Winter

URB INSIDER

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At The Supreme Court

High Court Hearing Some High Profile Cases

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The United States Supreme Court will be hearing a number of high-profile cases over the next several months, two of which are highlighted below.

Most recently, the High Court announced it will hear a case that tests the authority of the federal government, in a review of Arizona's policy on illegal immigrants.

Arizona's crackdown on illegal immigrants has been the basis for similar efforts in other parts of the country. The law has been the source of a debate nationwide about the rights of illegal immigrants.

In January, 2012 the High Court will hear an emergency appeal from Texas that focuses on the role the federal courts play in the oversight of political redistricting. There has been explosive growth in Texas, mostly from the Latino population. Maps drawn by federal judges would give minorities more say in the elections, but Texas appealed to the Supreme Court. This is a deeply partisan issue that could have a widespread impact on future elections.

The High Court will also be hearing oral arguments in March, 2012 over the constitutionality of the health care bill, referred to as "Obamacare" in the media. The law requires most Americans to carry health insurance starting in 2014. The central issue in the case is if Congress can force Americans to buy health insurance.

This is a landmark case. The outcome of the case could have significant ramifications in the 2012 presidential election. A decision could come by the summer of 2012.♦

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Serious Injury Review

Editor's Note: Below is the opinion of the New York Court of Appeals in *Perl v Meher*, 2011 NY Slip Op 08452.

In *Pommells v Perez* (4 NY3d 566, 571 [2005]), then Chief Judge Kaye described the working of the No-Fault Law (officially the Comprehensive Motor Vehicle Insurance Reparations Act, Insurance Law §§ 5101 *et seq.*) by saying: "Abuse . . . abounds." That included, she said, "abuse . . . in failing to separate 'serious injury' cases" from others (*id.*).

No-fault abuse still abounds today. In 2010, no-fault accounted for 53% of all fraud reports received by the Insurance Department (Annual Report to the Governor and the Legislature of the State of New York on the Operations of the Insurance Frauds Prevention Act at 23). "Serious injury" claims are still a source of significant abuse, and it is still true, as it was in 2005, that many courts, including ours, approach claims that soft-tissue injuries are "serious" with a "well-deserved skepticism" (*Pommells*, 4 NY3d at 571).

Here, we confront three cases in which the Appellate Division rejected allegations of serious injury as a matter of law. We conclude that we must reverse in two of the cases, *Perl v Meher* and *Adler v Bayer*, because the evidence plaintiffs have put forward is legally sufficient. We affirm in the third case, *Travis v Batchi*.

In finding that two of these three claims survive our scrutiny, we by no means signal an end to our skepticism, or suggest that that of lower courts is unjustified. There are cases, however, in which the role of skeptic is properly reserved for the finder of fact, or for a court that, unlike ours, has factual review power.

I

Plaintiffs Joseph Perl, David Adler and Sheila Travis brought lawsuits for personal injuries allegedly resulting from automobile accidents; Perl's and Adler's wives also sued, asserting derivative claims. Because the No-Fault Law bars recovery in automobile accident cases for "non-economic loss" (*e.g.*, pain and suffering) unless the plaintiff has a "serious injury" as defined in the statute, Perl, Adler and Travis seek to show that their injuries were serious.

Of the several categories of "serious injury" listed in the statutory definition, three are relevant here: "permanent consequential limitation of use of a body organ or member"; "significant limitation of use of a body function or system"; and "a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment" (Insurance Law § 5102 [d]). Plaintiffs in all these cases rely on one or both of the first two of these categories, claiming permanent and significant limitations of their use of a bodily organ or system. Travis also relies on the third category, claiming that she was disabled from "substantially all" of her "usual and customary daily activities" for at least 90 out of the 180 days following her accident.

