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

In the News

Terrorism Risk Insurance Revision

There had been much in the news speculating about what Congress and the President will do with the Terrorism Risk Insurance Act or TRIA which was enacted in 2002 and then extended until December 31, 2007 under the Terrorism Risk Insurance Extension Act. There was pending in both houses of Congress two versions of a bill to extend the terrorism program.

According to various sources, the House version of this bill was passed by the House on September 19, 2007 and the Senate version of this bill was passed by the Senate on November 16, 2007.

In pertinent part, the House version of H.R. 2761 extended the terrorism program 15 years and would extend the program's scope to require insurers to make coverage available for nuclear, biological, chemical and radiological attacks. It would also reduce the insurer loss threshold that would trigger government coverage to $50 million from $100 million.

The Senate bill, utilizes H.R. 2761 as a base but substitutes language from S.2285 for some minimal changes including a seven year coverage period but it retains the $100 coverage trigger.

But, as recently as December 12, 2007, the White House is reported to have repeated a vow to veto the House version of the terrorism insurance bill.

The Bush Administration had been quoted as saying that it believes TRIA should be phased out in favor of a private market for terrorism insurance and has set forth three key elements for an acceptable extension of TRIA. These are that the program should be temporary and short-term, there should be no expansion of the program and private sector retentions should be increased.

The House on December 12th passed another bill extending the Terrorism Risk Insurance Act and that version accepted most of the provisions of the Senate's bill. But the House did add several provisions, as well.

On December 18, the House and Senate passed identical legislation which extends the terrorism risk insurance program for seven years through 2014, which President Bush is expected to sign. It is known as the Terrorism Risk Insurance Program Reauthorization Act of 2007.

Some aspects of the legislation remain unchanged, with Farmowners multi-peril still not being covered under the program. A proposal to add coverage for NBCR events was not adopted, but the legislation eliminates the distinction between domestic and foreign acts of terrorism, reinforces the $100 billion cap on aggregate insured losses, and includes an additional disclosure requirement.

As a result of the extension, insurers must continue to make coverage available for certified acts of terrorism and insurers must continue to disclose the premium for the coverage.

URB is reviewing the applicable forms and disclosures as they relate to terrorism to update the materials to comply with the changes to the statute. These materials shall be forwarded to the URB companies as soon as they are available for use. ◆

From the Court of Appeals

No Tort Liability

On the evening of August 8, 2001, plaintiff Gregory G. Stiver was driving his automobile in the eastbound center lane of a divided highway in Tonawanda. The weather was fine; traffic was moderately heavy. Without warning, the vehicle immediately ahead of him shifted abruptly into the right lane. When plaintiff "looked to see what [this driver] was swerving to miss and started to apply the brakes," he saw a car stopped in the center lane, dead ahead of him. Unable to slow down or pull over into another lane in time to avoid a collision, plaintiff rear-ended the disabled car, which was owned and driven by Stephen Corbett. Plaintiff was wearing a seat belt and his automobile's airbag deployed upon impact. Nonetheless, his head struck the steering wheel with sufficient force to impair his right eye permanently. On June 27, 2002, plaintiff, and his wife derivatively, commenced a lawsuit against Corbett alleging that he had suffered a serious injury. During the course of discovery, Corbett testified at an examination before trial that, just before his car slid to a standstill, he heard a rumbling noise and experienced difficulty steering; he observed pieces of the vehicle's transmission rolling down the road. When he inspected his car just after the accident, he saw that the front right wheel was "sideways with the inside of it facing forward," and a half shaft, the driveshaft linking this wheel to the transmission, was disconnected and dangling from the vehicle's undercarriage.

Plaintiffs subsequently learned that on June 13, 2001, about two months before the accident, a mechanic employed by defendant Good & Fair Carting & Moving, Inc., had performed the required annual New York State motor vehicle inspection of Corbett's car, and had issued the certificate denoting that the car was in proper and safe working condition. On June 10, 2004, plaintiffs commenced this action against Good & Fair, alleging that the collision was caused by its negligent inspection of the Corbett vehicle.

On August 2, 2005, Good & Fair moved for summary judgment to dismiss the complaint. Plaintiffs opposed the motion. While acknowledging that Good & Fair would ordinarily owe no duty to third parties lacking contractual privity with Corbett, they claimed that this case was an exception to the general rule because Good & Fair launched an instrument of harm, and they detrimentally and reasonably relied on Good & Fair's inspection.

