URB INSIDER

A Quarterly Publication of Underwriters Rating Board

At The Supreme Court

High Court Rules On Wal-Mart Discrimination Case

Summer, 2011

Volume 9, Issue 2

The U.S. Supreme Court recently ruled on behalf of corporate giant Wal-Mart in *Wal-Mart Stores, Inc. v. Dukes*, et al., a sex discrimination case.

The High Court unanimously held that the case can not go forward as a class action, thus, reversing the decision of the 9th Circuit Court of Appeals.

The decision could make it much harder to bring similar class action discrimination lawsuits against large employers.

In a 5-4 ruling, Justice Antonin Scalia wrote the opinion for the High Court's conservative majority. It was said the respondents wanted "to sue about literally millions of employment decisions at once..." and that the commonality among the plaintiffs was absent.

Justice Ruth Bader Ginsberg wrote the opinion for the High Court's four liberal justices. It was indicated that the lower court's finding of commonality was correct.

The case has captured much media attention with business interests lined up on Wal-Mart's side and consumers taking the side of the employees. Both the business community and consumer groups have described the case as having significant consequences.

The business community thought a ruling for the employees would provide for a flood of these type of lawsuits. Consumer groups have believed that a decision for Wal-Mart could deter groups of employees from trying to fight discrimination in the workplace.

The few women who brought the case may pursue their claims on their own. ♦

Index for this Issue:

New York Cases

Court Interprets "Any Benefit" Exclusion

Editor's Note: Below is the decision of the New York Court of Appeals in the case of *Cragg v. Allstate Indem. Corp.*, 2011 NY Slip Op 04767 (17 NY3d 118). Opinion by Chief Judge Lippman.

This appeal requires us to interpret the breadth of an exclusion in a homeowner's insurance policy excluding coverage for bodily injury to an insured where an insured would receive "any benefit" under the policy.

Plaintiff, Eric Cragg, is the father of decedent, Kayla Margaret Rose Cragg. Three-year-old Kayla and her mother, defendant Marina Ward, lived with defendant grandparents, Gregory and Katherine Klein, in the Kleins' Clarence, New York home. In July 2001, Kayla drowned accidentally in the Kleins' swimming pool. At the time, the Kleins had a homeowner's insurance policy in place that had been issued by Allstate. Under the terms of the policy, Kayla and her mother were insured persons, as residents of the household who were related to the policyholders. Plaintiff maintained a separate residence and was not an insured under the Kleins' homeowner's insurance policy.

Allstate disclaimed coverage based on the policy exclusion at issue here. Under "Coverage X [-] Family Liability Protection," the policy states that "[w]e do not cover bodily injury to an insured person . . . whenever any benefit of this coverage would accrue directly or indirectly to an insured person." Bodily injury is defined in the policy as "physical harm to the body, including sickness or disease, and resulting death." The policy does not define the term "benefit."

Plaintiff, as the administrator of Kayla's estate, commenced an action seeking to recover against defendants for Kayla's wrongful death and for her conscious pain and suffering. Defendant Ward defaulted and judgment was entered against her in the amount of $300,000 — $150,000 for wrongful death and $150,000 for pain and suffering. Plaintiff brought this declaratory judgment action against Allstate for a declaration that Allstate was required to defend and indemnify its insureds. Supreme Court granted Allstate's motion for summary judgment, declaring that Allstate had no obligation to defend or indemnify Ward or the Kleins in relation to the wrongful death or conscious pain and suffering claims.

The Appellate Division affirmed (74 AD3d 90 [4th Dept 2010]). That Court noted that the general purpose of homeowner's insurance policies is to provide coverage for injuries sustained by those who are not insured by the subject policy and found that, based on the plain language of the exclusion, Allstate did not have to indemnify Ward because she would thereby obtain a benefit under the policy. We granted plaintiff leave to appeal (15 NY3d 705 [2010]) and we now reverse.

