URB INSIDER

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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.

Terrorism Program Extended

The Terrorism Risk Insurance Extension Act of 2005 was scheduled to expire on December 31, 2007 but it was extended on December 26, 2007 when the Terrorism Risk Insurance Program Reauthorization Act of 2007 was signed into law, which extended the Terrorism Risk Insurance Act (TRIA).

Major changes to the Terrorism Risk Insurance Act, as amended, include: revision of the definition of a certified act of terrorism to eliminate the requirement of acting on behalf of a foreign person; extension of the program through December 31, 2014; a requirement of a clear and conspicuous notice to policyholders of the $100,000,000,000 cap; fixing the insurer deductible at 20% of an insurer's direct earned premium and the federal share of compensation at 85% of insured losses that exceed insurer deductibles; fixing the program trigger at $100,000,000 for all additional program years and requiring the United States Treasury to promulgate regulations, determining pro-rata shares of insured losses under the program when insured losses exceed $100,000,000,000.

As previously communicated, the URB updated its disclosures and exclusions to reflect the changes in the statute and these materials have previously been provided to constituents. Older versions may not be used.

TERR-DISC Ed. 12/07 and NOTICE Ed. 12/07 are in the nature of the NAIC model disclosures and, the New York State Insurance Department has acknowledged these disclosures for informational purposes only.

The FL-114, LS-114, MR-114 and SF-114, all Ed. 12/07, are terrorism exclusions which are approved by the New York State Insurance Department for use under the applicable circumstances.

The FL-116, LS-116, MR-116 and SF-116, all Ed.1/08, are considered by the New York State Insurance Department to be disclosures which have been acknowledged for informational purposes only. These are not considered forms by the Department since 2006 and are not approved as forms. Moreover, they do not have an acknowledgement in them as do the NAIC model disclosures.

An inquiry to the Insurance Department Office of General Counsel indicated URB should direct an inquiry to the Treasury regarding if these disclosures are compliant with the statute. An inquiry to the Treasury resulted in a telephone response on March 20, 2008 indicating the Treasury would not review the disclosures to provide a determination if they are in compliance with TRIA, as amended. The representative indicated they are aware insurers are using disclosures without the acknowledgement and in the event of claims to be made, the issue will be for insurers to prove that notice was provided to insureds.

Based upon this information, insurers may determine what is best to use and may also elect to draft their own format. Information about how to comply with TRIA, as amended, has been previously provided, including that Treasury considers March 31, 2008 as the latest reasonable date for compliance. There is also guidance in the form of Circular Letters from NYSID, the most recent of which is dated February 22, 2008, and interim guidance from Treasury, the most recent of which is dated January 28, 2008. The NYSID information is available on the agency website at www.ins.state.ny.us, and the Treasury Department information is available on the agency website at www.treas.gov.◆

From the Court of Appeals

Extra-Contractual Damages Claims

The Court of Appeals in February rendered two decisions that have a profound effect on insurers. Prior to these decisions, insurers were somewhat insulated from "bad faith" or "punitive damages." The court has now allowed insureds to seek extra-contractual damages because the court determined an insurer's breach might cause additional damage. In prior rulings, punitive damages were not permitted to flow from the breach of an insurance contract unless there was certain conduct displayed by the insurer.

In Rocanova v. Equitable Life Assur. Society of U.S., 83 NY 2d 603, the Court of Appeals rejected the argument that a bad faith failure by an insurer to pay a claim could, without more, justify a punitive damages award. In the Rocanova case, the court held that punitive damages are not available for breach of an insurance contract unless the plaintiff shows "egregious tortious conduct" directed at the insured claimant and a "pattern of similar conduct directed at the public generally." But this standard was not upheld in two recent decisions of the New York High Court.

One case is Bi-Economy Market, Inc. v. Harleysville Insurance Company of New York, 2008 NY Slip Op. 01418 and the other case is Panasia Estates, Inc. v. Hudson Insurance Company, 2008 NY Slip Op 01419.

In the Bi-Economy case, the insured, a family-owned wholesale and retail meat market, was damaged by a major fire. The insurer covered the insured under a deluxe business owner's policy, which included business interruption insurance for coverage of lost business income for up to one year from the date of the fire. When the insured presented a claim, the insurer disputed the actual damages and only advanced $163,161.92. More than a year later, the insured was awarded $407,181 after submission of the dispute to alternative dispute resolution. The insurer only offered to pay seven months of the claim for lost business income, and the insured never resumed business operations.

