URB INSIDER

A Quarterly Publication of the Underwriters Rating Board

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At The Supreme Court Case Notes

► The Supreme Court has issued a 5-4 decision that indicates the Constitution's "right to bear arms" applies nationwide as a restraint on the ability of government to limit its application. This decision casts doubt on a Chicago handgun ban.

► The Supreme Court has now rejected appeals by the Obama administration as well as the nation's largest tobacco companies to get involved in 10 year old litigation about the dangers of cigarette smoking.

► The Supreme Court has upheld the search of a police officer's text messages on a pager owned by his government employer, saying it did not violate his constitutional rights.

► The Supreme Court has agreed to hear a case involving a federal appeals court ruling that dismissed the state advocate's lawsuit against Virginia's mental health commissioner and other officials. The Court will decide whether the advocate can force state officials to provide records relating to deaths and injuries at state mental facilities. ♦

Index For This Issue

Around The Country Case Headlines

- In Massachusetts—According to the Massachusetts Appeals Court, Liberty Mutual correctly denied worker's compensation benefits to a self-employed carpenter who severely injured his hand.
- In Ohio—The Supreme Court of Ohio has held that a Ohio trial court has jurisdiction of a defendant in an internet defamation case that concerns internet postings.
- In Montana—A judge in Montana has ruled that a man who used marijuana before he went to work, and was mauled by a bear while feeding them as part of his job at a tourist attraction, is entitled to worker's compensation. ♦

NY Cases

Additional Insured Coverage

Editor's Note: **The New York Court of Appeals has issued an important decision on the issue of an additional insured's liability. The decision explores when the additional insured's liability arises out of the named insured's work or ongoing operations for the additional insured. The case is** *Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 201 NY Slip Op 04661**. The opinion of the Court of Appeals is reprinted below for your information.**

Once again, we are asked to determine the obligation of an insurer to defend and indemnify an additional insured for potential liability arising out of the operations of the primary insured (e.g. *Worth Constr. Co., Inc. v Admiral Ins. Co., 10 NY3d 411*[2008]). The City of New York engaged URS Corporation (URS) as the construction manager for a renovation project at Rikers Island. By written agreement dated March 22, 1999, URS hired plaintiff Regal Construction Corporation (Regal) to serve as a prime contractor for general construction at the project, including demolition and renovation. The written agreement between Regal and URS required Regal to procure a commercial general liability (CGL) insurance policy naming URS as an additional insured. Accordingly, Regal obtained a CGL insurance policy from plaintiff Insurance Corporation of New York (INSCORP), which named URS as an "additional insured." The policy provided that Regal's insurance covered URS "only with respect to liability *arising out of* [Regal's] ongoing operations performed for [URS]" (emphasis added).

In March 2001, Regal's project manager, Ronald LeClair, was walking through the facility with Regal's superintendent and an employee of Regal's demolition subcontractor. Because the area was in the process of demolition, the flooring consisted of temporary sheets of plywood spread over steel floor joists. LeClair stepped from the plywood onto a floor joist to indicate a wall that needed to be demolished. According to LeClair, the joist on which he stepped had been recently painted and the paint caused him to slip, resulting in a back injury. LeClair claimed that an unnamed person from URS told him that URS employees had painted the joist.

In 2003, LeClair commenced a personal injury action against the City and URS. While LeClair did not name his employer, Regal, as a defendant, URS forwarded a copy of the complaint to Regal and its insurer, INSCORP, demanding a defense and indemnification based on the additional insured clause of the CGL policy. In April 2003, INSCORP informed URS by letter that it was reviewing the incident, and reserved its right to disclaim coverage at a later date if it determined that URS was not entitled to coverage under the policy. INSCORP thereafter accepted URS's tender of its defense. Subsequently, however, Regal and INSCORP commenced this declaratory judgment action against URS and its insurer, National Union Fire Insurance Company, seeking a declaration that URS was not entitled to coverage as an additional insured under the INSCORP policy.

Supreme Court granted judgment in favor of URS and its insurer, concluding that LeClair's injury arose out of Regal's work. Regal and INSCORP appealed. The Appellate Division affirmed, with two Justices dissenting (64 AD3d 461), and we now affirm.

An insurer's duty to defend its insured is "'exceedingly broad'" (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007], quoting *Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]). An "insurer will be called upon to provide a defense whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage" (*id.*, quoting *Cook*, 7 NY3d at 137 [quotation marks omitted]).

