URB INSIDER

A Quarterly Publication of Underwriters Rating Board

Supreme Court News

In its last public session until October, the Supreme Court recently decided cases that included topics of reverse discrimination, lending discrimination and strip searching at a school.

The reverse discrimination case was brought by New Haven, Connecticut firefighters who claimed they were discriminated against when the city disregarded the results of a promotion exam because too few minorities scored high enough. The Supreme Court ruled 5-4 that white firefighters were unfairly denied promotions.

The lending discrimination case was a fight between the states and the federal government over who gets to investigate national banks. The Supreme Court ruled 5-4 that state attorneys general can investigate national banks for discrimination and other crimes in the states where they operate if they can convince a judge the investigation is needed.

The strip search case involved a girl in Arizona who was strip-searched by school officials for carrying ibuprofen. The Supreme Court ruled that school officials violated the teenagers rights by strip-searching her for prescription strength ibuprofen.

In other Court news, Sonia Sotomayor became the Supreme Court's newest justice recently when she took the oath of office. Sotomayor is the first Hispanic justice and only the third woman to serve on the court during its history. She has served as a judge on the United States Court of Appeals for the Second Circuit since October, 1998. Sotomayor fills the spot previously held by Justice David Souter, who recently retired from the Court.♦

Summer, 2009

Volume 7, Issue 2

Index for this Issue:

Court Narrowly Construes the Earth Movement

Plaintiff seeks recovery under an insurance policy for damage to its building that resulted from an excavation on an adjacent lot. The Court held that policy exclusions for "earth movement" and "settling [or] cracking" did not unambiguously remove this event from the policy's coverage.

Plaintiff is the owner of a condominium apartment building. After cracks began appearing in the building, a structural engineer was called in. He found a number of cracks, separations and open joints, and concluded that they were caused by work that was in progress on the lot next door. That lot was being excavated, and underpinning had been built to protect the foundation of plaintiff's building. The engineer concluded, and it is undisputed in this case, that the underpinning was flawed, and that as a result earth slid away beneath plaintiff's building, causing damage.

Plaintiff submitted a claim for the damage to defendant State Farm Fire & Casualty Company (defendant), which had insured the building against "accidental direct physical loss." Defendant disclaimed coverage, relying on the "earth movement" exclusion in its policy, which says: "We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other uses of the loss; {12 NY3d at 306} or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss...

b. earth movement, meaning the sinking, rising, shifting, expanding or contracting of earth, all whether combined with water or not. Earth movement includes but is not limited to earthquake, landslide, erosion, and subsidence but does not include sinkhole collapse. "But if accidental direct physical loss by fire, explosion other than explosion of a volcano, theft or building glass breakage results, we will pay for the resulting loss."

Plaintiff brought this action to recover for its loss. In litigation, defendant and amici supporting it rely not only on the earth movement exclusion but on several others, only one of which required discussion. That exclusion, the settling or cracking exclusion, says: "We do not insure for loss either consisting of, or directly and immediately caused by, one or more of the following: f. settling, cracking, shrinking, bulging or expansion. But if accidental direct physical loss by any of the 'Specified Causes of Loss' or by building glass breakage results, we will pay for that resulting loss." None of the "Specified Causes of Loss"—a 14-item list, including fire, windstorm and water damage among other things—is present in this case.

"Any such exclusions or exceptions from policy coverage must be specific and clear..."

On cross motions for summary judgment, Supreme Court ruled in plaintiff's favor on the issue of liability (15 Misc 3d 1127[A], 2007 NY Slip Op 50869[U]). After a stipulation as to the amount of damages, Supreme Court entered judgment for plaintiff. The Appellate Division modified the judgment to add a declaration in plaintiff's favor, and otherwise affirmed (51 AD3d 649 [2008]). The Court of Appeals granted leave to appeal and the case was affirmed.

