URB INSIDER

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Volume 5, Issue 2

On the Legislative Agenda

The New York State Legislature adjourns in late June. Some bills of interest that have been up for consideration are outlined for your information.

In May, the Senate passed tough legislation to combat auto insurance fraud which is estimated to cost New Yorkers more than 1 billion dollars a year.

This legislation as it was proposed would cut in half the value of property obtained through a fraudulent insurance act in order to be convicted of a fraud. In addition, the proposed legislation would crack down on repeat offenders, allow prosecutors to aggregate the value of separate incidents and allow district attorneys to prosecute organized auto fraud rings under the Organized Crime Control Act.

Another bill makes the use of "insurance runners" illegal. Both bills were sent to the Assembly.

On June 19, the Senate passed legislation to crack down on drunk driving by increasing the penalties for DWI offenders with extremely high alcohol content, ensuring that repeat offenders are kept off the road, and increasing the penalties for drunk drivers who kill others. The bill reflects an agreement reached with the State Assembly.

On June 21, the Senate passed legislation to improve public boating safety. Modifications to public vessels will be required to be reported to and approved by the New York State Office of Parks and Recreation and Historic Preservation. The proposal will also make it illegal to operate a public vessel without the required number of crew. The bill was delivered to the Assembly.

These proposals are only some of the few

In this Issue:

From the Insurance Department

Recent adoptions of some emergency regulations at the Insurance Department are:

- Third Amendment to Regulation 68-C

11 NYCRR 65-3 - Claims for Personal Injury Protection Benefits

- Fourth Amendment to Regulation 68-D

11 NYCRR 65-4.

Filed with the Secretary of State March 27, 2006 and published in the State Register April 12, 2006.

- Regulation 182

11 NYCRR 221- Limitations Upon and Requirements For The Use of Credit Information for Personal Lines Insurance.

Filed with the Secretary of State May 10, 2006 and published in the State Register May 31, 2006.

For your information, the Department's website lists regulations at www.ins.state.ny.us.◆

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. The material in this publication was not necessarily prepared by an attorney admitted in the jurisdiction of the materials in the publication.

No Vicious Propensities Record, No Liability for Dog Owner

In July 2001, defendant, Dennis Ryan, awoke to the sound of a dog crying and discovered "Oreo" caught beneath the picnic table of a neighbor. After contacting the local animal control, defendant decided to keep the pit bull to find him a home.

For the next two months, the dog interacted with defendant's family and did not bark, growl or bare his teeth, jump on or display any aggression toward any person or animal.

On September 14, 2001, the defendant was walking the dog with his family when they encountered Casey Malpezzi, then six years old and his brother, Michael. Oreo bit Malpezzi on the arm and plaintiff commenced an action for damages.

Defendant moved for summary judgment, which was denied and defendant appealed. The Appellate Court reversed, and granted defendant's motion for summary judgment. As this Court has consistently held, "a plaintiff may not recover for injuries sustained in an attack by a dog unless he or she establishes that the dog had vicious propensities and that its owner knew or should have known of such propensities." (Palleschi v. Granger, 13 AD3d 871, 872 [2004]; see Brooks v. Parshall, 25 AD3d 853, 854 [2006]; Morse v. Colombo, 8 AD3d 808 [2004]). Here defendant and his girlfriend testified without contradiction, that they did not experience any problems with the dog prior to the incident with Malpezzi. Supreme Court erred in denying defendant's motion for summary judgment. Malpezzi v. Ryan, 2006 Slip Op 03138.

