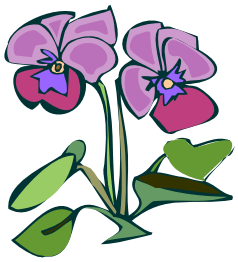

URB INSIDER

A Quarterly Publication of Underwriters Rating Board

Spring, 2007

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

TRIEA Testimony

Acting New York State Insurance Superintendent, Eric Dinallo, testified on March 5, 2007 before the Committee on Financial Services Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises at the United States House of Representatives, regarding extension of a Terrorism Risk Insurance Program.

As stated by Dinallo, the question before the committee was what is the best way to deal with insurance protection from the threat of terrorist attack and specifically what role should the federal government play. Dinallo stated that the threat of terrorist attack remains very real and there is no reason to believe that it will end anytime soon. He said his point is that terrorism is an essential issue for New York. But it is not only a New York issue.

"The nation appropriately understood the attack on the World Trade Center was an attack on all of us and appropriately responded by spreading the costs of that attack on all Americans, said Dinallo. He went on to say, "That brings us naturally to insurance. The role of insurance is to allow us to share or pool risk. We all buy home insurance so that if one of us has a fire, the loss does not wipe that one family out..."

He also stated, "The problem is that terrorism adds a very long tail to the curve... What the federal backstop does is eliminate the very, very large losses and thus cuts off the tail. That substantially reduces the mean and thus reduces premiums that insurers must charge and makes them more affordable."

Dinallo discussed the alternative which some advocate, a pure market solution. He said, "what that would mean is that insurers would have to charge to cover the largest potential risks. Prices would have to rise substantially. Effectively, only those who had to buy terrorism insurance would do so. This is known as adverse selection..." He went on to say, "That assumes that the private market would even be willing to offer terrorism insurance..."

Dinallo further stated, "Today, TRIEA is quickly approaching its expiration date. Our commitment to the need for a federal backstop as an essential underpinning of our national economy has not changed. If some federal backstop is not in place by January 1, 2008, we may revisit some of the same market disruptions and economic uncertainties we faced in the aftermath of September 11—especially since the private market still does not have the means and the capacity to appropriate address this exposure and its magnitude."

For further information, you may read the entirety of Mr. Dinallo's testimony on the NYSID website.

On a related note, while the federal backstop remains in place until the end of 2007, insurers should take steps to ensure compliance with the requirements of the statute and use appropriate, current disclosures and any current, applicable forms. Further information will be provided as it evolves regarding terrorism coverage.◆

Circular Letter from NYSID on Disaster Plans

The New York State Insurance Department recently issued Circular Letter No. 4 (March 15, 2007) This circular letter replaces and repeals Circular Letter No. 14 (2005). Disaster planning, preparedness, and response for the life insurance and health insurance industries are covered by separate circular letters.

The Circular Letter can be read in totality on the New York State Insurance Department website at www.ins.state.ny.us.com.

But in pertinent part, Circular Letter No. 4 states that "If your Disaster Response Plan provides answers to the following questions, it will generally have met the Disaster Response Bureau's standards for an acceptable plan."

The questions covered by the Circular Letter are as follows:

Management Oversight:

1. Does the Company have a Disaster Response Plan?

2. Is it a written Plan?

3. Has the Plan been reviewed and approved by:

a) Senior Management?

b) Board of Directors?

4. Has the Company provided a copy of the board resolution attesting to the approval of the Plan by the board of directors?

5. Has Management identified additional resources that will be needed during a disaster?

6. Has Management analyzed its ability to provide the financial resources necessary to meet the cost of the additional resources that will be needed?

General Information:

1. Does the Plan define what constitutes a disaster?

2. Are there clear guidelines to indicate when the Disaster Response Plan should be invoked?

3. Has the Company established a disaster response team?

4. Are the responsibilities of the disaster response team members segregated to establish clear reporting authority?

5. Does the Plan indicate that there is a role for designated "disaster liaison" and/or back-up liaison?

6. Does the plan indicate that the designated "disaster liaison" and/or back-up liaison have been advised of their duties?