Continued Next Page ⇨

Examined By The NY Court Of Appeals

"If [a] complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend" (*id.*, *quoting Technicon Elecs. Corp. v American Home Assur. Co.*, 74 NY2d 66, 73 [1989] [quotation marks omitted]). This standard applies equally to additional insureds and named insureds (*see id.* at 714-715, citing *Pecker Iron Works of N.Y. v Traveler's Ins. Co.*, 99 NY2d 391, 393 [2003]).

The additional insured endorsement at issue here provides that URS is an additional insured under the CGL policy issued by INSCORP to Regal "only with respect to liability arising out of [Regal's] operations." We have interpreted the phrase "arising out of" in an additional insured clause to mean "originating from, incident to, or having connection with" (*Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 472 [2005] [internal quotations marks and citations omitted]). It requires "only that there be some causal relationship between the injury and the risk for which coverage is provided" (*id.*).

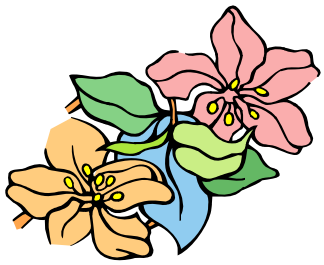
Here, Regal's employee, LeClair, was walking through the work site to indicate additional walls that needed to be demolished by Regal's subcontractor when he slipped on a recently-painted metal joist.

Although Regal and INSCORP contend that LeClair's injury did not arise from Regal's demolition and renovation operations performed for URS, but that it was URS employees who painted the joist on which LeClair slipped, the focus of the inquiry "is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained" (*Worth*, 10 NY3d at 416 [internal quotation marks and citation omitted]). Accordingly, the injury "ar[ose] out of" Regal's operations notwithstanding URS's alleged negligence, and fell within the scope of the additional insured clause of the insurance policy.

Regal and INSCORP's reliance on *Worth* to argue otherwise is misplaced. In that case, a subcontractor, Pacific Steel, Inc. (Pacific), hired to install stairs at a construction project, obtained a CGL policy naming the general contractor, Worth Construction Co. (Worth), as an additional insured (*id.* at 413). After Pacific completed the initial installation, it turned the project over to Worth, who hired a different subcontractor to pour cement over the steel stair "pans." After the cement was poured, Pacific was to return to install handrails. However, prior to Pacific's return to the job site, an employee of a different subcontractor slipped and fell on fireproofing which had been installed by yet a third subcontractor (*see id.* at 413-414). Pacific played no role in the installation of the fireproofing. Worth sought to invoke the protection of the additional insured clause of the CGL policy procured by Pacific, but we rejected Worth's argument that the injury arose out of Pacific's operations. Specifically, we explained that it was "evident that the general nature of Pacific's operations involved the installation of a staircase and handrails. An entirely separate company was responsible for applying the fireproofing material. At the time of the accident, Pacific was not on the job site, having completed construction of the stairs, and was awaiting word from Worth before returning to affix the handrails" (*id.* at 416). We went on to characterize the staircase as "merely the situs of the incident," concluding that there was no connection between the accident and Pacific's work (*id.*).

This case is factually distinct from *Worth*. Here, there was a connection between the accident and Regal's work, as the injury was sustained by Regal's own employee while he supervised and gave instructions to a subcontractor regarding work to be performed. That the underlying complaint alleges negligence on the part of URS and not Regal is of no consequence, as URS's potential liability for LeClair's injury "ar[ose] out of" Regal's operation and, thus, URS is entitled to a defense and indemnification according to the terms of the CGL policy.

Accordingly, the order of the Appellate Division should be affirmed, with costs. ♦



Five Month Delay Bars Coverage

***Editor's Note*: The Supreme Court, Appellate Division, First Department recently decided a case in which the issue was notice by the insured five months after the incident occurred. This is probably a case on a policy before the prejudice rule went into effect January 17, 2009. The case is** *Tower Ins. Co. of N.Y. v Miles*, 2010 NY Slip Op 04635**. The opinion of the court is reprinted below for your information.**

Order, Supreme Court, New York County entered December 8, 2009, which, insofar as appealed from as limited by the brief, denied plaintiff's motion for summary judgment declaring that it had no duty to defend or indemnify defendants Bruce Miles and 143 Selye Terrace, Inc. in an underlying personal injury action, unanimously reversed, on the law, without costs, the motion granted and it is declared that plaintiff has no duty to defend or indemnify Miles and 143 Selye Terrace.

