



URB INSIDER

A Quarterly Publication of Underwriters Rating Board

At The Supreme Court

A federal judge in Virginia ruled recently that the key requirement in the law for individuals to carry health insurance is unconstitutional. The Justice Department plans to appeal the ruling. But even if the Supreme Court agrees that the requirement is unconstitutional, the courts may not have the last word.

For decades, Medicare coverage for doctor's visits is voluntary and carries a separate premium. However, more than nine out of ten seniors sign up. The reason though, is because those who opt out when they become eligible face a penalty that escalates the longer they extend the waiting period. It could be that

the same kind of penalty could be incorporated into the health care law.

The Supreme Court has said it will not get involved in a New York dispute over law firm television commercials.

The 2nd U.S. Circuit Court of Appeals struck down much of the proposed lawyer's code, that included a ban on testimonials, paid endorsements, nicknames, trade names or mottos that suggest certain results can be obtained.

But in a case about climate change, the Supreme Court will hear an appeal from electric utilities that are trying to circumvent state efforts to reduce power plant emissions.

The Supreme Court will also consider a huge lawsuit that claims Walmart pays women less than men and that women receive promotions less frequently.

This case could involve 500,000 to 1.5 million women who now work or who once worked at Walmart. This is an appeal by Walmart from a ruling of the 9th U.S. Circuit Court of Appeals in San Francisco, that said the case could go to trial.

Among other cases the Supreme Court will consider are a review of the Arizona Campaign Finance Law, the broad use of the FOIA exemption, and California prison crowding. ♦

December, 2010

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Editor's Note: The material contained in this publication is provided as information only, and is not intended to be construed or relied upon as legal advice in any manner. Always consult an attorney with the particular facts of a case before taking any action. The material contained in this publication was not necessarily prepared by an attorney admitted to practice in the jurisdiction of materials contained in the publication.

No Insurer Summary Judgment On Leasehold

Editor's Note: Below is the decision of the Supreme Court, Appellate Division, Second Department. The case is *Bread & Butter, LLC v Certain Underwriters at Lloyd's, London*, 2010 NY Slip Op 08887.

In an action to recover damages for breach of contract, the defendant appeals, as limited by its notice of appeal and its brief, from so much of an order of the Supreme Court, Nassau County (Palmieri, J.), entered April 10, 2009, as denied those branches of its cross motion which were for summary judgment dismissing the cause of action to recover damages based upon the plaintiff's improvements and betterments claim and for summary judgment dismissing the complaint based upon the plaintiff's failure to comply with the limitation period set forth in the subject contract of insurance.

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

In March 2000, the plaintiff purchased the subject restaurant from the prior owner. In December 2005, there was a fire at the premises. Thereafter, the plaintiff made a claim for insurance coverage for the loss of improvements and betterments to the premises which it claimed it purchased from the prior owner of the restaurant. The plaintiff claimed that, pursuant to the terms of the commercial lease, which it had assumed, those improvements never became the property of the landlord who owned the real property. However, the defendant insurer denied the plaintiff's improvements and betterments claim on the basis, inter alia, that the plaintiff had neither made nor acquired the improvements as required to obtain coverage under the policy.

The plaintiff timely brought an action in federal court, but, upon receipt of documents demonstrating a lack of complete diversity, stipulated to a discontinuance of the action without prejudice. It then commenced suit in state court, whereupon the defendant asserted the defense that, pursuant to the terms of the subject insurance contract, the action was untimely. The Supreme Court denied those branches of the defendant's cross motion which were for summary judgment dismissing the plaintiff's improvements and betterments claim and for summary judgment dismissing the complaint based upon the plaintiff's failure to comply with the limitation period set forth in the subject insurance contract. We affirm.