Res Ipsa Not Applicable to Chair Incident

The plaintiffs appeal from an order which granted the defendants' motion for summary judgment. Plaintiffs commenced this action to recover damages for injuries sustained by plaintiff, Barbara Loiacono, when the chair she sat on in defendant's bagel shop suddenly collapsed. The defendants argued they neither had actual or constructive notice of the defective condition, and that the injured plaintiff was not entitled to rely on the doctrine of res ipsa locquitur. The defendants made a prime facie showing they neither created nor had actual or construc-

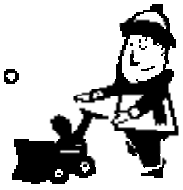
"...The evidence established defendants did not have exclusive control over the chair which collapsed..."

tive notice of the defective condition of the chair (See Gordon v. American Museum of Natural History, 67 NY2d 836). Supreme Court properly concluded that the doctrine of res ipsa locquitur was inapplicable, since the evidence established that the defendants did not have exclusive control over the chair (see Dermatossian v. New York City Tr. Auth., 67 NY2d 219). Loiacono v. Stuyvesant Bagels,

The Case of Abutting Landowner Liability

In a personal injury action, the plaintiff appealed an order of the Supreme Court that granted the defendant's motion for summary judgment dismissing the complaint. The Appellate Court affirmed the judgment as it was appealed.

The plaintiff was allegedly injured when she slipped and fell on a sidewalk adjacent to premises owned by the defendant. The sidewalk was owned by the Village of Ossining.

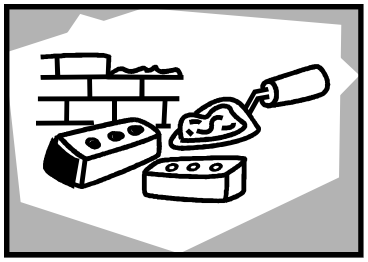


Generally, an owner of property is under no duty to pedestrians to remove snow and ice that naturally accumulates upon a public sidewalk abutting his or her premises (see Roark v. Hunting, 24 NY2d 470, 475; Verdino v. Alexandrou, 253 AD2d 553. A landowner can be held liable to a pedestrian injured by snow and ice on a public sidewalk when the landowner's "snow and ice removal efforts...made the sidewalk more hazardous" (see Martinez v. City of New York , 20 AD3d 513; see Freidman v. Stauber, 18 AD3d 606. Reynolds v. Gendron, 2006 NY Slip Op 03068. ◆

A Study of a Cause of Action for Malicious Prosecution

Plaintiff, Eric Gaylord, was in the stone hauling and removal business. In January, 2002 he was working for defendant, John Fiorilla. Three weeks into the project, Dennis Tompkins, Fiorilla's neighbor, advised Gaylord he wrongly removed a portion of the boundary wall belonging to Tompkins.

Police were contacted and after securing an estimate for the value of the stones from defendant, William Buchanan, the plaintiff was charged with a felony. The criminal matter was subsequently adjourned in contemplation of dismissal. The plaintiff repaired the damaged wall. The plaintiff then commenced an action for malicious prosecution and the defendants separately moved for summary judgment,



which was granted by Supreme Court.

Supreme Court properly granted the defendants' motions for summary judgment. The plaintiff conceded before the Supreme Court that claims of alleged malicious prosecution are precluded when an accused accepts an adjournment in contemplation of dismissal. (See Smith-Hunter v. Harvey, 95 NY2d 191, 197; Hollender v. Trum Vil. Coop., 58 NY2d 420, 426; Tzambazis v. City of New York, 291 AD2d 397. The claims alleging negligent infliction of emotional distress were properly dismissed as well. Gaylord et al v.

No Product Line Exception

A corporation that purchases another corporation's assets is not liable for the seller's torts, subject to four exceptions outlined in Schumacher v. Richards Shear Co. 59 NY 2d 239. The plaintiff in this case, Bridget Semenetz asks the Court of appeals to revisit Schumacher to endorse a fifth exception — the "product line" exception in cases of strict products liability.

In May 1998, defendant, S&W Edger Works, Inc., an Alabama Corporation, sold a band sawmill to Semenetz Lumber Mill, Inc., located in Jeffersonville, New York.