Where, as here, the contract of insurance requires the insured to notify its liability carrier of a potential claim "as soon as practicable," such requirement acts as a condition precedent to coverage (*Great Canal Realty Corp. v Seneca Ins. Co., Inc*, 5 NY3d 742, 743 [2005]), and the insured's failure to provide timely notice of an occurrence vitiates the contract as a matter of law (*see Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332, 339 [2005]). Here, Miles became aware approximately one week after the incident that a patron of his bar had potentially assaulted another patron on his premises. Because defendants were knowledgeable of facts that suggested a reasonable possibility of a claim against them and failed to conduct a sufficient inquiry into the circumstances, their five-month delay in notifying plaintiff of the incident was unreasonable as a matter of law (*see e.g. Tower Ins. Co. of N.Y. v Christopher Ct. Hous. Co.*, 71 AD3d 500 [2010]; *SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.*, 253 AD2d 583 [1998]). Miles' claimed belief of nonliability on the basis that none of his employees were involved in the incident was not reasonable under the circumstances (*see e.g. Tower Ins. Co. of N.Y. v Lin Hsin Long Co.*, 50 AD3d 305, 308 [2008]). ♦

From Pennsylvania

Case Briefs

• In a case entitled *Kurowski v Burroughs*, 2010 PA Super 69 (April 26, 2010) there were two articles and an editorial published in a local newspaper about an owner whose property had been set afire by an arsonist and was scheduled to be demolished. The owner, who is an attorney, successfully challenged the demolition order. He brought a defamation action against the newspaper. The trial court found in favor of the newspaper in response to a summary judgment motion.

The appellate court held that an editorial based on a statement of opinion is not capable of defamatory meaning. As such, when based on disclosed facts, it is not a valid cause of action.

• In a case entitled *Estate of Stein v Pennsylvania Turnpike Commission*, No. 1964 C.D. 2008 (Pa. Cmwlth., February 16, 2010) Pamela Stein on behalf of the Estate of Paul Stein, appealed an order of the Court of Common Pleas of Allegheny County entering a judgment in favor of the Pennsylvania Turnpike Commission in a wrongful death action.

The decedent was fatally injured when his car hydroplaned, spun off the roadway and struck a guardrail. The appellate court affirmed the trial court's holding that an exception from sovereign immunity has not been established for this type of action.♦

Policy Terminology At Issue

Editor's Note: **The Supreme Court, Appellate Division, Second Department recently issued an opinion about whether the insurance contract should be interpreted to allow notice to the broker. In the opinion, the court discusses the use of defined terms in the policy. The case is** *Prince Seating Corp., v QBE Ins. Co.*, 2010 NY Slip Op 4162**. The case is not based on URB policy language. The opinion of the court is reprinted below for your information**

In an action, inter alia, for a judgment declaring that the defendant QBE Insurance Company is obligated to defend and indemnify the plaintiff in an action entitled *Rabideau v Prince Seating Corp.*, pending in the Circuit Court of Fairfax County, Virginia, under At Law No. 213800, the defendant QBE Insurance Company appeals, as limited by its brief, from so much of an order of the Supreme Court, Kings County (Jacobson, J.), dated January 29, 2009, as denied its motion for summary judgment declaring that it is not obligated to defend or indemnify the plaintiff in the underlying action, and dismissing the second amended complaint insofar as asserted against it.

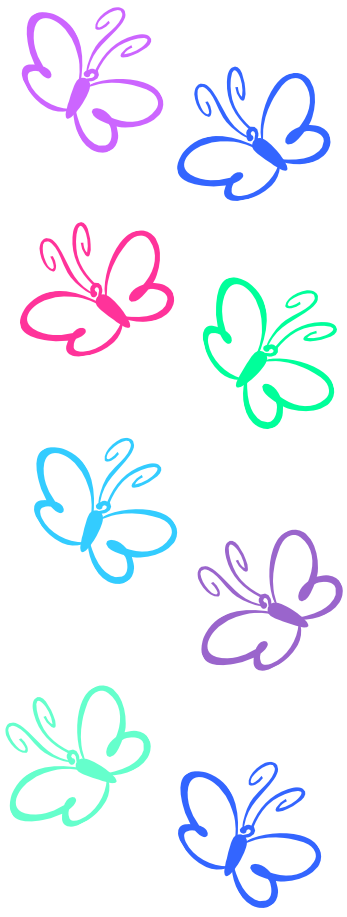
ORDERED that the order is affirmed insofar as appealed from, with costs.