7. Does the Plan provide for training of staff?

8. Has the Company established varying levels of response based on the severity of the disaster?

Claimant Services:

1. Is the role of the insurance agent/broker in a Disaster defined?

2. Has the Company established a separate toll-free number to be used by claimants?

3. Has the Company established procedures to increase the number of adjusters?

4. Has the Company analyzed the risk of its inability to respond to claimants in a timely manner?

5. Has the Company established expedited claim processing procedures?

6. If the Company plans to use simplified claim reporting forms, do these claim forms include the required fraud warning statement?

Fraud Detection:

1. Does the Plan include procedures for detecting fraud?

2. Does the Plan include procedures for reporting fraudulent activity to the appropriate regulatory authorities?

Testing of Plan:

1. Has the Plan been tested?

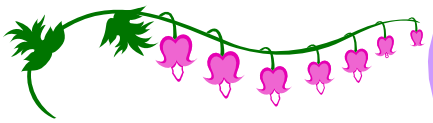
2. Does the Plan indicate when the last test was conducted?

3. Does the Plan indicate how often will the Plan be tested?

4. Did the testing include the ability to get resources to the disaster site?

5. Has the Plan been tested utilizing scenarios involving varying disaster levels?

For complete information on this Circular Letter, view the Circular Letter in its totality. This is an important issue that can impact insurers.◆



CASE BRIEFS

Release Void

Appeal from an order of Supreme Court entered April 10, 2006 in Otsego County which denied plaintiff's motion to dismiss defendants affirmative defenses of release and assumption of risk.

On November 7, 2004, plaintiff paid a fee to participate in a "fun day" at a cycle park operated by defendants. While riding his motocross bike around the course, he collided with a utility vehicle being driven by one of defendant's employees. It is undisputed that the collision occurred on the blind side of a jump near the finish line. According to plaintiff, the first time he saw the utility vehicle was when he hit the ground following this final jump. He attempted to avoid the collision, to no avail. No yellow warning flag had been waved to warn plaintiff of this hazard.

Plaintiff commenced this action to recover for injuries he sustained that day. One issue brought up by plaintiff and of interest here, is that the action is barred by a release.

Plaintiff contends that the release he signed on the morning of the practice session is void as against public policy by operation of statute (i.e. General Obligations Law § 5-326) and therefore, Supreme Court erred in denying his motion to dismiss the affirmative defense of release. We agree.

This section applies to a recreational facility who receives a fee from a user. Here the cycle park was a place of amusement or recreation within the meaning of the statute and plaintiff paid a fee to defendants to participate. Therefore, the release is void as against public policy and wholly unenforceable. Tuttle v. TRC Enters. Inc., 2007 NY Slip Op 01663.◆

The Saga of Cancellation for Non-Payment

Defendants, an insurance agency (IA) and an insurer, appealed an order from the Supreme Court, Albany County (New York), which, inter alia, granted summary judgment (SJ) to plaintiff insureds in their action, alleging breach of contract and seeking indemnification for a property loss. The insurer had cancelled their policy. The trial court had denied the IA's SJ motion with respect to the insurer's third-party indemnification claim.

The IA submitted the insureds' application for homeowners insurance to the insurer. The application was not signed and had indicated that there were no prior loss claims in the prior five years. Upon investigation, the insurer discovered that the insureds had several prior loss claims. Accordingly, the insurer notified the insureds of the policy cancellation pursuant to Insurance Law § 3425 based on their misrepresentations. Prior to the cancellation date, a tree fell through the insureds' roof and damaged their home. The insurer denied their loss claim and attempted to declare the policy void ab initio. The insureds filed suit and the insurer commenced its third-party action against the IA for indemnification. The trial court granted SJ to the insureds. On appeal, the court found that although the insurer could have rescinded the policy under Insurance Law § 3105(b), as it instead chose to cancel it, the policy was effective until the cancellation date. Accordingly, the insurer was obligated to indemnify the insureds for their loss. However, the IA was entitled to SJ dismissal of the third-party complaint, as the IA's conduct was not the proximate cause of the insurer's damage.