On July 26, 1999, infant, Sean Semenetz, caught his right hand and fingers in the sawmill, causing partial amputation of several fingers.

On October 5, 2000, Edger Works sold most of its assets to Sawmills and Edgers, Inc., another Alabama Corporation. The purchase contract documents expressly stated that the "Buyer (Sawmills) assume[d] non of the Seller's (Edger Works') liabilities except for the receipt of an payment of ordered but undelivered inventory. Edger works then changed its name to Sherling & Walden.

Plaintiff filed this action on behalf of her infant son in April, 2002 alleging strict liability, negligent design and manufacture, breach of duty to warn and breach of warranty. There was also a cause of action against Semenetz Lumber for failure to maintain safe premises.

Sawmills pleaded lack of personal jurisdiction and subsequently moved for summary judgment, which was denied by Supreme Court.

At the Appellate Division, they first determined there can be no jurisdiction here based on the corporate presence doctrine or New York's long-arm statute 21 AD3d 1138, 1139 [3d Dept 2005]. The Appellate Division acknowledge that Hart v. Bruno Mach. Corp. 250 Ad2d 58 [3d Dept 1998] adopted the "product line exception." Accordingly the Appellate Division reversed Supreme Court's order that denied Sawmill's motion for summary judgment and dismissed the complaint against Sawmills.

The Court of Appeals granted plaintiff permission to appeal and affirms but on a different ground altogether. The Court notes that the "product line" exception threatens annihilation for small businesses... and further, extending liability to the corporate successor places responsibility for a defective product on a party that did not put the product into the stream of commerce.

The Court states, "In short, adoption of the product line exception would mark a radical change from existing law implicating complex economic considerations better left to be addressed by the legislature." City of New York, 260 AD2d at 176, citing Restatement [Third] of Torts: Products Liability § 12, comment b, and note thereto. The Court joined the majority of courts who have declined to adopt the "product line" exception. Semenetz v. Sherling & Walden, Inc., et al., 2006 NY Slip Op 04750. ◆

Duty to Defend in Underlying Wrongful Death Action

The issue in this declaratory judgment action is whether the insurer has a duty to defend its policyholder under his homeowner's insurance policy in an underlying wrongful death action, resulting from a shooting committed in self-defense. The Court of Appeals concluded that the insurer is obligated to defend under the policy.

On February 20, 2002, Alfred Cook shot and killed Richard Barber inside his home. On the morning of February 20, Barber and another man were outside of Cook's home, hurling objects at the house. They left without further incident, but Barber returned later in the day with two other companions. When Cook, who was standing outside his door saw them approaching, he asked a person visiting him to leave because he expected trouble. He returned inside, locked the door and anticipating a confrontation, retrieved a .25 caliber handgun from his bedroom.

There was further testimony that the group burst into Cook's home. Four individuals gathered around and Barber demanded money. Cook, alarmed, drew his gun and demanded they leave his house. Barber apparently laughed at the small size of the pistol at which point Cook withdrew to obtain a larger weapon. He picked up a loaded 12 gauge shotgun and returned to his living room and ordered the men to leave the house.

Although they started to leave, Barber told his companions to take anything of value because he had some business to attend to. When Barber menacingly started advancing toward Cook, Cook warned he would shoot if he came any closer. Cook aimed the gun at Barber's navel and fired a shot into Barber's abdomen. Barber died later that day.

Cook was indicted for intentional and depraved indifference murder. At trial he raised a justification defense. A jury acquitted him.

The Administrator of Barber's estate, Victoria Pruyn, commenced a wrongful death action against Cook alleging negligence and an intentional act. Cook testified, "I knew the [shot from the] shotgun would injure Mr. Barber because I had to stop him, but I did not anticipate it killing him."

