URB INSIDER

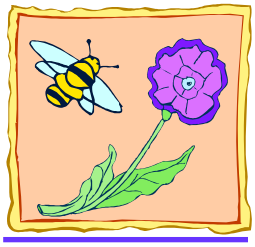
A Quarterly Publication of Underwriters Rating Board

April, 2005

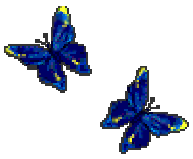
Volume 4, Issue 1

Inside this issue:

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.

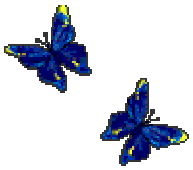


A MESSAGE FROM JIM LICHTEL



At my request, I will be retired by the time this short article is printed. It is difficult to explain what runs through your mind at this time. It is fair to say that I have ambivalent feelings about acknowledging that tomorrow, I won't be going to work.

I have had concerns about retiring and until recently, I wondered if I would have enough interests to fill my days. I have put those trepidations to rest as I began to realize that the days may not be long enough for me to do all the things I would like to do. I am looking forward to retirement and I am going to make the most possible out of it.



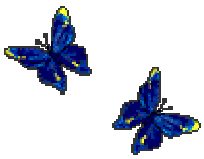
I've been privileged to have a full time job all of my adult life and, I am especially privileged that the past 15 years have been shared with the staff and all of my other friends at the URB. You have all collectively taken me under your wing and provided me with many years of productive and fulfilling career challenges. I am grateful to my golden and silver friends who reached out to me through the recent years. You have each and every one made this a very rewarding journey for me, and it is with great reluctance that I won't continue to be here to talk with you and work with you tomorrow. However, you will always remain in my thoughts and I will always hold our friendship very dear.

Please accept my sincere thanks for being there for me. I truly appreciate the assistance and support that I so richly received over the past number of years. I sincerely hope you will make a similar investment in the new Manager, Tim Curren, and the other members of the URB Management and Staff. I know that Tim and the other members of the URB Management and Staff will value the relationships in the same way I have done.

Best regards to all my friends!

~Jim Lichtel

April 26, 2005



REGULATORY UPDATE

Credit Scoring

Effective April 23, 2005, Regulation 182 (11 NYCRR 221) goes into effect. This is an emergency adoption with 10 subparts, which imposes requirements on insurers who use credit scoring. Circular Letter No. 2 dated February 25, 2005 provides some guidance regarding compliance with the existing requirements of this emergency adoption.

In particular, this article reviews the aspect of the legislation regarding scoring models. Effective April 23, 2005, insurers that use insurance scores to underwrite and rate risks must file their scoring models or other scoring processes with the Superintendent.

Any subsequent revision to the scoring models will require the insurer to file a summary of the revision with the Superintendent within 45 days. A third party may file scoring models on behalf of insurers. A filing by a third party shall clearly identify those insurers on whose behalf the filing is being made and the programs of insurance to which each scoring model will apply. The third party shall provide the Superintendent with name of each insurer's contact person and the person's telephone number. A filing that includes insurance scoring may include loss experience justifying the use of credit information.

Any filing relating to credit information filed and in possession of the Superintendent shall remain the property of the insurer and shall not be subject to any disclosure by the Superintendent. This information is privileged information and is not discoverable or admissible as evidence in a legal action that is of a civil, criminal or administrative nature.

Each scoring model filing made with the Superintendent shall include the date upon which the insurer intends to implement a new or revised scoring model or other scoring processes in its underwriting or rating of personal lines insurance policies. (NY S28 §2806; NY R 11 § 221.8 (Reg. No. 182))

Pursuant to the applicable section of the regulation, NY R § 221.8 requires that each scoring model or other scoring processes filing shall include the following information:

1.) The name, version and the edition date of the scoring model;

2.) A detailed description of the credit information and insurance data that were used in the development of the scoring model, including but not limited to the source(s) of the credit information and insurance data, and the time periods associated with such information and data;

3.) A list of all the factors, and the relative importance of such factors, that is used in the scoring model or other scoring processes;

4.) The actual algorithms, computer programs, models, or other processes that is used to produce an insurance score; and

5.) At least three distinct and detailed examples of insurance score calculations using the filing scoring models or other scoring processes.

