URB INSIDER

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From the Insurance Department

The New York State Insurance Department recently published Circular Letter No. 18 dated September 20, 2006.

The purpose of the Circular Letter is to advise insurers and rate service organizations regarding the enactment of Chapter 169 of the Laws of 2006, effective August 25, 2006, which amends Sections 3426(e)(1)(C) and 3426(g)(2) of the New York Insurance Law.

The legislation reduced the time period within which insurers are required to provide loss information upon written request by the first named-insured or such insured's authorized agent or broker from twenty days to ten days.

The amended Section 3426(g)(2) provides, in part, that upon written request by the first-named insured or such insured's authorized agent or broker, the insurer shall mail or deliver the loss information specified in the statute on closed claims, open claims, as well as information on notices of occurrences covering the period of time coverage had been provided by the insurer, within **ten** days of such request.

The circular letter states that all insurers and rate organizations should review their procedures, and cancellation, nonrenewal and conditional renewal notices and make the necessary revisions to comply with the above requirement. Any revisions of policy forms necessitated by the revision of the statute should be filed for approval in accordance with Section 2307(b) of the New York Insurance Law.

Note that companies who purchase commercial cancellation notices from a supplier may need to contact their supplier to ensure that the cancellation notices they are distributing comply with the revisions described in Circular Letter 18 (2006).

For companies that purchase cancellation notices from CCH (formerly Uniform Printing), the revised commercial cancellation notices (GU 323k) are available. To contact CCH, their telephone number is: 1-800-481-1522 or you may visit their website at www.insurance.cch.com. ◆

In 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. The material in this publication was not necessarily prepared by an attorney admitted in the jurisdiction of the materials in the publication.

A URB Service For You

As the weather turns colder, thoughts of preparing and filing Annual Statements abound in the offices of most insurers.

As a service to URB constituents, the URB print shop can print your Annual Statements. In some circumstances the price is dramatically less expensive than the cost previously incurred by most insurers.

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

Case Briefs

Residential Owner Exempt from Labor Law

The defendant appealed from an order of the Supreme Court, Nassau County, which denied defendants' motion for summary judgment dismissing the complaint.

"An owner of a one-or-two-family dwelling is exempt from liability under Labor Law §§240 241 unless he or she directed or controlled the work being performed." (McGlone v. Johnson, 27 AD3d 702; See Siconolfi v. Crisci, 11 AD3d 600; Miller v. Shah, 3 AD3d 521, 522; Saverino v. Reiter, 1 AD3d 427; Tilton v. Gould 303 AD 2d 491). "The phrase direct or control' as used in those statutes is construed strictly and refers to the situation where the owner supervises the method and manner of the work' " (McGlone v. Johnson, *supra*, quoting Siconolfi v. Crisci, supra at 601; see Saverino v. Reiter, supra at 427; Tilton v. Grould, *supra* at 491-492; Rimoldi v. Schanzer, 147 AD2d 541, 545; see also Rodas v. Weissberg, 261 AD2d 465, 466). The appellant made a prima facie showing that he was entitled to the protection of the homeowner's exemption by submitting evidence demonstrating that neither he nor his wife directed the manner and method of the construction work being performed. (see McGlone v. Johnson, *supra*; Siconolfi v. Crisci, *supra* at 601; Miller v. Shah, *supra* at 522; Saverino v. Reiter, *supra* at 427; Tilton v. Gould, *supra* at 492).

The evidence established that the involvement of the homeowner's wife was no more extensive than that of the typical homeowner who hires a contractor. Plaintiff was entitled to summary judgment and was also entitled to summary judgment on the common law and labor law §200 causes of action. Levy v. L.A.M General Contracting Corp., 2006 NY Slip Op

No Serious Injury, No Cause of Action

Plaintiff took a cab driven by defendant and was allegedly injured upon exiting the vehicle. Two days later, plaintiff's x-rays were negative and plaintiff was discharged with a diagnosis of pulled muscles.

Plaintiff commenced this action against defendant and alleged a serious injury within the meaning of Insurance Law §5102(d). Defendant appealed an order of Supreme Court, Bronx County, which denied his motion for summary judgment to dismiss the complaint, which was reversed.

Defendant bore the initial burden of setting forth a prima facie case that injuries sustained by plaintiff are not "serious"...