The law governing the interpretation of exclusionary clauses in insurance policies is highly favorable to insureds. The Court of Appeals said in *Seaboard Sur. Co. v Gillette Co.* (64 NY2d 304 [1984]):"[W]henever an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language. Any such exclusions or exceptions from policy coverage must be specific and clear in order to be enforced. They are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction. Indeed, before an insurance company is permitted to avoid policy coverage, it must satisfy the burden which it bears of establishing that the exclusions or exemptions apply in the particular case, and that they are subject to no other reasonable interpretation." (*Id.* at 311 [citations and internal quotation marks omitted; *see also Cone v Nationwide Mut. Fire Ins. Co.*, 75 NY2d 747, 749 [1989] [exclusions from coverage "construed strictly against the insurer"]; *Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 353 [1978] ["ambiguities in an insurance policy are to be construed against the insurer, particularly when found in an exclusionary clause"].)

The Court of Appeals has enforced policy exclusions only where they have found them to "have a definite and precise meaning, unattended by danger of misconception...and concerning which there is no reasonable basis for a difference of opinion" (*Breed*, 46 NY2d at 355).

The Court said, "this case is a close one, but we cannot say that the event that caused plaintiff's loss was unambiguously excluded from the coverage of this policy." *Pioneer Towers Owners Assn. v State Farm Fire & Cas. Co.* 2009 NY Slip Op 03409.

Continued next page⇨

and Settling, Cracking Exclusions in Policy

Defendant's argument is, in substance, that the literal language of the exclusions describes what happened here. The earth movement exclusion applies, defendant says, because the loss was caused by the movement of earth, and specifically by its "sinking" and "shifting" beneath plaintiff's building. And the settling or cracking exclusion applies, in defendant's view, because the loss consisted of cracking that was directly and immediately caused by the settling of the building (which was in turn caused by the excavation). Indeed, plaintiff's own engineer's report says "that the left wing of the building . . . had settled . . . as evidenced by the cracking and lateral displacement of the structure."

Plaintiff argues, however, that a literal reading of the words does not give the meaning that an ordinary reader would assign to these exclusionary clauses. As to the earth movement {**12 NY 3d at 308} exclusion, plaintiff stresses the examples of earth movement given in the policy—"earthquake, landslide, erosion, and subsidence." Plaintiff argues that an excavation—the intentional removal of earth by humans—is a different kind of event from an earthquake and the other examples given; plaintiff suggests that, when specific examples are mentioned, those not mentioned should be understood to be things of the same kind. Indeed, if the drafter of the policy intended to bring excavation—an obvious and common way of moving earth—within the exclusion, why was it not listed as an example while less common events were listed.

Similarly, plaintiff argues that the settling or cracking exclusion would not be thought, by an ordinary reader, to apply to settling or cracking that is the immediate and obvious result of some other event, such as the intentional removal of earth in the vicinity of the building. Read literally, the exclusion would apply, for example, where a refrigerator fell over and cracked a wall, but that can hardly have been the intent of the policy's drafters. The Court of Appeals said, "We conclude that both plaintiff's and defendant's readings of the clauses are reasonable. Our precedents require us to adopt the readings that narrow the exclusions, and result in coverage. As to the earth movement exclusion, our holding is also supported by precedent which, though not binding on us, is directly on point. Two Appellate Division cases and one federal district court decision have held that earth movement exclusions using identical language are not applicable to losses caused by excavation (*Lee v State Farm Fire & Cas. Co.*, 32 AD 3d 902 [2d Dept 2006]; *Burack v. Tower Ins. Co. of N.Y.*, 12 AD 3d 167 [1st Dept 2004]; *Wyatt v Northwestern Mut. Ins. Co. of Seattle*, 304 F Supp 781 [D Minn 1969]). The parties have cited no case, and the court found none, applying the earth movement exclusion to intentional earth removal. *Pioneer Associates*, supra.♦

Household Exclusion Held Valid

PA Case

The policy issued by the Erie Insurance included $100,000/$300,000 in underinsured motorist (UIM) coverage on each of the three vehicles and the insured did not sign a waiver of his rights to stack the coverages. The insured was in an accident while operating his motorcycle, which was not insured by the insurer, but with Universal Insurance. The other policy included $15,000 in UIM coverage, which was paid to the insured. The tortfeasor's insurance was insufficient to cover the insured's injuries, and he sought the additional UIM benefits from the Erie policy.