At this stage of the litigation, plaintiff properly limits his argument to the wrongful death claims of the underlying action. As we recently noted, a claim for conscious pain and suffering belongs to the estate of the deceased, rather than the distributees (*see Heslin v County of Greene*, 14 NY3d 67, 76-77 [2010]; EPTL 11-3.2 [b]). By contrast, "a wrongful death action belongs to the decedent's distributees and is designed to compensate the distributees themselves for their pecuniary losses as a result of the wrongful act" (*Heslin*, 14 NY3d at 76; *see also* EPTL 5-4.3). Plaintiff's wrongful death claim therefore is based on his own loss and is not derivative of any claim on behalf of his insured daughter.

Insurance contracts must be interpreted according to common speech and consistent with the reasonable expectations of the average insured (*see Matter of Mostow v State Farm Ins. Cos.*, 88 NY2d 321, 326-327 [1996]). To the extent that there is any ambiguity in an exclusionary clause, we construe the provision in favor of the insured. Moreover,

> "'exclusions or exceptions from policy coverage . . . 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'" (*Pioneer Towner Owners Assn. v State Farm Fire & Cas. Co.*, 12 NY3d 302, 307 [2009], quoting *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]).

Allstate has not met that burden here.

The language of the policy exclusion — excluding coverage "whenever any benefit of this coverage would accrue directly or indirectly to an insured" — is ambiguous. It could be interpreted, as Allstate urges, to mean that bodily injury to an insured is not covered whenever any

Continued Next Page ⇨

"Any Benefit" Cont'd

benefit — including coverage itself in the form of defense and indemnification — would accrue to an insured. However, as plaintiff points out, this interpretation ascribes meaning only to the first clause of the exclusion — "[w]e do not cover bodily injury to an insured person." Since the right to defense and indemnification universally accrues to an insured, under Allstate's interpretation the condition of the second clause of the exclusion would always be met. However, the second part of the exclusion must somehow modify the first part of the clause in order to have any meaning. In this context, a benefit must mean something other than coverage itself and is more naturally read to mean proceeds paid under the policy. In light of our obligation to interpret the exclusion in a manner that gives full force and effect to the policy language and does not render a portion of the provision meaningless (*see County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628 [1994]), we find plaintiff's interpretation of the clause to be more in keeping with these well-settled principles of contract interpretation.

The current version of the exclusion at issue was brought about in response to the decision in *Allstate Ins. Co. v Pestar* (168 AD2d 931 [4th Dept 1990]). The prior version of the exclusion had excluded coverage for bodily injury to an insured. In *Pestar*, a child was injured when she dove into a State-owned lake. Her parents filed a negligence action against the State and the State counterclaimed seeking contribution.

Despite the policy exclusion, the Appellate Division determined that Allstate had a duty to defend and indemnify the parents on the State's counterclaim, finding that "the liability at issue . . . is not the parents' liability to [the insured child] but rather the parents' potential liability to the State on a claim of equitable apportionment" (*Pestar*, 168 AD2d at 931-932). The insurer subsequently added language to the exclusion stating that bodily injury to an insured is not covered "whenever any benefit of this coverage would accrue directly or indirectly to an insured person" (*see* 9A Couch on Insurance 3d § 128:4).

Assuming the insurer intended this language to exclude coverage under the policy entirely for bodily injury to insureds, it did not accomplish the desired result. Instead of making the exclusion broader, the additional language can be read as limiting the application of the exclusion to situations where an insured would receive a benefit (i.e. payment) under the policy. The amendment, then, can be seen as the insurer's attempt to cut off indirect claims, such as claims for contribution. As relevant to this appeal, however, the exclusion fails to bar unambiguously payment to a noninsured plaintiff, that is to say it does not clearly cut off the nonresident distributee's wrongful death claims arising from the fatal injury to an insured.