The Appellate Division, First Department, held that Supreme Court erred in determining that defendant failed to make a prima facie showing of entitlement to judgment as a matter of law. Based on multiple objective tests, plaintiff had a normal range of motion and suffered no disabilities. Plaintiff was involved in two prior accidents and her expert failed to address how her current medical problems are related to the subject accident. Yvonne Style v. Christopher K. Joseph, Winsom Morris, etc. 2006 NY Slip Op 06129.◆

Homeowners Policy Embraces Coverage

Plaintiff insurer issued a homeowners's policy to Susan Sweeney. Her son, Joshua, is an insured. The policy excludes coverage for acts expected or intended from the standpoint of the insured. Sweeney pleaded guilty to attempted assault admitting that he aimed what he knew was a loaded flare gun and fired it at Jacob Weaver and Weaver's friend.

Plaintiff insurer filed an action seeking a declaratory judgment that it owed no duty to either defend or indemnify Sweeney. Supreme Court granted the motion finding that Sweeney's acts were not an occurrence within the meaning of the policy.

The Appellate Division, Third Department reversed on appeal. The decision is based on the recent Court of Appeals holding in Automobile Ins. Co. of Hartford v. Cook 2006 NY Slip Op 04456. In both cases, the allegation is that the weapon was negligently discharged. The court held that such a claim is "within the embrace of the policy." and that the insurer must defend. Merchants Insurance of New Hampshire, Inc., v. Jean Weaver, Individually and as Parent and Guardian of Jacob Weaver, an Infant. 2006 NY Slip Op 99393. ◆

Rising, Shrinking, etc. of Earth Not Excavation

The plaintiffs own residential property in Queens on which they obtained a rental dwelling property policy from defendant. Some soil beneath the building was removed during an excavation on the lot adjoining plaintiffs' property, causing damage to plaintiff's property.

State Farm disclaimed coverage based on the earth movement policy exclusion. The earth movement exclusion included sinking, rising, shifting, expanding or contracting of earth...

Plaintiffs appeal from an order of Supreme Court, Queens County, that denied their motion for summary judgment against defendant State Farm Fire & Casualty Co.

"Generally where an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language" (see Seaboard Sur. Co. v . Gillette Co., 64 NY2d 304, 311). The court explained that the exclusions are narrowly construed and the insurance company has the heavy burden of establishing the exclusions apply in a particular case and that they are subject to no other reasonable interpretation. (see Seaboard Sur. Co. v. Gillette Co., *supra*, and Gaetan v. Fireman's Fund Ins. Co. of Newark, 264 AD2d 806; Pepsico, Inc. v. Winterhur Intl. Am. Ins. Co., 13 AD3d 599.)

The court noted that the earth underneath plaintiff's dwelling did not sink, rise, shift, expand or contract but rather was excavated, which falls outside the language of the exclusion. The court distinguished the case at bar from two existing cases in which the loss occurred from a sinking of the ground beneath each property. As such, the plaintiff's motion should have been granted. The case was remitted to Supreme Court on the issue of damages. Deborah Lee v. State Farm Fire & Cas. Co. 2006 NY Slip Op 06559. ◆

Duty of Landlords For Third-Party Criminal Acts

Plaintiffs commenced this action seeking damages for the wrongful death and conscious pain and suffering of decedent.

Decedent leased an apartment in a building owned by defendant, HKS Realty Associates, Inc. and managed by defendant, James Properties, Inc., and she was murdered in the apartment. The murder investigation remains open and unsolved.

This is an appeal from an order of the Supreme Court, Onondaga County which denied in part, the defendants motion for summary judgment seeking dismissal of the complaint. The Appellate Division, Fourth Department, held that the order appealed from be unanimously reversed on the law and granted defendants' motion in its entirety, dismissing the case.

"Landlords have a common law duty to take minimal precautions to protect tenants from foreseeable harm, including a third party's foreseeable criminal conduct." (Burgos v. Aqueduct Realty Corp., 92 NY2d 544, 548). However, "the necessary causal link between a landlord's culpable failure to provide adequate security and a tenant's injuries resulting from a criminal attack in [a] building can be established only if the assailant gained access to the premises through a negligently maintained entrance." (Id. at 550).