Defendants challenged plaintiffs' showing of serious injury in all three cases. In *Perl*, defendants moved for summary judgment; Supreme Court denied the motion, but the Appellate Division reversed and dismissed the complaint, with two Justices dissenting (*Perl v Meher*, 74 AD3d 930 [2nd Dept 2010]). The *Adler* case was tried, resulting in a jury verdict for plaintiffs after defendants had unsuccessfully moved for judgment as a matter of law under CPLR 4401; the Appellate Division reversed, granted defendants' motion and dismissed the complaint (*Adler v Bayer*, 77 AD3d 692 [2d Dept 2010]). In *Travis*, Supreme Court granted defendants' motion for summary judgment and the Appellate Division affirmed (*Travis v Batchi*, 75 AD3d 411 [1st Dept 2010]). Plaintiffs in *Perl* appeal to this Court as of right, pursuant to CPLR 5601 (a). We granted leave to appeal to plaintiffs in *Adler* and *Travis*.

All three cases turn on the sufficiency of plaintiffs' proof. In *Perl* and *Travis*, all of the Appellate Division Justices concluded, as do we, that the evidence offered in support of defendants' summary judgment motions sufficed to shift to plaintiffs the burden of coming forward with evidence to raise an issue of fact. The question is whether plaintiffs met that burden. In *Adler*, the question is whether plaintiffs offered enough evidence at trial to get to the jury.

II

The *Perl* and *Adler* cases are not related, but they are similar in a number of ways, and plaintiffs in each relied on the testimony of the same expert, Dr. Leonard Bleicher.

Perl and Adler both testified that their ability to function had been significantly limited since their accidents. Perl, 82 when the accident occurred, testified that he could no longer garden, carry packages while shopping, or have marital relations. Adler, a school teacher, testified that he could not move around easily, could not read for a long time and could not pick up his children.

We held in *Toure v Avis Rent A Car Sys.* (98 NY2d 345, 350 [2002]) that such "subjective complaints alone are not sufficient" to support a claim of serious injury; there must be "objective proof." Thus Dr. Bleicher's testimony was critical in both the *Perl* and *Adler* cases. In each case, the doctor testified that he examined the injured plaintiff shortly after the accident; that he performed a number of clinical tests, named but not fully described in the record, which were "positive" — i.e., indicated some departure from the norm; that he observed that the patient had difficulty in moving and diminished strength; and that the patient's range of motion was impaired. Bleicher did not, at his initial examination of either Perl or Adler, quantify the range of motion he observed, except to say that Perl's was "less than 60 percent of normal in the cervical and lumbar spine." In each case, however, Bleicher again examined the patient several years later, using instruments to make specific, numerical range of motion measurements.

We said in *Toure*:

> "In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury . . . An expert's *qualitative* assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*id.*).

We need not decide here whether Bleicher's testimony would furnish legally sufficient proof of serious injury under the "qualitative" prong of *Toure*. While his observations at his initial examinations were detailed, it is debatable whether they have an "objective basis," or are simply a recording of the patients' subjective complaints. Under the "quantitative" prong of *Toure*, however, Bleicher's later, numerical measurements are sufficient to create an issue of fact as to the seriousness of Perl's and Adler's injuries.

Defendants argue that Bleicher's quantitative findings were made too long after Perl's and Adler's accidents. The Appellate Division in *Perl* agreed, holding that "plaintiffs are . . . required to demonstrate restricted range of motion based on findings both contemporaneous to the accident . . . and upon recent findings" (*Perl v Meher*, 74 AD3d at 931). (The Appellate Division's rationale in *Adler*, though not specifically explained, is presumably the same.) *Toure*, however, imposed no such requirement of "contemporaneous" quantitative measurements, and we see no justification for it. ⇨

Serious Injury Review Cont'd

There is nothing obviously wrong or illogical about following the practice that Bleicher followed here — observing and recording a patient's symptoms in qualitative terms shortly after the accident, and later doing more specific, quantitative measurements in preparation for litigation. As the author of a recent article points out, a contemporaneous doctor's report is important to proof of *causation*; an examination by a doctor years later cannot reliably connect the symptoms with the accident. But where causation is proved, it is not unreasonable to measure the *severity* of the injuries at a later time (*see* Morrissey, "Threshold Law": Is a Contemporaneous Exam by Court of Appeals in Order? New York Law Journal, January 17, 2011). Injuries can become significantly more or less severe as time passes.