Other jurisdictions have observed that there are valid policy reasons for excluding coverage in cases such as this one. They have noted that homeowner's insurance is generally meant to cover bodily injury to noninsureds (*see Cincinnati Indem. Co. v Martin*, 85 Ohio St 3d 604, 608; 710 NE2d 677, 680 [1999]) and that coverage is excluded in these types of situations in order to avoid imposing liability on the insurer in a case where the insured, due to a close relationship with the injured party, might be unmotivated to assist the insurer in defending against the claim (*see Whirlpool Corp. v Ziebert*, 197 Wis 2d 144, 149; 539 NW2d 883, 885 [1995])[FN*]. However, faced with a very similar case addressing the identical exclusion, the Wisconsin Supreme Court recently held that "Allstate has failed to meet its burden to demonstrate that the policy term 'benefit' unambiguously includes the contractual right to receive a defense or the contractual right to indemnification" (*Day v Allstate Indem. Co.*, 2011 WI 24, ¶57 [decided April 29, 2011]). We agree with this analysis.

We therefore find that judgment should have been granted in plaintiff's favor, as the exclusion did not operate to bar coverage for the noninsured plaintiff's wrongful death claim for the death of the insured decedent.

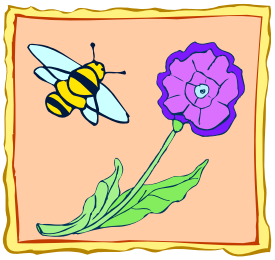
Accordingly, the order of the Appellate Division should be reversed, with costs, and the matter remitted to Supreme Court for further proceedings in accordance with this opinion.

Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Order reversed, etc.

Footnotes

Footnote *: We note that the record does not provide any indication that there was collusion between these parties. ♦



Residence Premises At Issue

Editor's Note: Below is the decision of the Supreme Court of New York, Appellate Division, First Department in the case of *Dean v. Tower Ins. Co. of NY.*, 2011 NY Slip Op 03899 (84 AD3d 499).

Order, Supreme Court, New York County (Joan A. Madden, J.), entered May 7, 2010, which granted defendant's motion for summary judgment dismissing the complaint and denied plaintiffs' cross motion for summary judgment on liability, unanimously modified, on the law, defendant's motion denied, the complaint reinstated, and otherwise affirmed, without costs.

Defendant failed to satisfy its prima facie burden on its motion for summary judgment. Because the "residence premises" insurance policy fails to define what qualifies as "resides" for the purposes of attaching coverage, the policy is ambiguous in the circumstances of this case, where the plaintiff insureds purchased the policy in advance of closing but were then unable to fulfill their intention of establishing residency at the subject premises due to their discovery and remediation of termite damage that required major renovations. "[B]efore 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" (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984] [citations omitted]). Accordingly, the ambiguity in the policy must be construed against defendant under the facts of this case, and precludes the grant of summary judgment in its favor (*see Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398 [1983]). *Marshall v Tower Ins. Co. of N.Y.* (44 AD3d 1014 [2007]) is inapposite because it did not address whether the term "residence premises" is ambiguous in light of the policy's failure to define "resides." Moreover, unlike here, the plaintiff in *Marshall* had no intention of living at the premises (*see Marshall v Tower Ins. Co. of N.Y.*, 12 Misc 3d 1170[A], 2006 NY Slip Op 51125[U] [Sup Ct 2006]).

An issue of fact as to whether plaintiffs misrepresented their intention to reside in the subject premises as contemplated by the policy precludes a grant of summary judgment to both parties.

We have considered the parties' remaining contentions and find them to be without merit. Concur—Mazzarelli, J.P., Sweeny, DeGrasse, Richter and Manzanet-Daniels, JJ. **[Prior Case History: 2010 NY Slip Op 31107(U).]** ♦

NY Attorney General Brings Hydro-Fracking Suit

The NY Attorney General recently filed a suit in federal court against the Army Corps of Engineers and other federal agencies because they didn't engage in a national environmental review of proposed regulations regarding hydro-fracking.