Defendants established that there was no history of violent crime by third parties in the building, and plaintiffs failed to raise an issue of fact whether defendants knew or had reason to know "from past experience 'that there [was] a likelihood of [violent] conduct on the part of third persons' " in the building. (Nallan v. Helmsley-Spear, Inc., 50 NY2d 507, 519; see Todorovich v. Columbia Univ., 245 Ad2d 45, 45-46, lv denied 92 NY2d 805; cf. Jacqueline S. v. City of New York, 81 NY2d 288, 291, rearg denied 82 NY2d 749; Venetal v. City of New York, 21 AD3d 1087, 1089).

Although plaintiffs provided evidence of one violent crime in proximity to the building in which decedent lived, they failed to raise an issue of fact whether "ambient crime ha[d] demonstrably infiltrated [the] premises or [that defendants were] otherwise on notice of a serious risk of such infiltration that [their] duty to provide a protection against the acts of criminal intruders may be said to [have] arise [n]" (Todorovich, 245 AD2d at 46).

The court concluded that the affidavit of plaintiff's security officer was insufficient to raise a question of fact. Defendants established the doors were secured by automatic locks, each apartment door was secured with a dead bolt and equipped with a peep hole. The court concluded that plaintiffs failed to raise a question of fact that "assailant gained access to the premises through a negligently maintained entrance. (Burgos, 92 NY2d at 550; cf. Jacqueline S., 81 NY2d 292; Venetal, 21 AD3d at 1090-91. Browning and Euto v. James Properties and HKS Realty Associates, Inc., CA 06-00569). ◆

Insurance Contract RC Provision Interpretation

Plaintiff's home, located in the Town of Lansing, Tompkins County, was destroyed by fire on March 30, 2002. The property was covered by a farmowners insurance policy issued by defendant, Wayne Cooperative Insurance Company. After plaintiff sought to collect on his insurance policy, defendant disclaimed liability and denied coverage alleging, among other things, that plaintiff committed an arson.

Plaintiff commenced this action, seeking damages for the replacement cost of the dwelling, its contents and the loss of use of the premises in the sum of $100,224.38. Plaintiff moved for summary judgment on the issue of replacement damages if liability was ultimately proven. Defendant contended that even with a verdict in favor of plaintiff, the policy states that if plaintiff did not replace the property within 180 days, he would only be entitled to actual cash value. Supreme Court granted part of plaintiff's motion regarding damages, with an amount stipulated to by the parties, but noted that pursuant to the terms of the policy, defendant would not be liable for any amount exceeding the actual cash value unless plaintiff actually repaired or replaces his property and/or structure.

Following a trial, the jury returned a liability verdict in favor of plaintiff. In a judgment after trial, Supreme Court ordered that if plaintiff replaced the structure and personal property within 12 months, defendant was required to pay plaintiff the replacement costs thereof, up to the limit of its liability, less the amounts of the actual cash values of the structure and property which were also awarded by that judgment. Plaintiff appeals from so much of the order and judgment that limited his recovery to the actual cash value unless he rebuilds or replaces the structure and/or personal property.

When interpreting an insurance contract, a court " 'must determine the rights and obligations of the parties under...[that] contract based on the policy's specific language' "(Pepper v. Allstate Ins. Co., 20 AD3d 633, 634 [2005], quoting State Farm Mut. Aut. Ins. Co. v. Glinbizzi, 9 AD3d 756, 757 [2004]). Where the provisions of the contract are unambiguous, the terms must be given their plain and ordinary meaning (see Pepper v. Allstate Ins. Co., *supra* at 634; Stasack v. Capital Dist. Physicians' Health Plan, 290 AD2d 866, 867 [2002]). Viewing the provisions here, we find that Supreme Court properly determined that plaintiff had the option to seek either the actual cash value of his loss, determined pursuant to a broad rule of evidence (see Mazzocki v. State Farm Fire & Cas. Corp., 1 AD3d 9, 12-13 ([2003]), or a settlement of the loss according to the policy's replacement cost provision. Under the terms thereof, replacement cost value cannot be awarded without plaintiff first actually repairing or replacing the property (see D.R. Watson Holdings v. Caliber One Indem. Co., 15 AD3d 969 [2005]' lv dismissed 4 NY3d 882 [2005], lv dismissed 5 NY3d 842 [2005]; Stasack v. Capital Dist. Physicians' Health Plan, *supra* at 867-868; Matter of New York Cent. Mut. Fire Ins. Co [Prehoda], 231 AD2d 829, 830 [1996]). Contrary to plaintiff's contentions, Zaitchick v. American Motorists Ins. Co. (554 F Supp 209 [1982]) is not applicable because here plaintiff was entitled to receive the actual cash value for his property and structure which enabled him to commence the rebuilding process. ◆

At The Supreme Court

The Supreme Court ended its session in late June. Some of their more notable cases included these matters.