On November 10, 2005, Supreme Court denied Good & Fair's motion, citing the Appellate Division's decision in Wood v. Neff, (250 AD2d 225 [3rd Dept 1998]) as controlling authority for the proposition that "an inspector's duties under the Vehicle and Traffic Law . . . extend to third parties as it is reasonably foreseeable that someone, other than [the] owner, may be injured in an accident because of a defect in a motor vehicle." Importantly, however, *Wood* was handed down before our decisions in Espinal v. Melville Snow Contrs. (98 NY2d 136 [2002]) and Church v. Callanan Indus. (99 NY2d 104 [2002]). Nonetheless, the trial court opined that it "ha[d] no alternative but to apply [*Wood*] . . . and conclude that there is a duty under the law, the breach of which may be the basis for a finding of negligence against" Good & Fair.

On September 22, 2006, the Appellate Division unanimously reversed Supreme Court's order, granted the motion and dismissed the complaint. Citing several of our cases, most notably Espinal and *Church*, the court found no basis for deviating from the general rule that "recovery for negligent performance of a contractual duty is limited to an action for breach of contract, and a party to a contract is not liable in tort to noncontracting third parties" (Stiver v. Good and Fair Carting & Moving, Inc., 32 AD 3d 1209, 1210 [4th Dept 2006]). Plaintiffs' motion for leave to appeal was granted and is now affirmed.

"[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party." (Espinal, 98 NY2d at 138; *see also Church*, 99 NY2d at 111.

Three exceptions to this general rule have been identitifed, which are summarized in Espinal. These are "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launches a force or instrument of harm' [quoting Moch Co., Inc. v. Rensselaer Water Co., 247 NY 160, 168 (1928)]; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties [citing Eaves Brooks Costume Co. v. Y.B.H. Realty Corp., 76 NY2d 220, 226 (1990)] and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely [citing Palka v. Servicemaster Mgt. Servs. Corp., 83 NY2d 579, 589(1994)]" (Espinal, 98 NY2d at 140; *see also* Church, 99 NY2d at 112-113). Good & Fair's allegedly negligent inspection does not match any of these exceptions.

First, Good & Fair cannot be said to have launched an instrument of harm since there is no reason to believe that the inspection made Corbett's vehicle less safe than it was beforehand (*see* Church, 99 NY2d at 112). Inspecting the car did not create or exacerbate a dangerous condition (*see* Espinal, 98 NY2d at 142-143). Second, there was no detrimental reliance. The plaintiff driver did not know whether or when the Corbett vehicle had been inspected. There are vehicles on the road, including many vehicles registered in other states, which have not passed a New York State motor vehicle safety inspection. As for the third exception, we cannot reach it in this case. The Appellate Division correctly determined that it was unpreserved for review.

Finally, as a matter of public policy, we are unwilling to force inspection stations to insure against risks "the amount of which they may not know and cannot control, and as to which contractual limitations of liability [might] be ineffective" (Eaves Brooks, 76 NY2d at 227). If New York State motor vehicle inspection stations become subject to liability for failure to detect safety-related problems in inspected cars, they would be turned into insurers. This transformation would increase their liability insurance premiums, and the modest cost of a State-mandated safety and emission inspection would inevitably increase. Stiver v. Good & Fair Carting & Moving, Inc. 2007 NY Slip Op 09062. ◆

Motion Burden A Heavy One

Defendant Delaney Construction Corporation was contracted by defendant Town of Queensbury to perform a sewer renovation project along State Route 9. On April 30, 2004, Robert Weisgerber, a superintendent in charge of the Delaney renovation project, noticed that a sinkhole had developed along the curb on the northbound side of Route 9 where Delaney had been working. Although the area had already been marked as a construction zone, Weisgerber also placed a "lane shift" sign, as well as additional warning barrels and cones at the site of the sinkhole, to divert traffic from that area. Weisgerber thereafter contacted a concrete company which filled the sinkhole with "flowable fill," a cement-based substance, at approximately 6:15 A.M. the next day.

