The URB Insider

A Quarterly Publication of Underwriters Rating Board

Healthcare Law Upheld

National Federation of Independent Business v. Sebelius, et al., 567 U.S. ____ (2012)
Argued March 26, 27, 28, 2012—Decided June 28, 2012

Volume 10, Issue 2

Summer, 2012

Index for this Issue:

In what was an unexpected decision, the U.S. Supreme Court upheld the Affordable Care Act in a 5-4 decision.

One of the most important issues regarding the health care reform legislation was whether Congress had the power to require individuals to buy health insurance.

The opponents of the legislation argued the Affordable Care Act violated the Commerce Clause of the U.S. Constitution by compelling Americans to purchase insurance in the marketplace against their will.

Writing for the majority, Chief Justice John Roberts agreed with this argument. Although the requirement could not be upheld on that basis, it could be upheld as a tax because Congress has the power to tax citizens.

Regarding the Medicaid expansion for low income people, the Court held states can opt out without any threat of losing other federal funding for the program. ◆

Arizona Immigration Case Decided

Arizona et. al. v. United States, 567 U.S. ____ (2012)
Argued April 11, 2012– Decided June 25, 2012

The Supreme Court has struck down key provisions of the Arizona Immigration Law that sought to deter illegal immigration. The ruling upheld the authority of the federal government to set immigration policy and laws.

While concluding the federal government has the power to block the law, the Court let stand one of the most controversial parts. This is the part of the law that requires police officers who are stopping someone to make efforts to verify the person's immigration status with the federal government.

But, the Court struck down three other parts of the law. These are the part that makes it a crime for illegal immigrants to work or seek work in Arizona; the part which authorized state and local officers to arrest people without a warrant if officers have probable cause to believe a person is an illegal immigrant; and, the part that made it a state requirement for immigrants to register with the federal government. ◆

NY Cases

Building Or Business Property Coverage Scrutinized

Avery Realty Co., Inc. v. Finger Lakes Fire & Cas. Co., 2012 NY Slip Op 04812 [96 A.D.3d 1214]

Editor's Note: The following is the decision of the Supreme Court, Appellate Division, Third Department in the captioned case. The case discusses when certain types of fixtures are business property rather than part of the building. This is URB policy language.

Malone Jr., J. Appeal from an order of the Supreme Court (Rumsey, J.), entered October 5, 2011 in Cortland County, which, among other things, granted defendant's cross motion for summary judgment dismissing the complaint.

Plaintiff owns a building in the City of Cortland, Cortland County that was damaged by a fire in June 2008. The second floor of the building contained apartments and the first floor contained two spaces for retail stores and a self-service laundromat, which was owned and operated by plaintiff and was open to the public. At the time of the fire, plaintiff maintained a policy of insurance with defendant consisting of two parts, each part providing actual cash value compensation; coverage A had a limit of $829,000 and covered damage to the building and coverage B had a limit of $50,000 and covered damage to plaintiff's business property contained within the building. Plaintiff then submitted a claim for both damage to the building and damage to the laundry equipment, alleging, among other things, a "replacement cost" loss of $258,145 for the laundry equipment. Defendant paid plaintiff $371,801.50 for damage to the building under coverage A and, after calculating the actual cash value of plaintiff's loss with respect to the laundry equipment to be $60,723, paid plaintiff $50,000 under coverage B, the maximum amount available under the policy.

Plaintiff then commenced this action seeking, as is relevant here, a declaration that the damage to the laundry equipment was insured under coverage A, as part of the building, rather than coverage B, as part of the business, and, as such, defendant was required to pay the remainder of its claim for damages to the equipment. Following joinder of issue, plaintiff moved for summary judgment and, in response, defendant cross-moved for summary judgment dismissing the complaint. Supreme Court denied plaintiff's motion and granted defendant's cross motion after finding that the laundry equipment was insured by only coverage B of the policy. Plaintiff appeals.