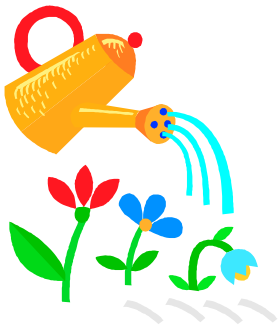
NY R 11 § 221.8 also requires that scoring models or other scoring processes in use as of April 23, 2005 and those that insurers start using after April 3, 2005 but prior to August 15, 2005, should be filed with the Superintendent as soon as possible but no later than July 1, 2005.

With respect to a scoring model that an insurer intends to start using on or after August 15, 2005, the insurer shall file its scoring model or other scoring processes with the Superintendent at lest 45 days prior to use. Summaries of revisions to previously filed scoring models or other scoring processes shall be filed no later than 45 days after its use, but insurers are strongly encouraged to file summaries prior to use.

Furthermore, NY R 11 § 221.8 requires that insurers complete and submit an Insurer Credit Information Compliance Certification along with every scoring model or other scoring processes filing and every summary of revisions. (NY Circular Letter No. 2 (2005)).

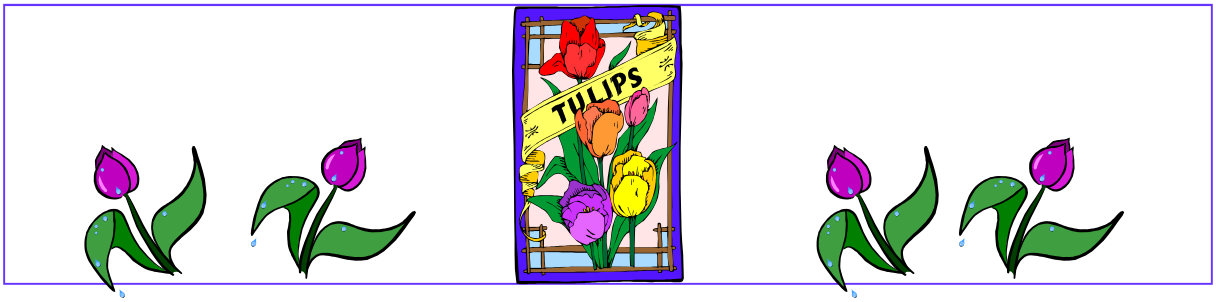
All insurers must complete and submit and Insurer Credit Information Compliance Certification in the form prescribed by the Superintendent. This requirement applies to all personal lines insurance filings that use credit scoring in underwriting and/or rating risks. (Reg. No. 182; Circular Letter No. 2 (February 25, 2005)).

The Insurer Credit Information Compliance Certification must be completed by a duly authorized officer of the insurer, who certifies they are knowledgeable with Article 28 of the Insurance Law and Regulation 182 as they are applicable to the use of credit information by an insurer to underwrite and rate personal lines insurance. The officer certifies such use of credit information by the insurer is fully in compliance with the aforementioned law and regulation and that the scoring model or other processes used do not utilize any factors prohibited by the statute and regulation. ◆



2004 Homeowners Values
By Zone
In ($)

	RC ML-1R	RC ML-2	RC ML-3	RC ML-5	RC ML-8	ACV ML-1	ACV ML-2	ACV ML-3	ACV ML-8	Total
Zone 1.1	82,813	85,129	102,885	163,571	None	51,964	59,628	71,189	32,500	81,434
Zone 1.2	112,941	100,509	128,346	176,129	None	62,000	72,517	87,925	None	119,924
Zone 1.3	92,400	103,850	117,109	183,158	70,000	53,605	66,112	78,060	48,000	104,297
Zone 1.4	94,773	103,713	104,200	178,333	96,000	59,520	60,220	76,963	45,000	100,906
Zone 1.5	83,333	97,536	114,983	152,000	70,000	46,263	64,352	78,082	30,625	94,544
Zone 1.6	81,333	98,495	111,581	155,556	75,000	44,935	67,931	81,745	33,571	95,343
Zone 1.7	104,545	134,441	153,441	230,556	None	71,667	97,419	118,000	None	153,418
Zone 1.8	111,563	121,609	123,279	182,059	None	60,526	76,565	90,158	None	119,030
Zone 1.9	113,684	129,780	149,117	231,579	70,000	95,385	88,438	111,857	None	144,000
Zone 2	99,000	105,450	116,912	None	None	54,211	63,568	77,047	None	102,826
Zone 3	232,500	194,318	192,317	None	160,000	160,000	211,500	207,220	None	194,274
Zone 4	199,000	203,131	217,722	250,000	199,444	231,250	225,769	238,814	250,000	210,949
Zone 5	None	150,000	300,000	None	None	None	50,000	None	None	235,000
Zone 6	203,333	236,788	206,723	180,000	160,000	197,500	246,585	241,250	None	243,406
Zone 7	187,500	209,591	240,984	260,000	211,111	207,500	240,861	210,417	166,667	234,774
Zone 8	215,000	229,677	230,696	222,000	215,000	215,000	187,778	245,625	130,000	207,792
Zone 9	215,000	218,998	226,288	236,875	250,000	287,500	218,017	242,881	None	224,451
Zone 10	140,000	181,350	192,413	214,205	None	145,000	195,000	198,095	275,000	195,000