Around 7:00 A.M. that morning, plaintiff was riding his bicycle northbound on Route 9. As he approached the site, plaintiff, aware of the warning barrels and cones, rode his bicycle into the wet flowable fill. Plaintiff sustained injuries, and he commenced this action. Defendants subsequently moved for summary judgment, claiming that plaintiff's actions were the sole proximate cause of his injuries. Finding plaintiff's conduct culpable, Supreme Court, nonetheless, denied defendants' motion, finding a triable issue of fact as to whether the warning signs and other barriers were sufficient to warn of the sinkhole. Defendants appeal. In support of the motion for summary judgment, defendants offered not only the deposition testimony of Weisgerber, but his affidavit which stated that the warnings, cones and barrels were placed in conformance with the New York State Manual of Uniform Traffic Control Devices and general accepted standards and practices in the industry to warn and divert traffic from the area through the use of signage and a channeling process (*see* 17 NYCRR 300.3 [h] [1] [iv]; 292.5 [a]). With Vehicle and Traffic Law § 1231 providing that the traffic laws apply to persons riding bicycles upon a roadway (*see* Redcross v. State of New York, 241 AD2d 787, 790 [1997], *lv denied*, 19 NY2d 801 [1997]), and plaintiff's admission that he saw the warning barrels and cones but nonetheless rode his bicycle around them into the protected area areas fully depicted in pictures included within defendants' proffer we agree with Supreme Court that defendants made "a prima facie showing of entitlement to judgment as a matter of law" (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; *accord* JMD Holding Corp. v. Congress Fin. Corp., 4 NY3d 373, 384 [2005]).

With the burden shifted to plaintiff (*see* Alvarez v. Prospect Hosp., 68 NY2d at 324), we conclude, even when viewing the evidence in a light most favorable to the nonmoving party (*see* Macht v. J.S. Cinemas, Inc., 18 AD3d 1102, 1103 [2005]), that he failed to sustain his burden. Ribaudo v. Delaney Construction Corporation, 2007 NY Slip Op 07800. ◆

Disclaimer Delay Unreasonable

An alleged employee of plaintiff was injured in a construction site accident in March 1994 and in November, 1994 commenced an action against plaintiff that was subsequently dismissed upon stipulation. The alleged employee then commenced an action against the owner of the property in April, 1995 and the property owner commenced a third-party action against plaintiff in March 1996. It appears that the latter actions remain pending. At the time of the accident, plaintiff was insured under a policy issued by defendant, Nationwide Mutual Insurance Company.

Although defendant initially provided a defense to plaintiff in the two actions commenced against him, defendant issued a disclaimer of coverage on June 5, 1997 based on a policy exclusion barring coverage for injuries sustained by an employee of plaintiff. Plaintiff then commenced this action seeking, inter alia, a determination that defendant's notice of disclaimer was untimely and a declaration that defendant has a duty to defend and indemnify plaintiff in the underlying third-party action.

Before answering the complaint, defendant moved to dismiss it pursuant to CPLR 3211 (a) (1) and (7). In addition, defendant asked Supreme Court to treat its motion as one for summary judgment pursuant to CPLR 3211 (c) and to declare, inter alia, that it has no duty to defend or indemnify plaintiff in the underlying third-party action. In opposing the motion, plaintiff asserted that he is entitled to summary judgment in his favor in the event that the court treated defendant's motion as one for summary judgment. The Appellate Division of Supreme Court concluded that Supreme Court should have granted the relief sought by plaintiff, and therefore modified the order accordingly to grant judgment in favor of plaintiff. The court found defendant's explanation for the 19-month delay in disclaiming unreasonable as a matter of law. Wood v. Nationwide Mutual Insurance Company, 2007 NY Slip Op 08505. ◆

No Deprivation To Infant Plaintiff For Late Notice

An order was issued from Supreme Court, Bronx County and entered December 27, 2005, which granted plaintiffs' motion for an order deeming the notice of claim timely served upon defendants-appellants, and denied appellants' cross motion to dismiss the complaint for failure to file a timely notice of claim is unanimously affirmed, without costs.