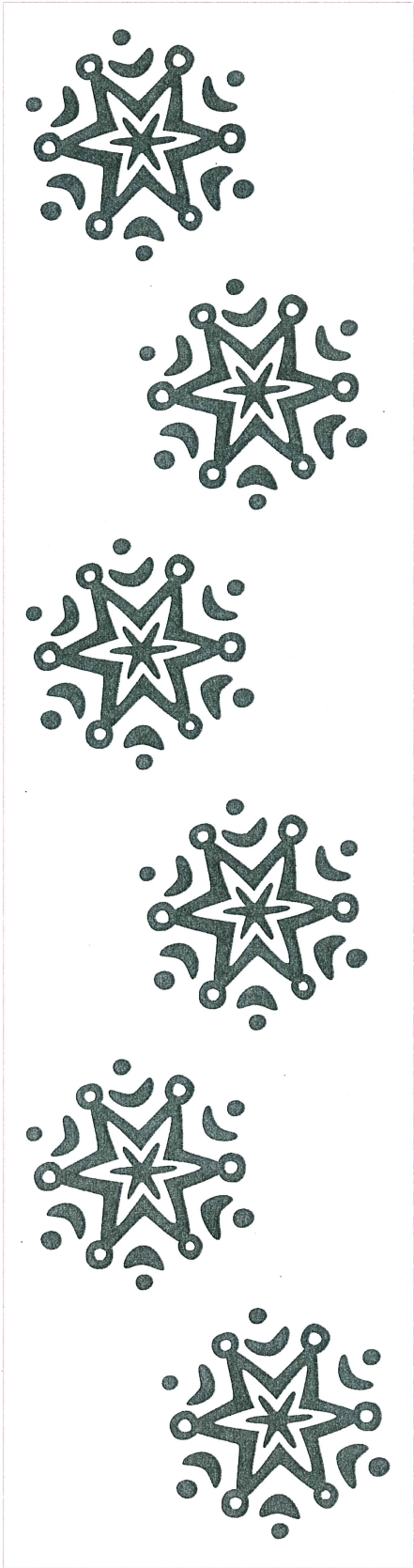
At the time of the discontinuance of the federal action, the parties sufficiently expressed their intent that the discontinuance

was not on the merits, that it was without prejudice, and that consequently, the commencement of a new action within six months pursuant to CPLR 205(a) was permitted (see *George v Mt. Sinai Hosp.*, 47 NY2d 170,180-181; *Matter of Walter*, 29 AD3d 598, 599; *Bailey v Brookdale Univ. Hosp. & Med. Ctr.*, 292 AD2d 328, 329). Accordingly, the Supreme Court correctly determined that the plaintiff's state court action was not untimely under the terms of the insurance contract.

In a dispute over insurance coverage, the insured bears the initial burden of establishing that the loss claimed falls within the scope of the policy (see *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 220). "Once coverage is established, the insurer bears the burden of proving that an exclusion applies" (*id.*). However, as the moving party with respect to the cross motion for summary judgment, the defendant had the burden of establishing its prima facie entitlement to judgment as a matter of law (see *Lancer Ins. Co. v Whitfield*, 61 AD3d 724, 725).

Viewing the facts in the light most favorable to the plaintiff (see *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315; *Pearson v Dix McBride, LLC*, 63 AD3d 895), the defendant failed to demonstrate either that the improvements and betterments at issue were not installed by the plaintiff's predecessor but by the landlord or a previous tenant, or, that, to the extent that the improvements and betterments were owned by the plaintiff's predecessor, they were not included in the sale of the business's assets. Consequently, the defendant failed to make a prima facie showing sufficient to shift the burden to the plaintiff (see *Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 321). Likewise, the defendant failed to demonstrate that the plaintiff's failure to provide certain requested documents constituted a "material breach" of the policy requirements or was "unexcused and willful" and thus that it was entitled to deny coverage based upon the policy exclusion for noncooperation with the defendant's investigation of the claim (*Matter of New York Cent. Mut. Fire Ins. Co. v Rafailov*, 41 AD3d 603, 604; see also *High Fashions Hair Cutters v Commerical Union Ins. Co.*, 145 AD2d 465, 466).

In light of the foregoing, we need not reach the parties' remaining contentions. ♦



Rumors Trigger No Trigger Of Insured Obligation

Editor's Note: Below is the opinion of the Supreme Court, Appellate Division, Third Department. The case is *Nationwide Mut. Fire Ins. Co. v. Maitland*, 2010 NY Slip Op 09058.

Appeal from that part of an order of the Supreme Court (Aulisi, J.), entered January 25, 2010 in Hamilton County, which denied plaintiff's motion for summary judgment seeking a declaration that it had no duty to defend or indemnify defendants Alex L. Maitland and Tamara Maitland in an underlying personal injury action.