> Bleicher testified in *Adler* that it is the better practice to defer a precise quantitative assessment of an injury:
>
> "On initial examination when person has assorted extensive fresh recent acute injuries, then it's better to go with our visual parameters because measuring range of motion of the joint when it's acutely injured, it's not reliable. It doesn't present correct numbers."

The orthopedist who testified for the defense in *Adler* did not challenge this opinion. In fact, the defense doctor acknowledged that he, like Bleicher in his initial examination, relied on visual estimates of range of motion, not on measurements with instruments.

We agree with the Appellate Division dissenters in *Perl* that a rule requiring "contemporaneous" numerical measurements of range of motion could have perverse results. Potential plaintiffs should not be penalized for failing to seek out, immediately after being injured, a doctor who knows how to create the right kind of record for litigation. A case should not be lost because the doctor who cared for the patient initially was primarily, or only, concerned with treating the injuries. We therefore reject a rule that would make contemporaneous quantitative measurements a prerequisite to recovery.

Defendants in both *Perl* and *Adler* offer alternative grounds for upholding the Appellate Division's dismissal of the complaints. We find only one of those grounds to warrant discussion: Defendants in *Perl* claim that there was insufficient evidence of a causal connection between Perl's accident and his injury. They assert that here, as in *Carrasco v Mendez* (decided with *Pommells v Perez*), defendants "presented evidence of a preexisting degenerative . . . condition causing plaintiff's alleged injuries, and plaintiff failed to rebut that evidence sufficiently to raise an issue of fact" (4 NY3d at 579).

Defendants in *Perl* did indeed present evidence, in the form of a sworn radiologist's report based on an MRI, that Perl's injuries were "degenerative in etiology and long standing in nature, preexisting the accident." However, plaintiffs' contrary evidence, while hardly powerful, was sufficient to raise an issue of fact. They submitted another radiologist's affidavit, saying that, while some findings from the MRI "are consistent with degenerative disease," a single MRI cannot rule out the possibility that "the patient's soft tissue findings are . . . a result of a specific trauma." That question, this radiologist said, can best be judged "by the patient's treating physician in conjunction with exam, history and any previous tests."

The treating physician, Dr. Bleicher, opined that since Perl "had not suffered any similar symptoms before the accident or had any prior injury/medical conditions that would result in these findings," the findings were causally related to the accident. A fact-finder could of course reject this opinion: It is certainly not implausible that a man of 82 would have suffered significant degenerative changes. We cannot say as a matter of law on this record, however, that such changes were the sole cause of Perl's injuries.

Though we hold plaintiffs' evidence of serious injury in both *Perl* and *Adler* to be legally sufficient, both cases have troubling features. Most striking is the sworn assertion by a defense physician who examined Perl, which in substance accuses Perl of malingering. The doctor said:

> "The fact that he sits, yet presents with a show of only 10 degrees of flexion of the lumbar spine is contradictory. His 'give-away' strength is contradictory with his ambulation. This individual's show of such decreased range of motion is totally contradicted by the fact that he followed me about, rotating the cervical spine 60 degrees and flexing at least 30 degrees. I do not believe that this individual presents with any true findings at this time."

The issue presented by this evidence, of course, is one of credibility, which is not for this Court to decide.

III

We reach a different result in *Travis*, because we see no evidence in the record of that case of a serious injury as defined in the No-Fault Law.

Travis, like Perl and Adler, relies on the two "limitation of use" categories of the statutory definition — categories that in substance require some significant, permanent impairment. But no evidence of such an impairment is to be found — indeed we cannot tell from the record what Travis's alleged permanent impairment is. She submitted a report from her treating physician, stating the conclusion that she has a "[m]ild partial permanent disability," but the report does not describe the disability; it says that Travis is "[c]urrently able to perform the essential functions of her job." There is no evidence that she suffered either a "permanent consequential limitation of use of a bodily organ or member" or a "significant limitation of use of a body function or system."