Cook sought homeowner's personal liability coverage from his insurer, Travelers. The carrier disclaimed explaining that the incident was not an occurrence and that the injury inflicted fell within the exclusion as it expected or intended by Cook. Supreme Court denied the insurer's motion and granted Cook's motion to the extent that an insurer had a duty to provide a defense for Cook in a wrongful death action. The Appellate Division reversed. The Court of Appeals granted leave to appeal and reversed.

An insurer may be required to defend even though it may not be required to pay once the litigation runs its course. When an insurer seeks to disclaim coverage on the further basis of an exclusion...the insurer will be required to provide a defense unless it can demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and further that the allegations in toto are subject to no other interpretation. Allstate Ins. v. Mugavero, 79 NY2d 153, 159 [1992]. Automobile Insurance Company of Hartford, v. Alfred S. Cook and Victoria Pruyn, 2006 NY Slip Op 04456. ◆

At The Supreme Court

Recently there have been some interesting rulings from the Supreme Court and there are some upcoming cases that have been accepted to be heard that will present interesting issues, as well.

In two recent decisions, the Supreme Court made it easier for death row inmates to contest their executions via lethal injection and to have DNA evidence put before judges. In the death penalty case, the unanimous vote allows condemned inmates to make special federal court claims that the chemicals used in executions are too painful and as such amount to cruel and unusual punishment. The other case allows for convictions to be overturned in light of DNA evidence.

In a government victory, the Supreme Court ruled recently that when armed with a warrant, police can barge into homes and seize evidence even when they don't knock.

The Supreme Court has said that it will be considering a second case that seeks to reinstate a government ban on the partial birth abortion law that resulted from a Bush Administration Appeal. The Court had already accepted a prior case on this issue to be heard in the fall. As such, the Court will review a pair of lower court cases that have previously struck down the law. Other cases will also be heard during the next term of the Supreme

A Look At PA's Hills and Ridges Doctrine

Appellants, Nancy and Jim Harvey, appeal from the judgment entered in favor of Appellees, Rouse Chamberlin, Ltd. and J. L. Watts Excavating in the Court of Common Pleas of Bucks County. This is a slip and fall case. Appellees moved for nonsuit arguing that the "hills and ridges" doctrine precluded a finding of liability. The trial court agreed.

Appellants live in Windtree Development in Plumsteadville Township. In January 2001, one section was still under development and the roads were still owned by Rouse Chamberlin. Chamberlin contracted with Watts to do the snowplowing.

On January 20, 2001, it began snowing and it stopped the next morning. The roads were then plowed by Watts. Nancy Harvey decided to take a walk. While walking on the roadway which appeared to be clear and dry, Nancy slipped and fell on black ice and sustained injuries.

In October, 2001 Nancy and her husband commenced an action alleging negligence against the Appellees. The case proceeded to trial at which time there was conflicting evidence of whether there was salting.

Appellants essentially raise only one issue: Whether the trial court erred in concluding that the "hills and ridges" doctrine precluded liability and, thus, improperly failed to remove the nonsuit and grant a new trial.

The standard is well established. "A nonsuit is proper only if the jury, viewing the evidence and all reasonable inferences arising from it in the light most favor able to the plaintiff, could not reasonably conclude that the elements of the cause of action had been established." Brinich v. Jencka, 757 A.2d 388, 402 (Pa. Super. 2000), *appeal denied*, 565 Pa. 634, 771 A.2d 1276 (2001).

The "hills and ridges" doctrine "protects an owner or occupier of land from liability for generally slippery conditions resulting from ice and snow to unreasonably accumulate in ridges or elevations." Morin v. Traveler's Rest Motel, Inc., 704 A.2d 1085, 1087 (Pa. Super. 1997) (citation omitted), ***appeal denied***, 555 Pa. 708, 723 A.2d 1025 (1998). In Bacsick v. Barnes, 341 A.2d 157 (Pa. Super. 1975), it was held the "hills and ridges" doctrine may be applied only in cases where snow and ice complained of are the result of an entirely natural accumulation, following a recent snowfall," id., at 160 (emphasis added), as the protection afforded by the doctrine "is predicated on the assumption that '[t]hese formations are [n]atural phenomena incidental to our climate,'"