On January 24, 2007, while at a bar in the Town of Speculator, Hamilton County, defendant Lisa Turner hit her head on the floor and was temporarily rendered unconscious. According to Turner, she was injured when defendant Alex L. Maitland, an old high school friend who she had encountered at the bar, lost his balance after attempting to pick her up onto his shoulders. Following the incident, an ambulance was summoned and Turner was diagnosed with a head injury and released from the hospital that evening. Several months later, in April 2007, Turner was diagnosed with two herniated disks and subsequently underwent surgery. Turner and her husband, derivatively, thereafter commenced a personal injury action against Maitland, among others. After Maitland was served, he notified plaintiff, his insurer, of the action on February 4, 2008. Plaintiff disclaimed coverage on the ground that neither Maitland nor Turner gave prompt notice of the incident. Plaintiff then commenced the instant action seeking a judgment declaring that it had no duty to defend or indemnify Maitland and his wife in connection with the underlying personal injury action. Following joinder of issue, plaintiff moved and the Maitlands cross-moved for summary judgment. Supreme Court denied both motions, prompting this appeal by plaintiff.

Where, as here, "a policy of liability insurance requires that notice of an occurrence be given 'as soon as practicable,' such notice must be accorded the carrier within a reasonable period of time" (*Great Canal Realty Corp. v. Seneca Ins. Co., Inc.*, 5 NY3d 742, 743 [2005] [citation omitted]; see *Sorbara Constr. Corp. v. AIU Ins. Co.*, 11 NY3d 805, 806 [2008]). There may be circumstances that excuse a delay in notifying the insurer, such as the insured's good faith reasonable belief in nonliability (see *Great Canal Realty Corp. v. Seneca Ins. Co., Inc.*, 5 NY3d at 743; *U.S. Underwriters Ins. Co. v. Carson*, 49 AD3d 1061, 1063 [2008]; *Spa Steel Prods. Co. v. Royal*

Ins., 282 AD2d 864, 865 [2001]). "The reasonableness of the insured's belief, as well as a failure to conduct further inquiry, generally remains a question of fact for the jury" (*Morehouse v. Lagas*, 274 AD2d 791, 794 [2000] [citations omitted]; see *Preferred Mut. Ins. Co. v. New York Fire-Shield, Inc.*, 63 AD3d 1249, 1251 [2009]). Guided by these principles, we find that questions of fact exist as to whether there was a reasonable excuse for Maitland's delay in providing notice.

Here, Maitland stated that he did not believe that Turner had sustained any type of significant injury on the date of the incident, explaining that she was walking after the fall, did not appear to be injured and refused to get into an ambulance until he convinced her to do so as a precautionary measure. Although Maitland indicated that he heard rumors in the summer of 2007 that he might be sued by Turner, he believed it to be simply "scuttlebutt about town," as the information did not come from Turner herself — or anyone with direct knowledge — and he did not learn of Turner's diagnosis of bulging disks until much later. Furthermore, while plaintiff submitted two letters that were sent to Maitland in August and September 2007 from the insurer of the bar inquiring as to the incident that caused Turner's injuries, as well as correspondence sent from Turner's counsel in May and October 2007 advising Maitland that Turner was being represented for serious injuries sustained as a result of the January 2007 incident, Maitland stated that he does not recall ever receiving these letters. Maitland averred that his address is "P.O. Box 789, Lake Pleasant" and that the correspondence, which was addressed to either "Route 8, Lake Pleasant" or "Route 8, Speculator," would likely not have reached his home without the inclusion of his post office box number since "Route 8 is a large expanse of state highway in Lake Pleasant and beyond." Maitland did mention in a recorded statement to the insurer that he received a letter from "an attorney" in September or October 2007, but there is no evidence as to the contents of that letter or who sent it, and Maitland subsequently averred that he did not recall receiving a letter from Turner's attorney. In light of these credibility issues and the conflicting inferences that may be drawn from the facts, and mindful of the preference for permitting a jury to decide the question of reasonableness, we find that Supreme Court properly denied plaintiff's summary judgment motion (see *North Country Ins. Co. v. Jandreau*, 50 AD3d 1429, 1431 [2008]; *Klerzy Bldg. Corp. v. Harleysville Worcester Ins. Co.*, 36 AD3d 1117, 1119

[2007]; *Morehouse v. Lagas*, 274 AD2d at 794; *G.L.G. Contr. Corp. v. Aetna Cas. & Sur. Co.*, 215 AD2d 821, 822 [1995]).