Erie filed a motion for judgment on the pleadings, arguing that the plain language of its household exclusion denied coverage because the insured was driving a vehicle owned by him but not insured under the policy.

On appeal, the insured claimed that the household exclusion violated the stacking provision of 75 Pa.C.S. § 1738. The court held that application of the household exclusion was not about stacking at all. The court held that the household exclusion was a valid and unambiguous preclusion of coverage of unknown risks.

The court affirmed the order upholding judgment on the pleadings in favor of the insurer. *Erie Ins. Exch. v Baker*, 972 A.2d 507. ♦

URB Update

For your information, the following Bulletins were announced recently:

- Bulletins CF-8, GL-39 and BOP-21 were issued on July 21, 2009. These bulletins contain the rating for previously approved forms LS-118 (Silica Exclusion) and LS-120 (Exterior Insulation Exclusion).
- Bulletin STATS-11 was issued on July 23, 2009.

Dram Shop Case Dismissed

After purchasing a 12-pack of beer at the defendants' convenience store, Earl Beers drove his vehicle at high speed, and struck a vehicle being driven by plaintiffs' son, killing both himself and the son. The collision occurred at 4:03 P.M. A cash register receipt found in Beers' car showed that he had purchased the beer at 3:56:49 P.M., Plaintiffs commenced this action alleging that defendants violated General Obligations Law § 11-101 (1) by selling alcohol to Beers when he was visibly intoxicated. Defendants moved for summary judgment dismissing the complaint. Supreme Court denied the motion, finding that certain statements about the sale allegedly made by the store clerk, Bonney Edwards, raised questions of fact. Defendants appealed and the court reversed.

A violation of General Obligations Law § 11-101 occurs when a defendant sells alcohol to a person who is visibly intoxicated at the time (*see* Alcoholic Beverage Control Law § 65 [2]; *Adamy v Ziriakus*, 92 NY2d 396, 400-401 [1998]). Here, defendants met their initial burden of establishing their entitlement to summary judgment. They submitted Edwards' sworn deposition testimony that her customer had not appeared intoxicated at the time of the sale and the affidavit of a toxicologist who opined that, based upon the alcohol content of .037% in a sample of Beers' blood, he would not have shown signs of intoxication at the time of the sale. This evidence shifted the burden to plaintiffs to raise a question of fact (*see Csizmadia v Town Of Webb*, 289 AD2d 854, 856 [2001]; *Sorensen v Denny Nash, Inc.*, 249 AD2d 745, 747 [1998]; *Gonyea v Folger*, 133 AD2d 964, 965 [1987]).

In opposition to defendants' motion, plaintiffs relied on a supporting deposition prepared by a police officer and purportedly signed by Edwards "under penalty of perjury" (*see* CPL 100.20), but not sworn or notarized. They also relied on the police officer's testimony as to the oral statements allegedly made by Edwards to him when he prepared the supporting deposition. Those statements include her description of the customer to whom she sold beer on the afternoon of the collision as well as her account that the customer had the odor of beer on his breath and she had difficulty understanding what he was saying. During her subsequent examination before trial, however, Edwards strongly denied making the statements upon which plaintiffs now rely to establish Beers' appearance of intoxication. Notably, Edwards asserted that the supporting deposition is not the actual document that she signed and does not accurately reflect the statement that she gave.

Since Edwards' out-of-court statements were offered by plaintiffs for the truth of their content, they constitute hearsay (see People v Romero, 78 NY2d 355, 361 [1991]; Prince, Richardson on Evidence § 8-101 [Farrell 11th ed]). As such, they are not admissible unless they satisfy one of the exceptions to the hearsay rule (see Nucci v Proper, 95 NY2d 597, 602 [2001]; People *v Settles*, 46 NY2d 154, 166-167 [1978]). Contrary to plaintiffs' suggestion at oral argument, the statements are not admissions attributable to a party, as there is no evidence that Edwards was authorized to speak on defendants' behalf (*see Loschiavo v Port Auth. of N.Y. & N.J.*, 58 NY2d 1040, 1041 [1983]; *Tkach v Golub Corp.*, 265 AD2d 632, 634 [1999]). Nor does the supporting deposition fall within the exception for a prior inconsistent written statement where the declarant is available to testify and there is no reason to believe that the declarant's words were incorrectly reported (*see Letendre v Hartford Acc. & Indem. Co.*, 21 NY2d 518, 524 [1968]; Prince, Richardson on Evidence § 8-104 [Farrell 11th ed, 2008 Supp]).