The plaintiff allegedly provided notice of the underlying claim to its broker, the defendant Century Coverage Corp. (hereinafter Century), rather than, as required by the subject policy, to the insurer, the appellant, QBE Insurance Company (hereinafter QBE). It is well settled that, absent some evidence of an agency relationship, even timely notice of an accident by an insured to a broker is not effective and does not constitute notice to the insurance company, as a broker is considered to be an agent only of the insured (*see Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimmons Corp., 31 N.Y.2d 436, 293 N.E.2d 76, 340 N.Y.S.2d 902*; *Matter of Temple Constr. Corp. v Sirius Am. Ins. Co., 40 AD3d 1109, 1111-1112, 837 N.Y.S.2d 689*; *120 Whitehall Realty Assoc., LLC v Hermitage Ins. Co., 40 AD3d 719, 721, 835 N.Y.S.2d 715*; *Gershow Recycling Corp. v Transcontinental Ins. Co., 22 AD3d 460, 462, 801 N.Y.S.2d 832*; *Rendiero v State-Wide Ins. Co., 8 A.D.3d 253, 777 N.Y.S.2d 323*). Moreover, absent a valid excuse, the failure to satisfy a provision in an insurance policy requiring notice of a covered occurrence, a condition precedent to the insurer's duty to defend and/or indemnify claims against the insured, vitiates the policy (*see Empire City Subway Co. v Greater N.Y. Mut. Ins. Co., 35 NY2d 8, 315 N.E.2d 755, 358 N.Y.S.2d 691*; *Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimmons Corp., 31 NY2d at 440*; *Jeffrey v Allcity Ins. Co., 26 AD3d 355, 356, 809 N.Y.S.2d 174*; *Centrone v State Farm Fire & Cas., 275 A.D.2d 728, 713 N.Y.S.2d 211*). In this case, there is no evidence that a principal-agent relationship between Century and QBE existed.

However, the terminology of the policy, including the notice provision, in which the words "we," "us," and "our," referring to "the company providing this insurance," were used to describe who should be notified, is ambiguous. QBE was not clearly identified as the party to whom those terms applied. Given that ambiguity, there is an issue of fact as to whether "the contract should be interpreted to allow notice to [the] broker" (*Jeffrey v Allcity Ins. Co., 26 AD3d at 356*).

Accordingly, the Supreme Court correctly denied QBE's motion.

In light of our determination, we do not reach the parties' remaining contentions.♦



From The Department

OGC Op. No. 10-06-01-Regulation 194

The Office of General Counsel issued the following opinion June 2, 2010, representing the position of the New York State Insurance Department.

Re: Regulation 194 Disclosure

Question presented:

Does the language set forth below satisfy the disclosure requirement set forth in Regulation 194?

Conclusion:

Yes. The language set forth below satisfies the disclosure requirements set forth in Regulation 194.

Facts:

The inquirer reports that he represents an association of professional insurance agents. The inquirer asks whether the following language comports with the disclosure requirements set forth in § 30.3 of Regulation 194:

> [The Producer] is an insurance producer licensed by the State of New York. Insurance producers are authorized by their license to confer with insurance purchasers about the benefits, terms and conditions of insurance contracts; to offer advice concerning the substantive benefits of particular insurance contracts; to sell insurance; and to obtain insurance for purchasers. The role of the producer in any particular transaction typically involves one or more of these activities.
>
> Compensation will be paid to the producer, based on the insurance contract the producer sells. Depending on the insurer(s) and insurance contract(s) the purchaser selects, compensation will be paid by the insurer(s) selling the insurance contract or by another third party. Such compensation may vary depending on a number of factors, including the insurance contract(s) and the insurer(s) the purchaser selects. In some cases, other factors such as the volume of business a producer provides to an insurer or the profitability of insurance contracts a producer provides to an insurer also may affect compensation.
>
> The insurance purchaser may obtain information about compensation expected to be received by the producer based in whole or in part on the sale of insurance to the purchaser, and (if applicable) compensation expected to be received based in whole or in part on any alternative quotes presented to the purchaser by the producer, by requesting such information from the producer.

Analysis:

Regulation 194 was promulgated on January 25, 2010, and goes into effect on January 1, 2011. That regulation: 1) regulates the acts and practices of insurers and insurance producers with respect to transparency of compensation paid to insurance producers and their role in insurance transactions in this State, and 2) protects the interests of the public by establishing minimum disclosure requirements relating to the role of insurance producers and the compensation paid to insurance producers.

