APPENDICES

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

No. 96

AMERICAN ECONOMY INSURANCE COMPANY ET AL.,
Respondents,

v.

STATE OF NEW YORK ET AL.,
Appellants.

Argued September 7, 2017
Decided October 24, 2017
[30 N.Y.3d 136]

OPINION OF THE COURT

Fahey, J.

Workers' compensation insurance is a heavily regulated area of the law. Any modification almost always has a prospective impact and can sometimes have a retroactive impact on the parties to the insurance coverage contract. At issue here is the New York State Legislature's 2013 amendment to Workers' Compensation Law § 25-a.

We conclude that, assuming the amendment has a retroactive impact by imposing unfunded costs upon plaintiffs for policies finalized before the amendment's effective date, that retroactive impact is constitutionally permissible.

I.

Plaintiffs are approximately 20 insurance companies that write workers' compensation insurance policies in New York. They challenge the legislature's 2013 amendment to Workers' Compensation Law § 25-a, which closed the Special Fund for Reopened Cases (the Fund) to new applications after January 1, 2014.

A. The Fund's Background

The Fund was established in 1933. Its original purpose was to ensure that injured workers with "closed" cases that unexpectedly "reopened" after many years due to, for example, "a recurrence of malady, a progress in disease not anticipated, or a pathological development not previously prognosticated" (*Matter of Ryan v American Bridge Co.*, 243 App Div 496, 498 [3d Dept 1935], *affd* 268 NY 502 [1935]), would continue to receive necessary benefits, even if the insurance carrier had become insolvent. The Fund was also created to protect insurance carriers and employers from uncertain future liability costs they might incur in these "stale" cases (*see id.* at 498-499).

The Fund was initially financed with a one-time assessment on insurance carriers, but that funding eventually became inadequate, and in 1948 the legislature authorized the Workers' Compensation Board (the Board) to impose annual assessments on carriers to maintain the Fund. The carriers were permitted to pass those assessments on to their insureds through policyholder surcharges. The cost of the Fund was therefore ultimately borne by New York employers, not insurance carriers.

Before the Fund's closure in 2014, benefits on a reopened case would be paid by the Fund under the fol-

lowing conditions. First, the case must have been previously "closed" either formally or informally, i.e., "no further proceedings were foreseen" (*Matter of Casey v Hinkle Iron Works*, 299 NY 382, 385 [1949]; *see Matter of Riley v Aircraft Prods. Mfg. Corp.*, 40 NY2d 366, 370 [1976]). Second, the case must have reopened, which often occurred due to an unanticipated change in the claimant's medical condition. Third, a minimum of seven years must have elapsed from the date of injury. Finally, three years must have elapsed from the date of the last payment of compensation (*see* former Workers' Compensation Law § 25-a [1]).[1] Neither the Fund nor any carrier or self-insured employer was required to pay benefits on a claim if both 18 years had elapsed from the date of injury or death and eight years had elapsed from the last payment of compensation (*see* Workers' Compensation Law §§ 25-a [6]; 123).

Whether those requirements were met in any particular case was often the subject of litigation. For example, the Appellate Division, Third Department decided cases regarding when the "last payment of compensation" was made (*see e.g. Matter of Nicpon v Zelasko Constr., Inc.*, 120 AD3d 66, 67-68 [3d Dept 2014]), and whether additional payment to the claimant constituted "deficiency compensation" that rendered a case ineligible for assignment to the Fund (*see e.g. Matter of Marshall v Roth Bros. Smelting Corp.*, 55 AD3d 1189, 1190-1191 [3d Dept 2008], *lv denied* 12 NY3d 702 [2009]). In that regard, one of the most litigated issues

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[1] Different provisions applied where death resulted from the injury, where the initial claim for compensation had been disallowed, or where the claim had "been otherwise disposed of without an award of compensation" (*see* former Workers' Compensation Law § 25-a [1]).

was whether a case had previously been "truly closed," or whether further proceedings were contemplated (*see e.g. Matter of Palazzolo v Dutchess County*, 132 AD3d 1053, 1054-1055 [3d Dept 2015]; *Matter of Bates v Finger Lakes Truck Rental*, 41 AD3d 957, 959-960 [3d Dept 2007]; *Matter of Washburn v Bob Hooey Constr. Co.*, 39 AD3d 956, 957-958 [3d Dept 2007]). Whether the case was truly closed was a factual determination for the Board to make under the circumstances of each particular case (*see Matter of Reddien v Joseph Davis Inc.*, 136 AD3d 1144, 1145 [3d Dept 2016]). Any party aggrieved by the decision of the workers' compensation law judge had avenues for administrative review and appeal (*see generally* Workers' Compensation Law § 23).