A major point to take note of with respect to the holding of the case is that the insurer had the option of rescinding the policy, but because the insurer chose to cancel it, the policy was effective until the cancellation date. Effectively this is because the cancellation acknowledges that there is a policy in force up until the cancellation date. If the policy had been rescinded, it was like it did not exist and so there would not have been coverage for a claim. But because the policy was in force until the effective date of the cancellation, the insurer was obligated to defend and indemnify the insureds for what was a covered loss. Stein v. Security Mut. Ins. Co., 2007 NY Slip Op 1657.◆

No Duty Owed, No Liability

This is an appeal from a judgment of the Supreme Court entered November 7, 2005 in Montgomery County, upon a decision of the court in favor of plaintiff.

Thomas R. Filiberto, the decedent, arrived at a bar owned by defendant, Herk's Tavern, Inc., and consumed numerous alcoholic beverages, staying until closing time. Defendant, Phillip R. Bracchi, the bartender who served the decedent, was the sole owner, officer and employee of Herk's Tavern, as well as a personal friend of decedent. Decedent customarily went to Herk's Tavern after work on Thursday nights until closing, then went out to eat with Bracchi. On the night in question, Bracchi drove himself and the decedent to MJM Diner, Inc., where both ordered hot roast beef sandwiches. Decedent choked on his sandwich, resulting in his death.

Plaintiff commenced this action against Herk's, Bracchi, and MJM Diner, and the claims against the diner were dismissed on a summary judgment. The remaining parties agreed to sever the dram shop cause of action and proceeded to a nonjury trial on the negligence cause of action. Supreme Court found in plaintiff's favor, but reduced the award because the court found that decedent was 50% responsible. Bracchi and Herk's Tavern appeal.

The trial court must first determine as a matter of law whether a duty existed before a determination is made regarding whether the duty was breached. (see Rivera v. Nelson Realty, 7 NY3d 530, 534 [2006] ; Tagle v. Jacob 97 NY2d 165, 168 [2001]). In assessing the scope of the defendant's duty, the court looks at whether the parties' relationship is such as to give rise to a reasonable duty of care, whether the accident resulted from a reasonably foreseeable risk (see Di Ponzio v. Riordan, 89 NY2d 578, 583 [1997]). As no duty existed here, Supreme Court should have found in favor of defendants.

While the parties deal with Bracchi and Herk's Tavern together, they are separate defendants. Their liability may be intertwined in the dram shop cause of action, but the negligence cause of action was based on Bracchi's actions of driving decedent to a diner and ordering or permitting decedent to order a meal that required extensive chewing despite allegedly knowing that decedent was highly intoxicated. The record fails to disclose that Bracchi was acting in a representative capacity on Behalf of Herk's Tavern, as opposed to acting in his personal capacity as decedent's friend. Hence, Herk's Tavern had no duty to decedent and was entitled to dismissal of the negligence cause of action. (see Livelli v. Teakettle Steak House, 212 AD2d 513, 514 [1995]). As for Bracchi, we disagree with Supreme Court's finding that he voluntarily assumed a duty by agreeing to drive the intoxicated decedent home. Even when no duty is originally owed, once a defendant voluntarily takes charge or one who is not able to adequately protect himself or herself, that defendant will be liable for harm caused by the failure to exercise reasonable care to secure the other person's safety while in the defendant's charge (see Parvi v City of Kingston, 41 NY2d 553, 559 [1977] , citing Restatement of Torts 2d §324; Poole v. Susquehanna Motel Corp., 280 AD2d 764, 766 [2001]). Had Bracchi agreed to drive decedent home, Bracchi may have taken charge of decedent and voluntarily assumed a duty toward him. But there is no proof that Bracchi was going to drive decedent home. Instead, Bracchi testified without contradiction that, as was their custom, he offered to drive decedent to the diner, not because decedent was intoxicated but merely to avoid taking two vehicles, and planned to return decedent to his car in the tavern parking lot after the meal. Even if Bracchi had agreed to take decedent home, decedent choking on an unchewed piece of roast beef was not a reasonably foreseeable risk of stopping for a bite to eat. Bracchi had no duty to protect him from the risk of this remote possibility. This court previously denied plaintiff's standing argument in a motion decision. Filiberto v. Herk's Tavern, Inc. 2007 NY Slip Op 01448. ◆

Terrorism Coverage Not Required by Tenant

In a situation where a tenant has a ground lease and is required to maintain insurance on the building, there are limitations as to the extent of coverage the tenant is required to maintain for terrorism, according to Supreme Court, Appellate Division, First Department.