Case Briefs

NY HIGH COURT: NO PREJUDICE NEEDED

The insured building owner and its two management companies notified the insurer 14 months after they were first served with a lawsuit and 6 months after a default judgment was entered against them in the underlying slip and fall case. The policy contained a provision that insureds were to notify the insurer "as soon as practicable" after an occurrence, which was a condition precedent to coverage. No excuse was supplied for the delay in notice.

The issue was whether the insurer, as a primary liability insurer, could disclaim coverage based solely upon a late notice of lawsuit or was required to show prejudice before it could disclaim coverage.

The Court of Appeals of New York held that the insurer did not have to show prejudice and this is known as the "no-prejudice rule." The Court of Appeals said,"...the absence of timely notice of occurrence is a failure to comply with a condition precedent which, as a matter of law vitiates the contract..."

A liability insurer which has a duty to indemnify and often also to defend, requires timely notice of a lawsuit in order to be able to take an active, early role in the litigation process and in any settlement discussions and to set ade-

STATUTORY MINIMUM NOT APPLICABLE

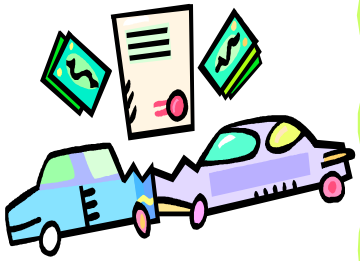
The Supreme Court, Appellate Division, Second Department has held that a motorist is not limited to the statutory minimum recovery of $25,000 on an uninsured motorists' claim.

The injured motorist had obtained a $125,000 judgment in an underlying personal injury action.

The injured motorist subsequently brought an action to recover the unsatisfied judgment against the uninsured motorist insurer.

The insurer claimed that it did not issue a policy that covered the accident. However, the insurer had not participated in the earlier stages of the uninsured motorist's claim.

Although the burden was on the insurer to show it did not issue a policy, the insurer failed to demonstrate that it did not issue a policy with uninsured motorist coverage on it to the injured party who was named as an insured.



SERVICE ON COUNSEL CAN WORK

The insurer argued that service upon its in-house legal staff of a letter notifying it of a potential excess coverage claim was insufficient to constitute notice of the claim. The appellate court disagreed.

The attorneys who were served were employees of the insurer and handled many of the scribe any specific manner of notification of a claim or to designate a particular individual or department to which such notice should have been directed. Thus, a general authority on the part of the attorney-employee to receive notice on behalf of the insurer in the ordinary course of their employment was inferred.

The 62-day delay between notification of the claim and the insurer's notice of disclaimer based on lack of timely notification was unreasonable as a matter of law. The trial court properly denied the insurer's summary judgment motion. The appellate court found that summary judgment for the claimant awarding her declaratory relief was appropriate. Banuchis v. Government Employees Ins. Co., 2005 N.Y. Slip Op. 00363.◆

SNOWMOBILE CLUB COULD BE LIABLE

Plaintiff estate administrators filed a wrongful death and personal injury claims against a snowmobile club, which sought to amend its answer and for summary judgment based on a defense predicated upon N.Y. Gen. Oblig. Law § 9-103, commonly known as the recreational use statute. The snowmobile club was not the "occupant" of a marked snowmobile trail on a bicycle path that was owned by a village and was subject to a utility easement at the time of a fatal snowmobile accident.