Similarly unpersuasive is plaintiff's assertion that Turner's notice to it was untimely as a matter of law. Insurance Law § 3420 (a) (3) affords an injured party an independent right to give notice so as to preserve his or her right to proceed directly against an insurer, notwithstanding the timeliness of the notice given by an insured (see *American Tr. Ins. Co. v. Sartor*, 3 NY3d 71, 76 [2004]; *General Acc. Ins. Group v. Cirucci*, 46 NY2d 862, 863-864 [1979]; *U.S. Underwriters Ins. Co. v. Carson*, 49 AD3d at 1064; *Lauritano v. American Fid. Fire Ins. Co.*, 3 AD2d 564, 568 [1957], *aff'd* 4 NY2d 1028 [1958]). "Significantly, the notice required of an injured party to an insurer is measured less rigidly than the notice required of an insured . . . 'since what is reasonably possible for the insured may not be reasonably practical for the injured person'" (*GA Ins. Co. of N.Y. v. Simmes*, 270 AD2d 664, 666 [2000], quoting *Jenkins v. Burgos*, 99 AD2d 217, 221 [1984]; accord *U.S. Underwriters Ins. Co. v. Carson*, 49 AD3d at 1064). "In each case, the test is one of reasonableness, measured by the diligence exercised by the injured party in light of the prospects afforded to him [or her] under the circumstances" (*Jenkins v. Burgos*, 99 AD2d at 221 [citation omitted]; see *GA Ins. Co. of N.Y. v. Simmes*, 270 AD2d at 666).

Here, within a few weeks of being diagnosed with herniated disks and advised of the need for surgery, Turner retained an attorney. Her attorney promptly engaged the services of a private investigator, but the investigator was unable to locate or speak with Maitland ~~ENR~~. After ascertaining that Turner had a viable claim, Turner's attorney immediately requested in a May 1, 2007 letter, and again in an October 2007 letter, that Maitland provide notice to his insurer and to contact him if he was not insured. Under these circumstances, the reasonableness of Turner's actions in attempting to provide notice to plaintiff presents a question of fact for the jury to resolve (see *U.S. Underwriters Ins. Co. v. Carson*, 49 AD3d at 1064; *Allstate Ins. Co. v. Marcone*, 29 AD3d 715, 717 [2006], *lv dismissed* 7 NY3d 841 [2006]; *GA Ins. Co. of N.Y. v. Simmes*, 270 AD2d at 666-667).

Footnote 1: Notably, Maitland averred that he was rarely home in 2007 because his job required him to engage in extensive travel.♦

Insurer's Delay Excuses Late Notice

Editor's Note: Below is the opinion of the Supreme Court, Appellate Division, Second Department. The case is *Salvatore Bellavia & Franchised Distrib., Inc. v. Seneca Ins. Co., Inc.*, 2010 NY Slip Op 08923.

In an action, inter alia, for a judgment declaring, in effect, that the defendant is obligated to defend and indemnify the plaintiffs and to reimburse the plaintiffs for all reasonable attorney's fees and disbursements incurred in the defense of an underlying action entitled *Berman v Bamonty Realty, LLC*, pending in the Supreme Court, Suffolk County, under Index No. 26686/06, the defendant appeals, as limited by its brief, from so much of an order of the Supreme Court, Suffolk County (Molia, J.), dated September 18, 2009, as denied its motion for summary judgment dismissing the complaint and declaring that it is not obligated to defend and indemnify the plaintiffs in the underlying action and granted that branch of the plaintiffs' cross motion which was for summary judgment declaring that it was so obligated, and the plaintiffs cross-appeal from stated portions of the same order which, among other things, in effect, denied that branch of their cross motion which was for summary judgment declaring that the defendant is obligated to reimburse them for all reasonable attorney's fees and disbursements incurred in the defense of the underlying action. ORDERED that the order is modified, on the law, by deleting the provision thereof, in effect, denying that branch of the plaintiffs' cross motion which was for summary judgment declaring that the defendant is obligated to reimburse them for all reasonable attorney's fees and disbursements incurred in the defense of the underlying action and substituting therefor a provision granting that branch of the cross motion; as so modified, the order is affirmed insofar as appealed and cross-appealed from, with costs to the plaintiffs payable by the defendant, and the matter is remitted to the Supreme Court, Suffolk County, for the entry of a judgment declaring that the defendant is obligated to defend and indemnify the plaintiffs and to reimburse the plaintiffs for all reasonable attorney's fees and disbursements incurred in the defense of the underlying action.