The insured subsequently brought the instant action. On appeal, the court reversed. The court determined that the insured could properly seek consequential damages for the collapse of its business as the insurer should have been aware that any breach of its obligations to investigate in good faith and pay covered claims promptly would result in payment of damages to the insured for the loss of its business as a result of the breach. Thus, the claim for consequential damages was reasonably foreseeable and contemplated by the parties.

In making a determination, the Court of Appeals stated, "the nonbreaching party may recover general damages which are the natural and probable consequence of the breach" (Kenford Co. v. County of Erie, 73 NY2d 312, 319, 537 N.E.2d 176, 540 N.Y.S.2d 1 [1989]). Special, or consequential damages, which "do not so directly flow from the breach," are also recoverable in limited circumstances (American List Corp. v. U.S. News & World Report, Inc., 75 NY2d 38, 43, 549 N.E.2d 1161, 550 N.Y.S.2d 590 [1989]).

The court elaborated by saying, To determine whether consequential damages were reasonably contemplated by the parties, courts must look to "the nature, purpose and particular circumstances of the contract known by the parties . . . as well as 'what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made'" (Kenford, 73 NY2d at 319, *quoting* Globe Ref. Co. v. Landa Cotton Oil Co., 190 U.S. 540, 544, 23 S. Ct. 754, 47 L. Ed. 1171 [1903]).

As in all contracts, implicit in contracts of insurance is a covenant of good faith and fair dealing, such that "a reasonable insured would understand that the insurer promises to investigate in good faith and pay covered claims" (New York Univ. v. Continental Ins. Co., 87 NY2d 308, 318, 662 N.E.2d 763, 639 N.Y.S.2d 283 [1995]).

The purpose served by business interruption coverage cannot be clearer – to ensure that Bi-Economy had the financial support necessary to sustain its business operation in the event disaster occurred (*see* Howard Stores Corp. v. Foremost Ins. Co., 82 AD2d 398, 400, 441 N.Y.S.2d 674 [1st Dept 1981].

Thus, the very purpose of business interruption coverage would have made Harleysville aware that if it breached its obligations under the contract to investigate in good faith and pay covered claims it would have to respond in damages to Bi-Economy for the loss of its business as a result of the breach (*see* Sabbeth Indus. v. Pennsylvania Lumbermens Mut. Ins. Co. (238 AD2d 767, 769, 656 N.Y.S.2d 475 [3d Dept 1997]).

The Panasia Estates, Inc. v. Hudson Insurance Company case involves an underlying roof damage claim. During the policy period, the roof of the insured's building was opened in order to perform construction work. Inclement weather caused rain to enter the building through the roof opening, resulting in extensive damage to the property. The insured claimed it promptly notified the insurer of the loss and that the insurer failed to investigate or adjust the claim until several weeks later. The insurer then denied the claim three months after that, stating that the insured's loss was the result of repeated water infiltration over time and wear and tear rather than from a risk covered under the builders risk policy provision.

Continued next page →

Extra-Contractual Damages Claims Cont'd

The Court of Appeals found that the insured could recover foreseeable damages, beyond the limits of its policy, for breach of a duty to investigate, bargain for and settle claims in good faith. The Appellate Division correctly concluded that the contractual exclusion for consequential loss did not bar the recovery of consequential damages.

Panasia Estates is the owner of commercial rental property located at 33 West 19th Street in Manhattan. Panasia had a commercial property insurance policy with Hudson Insurance Company, which included "Builders Risk Coverage," covering damage to its property while undergoing renovation. During the policy period, the roof of its building was opened in order to perform construction work. Inclement weather caused rain to enter the building through the roof opening, resulting in extensive damage to the property.

Shortly after the occurrence, Panasia claimed it promptly notified Hudson of the loss. According to Panasia, however, Hudson failed to investigate or adjust the claim until several weeks later. Hudson then denied the claim three months after that, stating that Panasia's loss was the result of repeated water infiltration over time and wear and tear rather than from a risk covered under the builders risk policy provision.

Panasia commenced this action against Hudson, alleging that it breached the insurance contract by failing to properly investigate the loss and denying the loss as not covered under the policy. Panasia sought both direct and consequential damages that it claimed stemmed from Hudson's breach.

Hudson moved for partial summary judgment "dismissing all of Panasia's bad faith allegations and all prayers for consequential, extra contractual, or incidental damages or attorneys [sic] fees." Hudson argued, among other things, that a contractual exclusion for "[a]ny other consequential loss" precluded Panasia's request for consequential damages.