As is relevant here, coverage A of the policy at issue insured plaintiff's "building," including "permanent fixtures, machinery and equipment forming a part of or pertaining to the services of the building or its premises." Coverage B of the policy insured plaintiff's "business property," including "furniture and fixtures . . . machinery and equipment not servicing the building . . . [and] all other business property owned by [plaintiff] and used in [plaintiff's] business." In support of its position that the laundry equipment was insured under coverage A, plaintiff submitted the affidavit of its owner, Theresa Tutino, who opined that because the laundry equipment was hard-wired into the utilities systems of the building, it was part of the "structural integrity of the laundry walls" and, therefore, that constituted fixtures forming a part of the building and pertained to the services of the building. In support of its position that the equipment was not insured under coverage

A, defendant presented expert evidence that the laundry equipment neither formed a part of the building nor pertained to the services of the building. Specifically, one of defendant's experts, a licensed independent insurance adjuster, averred that he had inspected the damage to the contents of the building and that, in his opinion, even though the laundry equipment was hard-wired into the utilities of the building, that fact did not render the equipment either part of the building or pertaining to the services of the building. The remainder of defendant's evidence supports the finding that the laundry equipment was property used by plaintiff solely in the business of the laundromat and was not used by plaintiff in its capacity as a landlord to service the second floor apartments. Inasmuch as plaintiff's self-serving and conclusory statements to the contrary are insufficient to defeat defendant's cross motion (*see Charter One Bank, FSB v. Leone*, 45 AD3d 958, 959 [2007]; *Rosen Auto Leasing, Inc. v. Jacobs*, 9 AD3d 798, 800 [2004]), we agree with Supreme Court that defendant was entitled to summary judgment dismissing the complaint.

Finally, we have considered plaintiff's argument that certain language of the insurance policy is ambiguous and find it to be without merit.

Lahtinen, J.P., Spain, Kavanagh and McCarthy, JJ., concur. Ordered that the order is affirmed, with costs.◆

Question Of Fact Defeats Motion In Canine Liability Case

Reil v. Chittenden, 2012 NY Slip Op 05058 [96 A.D.3d 1273]

Editor's Note: The following is the decision of the Supreme Court, Appellate Division, Third Department in the captioned case.

McCarthy, J., Appeal from an order of the Supreme Court (Lynch, J.), entered November 22, 2011 in Rensselaer County, which denied defendants' motion for summary judgment dismissing the complaint.

Plaintiff opened the door to defendants' house and called out to see if anyone was there. Defendants were not in the house, but five of their dogs who were inside rushed to the door. One dog bit plaintiff on the leg. Plaintiff struck the dog that was biting him, at which time the dog bit plaintiff's finger, partially amputating the fingertip. Plaintiff commenced this action to recover for his injuries. Defendants moved for summary judgment dismissing the complaint. Supreme Court denied the motion. Defendants appeal.

The complaint sufficiently pleaded a cause of action for strict liability. A person injured by a domestic animal may not recover from the owner through a traditional negligence cause of action, but may hold an owner strictly liable where the owner knows or had notice of the animal's vicious propensities (*see Petrone v. Fernandez*, 12 NY3d 546, 550 [2009];*Bard v. Jahnke*, 6 NY3d 592, 599 [2006]; *Gordon v. Davidson*, 87 AD3d 769, 769 [2011]). Although plaintiff cited "negligence" and or gross negligence as the basis of his complaint, we must construe pleadings liberally and ignore any defects that do not prejudice the substantial rights of any party (*see* CPLR 3026; *Kosowsky v. Willard Mtn., Inc.*, 90 AD3d 1127, 1128-1129 [2011]). The complaint alleged that plaintiff was bitten by a dog owned by defendants and that "defendants knew said dog to be ferocious, vicious, and accustomed to attack and bite humans." Thus, regardless of how plaintiff referred to his theory of recovery, he sufficiently stated a cause of action to recover for injuries related to the dog bites (*see* CPLR 3013).

Defendants submitted veterinarian records and their own deposition testimony showing that they had owned the border collie named Drake for nine years, he had never bitten anyone or acted aggressively and no one had informed them that Drake ever acted aggressively. Drake had passed a canine good citizen test, meeting 10 separate criteria. Defendants also submitted plaintiff's deposition testimony where he stated that he had previously noted defendants' dogs to be friendly and had never found them to be aggressive. Thus, defendants met their burden of establishing a lack of knowledge of vicious propensities, thereby shifting the burden to plaintiff (*see Illian v. Butler*, 66 AD3d 1312, 1313 [2009]; *Brooks v. Parshall*, 25 AD3d 853, 854 [2006]).