The plaintiffs were insured by a comprehensive business liability insurance policy (hereinafter the policy) issued by the defendant. Among other things, the policy obligated the defendant to defend and indemnify the plaintiffs in claims or suits brought against them to recover damages for per-

sonal injuries and required the plaintiffs to notify the defendant "as soon as practicable" in the event of an occurrence.

On or about April 26, 2005, the plaintiffs notified the defendant of a personal injury claim against them arising from an occurrence on August 10, 2004. On June 21, 2005, the defendant disclaimed coverage on the ground that the plaintiffs had not notified it of the occurrence as soon as practicable. A personal injury action was commenced against the plaintiffs to recover damages allegedly arising from the occurrence (hereinafter the underlying action). The plaintiffs commenced this action seeking, among other things, a judgment declaring, in effect, that the defendant is obligated to defend and indemnify them and to reimburse them for all reasonable attorney's fees and disbursements incurred in the defense of the underlying action.

The Supreme Court properly granted that branch of the plaintiffs' cross motion which was for summary judgment declaring that the defendant is obligated to defend and indemnify them in the underlying action and properly denied the defendant's motion for summary judgment dismissing the complaint and declaring that it is not so obligated. Insurance Law § 3420(d) requires an insurer to provide a written disclaimer of coverage "as soon as is reasonably possible" (Insurance Law § 3420[d][2]). An insurer's failure to provide notice of disclaimer as soon as is reasonably possible precludes it from disclaiming coverage, even where the insured's own notice of the incident is untimely (see *Matter of New York Cent. Mut. Fire Ins. Co. v Aguirre*, 7 NY3d 772, 774; *First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 67). "The timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage" (*Tex Dev. Co., LLC v Greenwich Ins. Co.*, 51 AD3d 775, 778; see *First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d at 68-69; *Matter of New York Cent. Mut. Fire Ins. Co. v Steiert*, 68 AD3d 1120, 1121).

Here, the plaintiffs made a prima facie showing of their entitlement to judgment as a matter of law declaring that the defendant is obligated to defend and indemnify them in the underlying action by establishing that, under the circumstances, the defendant did not provide a written disclaimer of coverage as soon as reasonably possible (see Insurance Law § 3420[d][2]; *Mid City Constr. Co., Inc. v Sirius Am. Ins. Co.*, 70 AD3d 789, 789-790; *Tex Dev. Co., LLC v Greenwich Ins. Co.*, 51 AD3d at 778). In opposition, the defendant, which had the burden of justifying its delay

in providing the written notice of disclaimer (see *First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d at 69), failed to raise a triable issue of fact.

Based on the foregoing, the Supreme Court also should have granted that branch of the plaintiffs' cross motion which was for summary judgment declaring that the defendant is obligated to reimburse them for all reasonable attorney's fees and disbursements incurred in the defense of the underlying action (see *New York City Hous. Auth. v Underwriters at Lloyd's, London*, 61 AD3d 726, 727-728; see also *State Ins. Fund v American Hardware Mut. Ins. Co.*, 64 AD3d 581, 583).

The plaintiffs' remaining contentions are without merit.

Since this is, in part, a declaratory judgment action, the matter must be remitted to the Supreme Court, Suffolk County, for the entry of a judgment declaring that the defendant is obligated to defend and indemnify the plaintiffs and to reimburse the plaintiffs for all reasonable attorney's fees and disbursements incurred in the defense of the underlying action (see *Lanza v Wagner*, 11 NY2d 317, 334, appeal dismissed 371 US 74, cert denied 371 US 901). ♦



Briefs From Recent Cases

Defense Reimbursement

In the recent case of *American and Foreign Insurance Company v Jerry's Sport Center, Inc.*, 2010 Pa. Lexis 1803, the Pennsylvania Supreme Court decided the issue of if an insurance company is entitled to reimbursement for amounts paid out to defense counsel once a declaration has been made that the insurer had no duty to defend.

Jerry's Sports Center is a firearms dealer. The case is about a lawsuit filed by the NAACP against several firearms dealers for their failure to distribute the products safely.

American and Foreign Insurance Company insured Jerry's Sports Center and defended its insured under a reservation of rights letter. The insurer brought a declaratory judgment action and succeeded with a finding that there was no duty to defend or indemnify its insured. The insurer subsequently sought to recover over \$300,000 in defense costs it paid out.