The court providently exercised its discretion in deeming the notice of claim timely served upon appellants (General Municipal Law § 50-e[5]). Although the stated ignorance of the law by infant plaintiff's mother is not a reasonable excuse for the failure to have served a timely notice of claim (*see* Harris v. City of New York, 297 AD2d 473 [2002], *lv denied* 99 NY2d 503 [2002]), infant plaintiff should not be deprived of a remedy, where, as here, the record evidence demonstrates that appellants' possession of the medical records sufficiently constituted actual notice of the pertinent facts, and that they would not be substantially prejudiced by the delay (*see* De La Cruz v. New York City Health & Hosps. Corp., 13 AD3d 130 [2004]). Plaintiffs submitted affirmations from a physician establishing that the medical records, on their face, evinced that appellants failed to provide infant plaintiff with preventive care against lead poisoning (compare Williams v. Nassau County Med. Ctr., 6 NY3d 531, 537 [2006]), and appellants' argument that the delay would prejudice them in defending the action because of the inability to reconstruct events and conversations is unconvincing (Moody v. New York City Health & Hosps. Corp., 29 AD3d 395 [2006]; Matter of McMillan v. City of New York, 279 AD2d 280 [2001]). This is the decision and order of the Supreme Court, Appellate Division, First Department. Bayo, et al., v. Burnside Mews Associates, etc., 2007 NY Slip Op 09504. ◆

Policy Provision Not Ambiguous

In an action to recover damages for breach of an insurance policy, the defendant Tower Insurance Company of New York appeals from so much of an order of the Supreme Court, Kings County dated June 14, 2006, as denied that branch of its motion which was for summary judgment dismissing the causes of action asserted by the plaintiff Joseph Gerard-Jean against it.The order is reversed insofar as appealed from, on the law, with costs, and that branch of the motion of the defendant Tower Insurance Company of New York which was for summary judgment dismissing the causes of action asserted by the plaintiff Joseph Gerard-Jean against it is granted.

"The construction of terms and conditions of an insurance policy that are clear and unambiguous presents a question of law to be determined by the court when the only issue is whether the terms as stated in the policy apply to the facts" (Raino v. Navigators Ins. Co., 268 AD2d 419, 419-420; *see also* Briggs v. Allstate Ins. Co., 1 AD3d 392). Moreover, "where the provisions of the policy are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement" (Government Empls. Ins. Co. v. Kligler, 42 NY2d 863, 864). However, any ambiguity must be construed against the insurer in favor of coverage (*see* Ace Wire & Cable Co. v. Aetna Cas. & Sur. Co., 60 NY2d 390, 398).

The provisions at issue in the instant policy are not ambiguous. The policy defines the insured location as, inter alia, the "residence premises." The term "residence premises" is defined as follows:"8. Residence premises' means:

a. The one family dwelling, other structures, and grounds; or

b. That part of any other building; *where you reside and which is shown as the residence premises' in the Declarations*."

The Declarations identify the insured as the plaintiff Joseph Gerard-Jean (hereinafter the plaintiff) with an address of 1598 E. 53rd Street, Brooklyn NY (hereinafter the subject premises). It further states that "The residence premises covered by this policy is located at the above insured address."

Contrary to the plaintiff's contention, the set-off clause beginning "where you reside" clearly applies to and modifies sections 8(a) and (b) quoted above. Neither section 8(a) nor 8(b) identifies a specific location without also adding the underlined clause beginning "where you reside" (*see* Metropolitan Prop. & Cas. Ins. Co. v. Pulido, 271 AD2d 57, 58). As the parties do not dispute that the plaintiff, the named insured under the policy, did not reside at the subject premises, the defendant Tower Insurance Company of New York properly concluded that the subject premises were not covered under the policy and properly disclaimed on that basis. Marshall v. Tower Insurance Company of New York, 2007 NY Slip Op 08200. ◆

At the Supreme Court — First Amendment Discussion

At a school-sanctioned and school-supervised event, the petitioner, the high school principal, saw students unfurl a banner which she regarded as promoting illegal drug use. Consistent with established school policy prohibiting such messages at school events, the principal directed the students to take down the banner. When one of the students who had brought the banner to the event--refused, the principal confiscated the banner and later suspended him. The school superintendent upheld the suspension, explaining, *inter alia*, that the student was disciplined because his banner appeared to advocate illegal drug use in violation of school policy. Petitioner school board also upheld the suspension. Frederick filed suit under 42 U. S. C. §1983, alleging that the school board and Morse had violated his First Amendment rights. The District Court granted petitioners summary judgment, ruling that they were entitled to qualified immunity and that they had not infringed Frederick's speech rights. The Ninth Circuit reversed. Accepting that Frederick acted during a school-authorized activity and that the banner expressed a positive sentiment about marijuana use, the court nonetheless found a First Amendment violation because the school punished Frederick without demonstrating that his speech threatened substantial disruption.