DNA Evidence: In House v. Bell convicted murderer Paul Gregory House alleges that DNA evidence proves his innocence. House, whose appeal process has run out, is seeking a new trial based on the fact that DNA testing proved that body fluids on a murder victim's clothes belonged to her husband.

Insanity Defense: Clark v. Arizona challenges Eric Michael Clark's murder conviction on the grounds that the Arizona insanity law's refusal to consider mental disease or defect violated Clark's right to due process under the 14th Amendment. Clark understood right from wrong, but his lawyers say he made the judgment in the context of an abnormal state of reality.

Privacy Rights: In Hudson v. Michigan Booker T. Hudson Jr. seeks to suppress evidence of illegal drugs found in his home, citing a violation of the "knock and announce" rule rooted in the Fourth Amendment. Hudson was convicted of drug possession after officers burst into his home three to five seconds after announcing their

Around the Nation

Insurer Wins in Mississippi Wind Case

In the first case to test a wind and water insurance claim resulting from Hurricane Katrina, a judge in Mississippi has upheld the exclusion for damage caused by water and water-borne materials.

Paul and Julie Leonard sued their homeowners carrier, Nationwide Mutual in a case entitled Paul Leonard and Julie Leonard v. Nationwide Mutual after Nationwide denied coverage to the Leonards for losses their home sustained as a result of Hurricane Katrina. The suit was filed by the Leonards after Nationwide paid them approximately $1,660 for wind damage to their home that was caused by Hurricane Katrina in August, 2005. From the Leonards' perspective, the total damage to their house was estimated at more than $130,000. They sought to recover $158,000 for the damage plus interest, attorney fees and expenses.

Jay Fletcher, The Leonards' insurance agent, was a co-defendant in the law suit who worked for Nationwide. The Leonards contended that Fletcher told them all wind and water damage arising out of a hurricane would be covered by their insurance policy. The Leonards did not carry flood insurance on their property.

In a memorandum opinion, Judge Senter affirmed that the insurer had met the burden of proving that the majority of the damage to the Leonard's property was caused by water and water-borne materials within provision 1(b) of the Property Exclusions of the Nationwide policy.

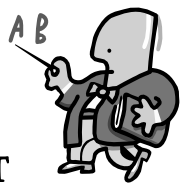
The Judge rejected the arguments of the Leonards. The memorandum opinion stated, "Fletcher did not materially misrepresent the terms of the Nationwide homeowners policy to the Leonards, and Fletcher did not make any statements which could be reasonably understood to alter the terms of the Nationwide policy. Fletcher did not tell Paul Leonard that he did not need a flood insurance policy because his homeowners policy would cover all water damage that might occur during a hurricane. Leonard apparently inferred that this was the reason Fletcher told him he did not need to buy a flood insurance policy, but Fletcher did not give any reason for his response to Leonard's inquiry. ◆

Prompt Compliance Required for Case Transfer

Appellant, Chris Falcone, Inc., appeals from the order entered in the Philadelphia County Court of Common Pleas, granting summary judgment in favor of Appellee, Insurance Company of the State of Pennsylvania, and dismissing Appellant's complaint with prejudice.

Specifically, Appellant asks the court to determine whether the trial court erred when it dismissed Appellant's complaint because Appellant had not promptly transferred its federal case to state court in compliance with the Pennsylvania transfer statute at 42 Pa.C.S.A. § 5103.

The Appellate court held the trial court properly interpreted Section 5103 and dismissed Appellant's complaint for failure to meet the statutory requirements for transfer of erroneously filed proceedings from federal court to state court. The judgment is affirmed. The scope of the review is plenary, the same standard is used as what is used by the trial court. Appellant simply did not attempt to conform to the requirements of the transfer statute until 10 months after the federal case had been dismissed. Chris Falcone Inc. v. Insurance Company of the State of Pennsylvania, 2006 PA Super 241.◆



SCHOLASTICALLY SPEAKING... BY PROFESSOR I.M. SMART

A Discussion of Misrepresentation and Concealment

The issues concerning property insurances become more complex as a consequence of our maturing society, and the increasing sophistication of our insuring population. In this case, it may be useful to take another look at the basic principles.