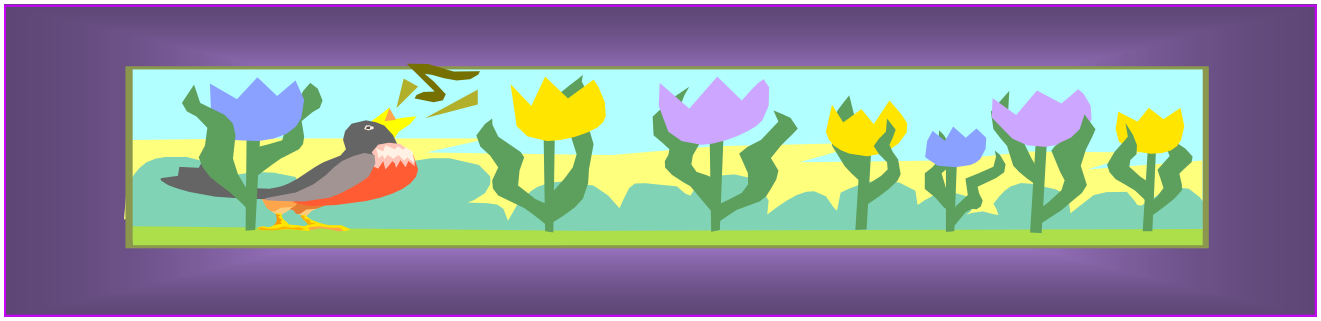
Supreme Court denied that part of Hudson's motion to dismiss Panasia's claims for consequential damages. The Appellate Division affirmed, stating that "[a]n insured may recover foreseeable damages, beyond the limits of its policy, for breach of a duty to investigate, bargain for and settle claims in good faith" (39 AD3d 343, 343, 835 N.Y.S.2d 49, *citing* Acquista v. New York Life Ins. Co., 285 AD2d 73, 730 N.Y.S.2d 272 [1st Dept 2001]). In addition, the court concluded that Hudson failed to show that the contractual exclusion for "'consequential loss' applied to Panasia's claim, rejecting Hudson's argument that "consequential loss" and "consequential damages" were synonymous (*id.*).

The Appellate Division granted Hudson leave to appeal to this Court, certifying the question: "Was the order of the Supreme Court as affirmed by this Court, properly made?" The Court of Appeals has concluded that it was.

The courts below properly rejected Hudson's contention that it was entitled to judgment as a matter of law because consequential damages are not recoverable in a claim for breach of an insurance contract. The Court of Appeals explained in Bi-Economy Mkt. v. Harleysville Ins. Co. of N.Y., 2008 NY Slip Op 01418; 2008 N.Y. LEXIS 278 consequential damages resulting from a breach of the covenant of good faith and fair dealing may be asserted in an insurance contract context, so long as the damages were "'within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting'" (majority opn, at 5, *quoting* Kenford Co. v. County of Erie (73 NY2d 312, 319, 537 N.E.2d 176, 540 N.Y.S.2d 1 [1989]). Here, the courts below failed to consider whether the specific damages sought by Panasia were foreseeable damages as the result of Hudson's breach. Because the record before the Court of Appeals is not fully developed on that issue, such claim must be considered by Supreme Court.

Lastly, as the Appellate Division correctly concluded, the contractual exclusion for consequential loss does not bar the recovery of consequential damages (*see* Bi-Economy, at 10-11).

As a practical matter, insurers will want to take note of these two significant decisions from New York's highest court. Insurers should be aware of the standard set forth in these two cases, due to the potential impact the holdings of these cases could have on future cases. These decisions can potentially have an effect on the business of property casualty insurers. ◆



Case Briefs

Rental = Homeowners Coverage

In an action to recover under a homeowners' insurance policy, defendant insurer sought review of an order of the Supreme Court, Greene County (New York), which, among other things, granted plaintiff insureds' motion for partial summary judgment on the issue of liability and denied the insurer's cross-motion for summary judgment dismissing the complaint.

The insureds had purchased a summer home. During a period of time when the insureds had entered a ski season lease with two individuals, the home was destroyed by fire. The insurer told the insureds that it would only pay $2,500 based on a limitation on coverage for personal property on insured premises used for business purposes.

On appeal, the court affirmed based on a finding that the policy language was ambiguous. In its definition of rental of property to others as a business, the policy language stated that the definition did not include an occasional rental for residential purposes.