As a result, the club was not entitled to the protection of the statute under which an occupant owes no duty to keep the premises safe for snowmobile use.

The club routinely received informal permission to mark and maintain snowmobile trails on public and private land. It designated a trail over a creek bridge. The administrators' case against the club was based upon the inappropriateness of the bridge as part of the snowmobile trail, and that by marking the bridge as part of the trail, the riders had an expectation of its appropriateness for snowmobile traffic.

The village planning board had recommended approval of the club's proposed marking and maintenance of the trail, and the village did not remove the club's signs or seek to prevent the snowmobile traffic.

However, there was no evidence that the village board of trustees formally approved the club's proposal. Furthermore, the utility easement did not permit snowmobile traffic. The court denied the club's motion to amend its answer and for summary judgment.

Blair v. Newstead Snowseekers, Inc., 2005 N.Y. Slip Op. 25008.◆

NO W.C. INSURANCE, NO SHIELD

The general contractor's third-party complaint sought common law indemnification and contribution against the subcontractor. The trial court granted the sub's cross motion for summary judgment dismissing the complaint on the basis that there was no real question that the worker was an employee of the subcontractor and therefore the general contractor's claims were barred by Section 11 of the New York Workers' Compensation Law. This section limits an employer's liability to third parties for contribution or indemnity in those cases of workplace injury where an employee has suffered a grave injury. Grave injury is defined in the Workers' Compensation Law.

However, Section 11 does not shield an employer that has failed to secure workers' compensation coverage for its injured employee.

An employer may not benefit from Section 11's protections against third-party liability unless it first complies with Section 10 and secures workers' compensation for its employees. Because the sub failed to secure the coverage, the appellate court held it could not avail itself of Section 11 protection. Boles v. Dormer Giant, Inc. 2005 N.Y. Slip Op. 01270.◆

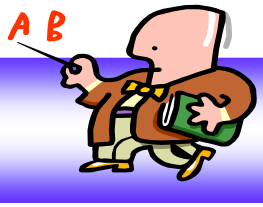
Around the Nation

$10.2 MILLION VERDICT AGAINST

A four-week trial in Jacksonville, Florida ended recently with a $10.2 million verdict for the husband of a woman killed when the roof of her 2000 Ford Explorer collapsed and fractured her skull during a rollover accident.

Claire Duncan was driving on Route I-95 in May, 2001 when she swerved to avoid merging with another vehicle. The Explorer rolled over five times, with the roof collapsing down on the driver's seat. Other passengers walked away with minor injuries. All occupants were wearing their seat belts.

This case is purportedly the first verdict against Ford Motor Company in a case that focused exclusively on the alleged defects in the vehicle's roof and related seat-belt system. Testimony is reported to have included a study showing the Explorer has the weakest roof of any sport utility vehicle as well as a Ford engineering report that recommended the roof be strengthened. Duncan v. Ford Motor Co., No. 01-7230-CA (Fla. Cir. Ct., 4th Cir., Duval County Mar. 28, 2005.◆



THE INSURABLE INTEREST FACTOR

As most insurers are aware, the issues shrouding insurable interest are among the most complex of all insurance challenges. The fluid nature of real estate relationships, the evolving changes in bailment law and the tort law, in general, as well as the vagaries of our court system make this a very difficult arena. It is necessary to profitably conduct business in this arena and to equitably and efficiently meet the needs of policyholders and the public. As this is a very broad topic covering many facets, this report will focus on a single component, lessor-lessee relationships with respect to real and personal property.

Leasing is an age old concept. A lease is an agreement that transfers possession from the transferor (lessor-landlord) to the transferee (lessee-tenant). Possession gives the lessee the privilege to use the property in an agreed upon manner for a prescribed period of time. Leases may be express or implied and oral leases may be enforceable subject to the Statute of Frauds or other limitations.

In spite of what appears to be a loose structure, there are certain requisites that have to be met before a property transfer qualifies as a lease transfer:

1.) The lessee must possess and occupy the property with the consent of the lessor. (Trespassers and squatters do not qualify as lessees.)

2.) The lessee's rights must be subordinate to those rights of the lessor with respect to the leased property. (If the lessee claims ownership rights, there is no lease in effect.)