The Supreme Court of Pennsylvania held that absent an express provision in the contract, an insurer is not entitled to be reimbursed for defense costs. ♦

Social Media Discovery

The use of Social Media and the concept of networking came up in a recent Jefferson County case entitled *McMillen v Hummingbird Speedway, Inc.*, 2010 Pa. Dist. & Cnty. Dec. Lexis 270. This is a car accident case. During discovery, the defendant asked in its interrogatories about the plaintiff's use of social media sites. The defendant asked for particulars including the site, plaintiff's user name, login information and password.

The plaintiff disclosed the information that he belonged to Facebook and MySpace but said his information was confidential and it would not be provided. A motion to compel was made by the defense.

Plaintiff provided information on these sites that was found to be relevant in proving or disproving plaintiff's alleged injuries.

There is a rule in Pennsylvania that the trial court pointed out that a party may obtain discovery of any information that is relevant and not privileged. The court held that the plaintiff did not satisfy any privilege in this matter. Such sites advise users of the possibility of disclosure of the information contained on the sites.

The court held that a person utilizing these sites could not reasonably expect the communications to remain confidential. The court held that the goal of obtaining the truth in civil trials should prevail in favor of the disclosure of information. ♦

Assumption of Risk Examined

Assumption of risk makes the injured party responsible for their own injury, in a manner of speaking. But a Superior Court decision in the case of *Montagazzi v Crisci*, 2010 PA Super 78 held that there is a continuing value to the assumption of risk doctrine in Pennsylvania. This case is about a boy who along with others created an explosive device. He was injured from lighting the fuse of the device. In the lawsuit, the defendants raised the assumption of risk doctrine.

The Superior Court panel did not agree with plaintiff that the assumption of risk doctrine should be abolished.

The appellate court indicated that the young man designed the explosive device, obtained the wick that worked as a fuse, allowed it to be lit, and held it in his hand on two occasions prior to being injured.

The Superior Court held that the plaintiff proceeded knowing of the danger of the explosion and assumed that risk that the device would explode. In other words, he voluntarily and knowingly exposed himself to the danger of the device. As a result, any liability on the part of the defendants was found to be negated by the assumption of risk doctrine. ♦

Season's Greetings

Happy New Year



Attention Assessable Cooperatives:
The New York State Insurance Department has changed the method of filing for Assessable Cooperatives. URB is available to assist you with these filings and if you have questions or concerns.

Please call us today!

Editor's Note: Circular Letter No. 18 (2010) dated November 5, 2010 regarding the Implementation of Compliance with 11 NYCRR 30 (Regulation 194) is reprinted below for your information. This regulation is related to disclosure of producer compensation. The regulation goes into effect January 1, 2011.

The purpose of this Circular Letter is to set forth the Department's expectations regarding compliance by insurance producers, and authorized insurers with 11 NYCRR 30 (Regulation 194- *Producer Compensation Transparency*). Regulation 194 takes effect on January 1, 2011. In promulgating Regulation 194, the Department was committed to achieving the appropriate balance between informing purchasers as to the role and compensation of producers, while not unduly burdening producers, hindering the sales process, or imposing significant, additional costs on the sale and distribution of insurance¹ in New York. The Department is committed to providing appropriate and useful guidance to aid implementation of Regulation 194's requirements. Producers are encouraged to provide the Department information or evidence of any adverse effects of Regulation 194, and to submit any additional questions that they may have.

The Department expects licensees to comply fully with Regulation 194. In the first six months after the regulation's effective date, however, the Department's enforcement efforts will focus primarily on violations that are willful or egregious or demonstrate a pattern or practice of wrongdoing.

Identified below are certain methods of compliance that fulfill the requirements of Regulation 194. The list is not prescriptive or exhaustive. Other methods of compliance that producers choose to utilize may be equally reasonable and compliant with the Regulation. Though not required to do so, producers may wish to consult with the Department about any other method of compliance that they are considering.

General

No particular format is required for the disclosures required under § 30.3(a), (b) and (d) of Regulation 194.

For annuity or other contracts also regulated by the Securities and Exchange Commission ("SEC"), any disclosure required under Regulation 194 may be incorporated into the federal prospectus disclosure required by the Securities Act

of 1933 and SEC rules provided that the disclosure required under Regulation 194 is prominent. However, SEC disclosures may not be sufficient to comply with Regulation 194 and producers should be cognizant of any additional requirements imposed by the regulation.