While the insurer claimed that the rental for a five-month period was not an occasional rental, the court found it was also reasonable to interpret the term "occasional rental" as one that occurred now and then with the property owners intending to remain the primary residents. In the instant case, the lease at issue was the first time the insureds had rented their home since purchasing it two years prior and was clearly a vacation rental. Therefore, the ambiguity had to be construed against the insurer.

The court affirmed the trial court's order. When making its determination, the court discussed it is well settled that an insurer seeking to invoke a policy exclusion "must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case" (Continental Cas. Co. v. Rapid-American Corp., 80 NY2d 640, 652, 609 N.E.2d 506, 593 N.Y.S.2d 966 [1993]; *accord* Kramarik v. Travelers, 25 AD3d 960, 962, 808 N.Y.S.2d 807 [2006]). In determining whether a policy provision is ambiguous, the focus is "'on the reasonable expectations of the average insured upon reading the policy'" (Pepper v. Allstate Ins. Co., 20 AD3d 633, 635, 799 N.Y.S.2d 292 [2005], quoting Matter of Mostow v. State Farm Ins. Cos., 88 NY2d 321, 326-327, 668 N.E.2d 392, 645 N.Y.S.2d 421 [1996]; *see* State Farm Mut. Auto. Ins. Co. v. Glinbizzi, 9 AD3d 756, 757, 780 N.Y.S.2d 434 [2004]). Particularly where exclusionary language is at issue, any ambiguity in the policy is resolved in favor of the insured (*see* Pepper v. Allstate Ins. Co., 20 AD3d at 635; Boggs v. Commercial Mut. Ins. Co., 220 AD2d 973, 974, 632 N.Y.S.2d 870 [1995]).

Plaintiffs' one-time rental of their summer home for a five-month period, with no definite plans to continue to rent the home but with the intent to return to use the summer home exclusively themselves, fits comfortably within these alternative definitions. Villanueva v. Preferred Mut. Ins. Co., 2008 NY Slip Op 01679.◆

Reasonable Time Key To Non-Liability

Plaintiff sought review of an order entered by the Supreme Court, Albany County, which granted defendant property owners' motion for summary judgment dismissing a personal injury complaint. Plaintiff was attempting to deliver a fruit basket, weighing about 12 to 14 pounds and without a handle, from her employer to the owners. At the time, moderate freezing rain was falling; plaintiff stated that she successfully climbed a set of exterior stairs but slipped and fell on a concrete walkway leading to the residence's entrance. On appeal, the court affirmed. While the owners did not establish that the exterior stairs were compliant with applicable building codes due to a lack of handrail, the owners demonstrated that such a lack was not the proximate cause of plaintiff's fall as plaintiff testified that she fell on the walkway, not the stairs. Any argument that a handrail would have prevented plaintiff's fall was unfounded speculation, which was insufficient to defeat the owners' motion for summary judgment. Because freezing rain was falling at the time of the incident, the owners had a reasonable time after the storm ended to correct such storm-created hazardous ice and snow conditions.

The court affirmed the trial court's judgment. In making this determination, the court said, "[a] party in possession or control of real property has a reasonable period of time after the cessation of a storm in which to take protective measures to correct storm-created hazardous ice and snow conditions" (Fusco v. Stewart's Ice Cream Co., 203 AD2d 667, 668, 610 N.Y.S.2d 642 [1994]; *accord* Convertini v. Stewart's Ice Cream Co., 295 AD2d 782, 783, 743 N.Y.S.2d 637 [2002]), this evidence satisfied defendants' initial burden on their motion for summary judgment.

In response, the plaintiff was obligated to provide sufficient proof and the court said mere conclusions and expressions of hope or unsubstantiated allegations are insufficient. Avina v. Verburg, 2008 NY Slip Op 00603.◆

No Ambiguity, Disclaimer Held Proper

Plaintiff insureds appealed an order and judgment by the Oneida County Supreme Court (New York) that denied their motion for summary judgment and granted defendant insurer's motion for summary judgment in the insureds' action for improperly disclaiming insurance coverage for fire damage to their property.

The insureds' daughter candidly acknowledged during her deposition that she used a barn on the insureds' property for her business that involved the breeding and boarding of horses and that she was operating that business at the time of the fire. The appellate court found that the terms "business" and "insured person" in the insurance policy were not ambiguous. Contrary to the insureds' contention, the insurer met its initial burden on its cross-motion with respect to the first cause of action by establishing that the barn was being used by the insureds' daughter for business purposes and that the insurance policy excluded coverage for structures used for business purposes. The insureds failed to raise a triable issue of fact whether their daughter's business activities were sporadic or not motivated by profit. The complaint, as amplified by the bill of particulars, asserted only causes of action for breach of contract against the insurer. Therefore, the trial court properly granted the insurer's motion for summary judgment.