"While we recognize that a prior [inadmissible,] inconsistent hearsay statement may, under certain circumstances, raise an issue of fact sufficient to defeat summary judgment, those circumstances are not present here" (*Edmonds v Quellman*, 277 AD2d 579, 580-581 [2000] [citation omitted]). Edwards' statements could be considered only if there were an acceptable excuse for plaintiffs' failure to present the evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Meizinger v Akin*, 192 AD2d 1011, 1014 [1993], *lv denied* 82 NY2d 661 [1993]) or other competent evidence in the record supporting their claim (see *Saint James' Episcopal church v F.O.C.U.S. Found.*, 47 AD3d 1058, 1060 [2008]; *Tibbits v Verizon N.Y. Inc.*,40 AD3d 1300, 1302 [2007]; *Stankowski v Kim*, 286 AD2d 282, 283 [2001], *appeals dismissed* 97 NY2d 677 [2001]; *Guzman v L.M.P. Realty Corp.*, 262 AD2d 99, 100 [1999]; *Egleston v Kalamarides*, 89 AD2d 777, 778 [1982], *mod on other grounds* 58 NY2d 682 [1982]). Here, plaintiffs could not present the relevant statements in admissible form because Edwards repudiated them. Thus, this is not a case where the witness was unavailable or unwilling to give a sworn statement as to the relevant facts (*cf. Egleston v Kalamarides*, 58 NY2d 682, 684 [1982]; *Gizzi v Hall*, 300 AD2d 879, 881 [2002]; *Maldonado v Townsend Ave. Enters., Ltd. Partnership*, 294 AD2d 207, 208 [2002]).

Nor is there any other admissible evidence tending to support the contention that Beers appeared intoxicated in the convenience store. Apparently, no one else observed Beers at the store and plaintiffs presented no expert evidence that his blood alcohol content would have caused him to appear intoxicated at the time of the sale (*cf. Adamy v Ziriakus*, 92 NY2d at 402). Defendants' motion should have been granted. *Kaufman v Quickway, Inc.*, 2009 NY Slip Op 05727.♦

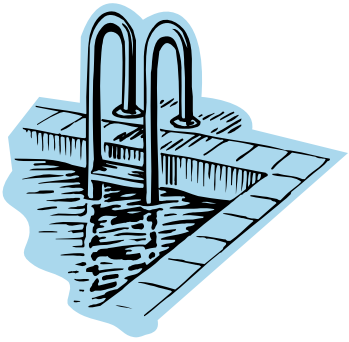
Water Damage Exclusion Held Applicable

The case of *Jahier v. Liberty Mut. Group*, 2009 NY Slip Op 05948 is an action to recover damages for breach of contract and for a judgment declaring that the defendants are obligated to provide coverage pursuant to a homeowners policy. The defendants have appealed from an order of the Supreme Court in Suffolk County that denied their motion for summary judgment dismissing the first cause of action alleging breach of contract and declaring that they were not so obligated, and that granted the plaintiff's cross motion for summary judgment on the issue of liability on the first cause of action alleging breach of contract and declaring that the defendants are obligated to provide coverage.

The order is reversed and the plaintiffs' cross motion for summary judgment obligating the defendants to provide coverage for certain damage to plaintiffs' property is denied.