A producer may incorporate any disclosure required by Regulation 194 into other written materials provided to the purchaser, as long as the disclosure is prominent.

Regulation 194 does not apply where an existing policy or contract is modified or otherwise amended. The regulation applies only upon the issuance of a new policy or contract.

A producer may combine all disclosures required by Regulation 194 into one document provided to the purchaser at or prior to the time of application for an insurance contract.

Section 30.2 ... Definitions

A producer is required under Regulation 194 to disclose compensation (as defined in the Regulation) only if the receipt of the compensation is based in whole or in part on the sale of an insurance contract or contracts.

Section 30.3(a) ... Mandatory Initial Disclosure

A producer that is a business entity, such as a corporation or partnership, and that sells insurance contracts through its employees or sublicensees, is the producer "selling an insurance contract" for purposes of § 30.3(a) of Regulation 194. Such a producer is therefore required to provide disclosure pursuant to Regulation 194. Such a producer need not disclose the compensation it pays to its individual employees (whether licensed or not) or sublicensees. Only one set of disclosures per transaction is required.

Initial disclosure required under this section may be made at or prior to the time of application for binding of an individual insurance contract. A producer's use of an application form to merely solicit multiple quotes does not trigger the disclosure requirements under Regulation 194.

No particular format is required for the disclosures mandated by § 30.3(a) of Regulation 194. A producer may satisfy the initial disclosure requirement with a "boilerplate" form to use for each written disclosure. An initial disclosure may be, but is not required to be, a statement a few sentences long.

In addition to the disclosures required by § 30.3(a), a producer may disclose

other information such as: (1) if applicable, that the producer is prohibited by law from rebating commission or other compensation to the insured or potential insured or otherwise providing an inducement to the insured or potential insured in order to make the sale; (2) if applicable, that compensation is limited by New York law and a general description of those limits; (3) additional information about the producer, the kind of insurance for which application is made, or the insurer; and (4) that compensation received for various sales may not be readily comparable due to differences in insurers' distribution systems and compensation structures.

The disclosures required by § 30.3(a) must be prominent.

Section 30.3(b) - Disclosure Upon Request

In order to meet the requirement in § 30.3(b)(1) that the producer disclose the "amount" of compensation to be received, the producer may state the amount in a number of different ways.

For example:

- A producer's known compensation may be described as the total dollar amount expected to be received based in whole or in part on the sale.
- A producer's known compensation may be described as the total amount expected to be received based in whole or in part on the sale stated as a percentage of one year of premium.
- Unlike other kinds of insurance, life insurance policies, annuity contracts, long-term care insurance policies and disability income insurance policies last for a number of years, but compensation is typically greater in the early years that the policy is in effect. Accordingly, a producer may disclose the known compensation as a percentage of the total premium paid over the expected duration of the policy or contract. For such a disclosure to be acceptable, it must state (1) the expected duration used (which must take account of appropriate mortality and termination rates for the kind of policy being sold), and (2) that most compensation is paid in the first year if such is the case, or that most of the compensation is paid in the first 5 years if such is the case. Example: "I expect to receive from the insurer 8% of the total premium you pay on this policy if you keep the policy in place for 13 years which is the expected average duration of this type of policy. Most of that compensation will be paid in the first year." Continued Next Page ⇨

Re: Implementation of and Compliance with 11 NYCRR 30

A producer may explain the § 30.3(b) compensation information orally and in an abbreviated form when a request is made so long as the information required to be disclosed is subsequently provided in a prominent writing at or prior to the issuance of the insurance contract.

A producer is not required to provide separate disclosures for multiple lines of coverage provided at the same time so long as the disclosure contains total compensation for each of the multiple lines.

Material ownership interest under § 30.3(b)(3) does not include shares of mutual funds or other substantially similar indirect ownership vehicles.

Section 30.3(d) - Disclosure of Reasonable Estimate of Compensation

Compensation is "not known at the time of disclosure" when it is contingent upon some future occurrence such as meeting sales volume, profitability or retention targets.

Compensation that may not be paid, or that the producer may be required to return to the insurer, merely because the policyholder cancels or ceases paying premiums on the policy (e.g., commissions subject to chargeback) does not constitute compensation "not known at the time of disclosure."