In response, plaintiff pointed to the portion of his deposition testimony where he recounted a statement made by defendant Kathy Chittenden while she drove plaintiff to the hospital following the incident. Plaintiff testified that Chittenden said, without having gone into her house or seeing the dogs, "I know the dog that did it, it was Drake." Chittenden testified at her deposition that she "did not know for sure which dog it was until [she] got home," implying that she thought or suspected which dog it was before getting home. Upon returning home, she noticed that Drake's nose was split open. According to defendants, this nose injury caused them to believe that Drake was the dog that had bitten plaintiff, consistent with plaintiff's assertion that he struck the biting dog. Chittenden testified that she may have identified Drake because he was their oldest dog and had lived in the house the longest, implying that he would be most protective of the house. Despite this attempted explanation, Chittenden's statement identifying Drake as the biter before observing his nose injury raises a factual question as to why she made that identification and whether it was based on knowledge of any vicious propensities on Drake's behalf (*see Morse v. Colombo*, 8 AD3d 808, 809 [2004]). Her explanation creates a credibility question that a jury should resolve. Viewing the evidence in a light most favorable to plaintiff, Supreme Court properly denied defendants' motion for summary judgment.

Spain, J.P., Kavanagh, Stein and Egan Jr., JJ., concur. Ordered that the order is affirmed, with costs.◆

Meaning Of Residency Determines Motion Outcome

Neary v. Tower Ins., 2012 NY Slip Op 02471 [94 A.D.3d 725]

Editor's Note: The following is the decision of the Supreme Court, Appellate Division, Second Department in the captioned case.

In an action, inter alia, to recover damages for breach of an insurance contract, the defendant Tower Insurance appeals, as limited by its notice of appeal and brief, from so much of an order of the Supreme Court, Kings County (F. Rivera, J.), dated September 30, 2010, as denied that branch of its cross motion which was for summary judgment dismissing the complaint insofar as asserted against it.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the cross motion of the defendant Tower Insurance which was for summary judgment dismissing the complaint insofar as asserted against it is granted.

Raymond H. Neary, Sr., and Janet T. Neary (hereinafter together the Nearys) owned a residence in Brooklyn (hereinafter the premises), which they insured under a homeowners' policy (hereinafter the policy) with the defendant Tower Insurance (hereinafter Tower). The policy provided coverage only for premises where the Nearys, as the insureds, resided. On January 18, 2005, the premises were damaged in a fire. Tower disclaimed coverage on the ground that the Nearys did not reside at the premises at the time of the loss.

The Nearys commenced this action, inter alia, to recover damages from Tower for breach of the insurance contract. Subsequently, the Nearys died, and their daughter, Kathleen Neary (hereinafter the plaintiff), was substituted as executrix of their

estates.

The Supreme Court erred in denying that branch of Tower's cross motion which was for summary judgment dismissing the complaint insofar as asserted against it. "The standard for determining residency for purposes of insurance coverage requires something more than temporary or physical presence and requires at least some degree of permanence and intention to remain" (*Vela v. Tower Ins. Co. of N.Y.*, 83 AD3d 1050, 1051, 921 N.Y.S.2d 325, quoting *Government Empls. Ins. Co. v. Paolicelli*, 303 AD2d 633, 633, 756 N.Y.S.2d 653 [internal quotation marks omitted]; *see Matter of Allstate Ins. Co. [Rapp]*, 7 AD3d 302, 303, 776 N.Y.S.2d 285; *New York Cent. Mut. Fire Ins. Co. v. Kowalski*, 195 AD2d 940, 941, 600 N.Y.S.2d 977). Mere intention to reside at certain premises is not sufficient (*see Vela v. Tower Ins. Co. of N.Y.*, 83 AD3d at 1051).