The defendants, Liberty Mutual Group and the First Liberty Insurance Corporation, issued a Deluxe Homeowners Policy that insured the plaintiffs' residence and structures on their property. In April, 2007, during the coverage period, the plaintiffs' in-ground swimming pool, patio area and plumbing which serviced the pool sustained damage when the pool lifted up several inches. At that time, the pool was not filled with water, since it was drained by a contractor hired to perform maintenance work. Heavy rains had fallen within the area during the time that the pool was empty. Plaintiffs made a claim for damage pursuant to the policy, but Liberty disclaimed coverage based upon clauses in the policy which excluded losses due to "Earth Movement" and "Water Damage."

"[C]ourts bear the responsibility of determining the rights or obligations of parties under insurance contracts based on the specific language of the policies" (*State of New York v Home Indem. Co.*, 66 NY2d 669, 671; see *Cali v Merrimack Mut. Fire Ins. Co.*, 43 AD3d 415, 416). An exclusion from coverage "must be specific and clear in order to be enforced" *Essex Ins. Co. v Pingley*, 41 AD3d 774, 776, quoting *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311; see Lee v State Farm Fire & Cas. Co., 32 AD3d 902, 903). An ambiguity in an exclusionary clause must be construed most strongly against the insurer (see *Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398; *Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 353). However, "the plain meaning of the policy's language may not be disregarded to find an ambiguity where none exists" (*Atlantic Balloon & Novelty Corp. v American Motorists Ins. Co.*, 62 AD 3d 920, 922; see *Cali v Merrimack Mut. Fire Ins. Co.*, 43 AD3d at 417). Where an insurer denies coverage based upon an exclusion, the burden is on the insurer to demonstrate that the exclusion applies in the particular case and that it is "subject to no other reasonable interpretation" (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d at 311).



In this case, the Supreme Court erred in denying Liberty's motion for summary judgment and in granting the plaintiffs' cross motion for summary judgment. Liberty met its initial burden of establishing its entitlement to judgment as a matter of law by demonstrating that the "water damage" exclusion clearly and unambiguously applied to the plaintiffs' loss (see *Reynolds v Standard Fire Ins. Co.*, 221 AD2d 616; *Hipper v CNA Ins. Co.*, 2002 NY Slip Op 40109[U] [App Tm 9th & 10th Dists 2002]; see generally *Cali v Merrimack Mut. Fire Ins. Co.*, 43 AD3d at 417; *Sheehan v State Farm Fire & Cas. Co.*, 239 AD2d 486, 487; *Kula v State Farm Fire & Cas. Co.*, 212 AD2d 16, 20). The plain language of the exclusion relieves Liberty from loss caused "directly or indirectly" by "[w]ater damage, meaning . . . [w]ater below the surface of the ground, including water which exerts pressure on . . . a building . . . swimming pool or other structure." Furthermore, losses due to "water damage" are excluded "regardless of any other cause or event contributing concurrently or in any sequence to the loss." Here, the evidence demonstrated that the plaintiffs' loss was attributable to the subsurface water pressure that was exerted upon the empty swimming pool, even though it was precipitated by the drainage of the pool and heavy rainfall (see *Cali v Merrimack Mut. Fire Ins. Co.*, 43 AD3d at 417-418; *Sheehan v State Farm Fire & Cas. Co.*, 239 AD2d at 487; *Reynolds v Standard Fire Ins. Co.*, 221 AD2d 616, 616-617; *Kula v State Farm Fire & Cas. Co.*, 212 AD2d at 20-21; Hipper v CNA Ins. Co., 2002 NY Slip Op 40109[U] [App Tm 9th & 10th Dists 2002]; *South Carolina Farm Bureau Mut. Ins. Co. v Durham*, 380 SC 506, 671 SE2d 610). In opposition to Liberty's motion and in support of its cross motion for summary judgment, the plaintiffs failed to raise a triable issue of fact or establish their prima facie entitlement to judgment as a matter of law, respectively, so as to preclude the award of summary judgment to Liberty (see *Zuckerman v City of New York*, 49 NY2d 557, 562). Since the action is, in part, for a declaratory judgment, the court remitted the matter to Supreme Court, Suffolk County, for entry of a judgment. ♦