The order and judgment were unanimously affirmed.

As a preliminary matter, the court concluded that the term "business," defined in the insurance policy as "any full or part-time activity of any kind engaged in for economic gain including the use of any part of any premises for such purposes," is not ambiguous with respect to the facts of this case (*cf.* Roland v. Nationwide Mut.Fire Ins. Co., 286 AD2d 872, 730 N.Y.S.2d 599; *see generally* W.W.W. Assoc. v. Giancontieri, 77 NY2d 157, 162, 566 N.E.2d 639, 565 N.Y.S.2d 440). We further conclude that plaintiffs' daughter is an "insured person" under the unambiguous definitions of that term in the insurance policy (*see generally* W.W.W. Assoc., 77 NY2d at 162). Contrary to plaintiffs' contention, defendant met its initial burden on its cross motion with respect to the first cause of action by establishing that the barn located on the property at issue was being used by plaintiffs' daughter for business purposes and that the insurance policy excluded coverage for structures used for business purposes (*see generally* Zuckerman v. City of New York, 49 NY2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595).

Contrary to the further contention of plaintiffs, they failed to raise a triable issue of fact whether their daughter's business activities were sporadic or not motivated by profit (*cf.* Pepper v. Allstate Ins. Co., 20 AD3d 633, 635-636, 799 N.Y.S.2d 292; Bragin v. Allstate Ins. Co., 238 AD2d 773, 774, 656 N.Y.S.2d 468; *see generally* Showler v. American Mfrs. Mut. Ins. Co., 261 AD2d 896, 897, 690 N.Y.S.2d 369). Weiss v. Allstate Ins. Co., 2008 NY Slip Op 02338. ◆

Pennsylvania

Non Resident Not An Insured

In a declaratory judgment action, a minor, by and through his parent and natural guardian, and his parent individually, appealed entry of summary judgment in favor of an insurance company by the Court of Common Pleas of Crawford County (Pennsylvania).

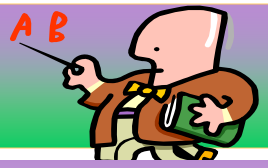
The minor was injured while visiting a residence. Due to pending actions that followed the incident, the insurance company sought a determination as to whether a grandchild qualified as an "insured" under a homeowners insurance policy. The appellate court did not find the term "resident" ambiguous merely because it was not defined in the policy. "Residence" was a factual place of abode evidenced by a person's physical presence in a particular place. Also, since resident status was a question of physical fact, intention was not a relevant consideration. Thus, the trial court did not err or abuse its discretion in finding that the grandchild was not a resident of his grandmother's household. The deposition testimony of several witnesses clearly supported the trial court's determination that the grandchild was a drifter whose visits at the home did not occur with any regularity, but rather were random at best. The grandchild did not have a key to the home nor did he have a bedroom at the house. When he stayed at the residence he would only stay a couple of nights at any given time, sleeping on the couch or in his brother's room.

When an insurer relies on a policy exclusion as the basis for its denial of coverage and refusal to defend, the insurer has asserted an affirmative defense and, accordingly, bears the burden of proving such a defense. When a provision of a policy of insurance is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer.

The judgment of the trial court was affirmed. Wall Rose Mutual v. Manross, 2007 PA Super 395.◆

SCHOLASTICALLY SPEAKING...

BY PROFESSOR I.M. SMART



Types of Ownership...What's In A Name

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

Re: Opinions of Counsel

Below are excerpts from a recent Opinions of Counsel of the New York State Insurance Department that may be of interest to property casualty insurers.

The Office of General Counsel issued an opinion on February 7, 2008 regarding Insurance Company Reserves.

The questions presented are:

1. Must a liability insurer establish a reserve upon receipt of a liability claim?

2. Must a liability insurer effectuate settlements of claims in good faith when liability under the policy is shown to be clear?