3.) The lessor must retain an interest in the property that will revert to the lessor on expiration of the lease. (If the lessor does not retain a reversionary interest, the relationship is that of a sale, not a lease or it could be that of a life estate which is beyond the scope of this column).

4.) The lessee must have the right to possess or occupy the property. (Agreements for use without possession are easements rather than leases.)

There are several typical approaches used to try to protect the interest of the lessor and lessee in dealing with their different insurable interests in shared exposures. The approaches can be consolidated under two headings known as insurance transfer devices and contractual transfer devices.

The insurance transfer devices are:

1.) Additional Insured Clauses;

2.) Loss Payable Clauses.

The contractual transfer devices are:

1.) Hold-harmless Agreements;

2.) Exculpatory Agreements.

There are several other approaches, as well, including the purchase of lessor's interest coverage, the purchase of Contingent Property Insurance or contingent Interest Insurance and other similar non-standard impairment type coverages. Perhaps the most practical method is a combination of several of these techniques, which we discuss in this article. The insurance transfer technique is probably the most commonly used method as it entails little or no exposure on the part of the part of the lessor and it is easily arranged.

The usual means of verifying that the "transfer" has been accomplished is for the lessor to oblige the lessee to furnish a certificate of insurance showing the lessor as an additional insured or loss payee on the policy.

The problems with this situation develop at the very onset of the relationship. It is unsound for the lessor to rely on a certificate of insurance as it does not confer any rights. The certificate of insurance is nothing more than an historical document that confirms the existence of an insurance contract at that particular time but it is no guarantee that it persists beyond that moment in history.

Aside from the problems associated with certificates of insurance, the lessor faces many other problems in the insurance relationship of loss payee or additional insured listed on the lessee's policy. The lessor-loss payee is simply entitled to the policy proceeds to the extent of his/her interest in the event of a covered loss under the lessee's policy. The lessor is entitled to a priority of payment but is not afforded any other rights. The loss payee's rights are dependent on the entitlement of the named insured to payment under the policy.

The lessor involved in an insurance transfer device will always face the risk that the lessee failed to purchase or renew the policy.

The lessor-additional insured is a party to the contract and may have protection for certain liability as well as having an interest in the building or other structures addressed by the policy.

Continued Next Page →

THE INSURABLE INTEREST FACTOR CONT'D

The additional insured status provides a greater degree of protection than the loss payee status but there is an array of problems that face the lessor in either, and usually both, situations.

The risk that the lessee failed to purchase the correct coverage or purchased inadequate limits or will be subject to co-insurance or other penalties will always be present. Other issues include the fact that the coverage may be void due to breach or neglect on the part of the lessee. In this case, the lessor will have no greater rights than the lessee. There is the unlikely possibility that the lessee's insurer could become insolvent. The lessor may well have rights to proceed against the lessee under the terms of the lease when the lessee's policy does not respond, but, will the lessee have the ability and assets to indemnify and defend the lessor?

There is one other major segment of the additional insured picture to review carefully. That is the extent of the coverage provided the additional insured and whether or not it exonerates the additional insured from subrogation pursuit by the lessee's insurer. The answers are not entirely clear but there are certainly enough issues to make any person approach with extreme caution.

The additional insured may be covered only for vicarious liability arising from acts or omissions of the lessee-insured. Some courts have interpreted the additional insured status as being covered only for liability imposed vicariously and have denied coverage for torts committed directly by the additional insured. The lessor will certainly have an exposure in multiple occupancy locations where the lessor is responsible for the common ways and means of the premises. The lessor will also be exposed where a defect in the premises was not disclosed to the lessee and injury or damage arose from that hidden defect. At any time that the lessor exercises a substantial contact with and degree of control over the premises, the exposure will be there.

The lessee's policy will only respond to liability arising with the coverage territory; often that area exclusively occupied by the named insured. It is likely that the additional insured status may not fully exonerate the lessor from the possibility of subrogation pursuit by the lessee's insurer. It is easy to see that the lessor-additional insured may have exposures that are not addressed by the lessee's policy.

Hold-harmless agreements and exculpatory agreements are two types of contractual transfer devices.