Insurance is a contract of utmost good faith requiring both parties to the contract to approach with clean hands and to respond fully and fairly. That basic premise underlies the equitable approach to claims matters and underlies this discussion.

The insurance contract represents the total agreement between seller and buyer. The buyer receives a copy of the contract at the inception of the policy. The buyer knows all of the rights and duties of both the buyer and the seller, insured and insurer. The insurer knows only the information provided by the insured in the application and what ever information is available to it through underwriting sources.

The insured possesses a greater knowledge of its risk than does the insurer. Although the insurer may be called upon to indemnify their insured when all of the conditions precedent and subsequent set out in the policy are satisfied by the insured. The insurer assumes both contractual and equitable remedies to level the playfield and equalize positions.

The insurer has defenses against the insured. These include defenses based on the breach of the implied covenant of utmost good faith which underlies the contract, breaches of warranty or material misrepresentations and the doctrine of concealment. The failure to approach in good faith (with "clean hands") speaks for itself. The matter of material misrepresentation (warranties, except perhaps in ocean marine and some crime lines, are weakened to a similar basis as material misrepresentations) are basically fraud in the inception defenses. The point being that had the insured not misrepresented material facts; the policy would not have been issued.

Editor's Note: This article is reprinted in part from a previous article dated June, 2004.

The doctrine of concealment is very similar. The insured fails to disclose material facts known to the insured that would have militated against the issuance of a policy.

A potential insured applies for a fire policy at noon today knowing that a fire occurred at 11:01 AM today and also knowing that the policy incepts at 12:01 AM today, 11 hours before the fire. The question may not have been asked but the insured has the obligation to disclose and failure to do so is a willful concealment.

There are remedies to address these issues. As stated below, the contractual remedy is cancellation of the policy. Cancellation is akin to a divorce; it is an admission that the marriage existed from its inception to its termination and any valid losses occurring during that term will be addressed by the policy. Also, any premium earned during that period remains with the insurer.

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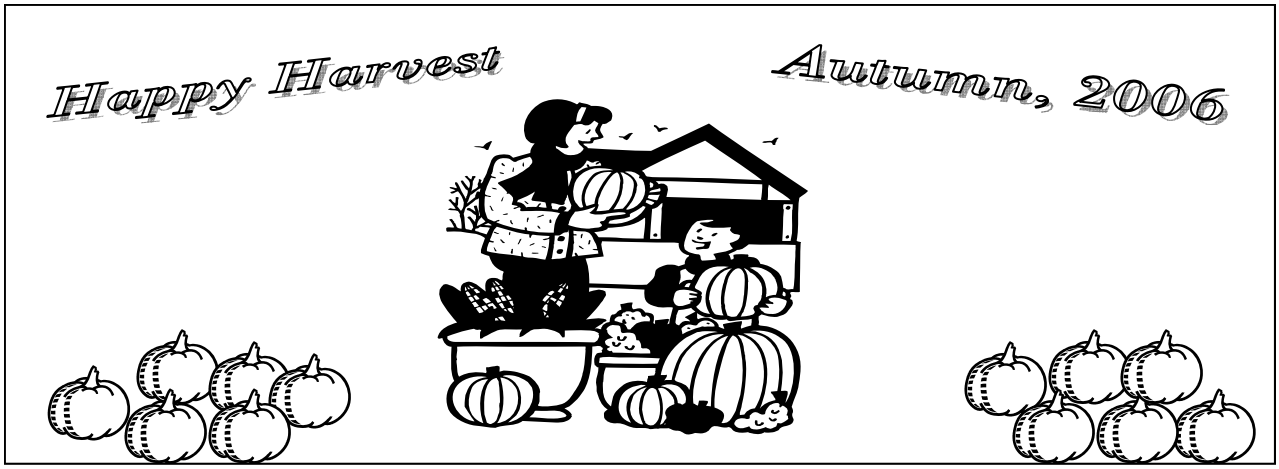

A Discussion of Misrepresentation and Concealment...