Travis relies more heavily on the category of the definition that relates to temporarily disabling conditions, claiming that she had a "medically determined injury or impairment of a non-permanent nature which prevented [her] from performing substantially all of the material acts which constitute [her] usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment." Again, however, the evidence to support the claim is lacking. Even Travis's subjective description of her injuries — which in any event would be insufficient, under *Toure*, to defeat summary judgment — does not show that there were 90 of the 180 days after the injury when she was disabled from "substantially all" of her usual activities. On the contrary, she acknowledges that she was able to do some work from home less than three months after the accident. And her doctor's reports say nothing at all about what activities she could and could not perform until, 111 days after the accident, she was found able "to perform the essential functions of her job," though with "restrictions." The record does not show any "medically determined injury" that would bring *Travis* within the "90/180" provision of the statute.

Accordingly, in *Perl v Meher*, the order of the Appellate Division should be reversed, with costs, and the order of Supreme Court denying defendant's motion for summary judgment reinstated; in *Adler v Bayer*, the order of the Appellate Division should be reversed, with costs, defendant's motion for judgment as a matter of law denied, and the case remitted to the Appellate Division for consideration of issues raised but not determined on the appeal to that court; and in *Travis v Batchi*, the order of the Appellate Division should be affirmed, with costs.♦

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New York Cases

Question Of Fact Precludes Summary Judgment

Editor's Note: Below is the opinion of the Supreme Court, Appellate Division, Second Department. The case is *Columbia Univ. Press, Inc. v Travelers Indem. Co. Of Am.*, 2011 NY Slip Op 07798.

In an action, inter alia, for a judgment declaring that the defendant is obligated to defend and indemnify the plaintiff, Columbia University Press, Inc., in an underlying action entitled *George Balloutine v Columbia University Press*, pending in the Supreme Court, New York County, under Index No. 11425/07, the defendant appeals, as limited by its brief, from so much of an order of the Supreme Court, Westchester County (Lefkowitz, J.), dated June 29, 2010, as denied that branch of its motion which was for summary judgment declaring that it is not obligated to defend or indemnify the plaintiff in the underlying action.

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

Where, as here, a policy of liability insurance requires that notice of an occurrence be given "as soon as practicable," such notice must be given to the carrier within a reasonable period of time (*see Sorbara Constr. Corp. v AIU Ins. Co.*, 11 NY3d 805806; *Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742,743; *Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 441). With respect to policies issued before January 17, 2009 (*see* Insurance Law § 3420[c][2][A]), as the subject policy was, an insurer could disclaim coverage when the insured failed to satisfy the notice condition, without regard to whether the insurer was prejudiced by the insured's failure to satisfy such condition (*see Zimmerman v Peerless Ins. Co.*, 85 AD3d 1021, 1023; *Ponok Realty Corp. v United Natl. Specialty Ins. Co.*, 69 AD3d 596, 596-597). The insured's failure to satisfy the notice requirement constitutes "a failure to comply with a condition precedent which, as a matter of law, vitiates the contract" (*Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332, 339; *see Sorbara Constr. Corp. v AIU Ins. Co.*, 11 NY3d at 806; *Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d at 743; *Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440). However, "there may be circumstances that excuse a failure to give timely notice, such as where the insured has a good-faith belief of nonliability,' provided that belief is reasonable" (*Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d at 743, quoting *Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d at 441; *see White v City of New York*, 81 NY2d 955, 957; *Zimmerman v Peerless Ins. Co.*, 85 AD3d at 1023-1024; *Ponok Realty Corp. v United Natl. Specialty Ins. Co.*, 69 AD3d at 597). The insured bears the burden of establishing the reasonableness of such excuse (*see Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d at 743; *White v City of New York*, 81 NY2d at 957; *Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d at 440), which is ordinarily an issue of fact and not one of law (*see Argentina v Otsego Mut. Fire Ins. Co.*, 86 NY2d 748, 750; *Deso v London & Lancashire Indem. Co. of Am.*, 3 NY2d 127, 129; *St. James Mech., Inc. v Royal & Sunalliance*, 44 AD3d 1030, 1031).