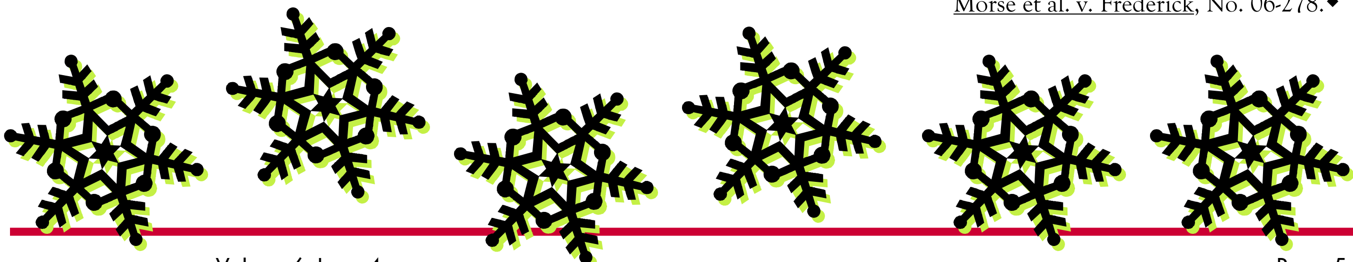
It also concluded that Morse was not entitled to qualified immunity because Frederick's right to display the banner was so clearly established that a reasonable principal in Morse's position would have understood that her actions were unconstitutional.

Held: Because schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use, the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending Frederick.

(a) Frederick's argument that this is not a school speech case is rejected. The event in question occurred during normal school hours and was sanctioned by Morse as an approved social event at which the district's student-conduct rules expressly applied. Teachers and administrators were among the students and were charged with supervising them. Frederick stood among other students across the street from the school and directed his banner toward the school, making it plainly visible to most students. Under these circumstances, Frederick cannot claim he was not at school.

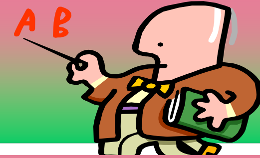
(b) The Court agrees with Morse that those who viewed the banner would interpret it as advocating or promoting illegal drug use, in violation of school policy. At least two interpretations of the banner's words--that they constitute an imperative encouraging viewers to smoke marijuana or, alternatively, that they celebrate drug use--demonstrate that the sign promoted such use. This pro-drug interpretation gains further plausibility from the paucity of alternative meanings the banner might bear.

(c) A principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. In Tinker v. Des Moines Independent Community School Dist., 393 U.S. at 506 the Court declared, in holding that a policy prohibiting high school students from wearing antiwar armbands violated the First Amendment, *id.*, at 504, that student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school," Id., at 513. The "special characteristics of the school environment," Tinker, 393 U.S. at 506 and the governmental interest in stopping student drug abuse allow schools to restrict student expression that they reasonably regard as promoting such abuse. Id., at 508, 509, distinguished. Reversed and remanded. Morse et al. v. Frederick, No. 06-278.◆



SCHOLASTICALLY SPEAKING...

BY PROFESSOR I.M. SMART



Vermin: Asking The Pesky Coverage Question...

Several inquiries have been received this year about what type of vermin are excluded under the URB forms. The answer should be out there but this query is not as simple as might be expected.

The term "vermin" is not defined in any URB policies and is not generally defined in other industry forms, although that may be changing. As a result, whether or not insurance forms convey coverage depends on the facts of each case as they are viewed by a court which generally uses the common meaning of the term located from a dictionary, because it is not defined in the applicable policy in question.

Variously assorted creatures such as squirrels, mice, rats, carpet beetles, roaches, skunks, snakes, raccoons, bats, turtles and pigeons have been cited as vermin in claim declinations. Whether or not this is a valid basis for declination becomes the issue to address.

All animals are not vermin. In circumstances where the policy excludes coverage for domestic animals, there is coverage for non-domestic animals, except where otherwise excluded as a bird, insect, rodent or vermin. So when Fluffy the cat causes damage to the insured's property, there probably is not coverage but when Bambi and her friends cause the damage, there is likely to be coverage under most policy forms. It is fairly simple to make a determination of what is a bird or insect, but rodents and vermin present a different story.