Tower established its prima face entitlement to judgment as a matter of law by demonstrating that the Nearys did not reside at the subject premises when the fire occurred (*id.*). In opposition, the plaintiff failed to raise a triable issue of fact. Contrary to her contention, the term "reside" or "residence" is not ambiguous (*id.; see Marshall v. Tower Ins. Co. of N.Y.*, 44 AD3d 1014, 1015, 845 N.Y.S.2d 90), and, therefore, must be accorded its plain and ordinary meaning (*see Vela v. Tower Ins. Co. of N.Y.*, 83 AD3d at 1051). Rivera, J.P., Dickerson, Chambers and Austin, JJ., concur. **[Prior Case History: 29 Misc.3d 1205(A), 2010 NY Slip Op 51700(U).]**◆

Forms Update

Recently Approved:

- ML-117 Ed. 5/12
Business Definition Clarification

- ML-122 Ed. 5/12
Birds, Vermin, Rodents, Insects, Raccoons, Skunks or Domestic Animals Exclusion
(For Use with ML-3 and ML-3T)

- ML-123 Ed. 5/12
Birds, Vermin, Rodents, Insects, Raccoons, Skunks or Domestic Animals Exclusion
(For Use with ML-5 and ML-5T)

Court Reviews Insurable Interest

Gilbert v. Allstate Ins. Co., 2012 NY Slip Op 03807 [95 A.D.3d 1072]

Editor's Note: The following is the decision of the Supreme Court, Appellate Division, Second Department in the captioned case.

In an action to recover additional proceeds of a fire insurance policy, the plaintiff appeals from an order of the Supreme Court, Orange County (Slobod, J.), dated May 12, 2011, which denied his motion for summary judgment on the issue of liability and granted the defendant's cross motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed, with costs.

The plaintiff owned property as a tenant in common with a business partner, Alice Gardner, who is not a party to this action. In 1996 the plaintiff procured a policy of fire insurance on the property from the defendant solely in his own name. On October 2, 2009, the premises were destroyed by a fire.

The defendant paid the plaintiff one-half of the value of the property on the ground that the plaintiff had only a one-half insurable interest in the property. The plaintiff, arguing that a tenant-in-common has an undivided right to the full use, enjoyment, and possession of the entire property (*see Butler v. Rafferty*, 100 NY2d 265, 269 [2003]), brought this action to recover the full value of the destroyed premises. The Supreme Court denied the plaintiff's motion for summary judgment on the issue of liability and granted the defendant's cross motion for summary judgment dismissing the complaint. We affirm.

Insurance Law § 3401 limits a contract or policy of insurance to the insured's "insurable interest." When two cotenants own real property which is damaged by a fire and insurance is procured in the name of only one cotenant,* recovery under the policy is limited to the insured cotenant's one-half interest in the real property (*see Graziane v. National Sur. Corp.*, 120 AD2d 773, 775 [1986]; *Krupp v. Aetna Life & Cas. Co.*, 103 AD2d 252 [1984]).

The plaintiff's remaining contentions are without merit. Florio, J.P., Balkin, Lott and Miller, JJ., concur.◆

***Editor's Note**: Spelling is in original.

From Pennsylvania

Asbestos Evidence Admissibility Examined

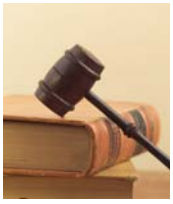
Betz v. Pneumo Abex, LLC, 44 A.3d 27, 2012 Pa. LEXIS 1208

The civil action underlying this appeal was selected as a test case for the admissibility of expert opinion evidence to the effect that each and every fiber of inhaled asbestos is a substantial contributing factor to any asbestos-related disease.

The Pennsylvania Supreme Court examined whether it was appropriate to sustain a *Frye* challenge. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) provides a legal threshold to determine the admissibility of scientific evidence.

The Pennsylvania Supreme Court upheld the grant of a *Frye* motion that unanimously rejected the expert testimony based on the theory that any exposure, no matter how small, contributed to the disease. Justice Saylor opined, "Simply put, one cannot simultaneously maintain that a single fiber among millions is substantially causative, while also conceding that a disease is dose responsive." *Betz v. Pneumo Abex LLC*, 44 A.3d 27, 2012 Pa. LEXIS 1208.

This came about as a result of a 2005 lawsuit against Ford Motor Company, Allied Signal, and others, in which a retired auto worker filed a lawsuit alleging he developed mesothelioma because he was repeatedly exposed to asbestos during his 44 years of working on brake linings. After plaintiff died, his wife took over the case.



This was one of a number of similar cases against the same defendants who expected it would be argued by this plaintiff and others that every single asbestos exposure, no matter how small, contributed to their asbestos-related disease These defendants filed a global motion that would apply to the cases. These companies argued that the theory was not scientifically valid.