From The Department

Circular Letters for Your

The New York State Insurance Department issued Circular Letter No. 11 on June 29, 2009 to all persons, firms, associations or other entities licensed, authorized, registered, certified or approved pursuant to the New York Insurance Law (collectively, "Licensees"). This is regarding Compliance with the Federal Bank Secrecy Act, Foreign Corrupt Practices Act and Office of Foreign Assets Control Requirements. Statutory reference: Insurance Law §§ 107, 201, 301, 308; Bank Secrecy Act ("BSA"), 31 U.S.C. §§ 5311–5330 (2009); Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. §§ 78dd-1 - 78dd-3 (2009); and the Office of Foreign Assets Control ("OFAC"), 31 U.S.C. § 313(a)(6)(c) (2009). The sum and substance of Circular Letter No. 11 (2009) is as follows:

The purpose of this Circular Letter is to set forth the Superintendent's expectations regarding compliance by licensees with regard to three federal laws: the Bank Secrecy Act ("BSA"), 31 U.S.C. §§ 5311–5330 (2009); Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. §§ 78dd-1 - 78dd-3 (2009); and the Office of Foreign Assets Control ("OFAC"), 31 U.S.C. § 313(a)(6)(c) (2009). Although supervision and enforcement of these statutes resides with national regulators, compliance with these laws is consonant with prudent risk management. Further, policies that licensees develop and adopt to comply with these acts should prove effective in detecting violations of New York law. See, e.g., N.Y. Penal Law §§ 470.05 - 470.20 and 176.05 (McKinney Supp. 2009) (pertaining to money laundering and insurance fraud, respectively). Accordingly, licensees should assess their business models and circumstances to determine the extent to which they should formulate or revisit their policies to ensure proper compliance with these federal laws.

As part of its future examination processes, the Department may make limited inquiry into a licensee's compliance function to assess how well the licensee takes into consideration the risks of money laundering, bribery of foreign persons, and recognition of federal economic sanctions. The review will be done within the normal review of a company's overall compliance function. To assess how a licensee's compliance function policies incorporate compliance with these federal laws, the Department, consistent with risk-focused surveillance, may specifically ask the members of a licensee's senior most governing body or senior management about those policies.

A licensee's policies should be commensurate with its assessment of the risk that its products or operations could be used to launder money, finance terrorism, bribe foreign persons, or violate national economic sanctions. Accordingly, at minimum, the policies should:

- establish that the licensee will adopt procedures and internal controls that are, in its opinion, reasonably designed to enable the licensee to comply with the requirements of the referenced regulatory regimes;
- identify a specific person responsible for the design and implementation of procedures and internal controls commensurate with the risks presented;
- ensure that the procedures and internal controls are updated as changes in the law and circumstances warrant, and that those modifications are communicated in a timely manner to all appropriate personnel;
- ensure that where the licensee's business, circumstances, or risks warrant, the procedures and controls are subject to independent testing and monitoring by internal audit and/or external audit; and
- ensure that procedures are in place to apprise senior management of noncompliance with regulations and compliance policies.

The Department may review a licensee's policies addressing any of the above items as part of its examination process to ensure that prudent policies have been established.

I. Bank Secrecy Act

With regard to the anti-money laundering prohibitions of the Bank Secrecy Act, this Circular Letter supplements and updates the Department's previous advice. See Circular Letter No. 10 (2002); Supplement No. 1 to Circular Letter No. 10 (2002); Supplement No. 2 to Circular Letter No. 10 (2002); and Supplement No. 3 to Circular Letter No. 10 (2005). The advice set forth in this Circular Letter also parallels the practices adopted by the National Association of Insurance Commissioners in its Financial Examiners Handbook, see Exhibit G, "Consideration of Fraud," at www.naic.org, and is consistent with the American Institute of Certified Public Accountants' Statement on Auditing Standards, see No. 99, "Consideration of Fraud in Financial Statement Audit," at www.aicpa.org. The United States Department of the Treasury ("Treasury") requires each insurance company to develop a written anti-money laundering program reasonably designed to prevent its "covered products" from being used to facilitate the financing of terrorist activities. See 31 C.F.R. § 103.137 (2009). Federal laws define "covered products" as those that possess features that make them susceptible for use to launder money or finance terrorism, and include a permanent life insurance policy (other than that issued to a group), an annuity contract (other than that issued to a group), or any other insurance product with features of cash value or investment. See 31 C.F.R. § 103.137(a)(4) (2009). Examples of activities that may indicate financing of terrorist activities include: individuals paying into policies or annuities, with cash equivalents from multiple sources and repeated loans taken against, or surrender of, those policies or annuities to the economic detriment of the annuity owner; large dollar withdrawals made shortly after the issuance of the policy or contract; and surrenders of annuities with return-of-premium guarantees. See Insurance Industry Suspicious Activity Reporting: An Assessment of Suspicious Activity Report Filings, Financial Crimes Enforcement Network, United States Treasury (April 2008), at http://www.fincen.gov/news_room/rp/reports/pdf/Insurance_Industry_SAR.pdf.