Where a ground lease required the tenant to maintain insurance on the building resulting from loss or damage by fire and other risks that are included in the standard extended coverage endorsement of the New York Standard Fire Insurance Policy, the tenant is not required to obtain coverage for acts of terrorism.

The court held that the precipitating cause of loss is central to the inquiry about whether coverage for an act of terrorism is required.

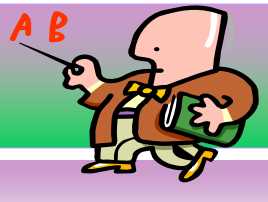
There may be coverage for some losses attributable in part to terrorism such as an aircraft striking the building. However, that did not mean that the endorsement afforded coverage for all terrorist acts. TAG 380, LLC v. ComMet 380, Inc., 2007 N.Y. SlipOp. 01224.◆

2005 URB Cos. Average HO Policy Values

	RC ML-1	RC ML-2	RC ML-3	RC ML-5	RC ML-8	ACV ML-1	ACV ML-2	ACV ML-3	ACV ML-8	Total	Total All 135,678
Zone 1.1	88,307	99,862	100,806	175,001	52,501	44,357	56,207	70,616	32,501	96,702	
Zone 1.2	106,667	111,375	126,891	187,143	none	56,500	67,804	74,822	none	127,385	
Zone 1.3	94,808	103,484	129,961	187,188	72,501	45,803	57,698	78,135	36,251	118,442	
Zone 1.4	85,441	102,882	115,732	189,660	96,251	48,619	60,106	76,196	40,625	113,366	
Zone 1.5	86,154	105,816	122,788	198,000	none	53,157	66,724	77,533	30,625	101,554	
Zone 1.6	none	110,130	133,160	177,274	72,501	51,680	67,731	87,584	35,715	106,849	
Zone 1.7	125,001	146,741	178,035	257,955	none	88,126	103,366	128,201	none	169,467	
Zone 1.8	126,251	134,981	146,482	199,319	82,501	68,847	77,280	101,157	122,501	136,357	
Zone 1.9	127,858	151,930	177,344	248,215	none	85,001	87,206	118,126	none	168,121	
Zone 2	116,500	110,625	132,742	191,563	none	58,394	71,673	84,914	none	114,588	
Zone 3	250,000	218,718	217,657	340,000	none	none	242,501	162,501	172,501	218,501	
Zone 4	212,501	226,251	239,073	252,500	192,501	282,501	186,539	168,750	292,501	229,147	
Zone 5	none	none	none	none	none	none	none	none	none	none	
Zone 6	none	257,718	267,144	228,333	none	192,501	none	none	162,501	256,204	
Zone 7	216,667	234,060	276,250	292,501	200,625	226,251	216,251	none	none	248,942	
Zone 8	182,501	248,751	280,173	242,501	272,501	none	none	none	none	268,309	
Zone 9	none	248,821	247,471	249,500	338,750	none	none	242,501	122,501	246,166	
Zone 10	none	226,471	214,546	228,930	none	150,000	182,501	200,625	none	218,567	

SCHOLASTICALLY SPEAKING...

BY PROFESSOR I.M. SMART



The P's and Q's of the Special Duty Rule

The special duty rule exists in New York as it relates to the duty of a municipality, or its lack of duty, to protect plaintiffs from third parties who may cause them harm. Ordinary tort rules, as a general matter, do not apply to municipal defendants and the special duty rule is an exception to ordinary tort rules applicable to non-government defendants. What this means is that the municipal defendant has no duty to act unless it assumes a "special duty" to do so.

Two different legal issues must be determined. (1) Whether the act or omission was primarily "proprietary" in nature or (2) governmental, with the exception of highway maintenance which is treated like an ordinary tort.