Suit was brought in U.S. District Court in Brooklyn because the Delaware River Basin Commission proposed regulations that would allow hydro-fracking in the Marcellus Shale layers in the region. The Attorney General has said through a spokesperson that hydro-fracking poses a threat to New York's air, water and land and an environmental impact study is essential.

The Delaware River commission's plans to allow drilling based on its regulations would result in the development of wells with the basin in Pennsylvania and New York, which includes a large portion of the New York City watershed. ♦

Unfair Coverage Denial

The plaintiff, Yuriy Pinkhasov, was the owner of a house in Pittston, PA that was insured under a homeowner's policy by Allstate Insurance, the defendant.

The homeowner's policy contained a $250,000 limit for the dwelling, $25,000 for other structures and $150,000 for personal property. The policy covered damage from the sudden and accidental escape of water but not from continuous or repeated seepage or leakage of water. Over the course of the policy period, plaintiff's property had experienced extensive flooding. Upon discovery, he immediately reported the damage to Allstate. Allstate did not investigate the claim or inspect the property, but payment on the claim was denied. Plaintiff was unable to have the necessary structural repairs to his basement completed which resulted in a growth of mold.

The plaintiff brought a breach of contract, bad faith and unfair trade practice lawsuit in the Lackawanna County Court of Common Pleas.

Allstate had the lawsuit removed to the U.S. District Court citing diversity jurisdiction. The plaintiff sought $75,000 in compensatory damages for breach of contract, plus he sought punitive damages for the bad faith claim, interest and attorney's fees, and he sought treble damages pursuant to his unfair trade practices claim.

To prevail on the bad faith claim, the plaintiff insured was required to show that the insurer lacked a reasonable basis for its denial and that the insurer had knowledge there was no such reasonable basis, or recklessly disregarded it. The Middle District court did not grant Allstate's motion to dismiss the bad faith claim.

The court held that the plaintiff insured stated sufficient factual allegations that there was a failure by Allstate to investigate the claim in good faith.

The court also held that the plaintiff's unfair trade practices claim should not be dismissed because assuming the factual allegations of the complaint to be true, the court would find that Allstate misrepresented their policy when they denied the claim. Allstate did not first investigate the claim or inspect the property and issued a denial letter to the insured that cited inapplicable policy provisions.

The court held that the plaintiff relied to its detriment upon the fraudulent assurances made to it by Allstate. As a result, the Middle District court did not dismiss the claim for bad faith and the claim for unfair trade practices. ♦

News Notes From Pennsylvania

Disaster Declared After Severe Storms

A disaster declaration has been issued by President Obama for the severe storms that struck northeastern Pennsylvania last April. This will clear the way for federal aid to the commonwealth, local governments, and some nonprofit organizations on a cost-sharing basis. This federal funding can be used to pay for emergency work, and repair and replacement of facilities damaged by the storms. ♦

Suit Filed In Pennsylvania Van Death

The father of a severely autistic man has filed a federal lawsuit against the residential facility and the employee who had charge of his 20-year-old son when he died last year. The man was left alone in a locked van on a 97-degree day. His caregiver was allegedly distracted by her cell phone. She has been sentenced to at least two-years in prison for her actions. ♦

PA Governor Signs Fair Share Civil Liability Reform

The Pennsylvania Governor recently signed a law that limits the liability for negligence of defendants in some civil cases. The legislation has been dubbed the "Fair Share Act". Defendants found to be less than 60 percent at fault would not have to pay more than their share of the damages, except for intentional misrepresentation, an intentional act, an environmental crime or a liquor law violation. ♦

From The Department

OGC Opinion No. 11-04-02

Editor's Note: Below is the text of an opinion issued by the State of New York Insurance Department Office of General Counsel regarding a premium credit by an assessment cooperative.

The Office of General Counsel issued the following opinion on April 25, 2011 representing the position of the New York State Insurance Department.

Re: Assessment Cooperative Premium Credit

Question Presented:

May an assessment cooperative offer a "marketing incentive," such as an insurance discount, to encourage a customer of a bank to become insured by the assessment cooperative through a particular insurance agent?