Here, the defendant made a prima facie showing of entitlement to judgment as a matter of law based on the plaintiff's approximately eight-month delay in notifying the defendant of the underlying incident (*see Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742; *Argentina v Otsego Mut. Fire Ins. Co.*, 86 NY2d at 750; *Zimmerman v Peerless Ins. Co.*, 85 AD3d 1021; *McGovern-Barbash Assoc., LLC v Everest Natl. Ins. Co.*, 79 AD3d 981, 983; *Evangelos Car Wash, Inc. v Utica First Ins. Co.*, 45 AD3d 727; *120 Whitehall Realty Assoc., LLC v Hermitage Ins. Co.*, 40 AD3d 719). However, in opposition, the plaintiff raised a triable issue of fact as to whether the delay was reasonably based on a good-faith belief of nonliability (*see 25th Ave., LLC v Delos Ins. Co.*, 84 AD3d 781; *North Country Ins. Co. v Jandreau*, 50 AD3d 1429; *St. James Mech., Inc. v Royal & Sunalliance*, 44 AD3d at 1031-1032; *Jordan Constr. Prods. Corp. v Travelers Indem. Co. of Am.*, 14 AD3d 655; *G.L.G. Contr. Corp. v Aetna Cas. & Sur. Co.*, 215 AD2d 821, 822; *Triantafillou v Colonial Coop. Ins. Co.*, 178 AD2d 925, 926). Accordingly, the Supreme Court properly denied that branch of the defendant's motion which was for summary judgment declaring that it was not obligated to defend or indemnify the plaintiff in the underlying action. ♦

Private Facebook Records Discoverable

Editor's Note: Below is the opinion of the Supreme Court, Appellate Division, First Department. The case is *Patterson v Turner Constr. Co.*, 2011 NY Slip Op 07572.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered April 7, 2011, which, in an action for personal injuries, granted defendants' motion to compel an authorization for all of plaintiff's Facebook records compiled after the incident alleged in the complaint, including any records previously deleted or archived, unanimously reversed, on the law and the facts, without costs, and the matter remanded for a more specific determination. Appeal from order, same court and Justice, entered January 24, 2011, which deferred determination on defendants' motion to compel to the extent of directing plaintiff to produce his Facebook records for an in camera review, unanimously dismissed, without costs, as taken from a nonappealable paper.

Plaintiff claims damages for physical and psychological injuries, including the inability to work, anxiety, posttraumatic stress disorder, and the loss of enjoyment of life. Although the motion court's in camera review established that at least some of the discovery sought "will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Abrams v Pecile*, 83 AD3d 527, 528 [2011] [internal quotation marks and citation omitted]), it is possible that not all Facebook communications are related to the events that gave rise to plaintiff's cause of action (*see Offenback v L.M. Bowman, Inc.*, 2011 WL 2491371, *2, 2011 US Dist LEXIS 66432, *5-8 [MD Pa 2011]). Accordingly, we reverse and remand for a more specific identification of plaintiff's Facebook information that is relevant, in that it contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims.

The postings on plaintiff's online Facebook account, if relevant, are not shielded from discovery merely because plaintiff used the service's privacy settings to restrict access (*Romano v Steelcase Inc.*, 30 Misc 3d 426, 433-434 [2010]), just as relevant matter from a personal diary is discoverable (*see Faragiano v Town of Concord*, 294 AD2d 893, 894 [2002]).

Dismissal of the appeal from the January 24, 2011 order is warranted because the order does not affect a substantial right and is not otherwise appealable as of right (*see Marriott Intl. v Lonny's Hacking Corp.*, 262 AD2d 10 [1999]; *Garcia v Montefiore Med. Ctr.*, 209 AD2d 208, 209 [1994]; CPLR 5701 [a][2] [v]). ♦

From Pennsylvania

Certification Of Class Against Cigna

The Eastern District of Pennsylvania Court recently certified a class against Cigna following the decision in the Supreme Court's *Wal-mart* case. The *Wal-mart* case was reported in the Summer, 2011 edition of the URB Insider.

As you may recall, the *Wal-mart* decision requires a commonality requirement. 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.

What resulted was a unanimous decision that the class should not have been certified, although the justices disagreed on the scope of the decision. 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. This was a ruling on behalf of Wal-mart.