The equitable remedies are reformation of contracts, suspension of coverage and recission of contracts.

Reformation of a contract is the means to correct a mistake and to reform the contract to express the intent of the parties to it. Literally, the policy is rewritten after the event to recognize the agreement of the parties.

Suspension of coverage is a remedy that literally suspends coverage for the period of time that an excess hazard within the knowledge or control of the insured exists. When the excess hazard is removed, coverage resumes. For example, coverage is suspended for the peril of explosion while the insured stores 50 sticks of dynamite in the garage. Coverage is in place if the garage burns down as the increase of hazard did not cause or contribute to the loss; however, there is no coverage if the dynamite explodes destroying the area. Coverage resumes when the dynamite is removed from the premises.

Recission means to void the contract. In the event that the contract is so fatally flawed as not to be correctable or subject to reformation, the remedy is to void the contract from its inception. Rescinding a contract is akin to an annulment; it never was and therefore, there are no rights, duties or obligations imposed on any one. As there never was a contract, there can be no earned premium and any collections must be returned in full but no obligations exist for any loss.

The contractual remedies are set out in the contract or at law and they consist of various rights and duties including the right of cancellation for those causes set out in Sections 3425 and 3426 of the insurance law. In certain circumstances, coverage may be voided or suspended, see lines 1-7 of the Standard Fire Policy (Section 3404 of the Insurance Law) for those conditions (fraud and false swearing) which void the contract and lines 28-37 which suspend coverage while

The insured's duties in the event of a loss are set out from lines 90-122. Insurers might consider demanding a proof of loss be filed and the insurer must furnish a blank copy with instruction that it be completed in its entirety, executed before a notary and retuned timely with supporting documentation. Issues of fraud and false swearing rising in connection with the submission of a completed proof of loss can be reviewed in an examination under oath. Insurers must observe all the obligations set out in Regulation 64, among others. Please note if the insurer denies coverage or otherwise breaches the policy, the insured no longer has any obligation to comply with the contract.

Please also note injudicious remarks or actions may reasonably lead an insured to believe that coverage is to be afforded and should they reasonably rely on those words or actions to their detriment, they may well have extra contractual recourse.◆

Terrorism Compliance Reminder

As has been discussed in several URB memos issued earlier this year, the Terrorism Risk Insurance Act was extended on December 22, 2005. The extension took effect on January 1, 2006 and will be in place until December 31, 2007.

The Extension Act made some changes, which require new forms to be in compliance.

The general disclosures TERR-DISC and NOTICE are updated and have been acknowledged by the Department. The line specific disclosures that are set up as endorsements (FL-116, LS-116, MR-116 and SF-116) are updated and have been approved by the Department.

Some lines were removed from the statute, including but not limited to, Farmowners Multi-peril.

The terrorism exclusions (FL-114, LS-114, MR-114, and SF-114) are updated and approved but can only be used once the make available requirement is met, and not on lines no longer covered

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Forms Update

Forms recently approved by the New York State Insurance Department include the HURRICANE DEDUCTIBLE (ML-373H 11/05) which provides a flat $1,000 deductible for Category One storms and various percentage deductibles selected by an insurer for Category Two storms and above. In addition to the Hurricane Deductible form, the Disclosure (ML-373H DISC) was sent to the Department and approved in accordance with Regulation 159.

The rating structure has been revised for the ML-373H 11/05 in Bulletin HO-44, also approved by the Department.

Please note the Hurricane Deductible is contained in the optional portion of the URB manual. It will be the decision of each constituent to elect to make the Hurricane Deductible mandatory, and if so, what amount with your intentions being sent to the Department by each constituent making such an election. The Hurricane Deductible is to be applied in accordance with Section 3425 of the New York Insurance Law, specifically in regard to the three-year required policy period. The aforementioned information is included in the Disposition Report received from the Department, a copy of which has been previously forwarded to all constituents.

In addition, the ML-373 4/06 which is the EXCLUSION OF CANINE RELATED INJURIES OR DAMAGES was recently approved by the Department. This enhanced exclusion includes dogs who have not been inoculated as required by law. The Disclosure (ML-373 DISC 8/06) is an updated version that was sent to the Department for informational purposes and was recently acknowledged.

A supply of the approved forms, disclosures and bulletin are available from the URB print shop. ◆