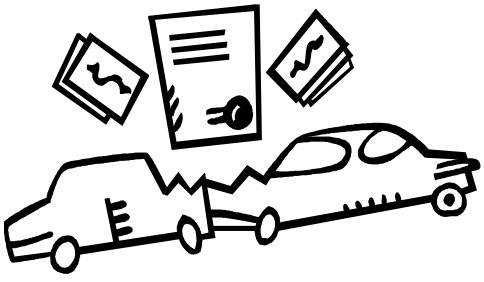
The trial court found that the hills and ridges doctrine precluded recovery because Nancy merely testified that she slipped on black ice and not that there was an accumulation. The trial court rejected Appellants' argument that the 'hills and ridges doctrine" does not apply as the ice of was artificial origin in that it formed as a result of Watts' plowing. Based on the applicable standard and the testimony, the Superior Court found the trial court in entering a nonsuit in favor of Watts. Harvey v. Rouse Chamberlin

CT Court: Statute Must Be Plain and Unambiguous to Apply

The defendant, Pacific Employers Insurance Company, appeals from a judgment of the trial court confirming an arbitration decision in favor of Jerome Kinsey.

This case arises from an automobile accident in which plaintiff was operating a vehicle owned and insured by his employer in which he sustained injuries that were caused by an underinsured motorist.

The issue in this appeal is whether the trial court properly concluded that a written request by the plaintiff's employer for a reduction in uninsured and underinsured motorist was ineffective because certain language in the informed consent form in which the request was made was not in twelve point type as required by the statute.



The court first concluded that the 12 point requirement was not plain and unambiguous. As a result, the judgment of the trial court was reversed. Jerome Kinsey v. Pacific Employers Insur-

Peer Group Study

Editor's Note: This exhibit takes information from the Annual Statement from the majority of URB Companies and puts it into a particular Peer Group. You can measure your performance against the group.

	Zero to Five Million		Five to Ten Million	
Number of Companies:	**17**		**11**	
DWP/Surplus		85.1%		114.18%
Direct Written Premiums	41,690,940		70,232,584	
NWP/Surplus		59.0%		64.84%
Net Written Premiums	28,913,788		39,883,704	
Surplus/RBC		1365.9%		1470.3%
Surplus	49,013,290		61,510,963	
Lines of Business:				
• **Fire & Allied Lines**	5,525,411	13.25%	5,650,549	8.05%
• **Farmowners**	4,847,849	11.63%	3,727,726	5.31%
• **Homeowners**	14,565,648	34.94%	24,382,476	34.72%
• **Commercial Multiple Peril**	13,836,486	33.19%	32,728,703	46.60%
• **Inland Marine**	1,769,585	4.24%	1,717,687	2.45%
• **Other Liability**	911,482	2.19%	1,702,644	2.42%
• **Boiler and Machinery**	234,269	0.56%	313,490	0.45%
• **Commercial Auto**	N/A	0.00%	N/A	0.00%
• **Personal Auto**	N/A	0.00%	N/A	0.00%
• **Other**	210	0.00%	9,309	0.01%
Total Written Premium	41,690,940	100.00%	70,232,584	100.00%
Other U/W Expense/NWP	36.9%		36.6 %	
Losses/LAE/Earned Premium	60.3%		57.3%	
Combined	97.2%		93.9%	
Investment Mix				
• **Bonds**	64%		63%	
• **Stocks**	12%		13%	
• **Mtg. Loans on Real Estate**	0%		0%	
• **Real Estate**	2%		3%	
• **Cash, Cash Equivalents**	22%		21%	
• **Other Invested Assets**	0%		0%	
Total Investments	100%		100%	

Peer Group Study

Editor's Note: This exhibit takes information from the Annual Statement from the majority of URB Companies and puts it into a particular Peer Group. You can measure your performance against the group.