This is the case of *Churchill v. Cigna Corp.*, 2011 U.S. Dis. LEXIS 90716 (E.D. Pa. Aug. 12, 2011), in which the plaintiff made allegations that the company improperly denied claims for some types of treatment for autism. These treatments are known as Applied Behavior Analysis and Early Intensive Behavioral Treatment, or "ABA". This treatment was denied because Cigna had an exclusion for experimental or investigative treatment. *Id.*

In the *Cigna* case being discussed, the court found that the commonality requirement was met because of Cigna's national policy of denying coverage for ABA to treat certain types of autism known as "ASD". This is in contrast to the *Wal-mart* decision where managers were given discretion over employment decisions. The court looked at the central question of whether Cigna's denial of medical coverage for ABA as a treatment for ASD on that basis that such treatment is investigative or experimental was proper, and the answer to this question would resolve each class member's individual claim. *Id.*

The court also found that the predominance aspect was satisfied because there was no evidence to indicate that the policy of denial was different from any of the ERISA plans managed by Cigna. The opinion stated that Cigna made a class-wide determination that ABA was experimental in all cases and went on to indicate the determination and whether it violates ERISA can easily be litigated in a single forum. *Id.*

The insurer here had one rule for all circumstances, in contrast to a Tennessee federal court decision brought up in this opinion. In that case, *Graddy v. Blue Cross Blue Shield of Tenn.*, 2010 WL 670081 (E.D. Tenn. Feb. 19, 2010), the court determined that the appropriateness of treatment would involve individualized assessments.

While common sense and good business might indicate a rule for denying similar claims, the court seems to want individualized assessment. That means without it, the company can more easily be subject to a class action, as happened in this case. ♦

From Around The County

Case Notes

Arkansas – The family of a Farmington, Missouri truck driver who was killed when his vehicle collided with another semi-truck in Arkansas has been awarded a $7 million judgment by a federal jury. It was alleged Morgan Quisenberry, who worked for Dunaway Timber Co., was headed west on U.S. Highway 62 in September, 2008 when he crossed into the eastbound lanes and collided with Roger Reagan's truck. Quisenberry drove longer than the U.S. Department of Transportation rules allowed and was fatigued.

Indiana – A 2004 propane explosion at a central Indiana horse farm that killed a man and injured three family members is the source of a $27 million jury award. The explosion destroyed an indoor horse arena. Defendants against whom damages were awarded included the electric utility and its propane subsidiary.

Maine – An Oxford County Superior jury ruled on behalf of a Maine ski resort for injuries sustained by Steven Sutton in 2007. The man reportedly fell off a chair lift on a windy day. The jury concluded that Sutton's injuries were accidental and not the result of negligence by the Sunday River resort.

New Jersey – A New Jersey pub was found not negligent in the death of Robert Barbiero II who was killed on the Garden State Parkway after he was in the bar. Testimony was he had signs of intoxication but his speech was not slurred nor was he stumbling. State law requires patrons must be visibly intoxicated for liability to attach.

South Carolina – According to South Carolina's Supreme Court, people playing contact sports assume the risk they will be injured, and they upheld a lower court's ruling. David Cole and his son were playing a softball game during a Boy Scouts camping trip in 2004. While Cole was running to home plate, he ran into Jeff Wagner, another father. Cole broke a rib, suffered a head wound and began going into convulsions. His son feared he would die. He and his son sued the Boy Scouts, a church and Wagner. Cole eventually settled with the other parties and a circuit court judge agreed that Wagner was entitled to summary judgment. Cole appealed. The court found that even though it was a casual game, he was still playing softball, which is a contact sport. ♦

Circular Letter No. 13 (2011)

Editor's Note: Below is the text of Circular Letter No. 13 (2011) issued by the Department of Financial Services.

Insurance Circular Letter No. 13 (2011)

November 28, 2011

TO: All Authorized Property Insurers Writing Business in New York State

RE: Unfair Claims Settlement Practices and the National Flood Insurance Program

STATUTORY REFERENCE: N.Y. Ins. Law § 2601

The purpose of this Circular Letter is to remind insurers that, as stated in Circular Letter No. 15 (1996), the requirements of Insurance Law § 2601 and 11 NYCRR Part 216 (Regulation 64) apply fully to insurers providing coverage through the National Flood Insurance Program ("NFIP") Write Your Own Program ("WYO").