What exactly is a rodent and how is it different from vermin? A rodent, according to the Miriam Webster Online Dictionary definition is "any of an order (Rodentia) of relatively small, gnawing mammals, as a mouse, squirrel or beaver) that have in both jaws a single pair of incisors with a chisel shaped edge." Rodents, therefore, can be identified as squirrels, rats, mice, chipmunks, porcupines and beavers.

The difficulty arises in distinguishing rodents from vermin. Vermin, according to the Miriam Webster Online Dictionary definition is "a: small, common, harmful, or objectionable animals (as lice or fleas) that are difficult to control; b: birds and mammals that prey on game; c: animals that at a particular time and place compete (as for food) with humans or domestic animals."

The New York Court of Appeals addresses the vermin issue in a 1933 case and then looked at it again in the case of Sincoff v. Liberty Mutual Fire Insurance Company, 11 N.Y.2d 386. A discussion of Sincoff may shed some understanding on how the New York Court of Appeals looks at the issue of vermin.

In Sincoff, the plaintiffs appealed a judgment that had reversed a judgment for plaintiffs. Defendant insurer contended that the policy's exclusionary language barred plaintiff's recovery under the policy.

In this case, the plaintiffs held an all risk personal property floater which insured plaintiffs personal property against risks of loss of or damage to the property covered, but excluded losses caused by deterioration, moth, vermin, and inherent vice. When carpet beetles damaged certain of plaintiffs' furniture, carpeting, and tapestry, plaintiffs sought to recover from defendant under the policy but defendants denied the claim. The basis was that damages from carpet beetles fell within the vermin exclusion. After a non-jury trial in which plaintiffs' expert testified as to several dictionaries' meanings of vermin and insects, a judgment was entered for plaintiff. When the case was heard by the Court of Appeals, the NY high court held that because the dictionaries had varying meanings, the term was capable of more than one meaning and the doubt was therefore resolved in favor of plaintiffs. The ambiguity in the language was resolved in favor of plaintiffs, the insureds.

In Umanoff v. Nationwide Mutual Insurance, 110 Misc. 2d 474, the Civil Court of New York County addressed the vermin issue as it relates to raccoons. The insured brought an action under his homeowner's policy for damage to the structure and personal property caused by an invasion of the attic by raccoons. The insurer denied the claim based on the exclusion of vermin. Both parties filed motions for summary judgment. The court granted the insured motion for loss of real property and the insurer's motion for loss of the personal property. The court held that the term vermin was capable of more than one meaning and resolved the ambiguity in favor of the insured because the insurer did not show it would be unreasonable for the average man reading the policy to conclude that raccoons were not vermin and that is own construction was the only one that could be fairly placed on the policy. The court held that the insured was precluded from recovering personal property damages because

The Nature Of Business Interruption Coverage

All businesses have an exposure to loss of income and expenses that necessarily continue during periods of business interruption. The question becomes how businesses deal with these exposures. This topic has been particularly prevalent since the destruction and damage caused in the wake of the World Trade Center bombings in 2001.

In terms of the history of business interruption insurance, it should be noted that the Standard Fire Policy specifically excludes coverage for these types of losses. Item 3 on page one of the Standard Fire Policy specifies that "the insurer would not pay an amount exceeding … number of dollars in any event for no more than the interests of the insured, against all direct loss by fire, lightning and by removal…" In addition, page 2 of the Standard Fire Policy in lines 7 through 9 states, "this policy shall not cover accounts, bills, currency, deeds, evidences of debt, money or securities…" Historically, money has not been insurable and the Standard Fire Policy does not address indirect losses. An indirect loss is that which occurs as a result of a direct loss. The destruction of a building or productive capacity is a direct loss, and the income that would have been earned from the building or productive capacity is an indirect loss.

An indirect loss is addressed by Business Interruption Insurance, among other forms. The purpose of business interruption insurance is to afford the means of recovery of income that the company is prevented from earning and also recovery of expenses that necessarily continue during periods of interruption. Therefore, business interruption insurance is essential to most businesses including those that may be operating at a loss or on a marginal basis.

Business interruption policies are triggered by perils set forth on the underlying coverage. The obligation of the insured is to exercise due diligence and dispatch in the restoration of productive facilities, and to resume operations as soon as reasonably possible. There are optional coverages for extended periods of restoration and for extended coverage of accounts, bills, currency, etc.

In addition to losses triggered by perils insured against in underlying contracts, there is also a provision in business interruption policies that extends coverage for up to 14 days for certain losses attributable to denial of access of the insured's premises resulting from valid acts of civil authority.

