of the corporate structure and the partnership structure. It is a separate entity like a corporation and carries liability protection for all its members, but is taxed like a partnership.

The owners are called members and can be virtually any entity. A husband and wife are considered two members for formation purposes. An LLC is formed by filing a form, usually called Articles of Organization, with the Secretary of State. The corporation division of most secretary of state offices handles LLCs.

The LLC is not a tax paying entity. Profits, losses etc. flow directly through and are reported on the individual members tax returns. The LLC files a partnership return under Subchapter K of the Internal Revenue Code.

The operating agreement is the agreement between the members as to how the LLC will be managed and contains provisions that will qualify it for favorable tax treatment. The key issue to determine whether the LLC qualifies for partnership tax treatment is whether or not it is too much like a corporation. Fortunately, there is a test and it boils down to four basic characteristics that corporations have. The LLC can only have two and still retain its partnership tax status. They are limited liability, continuity of life, centralized management and free transferability of interests.

Partnership (including Limited Partnership) - The partnership form of doing business is noted for its simplicity and ease of formation. A general partnership can be formed with nothing more than a verbal agreement. Nothing has to be filed with the state and freedom of contract is the governing principle. However, the partners are joint and severally liable.

In a limited partnership, the limited partners are not liable for partnership debt and only their investment is at risk. But, there has to be a general partner who has overall responsibility for everything. A limited partnership files a document with the secretary of state and is governed by a limited partnership agreement. Both general and limited partnerships enjoy the benefits of partnership taxation.

Sole Proprietorship - Operating as a sole proprietor is the easiest and least expensive form of doing business. There are no recordkeeping requirements. But there are no tax benefits, nor any protection for your personal assets from business liabilities. ◆

From the Department: Electronic Forms

On November 23, 2005 the Office of General Counsel of the New York State Insurance Department issued an opinion regarding issuance of policy forms in electronic format that may be relevant to many of our readers business practices and procedures.

The question presented is: "Does the Insurance Law prohibit an insurer from adopting a procedure whereby all of its insurance policy forms are transmitted to its agents exclusively in electronic form?"

The conclusion offered by the Office of General Counsel is that No, the New York Insurance Law does not preclude an insurer from transacting the policy forms it issues to its agents in electronic form for the agent to forward to their clients, the insureds.

The facts provided are that an insurer is considering the adoption of a procedure whereby its insurance policy forms would be transmitted to its agents exclusively in electronic form. In the analysis, it is stated that the Department interprets statutes that provide for "delivery" to permit electronic communications, in recognition of the authority established under the Electronic Signatures and Records Act ("ESRA"), N.Y. State Tech. Law, Art 4 (McKinney Supp. 2005 and Ch. 741 L. 2005 §7) and the federal Electronic Signatures in Global and National Commerce Act. ("E-SIGN"), 15 U.S.C.A. §§7001-7031 (West Supp. 2003).

In Circular Letter No. 33, the Department advises that certain insurance transactions may be done electronically, as most existing provisions of the New York Insurance Law will not hinder such transactions. The Department interprets statutes that use words such as "writing" or "certificate" to allow electronic documents. Furthermore, Circular Letter No. 33 states that electronic communications are permitted where statutes provide for "delivery." See also Supp. No. 1 to Cir. Letter No. 33 (09/03/2002). ESRA creates a statutory structure in New York State that supports the use of electronic records in everyday public and business undertakings. N.Y. State Tech Law §402(2) states: 'Electronic record' shall mean information, evidencing any act, transaction, occurrence, event, or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities.

N.Y. State Tech. Law §305(3) states that electronic records "shall have the same force and effect as those records not produced by electronic means." Thus, an electronic record has the same legal effect as one that is written. Federal E-SIGN provides that electronic records may not be denied legal validity simply because they are made electronically. Electronic documents are given the same force in law as paper signatures and documents. E-SIGN preempts inconsistent state laws, other than state statutes patterned after the Uniform Electronic Transactions Act ("UETA"). 15 U.S.C.A. §7001(a) states, in relevant part:(a)

Notwithstanding any statute, regulation, or other rule of law…with respect to any transaction in or affecting interstate or foreign commerce (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

Under both ESRA and E-SIGN (N.Y. State Tech. Law §309 and 15 U.S.C.A. §7001(c), respectively), consumers must consent to do business electronically. Insurance agents who would transmit the insurance policy forms to insureds by electronic means and in electronic form must therefore obtain the consent of each insured to make delivery in this manner. For insureds who do not give such consent, the agent would be required to print out a hard copy of the policy form and deliver it to them.

To review this NYSID Opinion of Counsel, go to the New York State Insurance Department website at: www. ins.state.ny.us. ◆

Happy Holidays from the URB!

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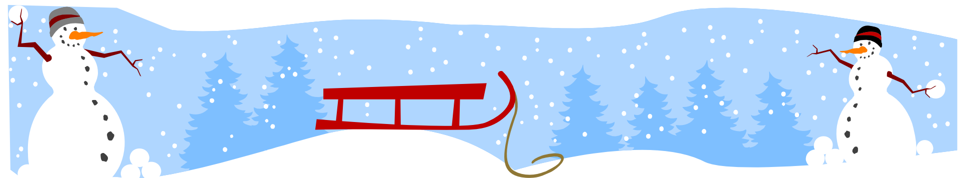

Did You Know...About These Forms...

We frequently receive questions from constituents regarding forms and coverages that may or may not be available in our inventory. As a result, we would like to tell you about some forms in our inventory that may be useful to you but of which you may not be currently aware. For this issue of the *URB Insider*, we have selected three forms from the ML series and three forms from the LS series to present to you for your consideration.

• **ML-16 (4/95, 6/99) - COMPARABLE VALUE HOMEOWNERS ENDORSEMENT.** This form modifies the *How Much We Pay for Loss of Claim* provision of the Homeowners policy. This does not pay for loss or increased cost resulting from the enforcement of any code, ordinance or law.

• **ML-184 (1/87, 6/99) - INFLATION GUARD.** This form increases Coverages A, B, C and D by 1 percent of the amounts shown in the Declarations at the end of each 3 month period after the effective date.

• **ML-373 (3/04) - EXCLUSION OF CANINE RELATED INJURIES OR DAMAGES.** Removes coverage L and Coverage M to any injury to persons or damage to property caused by certain enumerated canines.

• **LS-21(1/88, 9/02) - ADDITIONAL INSURED - EMPLOYEES (Direct Liability).** This form includes an additional insured in the definition of insured in the liability coverage. It provides coverage as an additional insured for any employee of the named insured while acting within the scope of his/her duties as an employee.

• **LS-30 (1/88, 9/02) - HOST LIQUOR LAW COVERAGE.** This form provides that coverage is extended to Host Liquor Law Coverage and removes the liquor liability exclusion in that regard.

• **LS-79(5/97, 9/02) - EXCLUSION OF SNOW/ICE CONTROL OPERATIONS.** This form removes Coverages L and N for snowplowing operations.

Note different versions may contain variations which should be reviewed before using any one of the forms.◆