The program should be designed to detect and monitor such events as large dollar withdrawals made shortly after the issuance of the policy or contract, or surrenders of annuities with return-of-premium guarantees. Forms for making proper reports in accordance with the Bank Secrecy Act are available at http://www.fincen.gov/forms/bsa_forms/insurance.html. In addition, the Treasury's Financial Crimes Enforcement Network (FinCEN) has established a regulatory helpline at (800) 949-2732.

Continued next page⇨

II. **Foreign Corrupt Practices Act**

The United States Securities and Exchange Commission ("SEC"), which, with the United States Department of Justice, is charged with enforcing the Foreign Corrupt Practices Act, has stated that FCPA prosecutions are a "growth area," and has noted that "[i]n fiscal year 2008, the SEC filed 15 FCPA cases. Since January 2006, the SEC has brought 38 FCPA enforcement actions — more than were brought in all prior years combined since FCPA became law in 1977." See Press Release, U.S. Securities and Exchange Commission, SEC Announces Fiscal 2008 Enforcement Results (Oct. 22, 2008), at www.sec.gov/news/press/2008/2008-254.htm. Further, the United States Supreme Court recently let stand a conviction under the FCPA for payments "obtaining or retaining business" – that is, payments to government officials aimed at achieving a reduction in import taxes and duties – which may suggest that the federal courts will increasingly interpret FCPA's scope in a broad fashion. See U.S. v. Kay, 513 F.3d 432 (5th Cir. 2007), cert. denied, 129 S.Ct. 42 (2008). The FCPA's antibribery provisions pertain to "domestic concerns," which include "any individual who is a citizen" of the United States and "any corporation . . . which has its principal place of business in the United States." See 15 U.S.C. § 78dd-2(a) (2009). Under the statute, payments to foreign persons or entities may violate the FCPA where a person or instrumentality of interstate commerce pays, offers, or promises to pay, or authorizes or directs the payment of money or anything of value, to any foreign official, political party, political party official, or candidate for office, or any person acting as an intermediary, with corrupt intent, to influence an official act or decision of that official, in order to obtain or retain business or secure an improper advantage. See 15 U.S.C. § 78dd-2(a) (2009). The Department of Justice has published guidance regarding compliance with the FCPA, which is available at http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html.

III. **OFAC**

In furtherance of national security, foreign policy, and United States' economic objectives, the Office of Foreign Assets Control (OFAC) administers and enforces economic sanctions against specific foreign nations or regimes, terrorists and terrorist organizations, and persons engaging in, or aiding in, the proliferation of weapons of mass destruction, drug trafficking, or other activities. See 31 C.F.R. Pt. 501 (2009). OFAC acts pursuant to authority granted by the Congress of the United States to the President under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 - 1707 (2009), and other laws. OFAC reports directly to Treasury's Undersecretary for Terrorism and Financial Crimes, see 31 U.S.C. § 313(a)(6)(c) (2009), and oversees the civil investigation and enforcement of economic sanctions, and, where appropriate, coordinates activities with state regulators and other law enforcement agencies.