Section 30.3 of Regulation 194 addresses disclosure of producer compensation, ownership interests and role in the insurance transaction. That section provides:

> (a) Except as provided in section 30.5 of this Part, an insurance producer selling an insurance contract shall disclose the following information to the purchaser orally or in a prominent writing at or prior to the time of application for the insurance contract:
>
> (1) a description of the role of the insurance producer in the sale;
>
> (2) whether the insurance producer will receive compensation from the selling insurer or other third party based in whole or in part on the insurance contract the producer sells;
>
> (3) that the compensation paid to the insurance producer may vary depending on a number of factors, including (if applicable) the insurance contract and the insurer that the purchaser selects, the volume of business the producer provides to the insurer or the profitability of the insurance contracts that the producer provides to the insurer; and
>
> (4) that the purchaser may obtain information about the compensation expected to be received by the producer based in whole or in part on the sale, and the compensation expected to be received based in whole or in part on any alternative quotes presented by the producer, by requesting such information from the producer.

Thus, an insurance producer selling an insurance contract must disclose to the purchaser the four items set forth in § 30.3 of Regulation 194. The language that the inquirer has provided squarely addresses those four items, and therefore satisfies the requirements of the regulation.

For further information you may contact Paul A. Zuckerman Assistant Deputy & Counsel at the New York City Office. ♦

Lead:Renovation, Repair, Painting Program Rule

The following information regarding the Lead: Renovation, Repair, Painting Program Rule (RRP) from the Environmental Protection Agency (EPA) is excerpted from the EPA website.

• Rule issued by EPA in 2008 because activities like sanding, cutting and demolition can create hazardous lead dust and chips by disturbing lead paint.

• Beginning in 2008, requires contractors performing renovation, repair and painting projects that disturb lead-based paint to provide pamphlet Renovate Right: Important Lead Hazard Information for Families, Child Care Providers, and Schools when the applicable facilities are built prior to 1978.

• Issued on April 22, 2008, beginning April 22, 2010, contractors performing renovation, repair and painting projects that disturb lead-based paint in homes, child care facilities and schools built before 1978 must be certified and must follow specific work practices to prevent lead contamination.

The United States Environmental Protection Agency issued further implementation guidance in a memorandum dated June 18, 2010 regarding enforcement of the Renovation, Repair and Painting Rule (RRP Rule) and the Amendment to Op-out and Recordkeeping provisions in the Renovation, Repair and Painting Program.

The Memorandum indicates since the RRP Rule became effective on April 22, 2010, concerns have been raised by the regulated community regarding difficulties experienced in obtaining the rule required firm certification and renovation worker training.

EPA will offer additional and sufficient time for renovation firms and workers to obtain the necessary training and certifications to comply as follows:

°Until October 1, 2010, EPA will not take enforcement action for violations of the RRP Rule's firm certification requirement.

°For violations of the RRP Rule's renovation worker certification requirement, EPA will not enforce against individual renovation workers if the person has applied to enroll in, or has enrolled in, by not later than September 30, 2010, a certified renovator class to train contractors in practices necessary for compliance with the final rules. Renovators must complete training by December 31, 2010.

• The Lead-Based Paint Renovation, Repair and Painting Program is a federal regulatory program affecting contractors, property managers, and others who disturb painted surfaces.

• It applies to residential houses, apartments, and child-occupied facilities such as schools and day-care centers built before 1978.

• It includes pre-renovation education requirements as well as training, certification, and work practice requirements.

• The RRP Rule does not apply to:

° Housing built in 1978 or later;

°Housing for elderly or disabled persons, unless children under 6 reside or are expected to reside there;

°Zero-bedroom dwellings (studio apartments, dormitories, etc.);

°Housing or components declared lead-free by a certified inspector or risk assessor;

°Minor repair and maintenance activities that disturb 6 square feet or less of paint per room inside, or 20 square feet or less on the exterior of a home or building. Note: minor repair and maintenance activities do not include window replacement and projects involving demolition or prohibited practices.

• For more information see: Small Entity Compliance Guide to Renovate Right EPA's Lead-Based Paint Renovation, Repair, and Painting Program Guide is available on the EPA website:

www.epa.gov/lead/pubs/sbcomplianceguide.pdf

• Also available on the EPA website: Renovate Right, Important Lead Hazard Information for Families, Child Care Providers, and Schools.♦

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URB FORMS UPDATE

Recently Approved Forms Are:

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- ML-86 Ed. 7/10

Secondary/Seasonal Homeowners Coverage Limitation Endorsement

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