The business interruption policy can be expanded to deal with contingent business interruption losses. In these cases, the insured's place of business may not be damaged but the insured is out of business because of loss or damage to the facilities of parties upon whom the insured depends. These parties may be the insured's sole customers, main suppliers or the leader retailer at a shared location.

Business interruption insurance coverage is an important consideration for any and all businesses. ◆

From the Department

Opinions, Regs, Circular Letters Update

What follows is information about some of the most recent Opinions of General Counsel, Regulations and Circular Letters that have been issued by the New York State Insurance Department and may be of interest to readers.

Of interest is an opinion dated October 10, 2007 entitled "Release for Third-Party Property Damage Claim" that discusses what insurers may seek to release in this circumstance. Another opinion that may be of interest to readers is also dated October when settlement checks are to be issued by insurers. Another opinion that may be of interest to readers is dated October 23, 2007 and is entitled "Employees Acting As Adjusters Without a License, which discusses this circumstance.

With regard to recent regulations, there have not been any emergency adoptions applicable to the URB members' and subscribers' business. However, there is the Frist Amendment to Regulation 119 (11 NYCRR 151) which includes the Workers' Compensation Insurance Rates are of interest to New York employers. There have not been any recent final adoptions of particular relevance to readers.

There have not been a great many Circular Letters issued by the Department recently, and of those issued, in general they do not present issues relevant to the business of the URB members and subscribers.

The opinions, regulations and circular letters of the Department may be viewed in detail at the Department website which is www. ins.state.ny.us.◆

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URB Update

Forms Meetings Recap

URB held two Forms Meetings, one on November 13, 2007 in Auburn, New York at the Holiday Inn and one on November 15, 2007 in Schenectady, New York at the URB office. Forms discussed with attendees included:

- LS-187 (6/07) - Asbestos Exclusion—note that there is a disclosure and the exclusion can trigger a conditional renewal in certain circumstances.
- FL-44 (9/07) - Additional Insureds
- ML-23 (9/07) - Additional Household Members Coverage
- ML-29 (9/07) - Assisted Living Care Facility Resident Coverage
- ML-64H(9/07) - Higher Limits of Liability Endorsement

The status of these forms was discussed and those forms not approved at the time of the meeting have since been approved. Forms under review to be revised or updated in 2008 were also discussed, as was the status of the NYSID statutory filing issue.

CE Update

URB Services Corp. sponsored two CE classes, one for the General Liability line of business on November 19, 2007 and one for the Homeowner line of business on November 20, 2007 at the URB offices. A total of 16 credits were earned by students who attended both sessions. ◆

In Pennsylvania

No Constitutional Viola-

Plaintiff, Cientha Moore, brought this action under 42 U.S.C. §1983 on behalf of herself and as parent and natural guardian of Russell Roundtree. She alleges that defendants failed to protect her kindergarten-aged son from assault by three other kindergarten students on a bus ride home from school on March 12, 2003.

Moore contends that defendants' nonfeasance resulted in physical and emotional harm to her son in violation of his constitutional rights under the Due Process Clause of the Fourteenth Amendment.

Following discovery, defendants filed a motion for summary judgment. While the events of March 12, troubling, they do not rise to the level of a constitutional violation, the court will grant defendants' motion for summary judgment.

Russell road the standard sixty seat bus from home to school. There were two specific seating assignments on the bus, one for a child who caused trouble and was to sit in the last seat on the bus and one for Russell, who was to sit in the first seat on the bus. On March 12, 2003 Russell was allegedly attacked by three other students on the bus, including the troublemaker. None of the students appeared injured to the driver, who warned them. This was the first report of an incident by Russell but his mother contends he was continually hit on the bus and that prior to his as- Russell's clothing, glasses and money were stolen from him. Moore alleges these incidents were reported to the school but personnel deny prior knowledge. Because of defendants' failure to act, Moore contends they are subject to liability under the "state-created danger" doctrine.

Defendants contend that the facts of this case are insufficient to satisfy the elements of a state-created danger claim. Plaintiffs can prove no set of facts demonstrating that defendants placed Russell in harm's way. Cienthia Moore Individually and as Parent and Natural Guardian of Minor Plaintiff, Russell Rountree and Russell Roundtree A Minor by Parent and Natural Guardian, Cienthia Moore.