Insurance Law § 2601, which applies to all claims an insurer processes in this State, prohibits insurers doing business in this State from engaging in unfair claims settlement practices. Insurance Law § 2601 further provides that, if any insurer performs any of the acts or practices proscribed by that statute without just cause and with such frequency as to indicate a general business practice, then those acts shall constitute unfair claims settlement practices subject to disciplinary action. Insurance Law § 2601 in pertinent part defines the following as unfair claims settlement practices:

(1) knowingly misrepresenting to claimants pertinent facts or policy provisions relating to coverage at issue;
(2) failing to acknowledge with reasonable promptness pertinent communications as to claims arising under its policies;
(3) failing to adopt and implement reasonable standards for the prompt investigation of claims arising under its policies;
(4) not attempting in good faith to effectuate prompt, fair and equitable settlements of claims submitted in which liability has become reasonably clear . . .
(5) compelling policyholders to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them . . . .

Regulation 64 implements the provisions of Insurance Law § 2601 and further defines an insurer's obligations to employ fair claims practices. For instance, among other things, Regulation 64 requires insurers to respond to communications from insureds within 15 business days; to commence an investigation within 15 business days of receiving a notice of claim from an insured; to notify the insured in writing of the insurer's acceptance or rejection of a claim within 15 business days, or to notify the insured that more time is needed and the reason for the additional time with periodic updates to insureds; to notify the insured in writing of the specific policy provision for any denial of any part of a claim that is based upon a policy provision; and to respond to inquiries from the Department of Financial Services ("DFS") within 10 business days.

The fact that the NFIP is a federal program administered by a federal agency, the Federal Emergency Management Agency ("FEMA"), does not alter the applicability of Insurance Law § 2601 and Regulation 64. The legislation creating the NFIP, the National Flood Insurance Act of 1968 ("NFIA"), does not expressly purport to preempt state claims handling or other laws. Indeed, the regulations implementing the NFIA expressly provide that, among other things, WYO insurers are "subject to audit, examination, and regulatory controls of the various States." See 44 CFR Part 62, Appendix B(b) (emphasis added). FEMA regulations also require a WYO insurer to process WYO flood claims in the same manner as the insurer processes its claims for all its other policies, i.e, policies exclusively governed by state law. See 44 CFR Part 62, Appendix A, Article II(A)(2); 44 CFR 62.23(e). Similarly, an insurer's claims processes for WYO claims are subject to a financial control plan that provides for state audit, examination and application of regulatory controls. See 44 CFR Part 62, Appendix A, Article II(A)(2); 44 CFR 62.23(e). These same provisions illustrate, too, that federal law does not in any way "occupy the field" in this area, and that instead, federal and state authority over administration of the NFIP are intended to coexist.

Finally, Insurance Law § 2601 and Regulation 64 are substantially consistent with FEMA standards. Thus, their applicability would not be subject to conflict preemption. To the extent that the FEMA regulations and guidance now or in the future provide a more stringent standard than that set forth in Insurance Law § 2601 and Regulation 64, an insurer complying with the more stringent federal standard would be in compliance with the state standard.

In short, insurers cannot use the federal aspects of NFIP WYO policies as a shield against discipline for violating New York Law. Any insurer that violates Insurance Law § 2601 or Regulation 64 in adjusting an NFIP claim can expect to face any form of disciplinary action authorized by the Insurance or Financial Services laws. ♦

Comment Period Extended On Hydrofracking Regs

The New York State Department of Environmental Conservation announced on their website recently that the public comment period for the proposed hydrofracking regulations has been extended.

The deadline for comments is now January 11, 2012. The DEC decided to extend the deadline for the 90-day comment period an additional month, by moving it from December 12, 2011 to the new date.

The issue is a hot one causing divided opinions between the gas industry and landowners who want to drill, as opposed to environmental advocates who believe more time is needed to study the ramifications of drilling.