A producer is not required to disclose detailed compensation structures but must provide a description of the circumstances that may determine the receipt and amount or value of any compensation not known at the time of disclosure. For example: "I may also be eligible for additional compensation depending upon a number of factors including premium and policy volume, losses and profitability."

In order to meet the requirement in § 30.3(d)(2) that the producer disclose "a reasonable estimate" of the amount or value of unknown compensation to be received, the producer may estimate the amount in a number of different ways. For example:

- A producer may estimate the unknown compensation as a reasonable range of percentages of premium based on the amount of such compensation the producer has received on the sale of similar policies in prior years.
- A producer may estimate the unknown compensation as a reasonable range of dollar amounts based on the amount of such compensation the producer has

received on the sale of similar policies in prior years.

- When a producer's unknown compensation received based on the sale of similar policies in prior years is not readily available or calculable, the producer may use an estimate provided by the insurer and based on the average amount of such compensation paid to producers per dollar of premium for similar policies in prior years.

- For life insurance policies, annuity contracts, long-term care insurance policies and disability income insurance policies, a producer may estimate the unknown compensation as an additional range of percentages of the total premium paid over the average duration of the policy or contract in accordance with the paragraph discussing life insurance policies and annuity contracts under Section 30.3(b) above.

- A producer who works exclusively for one insurer may estimate unknown compensation by stating all such compensation the producer receives in a given year as a percentage or range of percentages of the producer's total yearly compensation.

Section 30.5 - Exceptions

For purposes of the disclosure requirement in § 30.5(e), the payment of premium installments does not constitute a renewal. However, as a practical matter, the producer should be prepared to provide additional information about compensation if the purchaser requests it.

Subject to the exceptions set forth in § 30.5, any producer that is acting as a producer (i.e., requires a producer license for the activity at issue) must comply with Regulation 194.

Section 30.3 provides that the insurance producer selling an insurance contract has the disclosure obligations required by the regulation. The disclosure requirements of the regulation do not apply to:

- a salaried, licensed employee representative whose activities do not require a producer's license and who does not receive compensation based in whole or in part on the sale of insurance. Such a salaried employee may receive compensation for meeting criteria that are not based in whole or in part on insurance sales, such as number of applications taken by phone, payments made by phone and obtaining customer

feedback surveys; or

- a producer, such as a wholesaler or managing general agent, whose primary contact is with the selling agent or broker, and who has no contact with the purchaser that involves sales or solicitation. A producer, such as a wholesaler or managing general agent, does not have "direct sales or solicitation contact" with the purchaser under § 30.5(c) solely because the selling producer provides the name and contact information of the wholesaler, managing general agent or other producer to the purchaser.

Section 30.6 - Obligations of an Authorized Insurer

An insurer may delegate to a licensed insurance agent its obligation under § 30.6 to maintain records regarding the amount of compensation paid to the agent, provided that the agent maintains the records in accordance with 11 NYCRR 243 (Regulation 152).

Please direct any questions or comments regarding the contents of this Circular Letter to:

Paul A. Zuckerman

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New York State Insurance Department

25 Beaver Street

New York, NY 10004

212-480-5286 or email at pzuckerm@ins.state.ny.us.

¹ Throughout this circular letter, the terms "insurance", "insurance policy", and insurance contract" also include bonds and annuity contracts. ♦





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Other States Case Notes

- **Michigan** - In November, a federal judge in Michigan heard arguments in the case of a medical marijuana user claiming that Walmart wrongfully fired him for using and testing positive for the drug. There is a motion by attorneys representing the former worker to move the case back to state court, while Walmart has made a motion to dismiss the case.
- **Mississippi** - The Mississippi Supreme Court has upheld the dismissal of a lawsuit filed by a man who wanted the state to release records that would show the amount of Hurricane Katrina claims denied by insurance companies. The claimant made a public records request to the Department of Insurance who responded by saying they did not have such records. The Supreme Court upheld a county judge's dismissal of the claimant's lawsuit.
- **Florida** - An insurance company will pay a man \$650,000 after a dancer's platform shoe shattered his eye socket at a strip club. The dancer claimed she was walking on the bar, and swung around when somebody touched her. The attorney for the claimant says the dancer's metal heel went into the claimant's eye, requiring extensive surgery.
- **Connecticut** - A lawsuit by a former sprinter who required brain surgery after crashing into a cement wall has been settled for \$325,000. ♦

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