No United States-based underwriter, broker, agent, primary insurer, reinsurer, or United States citizen employee of a foreign insurance firm may engage in any transaction, including an investment transaction, not licensed by the Office of Foreign Assets Control that involves any person or entity designated a Specially Designated National ("SDN"). See OFAC Regulations and the Insurance Industry, Office of Foreign Assets Control, U.S. Department of the Treasury (Apr. 29, 2004), at http://www.treas.gov/offices/enforcement/ofac/regulations/facin.pdf. Licensees also should avoid engaging in transactions with SDNs and must freeze any asset (including any insurance policy) in which an SDN has a direct or indirect interest, and timely report such action to OFAC. See id. OFAC maintains a list of SDNs on its website that licensees should monitor closely.

OFAC maintains a list of "frequently asked questions" from the insurance industry, which is available at: http://www.treas.gov/offices/enforcement/ofac/faq/index.shtml#insurance. Additional information concerning OFAC is available at http://www.treas.gov/ofac.

Please direct any comments or questions regarding this Circular Letter to James Everett at New York State Insurance Department, One Commerce Plaza, Albany, NY 12257, or jeverett@ins.state.ny.us.

The New York State Insurance Department issued Supplement No. 2 to Circular Letter No. 22 (2005) on June 26, 2009 to All Property/Casualty Insurers Domiciled in New York State. It is regarding filing of Actuarial Opinion Summary ("AOS"). Statutory Reference: Sections 307(a)(1) and (a)(2), 308(b), and 4104(a) of the Insurance Law. The Circular Letter reads as follows:

The purpose of this Circular Letter is to advise all domestic property/casualty insurers licensed pursuant to New York Insurance Law § 4104(a) and required to file a Statement of Actuarial Opinion with the National Association of Insurance Commissioners ("NAIC") property/casualty statement (i.e., "yellow blank") in accordance with Insurance Law § 307(a)(1) and (a)(2) that they also should file an AOS with the New York State Insurance Department ("Department"). The instructions regarding this filing are set forth in the NAIC's 2009 "Annual Statement Instructions for Property Casualty Companies."

An insurer that believes its records contain "trade secrets . . . or if disclosed would cause substantial injury to the competitive position of the subject enterprise" may request, pursuant to New York Public Officers Law § 87(2)(d), that the Department except such documents from disclosure pursuant to Public Officers Law § 89(5)(a)(1). Should the Department receive a request for records for which an insurer requested an exception from disclosure, the Department will notify the insurer and give the insurer an opportunity to respond in accordance with Article 6 of the Public Officers Law.

Every insurer should file the AOS with the Department by March 15 of each year.

Please direct any questions regarding this circular letter to Gloria Huberman, Deputy Chief Actuary, at ghuberma@ins.state.ny.us or (212) 480-5134.

Circular Letters and Opinions of Counsel are published by the New York State Insurance Department and are available for viewing on their website at:

www. ins.state.ny.us. ♦

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Proof Editors: Mary Shell, CPCU; Jean French, CPCU

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URBRATINGBOARD.com
E-mail us at:
jean@urbratingboard.com
mary@urbratingboard.com
tim@urbratingboard.com
kim@urbratingboard.com

Case Briefs From Around The Country

- Rhode Island— A court in Rhode Island has ruled that the insurance company who insures the owners of the Station nightclub under a commercial general liability insurance policy is not required to defend them against criminal charges.
- Pennsylvania— A retired Pennsylvania Superior Court Judge who is serving 46 months in federal prison for insurance fraud will not forfeit his $82,000 annual pension. The Pennsylvania State Employees' Retirement System has decided the $440,000 insurance fraud conviction of Michael Joyce was not related to his public employment. Joyce was convicted of mail fraud and money laundering for allegedly exaggerating neck and back injuries to collect insurance proceeds.
- A New Jersey woman has been denied workers' compensation benefits resulting from a claim that her bipolar disorder was brought on by a stressful relationship with her boss. Mental disabilities are compensable in New Jersey when they arise out of job-related objective stress and anxiety. But here, the court ruled because her symptoms began to appear before she worked for this boss, they could not be attributed to stress caused by the relationship.

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