Conclusion:

No. An assessment cooperative may not offer a discounted assessment to encourage a bank customer to become insured by the assessment cooperative through a particular insurance agent because an assessment cooperative's assessment must be based upon the amount of insurance held by each cooperative member. An assessment cooperative also may not give to its insurance clients or prospective clients any other inducement or valuable consideration not specified in the policy, except where the item is a "keepsake" with a retail price of less than $15, as such inducement would run afoul of N.Y. Ins. Law § 2324 (McKinney 2007).

Facts:

The inquiry is of a general nature, without reference to specific facts.

Analysis:

An assessment cooperative is an insurer formed under and regulated pursuant to Article 66 of the Insurance Law. An assessment cooperative "levies upon its members regular assessments, the amount of which is determined by giving due cognizance, along with other relative factors either to the incurred liabilities of such insurer, or to its estimated liabilities likely to become incurred before the next regular assessment, or both . . . ." N.Y. Ins. Law § 6602(b)(2). A cooperative's assessment must be "sufficient to provide for the payment of losses, expenses, and other obligations, incurred or likely to be incurred during the fiscal year for which the assessment is levied." N.Y. Ins. Law § 6615(a)(1). Such assessment must be charged to each member in an amount proportional to the "several amounts of insurance held by [the] member." N.Y. Ins. Law § 6615(a)(2) & (3). The discounted assessment for some insureds would run contrary to the requirement that each assessment be proportional to the insurance held by the member.

Further, Insurance Law § 6612 makes an assessment cooperative subject to Insurance Law § 2324, which in connection with most property/casualty insurance, prohibits an insurer, and insurance producers and other persons acting on behalf of an authorized insurer, from offering a rebate or inducement that is not specified in the policy, other than a "keepsake item." Insurance Law § 2324 states in pertinent part as follows:

> No authorized insurer, no licensed insurance agent, no licensed insurance broker, and no employee or other representative of any such insurer, agent or broker shall make, procure or negotiate any contract of insurance other than as plainly expressed in the policy or other written contract issued or to be issued as evidence thereof, or shall directly or indirectly, by giving or sharing a commission or in any manner whatsoever, pay or allow or offer to pay or allow to the insured or to any employee of the insured, either as an inducement to the making of insurance or after insurance has been effected, any rebate from the premium which is specified in the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon, or shall give or offer to give any valuable consideration or inducement of any kind, directly or indirectly, which is not specified in such policy or contract, other than any article of merchandise not exceeding fifteen dollars in value which shall have conspicuously stamped or printed thereon the advertisement of the insurer, agent or broker . . . .

Continued Next Page ⇨

OGC Opinion 11-04-02 Cont'd

The express language of § 2324 precludes insurers, brokers, agents and their employees and representatives from directly or indirectly offering inducements or valuable consideration (other than an article of merchandise, or "keepsake", not exceeding $15 in value), in connection with the offer of insurance, unless the inducement or valuable consideration is specified in the insurance policy.[1] See Office of General Counsel ("OGC") Opinion 07-07-10 (July 18, 2007). And, pursuant to Insurance Law § 6615(a), an assessment cooperative must base its assessments upon the amount of insurance and not some other basis. Thus, an assessment cooperative may not offer a discounted assessment to encourage a customer of a bank to become insured by the assessment cooperative through a particular insurance agent because an assessment cooperative's assessment must be based upon the amount of insurance held by each cooperative member.