Since 2008, the New York State Department of Environmental Conservation has not issued permits for shale gas wells using the drilling technique known as hydrofracking. This technique involves using a mixture of sand, chemicals and water to blast through shale and remove natural gas from the ground. Much contention surrounds the fact that this method could cause water pollution. The industry says that it is a method that has been used safely for years.

It has been reported a DEC spokeswoman said nearly 10,000 comments have been submitted on an earlier draft of the environmental review in 2009. Some sources have reported as many as a total of 13,000 comments are being reviewed. There has been very high, unprecedented attendance at the public hearings, the last of which was concluded on November 30, 2011. In total, about 6,000 people attended the hearings, and about 600 made oral comments, according to the agency.

DEC Commissioner, Joe Martens said in his prepared statement on December 1, 2011 that "Public input on the draft environmental impact statement is an important and insightful part of developing responsible conditions for this activity as well as determining whether it can be safely conducted."

The hydrofracking issue has also been studied by the Environmental Protection Agency. There is a large area of shale primarily beneath Pennsylvania, New York, West Virginia and Ohio. Thus far, Pennsylvania has been the center of activity. There have been some resulting issues from it there.

Brad Gill, head of the Independent Oil & Gas Association of New York, has said that while the extension of the comment period may seem inconsequential to some, it is in fact a continuation of the existing four-year ban on economic opportunity for upstate New York.

In addition, Dan Fitzsimmons, president of the Joint Landowners Coalition of New York, has said that repeated delays in DEC's rulemaking have cost the state hundreds of potential jobs and millions of dollars in revenue.

In contrast, environmental groups have called for a longer comment period due to the complexity of the state's environmental review that numbers 1,537 pages.

A DEC spokeswoman has indicated the extended deadline won't set back the agency as it prepares its SGEIS (environmental impact statement) on hydrofracking in New York. The spokeswoman has indicated the agency still plans on releasing final docs sometime in 2012. ♦

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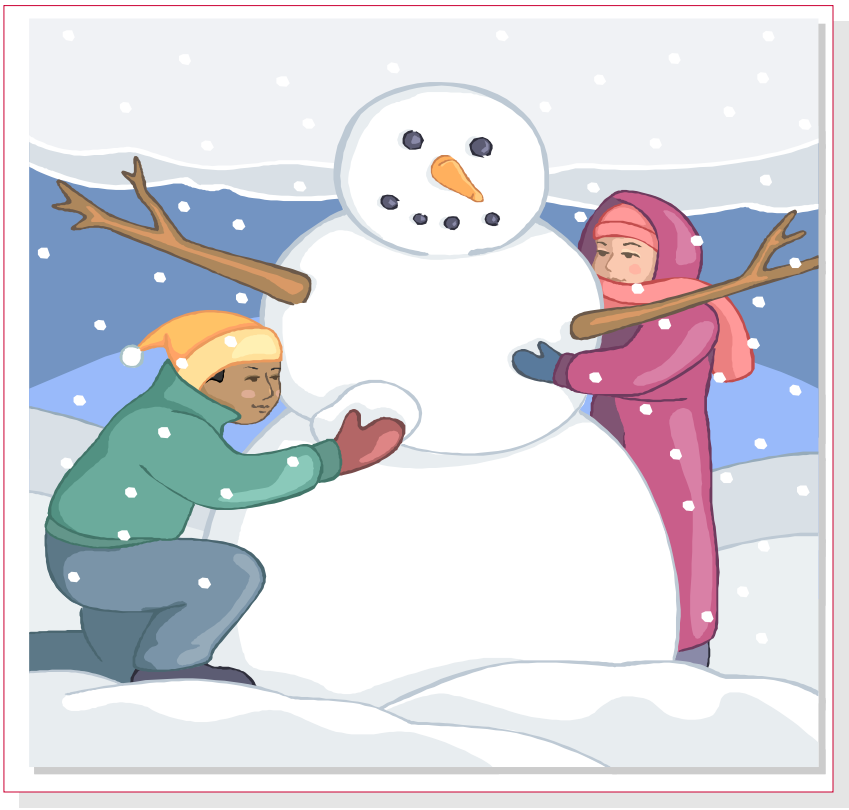

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