The trial court agreed with the defense. The Superior Court reversed to find that the theory was admissible. The Supreme Court reversed the decision of the Superior Court. ◆

From DFS

Circular Letter No. 14 (2011)

Editor's Note: The text of Circular Letter No. 14 issued by the DFS follows, which is printed due to the recent emphasis on ERM.

TO: All Domestic Insurers and Public Health Law Article 44 Health Maintenance Organizations ("HMOs") (Collectively, "Insurers")

RE: Enterprise Risk Management

STATUTORY REFERENCE: N.Y. Ins. Law §§ 201, 301, 310, 1115, Articles 13 and 14.

Summary

Given the importance of risk management, the Department of Financial Services ("Department") expects every insurer to adopt a formal Enterprise Risk Management ("ERM") function. An effective ERM function should identify, measure, aggregate, and manage risk exposures within predetermined tolerance levels, across all activities of the enterprise of which the insurer is part, or at the company level when the insurer is a stand alone entity.

Discussion

The Department encourages all insurers to effectively manage enterprise risk. As used in this Circular Letter, enterprise risk means any activity, circumstance, event or series of events involving one or more affiliates of an insurer that, if not remedied promptly, is likely to have a material adverse effect upon the financial condition or liquidity of the insurer or its insurance holding company system as a whole.

The ERM function should be appropriate for the nature, scale, and complexity of those risks. Further, the Department recognizes that a dedicated ERM function may be impractical or too costly for small insurers.

The Department views ERM as a key component of the risk-focused surveillance process. An insurer that maintains an effective ERM function upon which examination teams may rely will assist the Department with performing a more efficient examination.

The Department recently has established evaluation criteria to assess an insurer's ERM practices. Specifically, the Department has implemented a process of evaluating an insurer's ability to identify, measure, aggregate, and manage risk exposures within predetermined guidelines across all activities. The Department expects to perform the evaluation in conjunction with the statutory examination, but may also conduct the evaluation as a stand-alone exercise. The evaluation includes obtaining an understanding of the ERM function through interviews, questionnaires, and other documentation to be supplied by the insurer. The Department will also substantiate and validate key components of the insurer's ERM function.

The insurers that the Department selects for an ERM evaluation will receive advance notice. If the Department intends to conduct the ERM evaluation in conjunction with the statutory examination, the Department will distribute a request for information with the standard pre-exam planning materials sent to the insurer prior to the examination. The Department will incorporate the results of the ERM evaluation into the standard exam process to enhance the risk-focused surveillance process.

When conducting an ERM evaluation, the Department will look for adherence to the following ERM function objectives:

- An objective ERM function, headed by an appropriately experienced individual with the requisite authority and access to the board of directors and senior management, that is adequately resourced and has competent personnel who are able to provide the insurer's board of directors and management with ongoing assessments of the insurer's risk profile.
- A written risk policy that delineates the insurer's risk/reward framework, risk tolerance levels, and risk limits. An insurer's ERM function should provide for the identification and quantification of risk under a sufficiently wide range of outcomes using techniques that are appropriate to the nature, scale, and complexity of the risks the insurer bears and are adequate for capital management and solvency purposes.
- A process of risk identification and quantification supported by documentation providing appropriately detailed descriptions and explanations of risks identified, the measurement approaches used, key assumptions made, and outcomes of any plausible adverse scenarios that were run. Prospective solvency assessments, including scenario and stress testing, should be a key component of the ERM function, as they can help highlight the impact of such scenarios and stresses on an insurer's future solvency. The insurer's ERM function should incorporate risk tolerance levels and limits in the policies and procedures, business strategy, and day-to-day strategic decision-making processes.

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Enterprise Risk Managment

- In the context of its overall ERM framework, an insurer should consider a risk and capital management process to monitor the level of its financial resources relative to its economic capital and the regulatory capital requirements. Additionally, an effective ERM function should incorporate investment policy, asset-liability management policy, effective controls on internal models, longer-term continuity analysis, and feedback loops to update and improve ERM continuously.