The conclusions reached are:

1. Yes. A liability insurer in New York is required to establish reserves for claims.

2. Yes. An insurer is required to effectuate settlement agreements in good faith.

There are no specific facts provided. The analysis is reproduced in part. N.Y. Ins. Law §1303 (McKinney 2006), which discusses the requirement of establishing reserves, is relevant to the inquiry. That statute reads in pertinent part as follows:

"Every insurer shall, except as provided in section one thousand three hundred four of this article and subject to specific provisions of this chapter, maintain reserves in an amount estimated in the aggregate to provide for the payment of all losses or claims incurred on or prior to the date of statement, whether reported or unreported, which are unpaid as of such date and for which such insurer may be liable, and *also reserves in an amount estimated for the expenses of adjustment or settlement of such losees or claims.* (Emphasis added.)"

The opinion goes on to state in pertinent part, "Thus, by its very terms, Section 1303 of the Insurance Law requires that insurers maintain reserves for the payment of losses or claims and expenses, incurred on or prior to the statement date, whether reported or unreported. Reserves are funds created for the purpose of paying anticipated claims under insurance policies. In general, upon receipt of a claim, the insurance company will review the claim to establish whether there is a potential exposure that a claim will have to be paid. If there is liability, the insurer must establish an estimated reserve, in an amount that is adequate to fully settle the claim."

The inquirer's second question asks whether an insurer is obliged to effectuate the prompt settlements of a claim. Insurance Law § 2601(a)(4) is relevant to the inquiry. It defines certain acts that constitute unfair claims settlement practices and prohibits insurers doing business in New York from engaging in such acts. The statute reads in pertinent part, as follows:

"(a) No insurer doing business in this state shall engage in unfair claim settlement practices. Any of the following acts by an insurer, if committed without just cause and performed with such frequency as to indicate a general business practice, shall constitute unfair claim settlement practices." The opinion goes on to discuss the role of Regulation 64 and how it addresses unfair claims settlement practices. "Consequently, both Insurance Law §2601 and Regulation 64 provide that an insurance company must effectuate a settlement promptly and in good faith when there is a reasonable basis for doing so", states the opinion. The entire opinion is available on the New York Insurance Department website at www.ins.state.ny.us.◆

Annual Flood Notice Requirement Enacted

Legislation was signed on March 4, 2008 that amends New York Insurance Law Section 3444 to require insurers provide an annual notice to their homeowners and dwelling fire personal lines insureds that these types of policies do not cover mudslides, or floods and to explain that flood insurance is available through the National Flood Insurance Program.

The requirement is effective 180 days from the date of enactment.

This notice shall accompany all new homeowners and dwelling fire personal lines policies and all renewals of these types of policies.

Previously, this type of notice was required but the law did not specify that the notice be annual, as does the new legislation.

URB does have an existing flood notice which is the FMD-1 Ed. 12/94. A check of the telephone number on form indicates it is still a working number at the flood program.

Other than the change to an annual notice requirement, there does not seem to be any substantive changes required in the notice, the content of which was originally provided by the New York Insurance Department in a Circular Letter. As such, the notice appears to be serviceable should insurers want to use it to comply with the annual requirement.◆

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URB UPDATE

- A revised Homeowners manual, HO-48, has been filed with the Department and is pending approval.
- ML-72 Ed. 1/08, Added Water Damages Coverage, and HO-47 have been filed with the Department and are pending approval.
- ML-430A Ed. 2/08, Renewal Endorsement, and ML-430B Ed. 2/08, Renewal Endorsement, have been filed with the Department and are pending approval.

Around the Country

Other States Case Notes

• **R**ecently, in Mississippi, a federal appeals court held that business exclusions in an Allstate Insurance Company policy held by a former Mississippi Bureau of Narcotics director meant the insurer was not required to provide coverage, including defense in a case involving a leaked memo to the news media.

• **I**n Vermont, the Supreme Court recently upheld a ruling against an Elks lodge that found it discriminated against women. The court denied the appeal because no reversible errors were shown by the Elks Lodge in a 2005 trial.

• **A** judge in North Dakota awarded civil damages of $881,000 in a wrongful death lawsuit to the legal guardian of a teenager who was killed by another teenager in a car crash. An investigation indicated the at fault teenage driver had failed to yield the right of way at an intersection, and he and his parents failed to carry liability insurance.

• **P**laintiff Randolf Hinz of New Hampshire was awarded $1.75 million dollars by a Merrimack County Superior Court Jury against Dr. Eric Leefman in a malpractice action. Hinz contended his blindness was caused by Leefman's failure to provide him oxygen during surgery when he was treating Hinz for a leg injury resulting from a car accident.

• **I**n a recently decided Massachusetts case, a jury awarded $14.5 million to the family of a 30-year old woman who died one day after undergoing thyroid surgery. ◆