Transfer of any particular case to the Fund was therefore often a speculative matter based on uncertain future events, and subject to litigation. Once it had been determined that all requirements for transfer to the Fund were met, however, transfer was mandatory, not discretionary (*see* former Workers' Compensation Law § 25-a [1]; *Matter of De Mayo v Rensselaer Polytech Inst.*, 74 NY2d 459, 462-463 [1989]).

B. Closure of the Fund

The parties dispute the circumstances precipitating the legislature's decision to close the Fund. Defendants point to the Fund's drastically increased costs after 2006. They attribute these rising costs to the carriers' practice of increasingly pushing claims to the Fund, including by engaging in "indemnity-only" settlements that allowed carriers to apply for transfer of anticipated future medical costs to the Fund. Defendants also

note that the closure of the Special Disability Fund[2] in 2007 may have inadvertently provided carriers with an increased incentive to transfer claims to the Fund. Plaintiffs dispute this. They assert that medical costs in general rose significantly over the same time period, and that they had no incentive to engage in indemnity-only settlements in order to transfer medical costs to the Fund.

Whatever the reason, it is undisputed that the Fund's costs had increased dramatically before 2013. Plaintiffs noted in their complaint that there had been "a surge in reopened cases in recent years." Defendants assert that the annual assessment required to maintain the Fund was approximately $95 million in 2006, but that number had increased to over $300 million by the end of 2012.

Against this backdrop, in 2013, the legislature decided to close the Fund to new applications. The amendment was included in the Budget Reconciliation Act of 2013, as part of several reforms to the Workers' Compensation Law included in the "Business Relief Bill" (L 2013, ch 57, § 1, part GG, § 13 [eff Mar. 29, 2013]). The bill amended Workers' Compensation Law § 25-a to add subdivision (1-a), which provided that "[n]o application by a self-insured employer or an insurance carrier for transfer of liability of a claim to the fund for reopened cases shall be accepted by the board on or after the first day of January, two thousand four-

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[2] The Special Disability Fund had reimbursed carriers and self-insured employers, under certain specified conditions, for benefits paid to a claimant with a preexisting impairment due to an injury suffered during previous employment (*see generally* Martin Minkowitz, New York Workers' Compensation §§ 9:1-9:5 at 424-430 [2d ed 27 West's NY Prac Series 2011]).

teen" (L 2013, ch 57, § 1, part GG, § 13). Essentially, the legislature closed the Fund to new applications after January 1, 2014, providing an approximately nine-month grace period during which the Board would consider new applications (*see id.*). The Fund remains open to administer reopened cases previously assigned to the Fund.

The memorandum in support of that portion of the bill concerning the Fund's closure stated:

> "Closing the Fund would save New York businesses hundreds of millions of dollars in assessments per year. The Fund provides payments directly to claimants and health providers when the claimant's case is reopened under certain circumstances. The original intent of the Fund was to provide carriers relief in a small number of cases where liability unexpectedly arises after a case has been closed for many years. However, carriers do not need this relief because the premiums they have charged already cover this liability. This reform prevents a windfall for such carriers" (Mem in Support, 2013-2014 NY St Executive Budget, Public Protection and General Government Article VII Legislation at 29, available at https://www.budget.ny.gov/pubs/archive/fy1314archive/eBudget1314/fy1314artVIIbills/PPGG_ArticleVII_MS.pdf [last accessed Oct. 5, 2017], cached at http://www.nycourts.gov/reporter/webdocs/PPGG_Article_VIIMS.pdf).