- An insurer should address as part of its ERM all reasonably foreseeable and relevant material risks including, as applicable: insurance; underwriting; asset-liability matching; credit; market; operational; reputational; liquidity; and any other significant risks associated with group membership. The assessment should include identifying the relationship between risk management and the level and quality of financial resources necessary as determined with quantitative and qualitative metrics.

- Additionally, an insurer's board of directors and senior management should contemplate having the insurer perform its own risk and solvency assessment ("ORSA") as part of the ERM function to assess the adequacy of its risk management and current and future solvency position. Insurers should keep current with NAIC developments with regard to reporting on their ORSA. The ability of an insurer to reflect risks in a robust manner in its own assessment of risk and solvency is a key component of an effective overall ERM function. Insurers should consider the guidance provided in the ORSA Guidance Manual when conducting their ORSA. An insurer should perform their ORSA on a regular basis and should share the results of the assessment with senior management and its board of directors.

- If an insurer is part of a holding company, consolidated enterprise, conglomerate, or other group characterized by common control or management, then the insurer's ERM function should identify, quantify, and manage any risks to which the insurer may be exposed by transactions, or affiliation, with the holding company or the other affiliates within the group. That is, the insurer should assess and identify methods to manage the impact of affiliated entities or the holding company on the insurer. If systems to perform these functions are located at the common control and management level (e.g., holding company), then the insurer should be able to demonstrate how those systems anticipate and mitigate or manage the risks to which affiliates expose the insurer. This demonstration should include not only those risks that may result in direct financial loss to the insurer through transactional or common control ties, but also reputational and other risks where the loss of confidence in one member of the group may cause distress to the insurance company.

An insurer that believes that any of the records it submits to the Department in connection with its ERM contain "trade secrets . . . or if disclosed would cause substantial injury to the competitive position of the subject enterprise" may request, pursuant to New York Public Officers Law § 87(2)(d), that the Department except such documents from disclosure pursuant to Public Officers Law § 89(5)(a)(1). Should the Department receive a request for records for which an insurer requested an exception from disclosure, the Department will notify the insurer and provide the insurer with an opportunity to respond in accordance with Article 6 of the Public Officers Law.

Conclusion

The Department views ERM as a key component of the risk-focused surveillance process, and expects every insurer to adopt a formal ERM function that identifies, measures, aggregates, and manages risk exposures within predetermined tolerance levels, across all activities of the enterprise of which the insurer is part, or at the company level when the insurer is a stand alone entity.

Please direct any questions or comments regarding this circular letter to Tim Nauheimer, Chief Risk Management Specialist, Markets Division, at (212) 709-1538 or timothy.nauheimer@dfs.ny.gov.◆

Circular Letters, Opinions of Counsel and other resources are available on the DFS website at:

www.dfs.ny.gov

Flood Insurance Program Reauthorization Is Now Law

In late June, Congress passed the Biggert-Waters Flood Insurance Reform and Modernization Act of 2012, as part of a Conference Report Package along with the Surface Transportation Act of 2012, and an extension of the Federal Direct Stafford Student Loan Program. President Obama has signed the legislation that reauthorizes the National Flood Insurance Program (NFIP) until September 30, 2017. This five year extension also contains reforms to the program.◆

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Around The Country

New Jersey—A judge in New Jersey has ruled that a lawsuit against the Newark School District arising from the 2007 murders of three college-bound students in the schoolyard may proceed. It is alleged by the victims' families that the school district created a dangerous condition by leaving the schoolyard gates open even though it knew cameras and sensor lights were not working at the time.

Connecticut—A ski area in New Hartford, Connecticut is not liable for an accident in 2006 that paralyzed a 15-year old boy, according to a ruling by the state appellate court. The skier suffered spinal injuries at the ski area after getting off a ski jump, and is now a quadriplegic. The skier accused the ski area of negligence in building and maintaining the snow jump. The trial court jury found that the skier assumed the risk of his injury. The skier argued on appeal that the trial court judge gave the jury flawed instructions.

Florida— The Florida Supreme Court recently ruled that the failure to strictly follow the requirements for providing policyholders with information about the hurricane deductible does not mean the deductible is unenforceable. The court ruled it was not the legislature's intent to penalize insurer's for failing to strictly follow the disclosure's requirements and since there is no legislative penalty for failure to do so, a policyholder cannot bring suit against the insurer. ◆