The hold-harmless agreement is better adapted to the insurance contract than most other methods. The Commercial General Liability policy specifically covers it as an "insured contract". The hold-harmless agreement is a contract obliging the indemnitor resulting from their tort liability to third parties. The hold-harmless or indemnity agreement usually falls into one of three categories:

1.) Limited form– indemnity from vicarious liability;

2.) Intermediate form—indemnity from all liability arising from operations except negligence solely caused by the indemnitee

3.) Broad form— indemnity from all liability including sole negligence, which in some circumstances are not enforceable under laws of various states, including New York, in certain circumstances.

There are several issues that arise with hold-harmless agreements. The lessor's insurer is unlikely to voluntarily recognize the obligation unless it is clear and unambiguous and if an action is brought, the allegations must be within the scope of the agreement for the insurer to defend and indemnify in the action on behalf of the indemnitee. In some instances, these agreements apply only to bodily injury and property damage, not personal injury, and there may be exemptions not covered by the policy.

Exculpatory agreements bind the exculpatee (lessee) to exonerate the exculpatory (lessor) from any liability from specified circumstances that result in harm to the lessee or the property. This agreement does not involve third parties and it does serve as a waiver of subrogation releasing the exculpator from liability for damage to the exclupatee's property.

This type of agreement is not readily adapted to the insurance policy as it normally comes within the purview of the exclusion relating to property in the insured's care, custody and control. When the approach is under a property policy, there are still problems as even the broadest policy will have exclusions and the exculpatee may be saddled with an uninsured loss to its own property and have no recourse against the responsible party.

Exculpatory agreements suffer from many of the same problems as hold-harmless agreements. The transfer device is subject to legal attack for a variety of reasons and there is no guarantee it will be effective as a transfer at the time of a loss or claim. In New York, the General Obligations Law §5-321 may make these agreements void and unenforceable.◆

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A TRIBUTE AND FOND ADIEU

Here at the URB, we count ourselves fortunate to have had Jim Lichtel as the Manager of the Company and President of URB Services Corp. since 1993. Under his direction, the Company has prospered and progressed. In addition to New York, URB is licensed to do business in several other northeastern states, and Jim has authored thousands of forms and introduced many new programs. Not only has he provided sage advice to countless insurers who are the URB members and subscribers, but he has been the father of wisdom and guidance for those of us within the URB in fulfillment of his management responsibilities.

Prior to his tenure as Manager, Jim joined URB in 1988 to work on forms and the regulatory agenda. Jim's experience at the URB has been his second career, after working for 20 years at the Travelers Insurance Company in Albany. Jim was the Assistant Manager of the Property Claims Unit at Travelers.

A 1961 graduate of Ithaca College, Jim holds several insurance designations such as CPCU, ARM and AIC. He taught Insurance in the Finance Department of Siena College in Loudonville for many years, a position he retired from a few years ago.

When asked what he plans to do in retirement, Jim told us he plans to spend his time traveling, golfing, fishing and working around his house.

Jim has earned a place in the history of the URB and left us with many memorable times to treasure. The Management and Staff of the URB wish Jim all the best in retirement with our fondest regards for a happy future.◆

At the URB

CHANGE AT THE URB

As you may know, Jim Lichtel is retiring on April 26, 2005. We chose to publish this edition of the URB Insider in April, rather than March in conjunction with Jim's retirement as a tribute to him. By the time you receive this edition of the publication, Jim will be enjoying his retirement. The URB Management and Staff will be here in our new roles to serve you and strive for the excellence to which Jim inspired us. Here is an outline of who to contact in various capacities to serve your needs:

Timothy Curren, CPCU— Manager; General Management and Ratemaking responsibilities.

Mary Shell, CPCU— Assistant Manager; Computer Operations Management and Manuals/Rating Interpretation responsibilities.

Kimberly Davis, Esq., CPCU—General Counsel; Forms Management and Regulatory Liaison responsibilities.

Jean French, CPCU—Business Manager; Business Management and Manuals/Rating Interpretation responsibilities.

Wayne French—Print Shop Manager; URB Services Corp.

Ann Popkoski, Office Administrator— Office and Bookkeeping responsibilities.

John Peterson—Print Consultant; URB Services Corp.

As we progress through this transition and beyond, please feel free to contact any of us with your ideas, questions and concerns. Your input is invaluable and appreciated as we face the challenges of doing business in the 21st century.◆