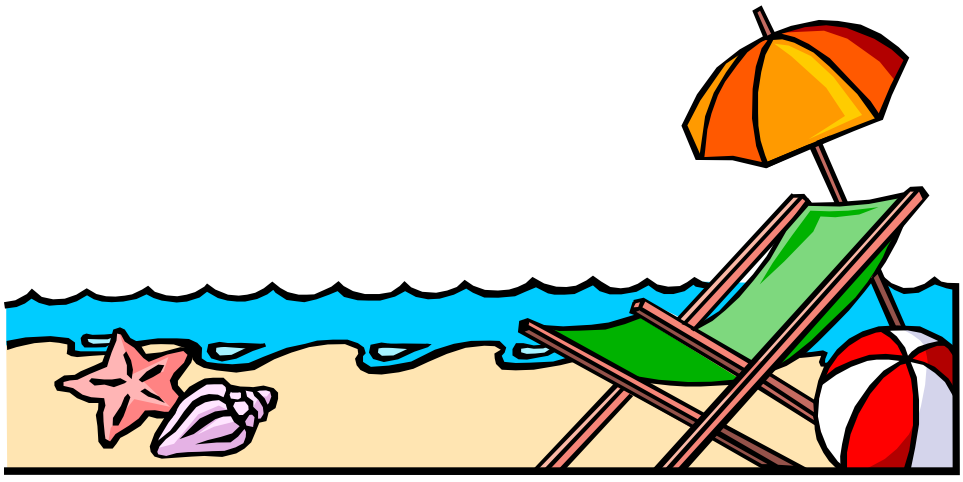
The "article of merchandise" that the statute contemplates is a "keepsake," not exceeding $15 in retail value, designed to keep the name of the insurer or producer before the customer through the embossing, conspicuous printing or stamping of the insurer, producer, agent or broker's name. OGC Opinion No. 02-05-17 (May 14, 2002); OGC Opinion 06-12-07 (December 8, 2006).

For further information you may contact Senior Attorney Brenda M. Gibbs at the Albany Office.

[1] A discounted assessment is not an inducement that may be specified in an assessment cooperative's insurance policy. ♦

For more opinions issued by the New York State Insurance Department Office of General Counsel , Circular Letters, Regulations and other resources go to:

www.ins.state.ny.us



URB Insider
Published Quarterly by
Underwriters Rating Board
2932 Curry Road
Schenectady, N.Y. 12303
Phone: 518-355-8363, Fax: 518-355-8639
Published for friends and affiliates of URB
Editor/Creator: Kimberly Davis, Esq., CPCU
Proof Editors: Mary Shell, CPCU; Arthur Adams, CPCU; Ann Popkoski

We're On the Web!
URBRATINGBOARD.com
E-mail us at:
jean@urbratingboard.com
mary@urbratingboard.com
tim@urbratingboard.com
kim@urbratingboard.com
arthur@urbratingboard.com

Other States Case Notes

- **FLORIDA**—The Florida Supreme Court recently ruled that motor vehicle leasing companies can not be held liable for accidents with their rented vehicles they did not cause. The case was about the vicarious liability of the rental car companies. The Florida high court agreed with the lower state courts in upholding a federal law that protects rental car companies from being sued for such vicarious liability. The decision preempts a state law that holds some rental car companies liable for damages up to $500,000.
- **OHIO**—In Ohio, the Supreme Court has recently ruled that an emotional distress claim may be pursued by a cancer patient for an allegedly faulty diagnosis that allowed the disease to spread. The ruling upheld an appellate court decision of the 9th District Court of Appeals. At issue was whether or not the claim was based on physical injury and may be pursued as part of a medical malpractice lawsuit. It was held that the failure of the doctor to detect a one-centimeter mass shown on a 2003 mammogram was a deviation from the applicable standard of care.
- **NEW JERSEY**—In a recent decision, the New Jersey Supreme Court has declined to hear an appeal from ExxonMobil over a $7 million judgment awarded to a woman who claimed she got cancer from her husband's clothes that were covered with asbestos. ♦

URB Services Corp. Print Shop Wants You...

To Send Us Your Print Jobs!

As a service to URB constituents, the URB print shop can print your letterheads, envelopes, applications and other projects. The price may be dramatically less expensive than the rate found at other printing establishments.

If you would like to inquire about this cost saving service, please contact us.

Not only will you like the price, but you'll like the quality!