The factors as to whether an act or omission is governmental and whether the special duty rule applies is set forth in the case of Cuffy v. City of New York, 69 N.Y.2d 255, 513 N.Y.S.2d 372 (1987). In that case, the Court of Appeals held four elements must be present to form a special relationship, as follows:

(1) An assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured;

(2) knowledge on the part of the municipality's agents that inaction could lead to harm;

(3) some direct contact between the municipality's agents and the injured plaintiff; and

(4) that party's justifiable reliance upon the municipality's affirmative undertaking.

The special duty rule is applied using varying methods to police cases, volunteer fire and ambulance cases and to other governmental and quasi-governmental activities. But in each case, plaintiff must prove all four components of the special duty rule to succeed in their case. ◆

Keeping the Flow of Freeze Ups Down *by Misty Nichols, Intern*

Homeowners and their insurers have just endured the season for frozen pipes. After reviewing some applicable cases they indicated in general that everything depends on the facts of the case and the language of the exclusions.

Taking a look at the URB forms, the ML-2 states ***We*** insure against direct physical loss to property caused by the following causes of loss:... Freezing of a plumbing, heating, air-conditioning, fire protective sprinkler system or domestic appliance. This does not cover loss on the ***insured premises*** while the ***residence*** is vacant, unoccupied (including temporary absence) or is under construction and unoccupied. However, this exclusion does not apply if ***you*** have used reasonable care to:

a. maintain heat in the building or manufactured home; or b. shut off the liquid supply and empty the system or domestic appliance.

While the ML-3 states under the exclusions for A&B 1. ***Freezing, Discharge, Leakage or Overflow-Unoccupied Residence***-If the ***residence*** is vacant, unoccupied (including temporary absence) or under construction and unoccupied, ***you*** must take reasonable care to:

a. maintain heat in the building or manufactured home; or b. shut off the water supply and completely empty liquids from any plumbing, heating, air-conditioning or automatic fire protective sprinkler system or domestic appliance.

If ***you*** fail to do this, ***we*** do not pay for loss caused by freezing or the resulting discharge, leakage, or overflow from such system or domestic appliance.

2. ***Freezing, Thawing, Pressure or Weight of Ice or Water*** - ***We*** do not pay for damage to structures (other than buildings, carports or manufactured homes) such as swimming pools, fences, retaining walls, septic tanks, piers, wharves, foundations, patios, and paved areas caused by freezing, thawing, or pressure or weight of ice or water whether wind driven or not. While Coverage C states the same as the ML-2. (6/99).

Research disclosed Some general tips to avoid freeze up include: Keep the temperature set at 60 degrees; Run water through pipes at least once daily; Have pipes in unheated areas insulated; Have your plumber check your system to ensure everything is working properly.

According to one master plumber, if you have a freeze up you could do the following: Keep the faucets open until you have water; Check other faucets in the house; Contact your plumber. They have a tool to clamp onto the pipe to restore the flow of water. ◆

The Office of General Counsel issued the following opinion on February 20, 2007, representing the position of the New York State Insurance Department. Footnote references are omitted due to space limitations. The opinion, including footnotes, may be viewed in its entirety on the NYSID website at www.ins.state.ny.us.

Re: Service of Process on Insurers

Question Presented:

May an insurer restrict where it accepts service of process, including requiring service outside of the State of New York?

Conclusion:

While an insurer may assign the task of accepting service of process and may establish its own internal procedures for insuring that the service of process is directed to those ultimately responsible for defending its interests, a process server may always serve the corporate personnel specifically identified in N.Y. C.P.L.R. § 311(a) (McKinney 2001). In addition, N.Y. Ins. Law § 1212 (McKinney 2006) requires an authorized insurer to appoint the Superintendent of Insurance as its attorney in this State, upon whom all process in any proceeding on a contract issued in this State may be served. Moreover, N.Y. Ins. Law § 1213 provides for substituted service on the Superintendent of Insurance for unauthorized insurers that, as specified in that section, engage in certain activities in New York.

The inquirer reports that he is a process server whose work mainly consists of service of process on automobile insurance companies regarding No-Fault matters for local law firms. He states that it is his understanding that corporations may be served at any corporate office, especially a local claims office, as long as the papers are served on a responsible individual, such as a manager, secretary, receptionist or claims associate. Several times in recent months an insurer has told him that it does not accept service at the location where he attempted to effectuate service, and stated that service would be accepted only at some other office – often in another city, or even in another State. He questions whether such insurers are lawfully refusing service of process.