Ten to Fifteen Million

Number of Companies	**5**		**6**	
Direct Written Premiums	56,764,896		201,364,839	
NWP/Surplus		87.89%		81.16%
Net Written Premiums	46,076,853		161,891,157	
Surplus/RBC		1035.63%		1117.46%
Surplus	52,426,239		199,460,974	
• **Lines of Business**				
• **Fire & Allied Lines**	3,828,307	6.74%	25,079,567	12.45%
• **Farmowners**	4,348,706	7.66%	9,255,391	4.60%
• **Homeowners**	16,037,299	28.25%	86,777,999	43.09%
• **Commercial Multiple Peril**	29,866,604	52.65%	59,829,492	29.71%
• **Inland Marine**	1,055,504	1.86%	2,111,053	1.05%
• **Other Liability**	1,128,049	1.99%	6,969,641	3.46%
• **Boiler and Machinery**	480,355	0.85%	N/A	0.00%
• **Commercial Auto**	N/A	0.00%	7,827,222	3.89%
• **Personal Auto**	N/A	0.00%	3,513,083	1.74%
• **Other**	N/A	0.00%	1,391	0.00%
Total Written Premium	56,764,824	100.00%	201,364,839	100.00%
Other U/W Expense/NWP	35.1%		35.6%	
Losses/LAE/Earned Premium	53.6%		59.0%	
Combined	88.7%		94.6%	
Investment Mix				
• **Bonds**	78%		68%	
• **Stocks**	12%		19%	
• **Mtg. Loans on Real Estate**	0%		0%	
• **Real Estate**	2%		1%	
• **Cash, Cash Equivalents**	7%		11%	
• **Other Invested Assets**	1%		0%	
Total Investments	100%		100%	

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About Being Our Guest...

In some prior editions of the URB Insider, we have been fortunate to have guest writers contribute stories for the "Be Our Guest" column. We would like to continue with this column and have you, our readers contribute to this newsletter.

If you like to write and have an insurance industry related topic you would like to share, please send it to kim@urbratingboard.com. The newsletter is published during the third month of every quarter. Submissions are needed by the beginning of the month of publication.

Readers may also send questions to be answered via articles in the newsletter. Let us hear from you! ◆

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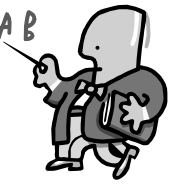
SCHOLASTICALLY SPEAKING... BY PROFESSOR I.M. SMART



RE: Timing of Payments and Cancellation

A reader has inquired about the issue of when is payment deemed received after a policy has been cancelled for non-payment of premium. Is it when the payment is postmarked or when it reaches the insurer and what about if the payment is sent electronically?

The mailbox rule found in contract law holds that acceptance takes place when it is mailed. Using that logic, a payment would be made when as of the date it is mailed, not the later date when it is received.

A case discussing this issue is Government Employees Insurance Company v. Solaman, et al., 157 Misc. 2d 737.

In this case, defendant insured did not respond to a notice from plaintiff insurer that defendant's policy would be cancelled if premium was not paid by December 20th. The insured mailed the payment on December 17th. There was an auto accident on December 21st, for which plaintiff insurer sought a declaratory judgment that defendant had no coverage. The court found that the premiums were made in a timely fashion and that plaintiff insurer was obligated by a valid insurance policy.

The court determined that the postal acceptance rule stated that mailed offers are accepted when mailed, that there is no legislative intent to change the rule for insurance premiums and that plaintiff should be estopped from challenging a lapse in policy because plaintiff accepted the check when it arrived.

This is a Supreme Court case in Nassau County and is not binding but persuasive in the Supreme Courts in other counties. A case law search did not locate any further case law that is on point or on receipt of electronic payments.

Professor Smart would like your input in answering this reader's question. Please let us know what