Analysis:

N.Y. C.P.L.R. § 311 (McKinney 2001) sets forth the methods of effecting personal service of process upon a corporation. It provides, in relevant part, as follows: (a) Personal service upon a corporation . . . shall be made by delivering the summons as follows: 1. [U]pon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. A not-for profit corporation may also be served pursuant to section three hundred six or three hundred seven of the not-for-profit corporation law. . .[1]

Service of process on a corporation, including an insurer, may be effectuated by making personal delivery to any of the corporate representatives set forth in N.Y. C.P.L.R. § 311(a)(1). While an insurer may assign the task of accepting service of process and may establish internal procedures for insuring that the service of process is directed to those ultimately responsible for defending its interests, a process server may always serve the corporate personnel specifically identified in the statute. See Fashion Page, Ltd. v. Zurich Ins. Co. N.Y., 50 N.Y.2d 265, 428 N.Y.S.2d 890, 406 N.E.2d 747 (1980).

The inquirer should also be aware that N.Y. Ins. Law § 1212 (McKinney 2006) requires an authorized insurer to appoint the Superintendent of Insurance as its attorney in this State, upon whom all process in any proceeding brought against the insurer on a contract issued in this State may be served. Section 1212 provides, in relevant part, as follows: (a) No domestic, foreign or alien insurer, including a fraternal benefit society, shall be or continue to be authorized to do an insurance business in this state unless there shall be filed in the office of the superintendent a power of attorney, executed by such insurer, appointing the superintendent and his successors in office, and authorized deputies, as its true and lawful attorney in and for this state, upon whom all lawful process in any proceeding against it on a contract delivered or issued for delivery, or on a cause of action arising, in this state may be served. Such power of attorney shall be accompanied by the insurer's written certificate of designation of the name and address of the officer, agent, or other person to whom such process shall be forwarded by the superintendent or his deputy. Such designation may be changed by filing of a new certificate of designation in the office of the superintendent. (b) Service of process upon any such insurer in any proceeding in any court of competent jurisdiction may be made by serving the superintendent, any deputy superintendent, or any salaried employee of the department whom the superintendent designates for such purpose, all of whom shall have authority to accept such service pursuant to any such power of attorney. c) At the time of service of process a fee of forty dollars shall be paid to the superintendent or his deputy. (e) Whenever any lawful process shall be served upon the superintendent, any deputy superintendent, or any salaried employee of the department whom the superintendent designates for such purpose under the provisions of this section, such person shall forward a copy of such process by mail, prepaid, directed to the person last designated by such insurer, as shown by the records of the department. (Emphasis supplied). Thus, service of process may be made upon an authorized insurer by effectuating service on the Superintendent of Insurance or his designee, and by paying the requisite fee of forty dollars at the Department's New York City office located at 25 Beaver Street, 4th Floor, New York, New York 10004 or the Department's Albany office located at One Commerce Plaza, Albany, NY 12257. ◆

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Recent Filings and Other News

- FL-373H Ed. 11/06— Hurricane Deductible and accompanying Disclosures have been approved by the New York State Insurance Department.

- ML-346 Ed. 8/06—Mechanical, Electrical Or Pressure Systems Breakdown (For Use With Homeowners Policies) - has been approved by the New York State Insurance Department.

- FO-DISC Farmowners Disclosure Notice 1/07– was sent to the New York and Albany bureaus of NYSID for informational purposes, with a recent acknowledgement from NY. ◆

Case Notes from Around the Country

- In Pennsylvania — In a federal civil rights action commenced by a woman alleging the city's police department had a policy of closing sexual assault complaints, a federal magistrate judge granted the city of Philadelphia's motion for judgment as a matter of law.

- In Ohio— An action was brought by the family of a woman who claimed she developed lung cancer resulting from exposure to asbestos fibers on her relatives' work clothes. In its ruling, an Ohio Appeals court said the plaintiffs failed to show that the woman's exposure to the defendants' products was a "substantial factor" in her disease. According to the court, the evidence provided was too "vague and uncertain" to sustain a suit against two suppliers of asbestos-containing products. ◆