Workers' compensation insurance policies are occurrence-based, meaning that each policy provides coverage for any claims arising from an accident occurring during that policy year, regardless of when the claim is

made. As such, the premium charged in each policy year is calculated to be sufficient to cover all of the carrier's liability arising from any accidents occurring during that policy year, including liability that might arise years after an injury occurred (*see generally* Minkowitz, New York Workers' Compensation § 18:11 at 776).

Premiums charged by carriers to their insureds are generally a function of two factors: "loss costs," representing losses carriers are likely to incur under their policies, and "loss-cost multipliers," representing each individual carrier's profit and expense structure. In New York, the New York Compensation Insurance Rating Board (NYCIRB)—a nonprofit association of insurance carriers—is responsible for calculating loss costs used by carriers in setting premiums. NYCIRB makes an annual recommendation to the Department of Financial Services (DFS) regarding whether loss cost levels should be adjusted for the upcoming policy year. Carriers may deviate from the DFS-approved rates only with DFS's permission.

Before the closure of the Fund, NYCIRB did not include in its loss cost calculations any costs carriers would incur on claims that would qualify for assignment to the Fund. Plaintiffs therefore allege that the premiums they charged for policies written before October 2013[3] did not include such costs. Plaintiffs further allege that, before 2013, their loss reserves did not account for any liability they might incur on reopened

[3] Plaintiffs assert that although the amendment was effective in March 2013, its alleged retroactive impact encompasses all policies issued before October 2013, when a DFS-approved rate increase took effect (*see American Economy Ins. Co. v State of New York*, 139 AD3d 138, 141-142 [1st Dept 2016]).

cases that would qualify for administration by the Fund.

NYCIRB acknowledged in 2013 that the closure of the Fund would result in "unfunded liability" for workers' compensation carriers. NYCIRB explained:

> "The unfunded liability results from claims on current and past policies which were closed, may be reopened in the future, and would have been subject to the provisions of Section 25-A. For example, a policy from 2007 could have had a claim that is now closed, and the last payment on which was in 2012. If this claim reopens in, for example, 2016, it could have been deferred to the Reopened Case Fund, but since the bill provides for the Fund's closure, this claim would remain the responsibility of the carrier. However, the premium charged for this policy did not incorporate that possibility, and assumed such costs would be borne by the Fund. Therefore, there is an unfunded liability which will have to be paid by the carriers (i.e. a retrospective cost impact)" (NYCIRB, Analysis of Proposed Bills to Reform the Workers Compensation System, Mar. 14, 2013, at 2, available at http://nycirb.net/2007/depts/actuary/S2605c.pdf [last accessed Oct. 5, 2017], cached at http://www.nycourts.gov/reporter/webdocs/S2605c.pdf).

NYCIRB estimated that carriers would incur collective unfunded liability of between $1.1 and $1.6 billion (*id.* at 3). Plaintiffs allege that their own share of this unfunded liability is approximately $62 million. Both parties assert that the carriers technically cannot recoup these costs by charging higher premiums in fu-

ture policy years because, as an actuarial matter, the ratemaking process is entirely prospective. Plaintiffs further note that in July 2013, DFS approved NYCIRB's recommended 4.5% increase in loss costs on future policies to account for the Fund's closure. Plaintiffs assert that this increase constitutes an acknowledgment that premiums charged before 2013 did not account for the costs of reopened cases that would have been assigned to the Fund.

C. The Present Litigation

Plaintiffs commenced the present declaratory judgment action in Supreme Court in July 2013. They alleged that the legislature's amendment to section 25-a operated retroactively to the extent that it imposed unfunded liability upon plaintiffs in connection with future reopened claims made on policies finalized before the amendment's effective date. Plaintiffs contended that this retroactive impact violated the Contract Clause of the Federal Constitution and the Takings and Due Process Clauses of the Federal and State Constitutions. Defendants thereafter moved to dismiss the complaint, and plaintiffs cross-moved for summary judgment.

Supreme Court granted defendants' motion to dismiss the complaint. The court concluded that the legislative amendment to section 25-a operated prospectively, inasmuch as it closed the Fund only to new applications, and only after a nine-month grace period. The court further rejected plaintiffs' constitutional challenges to the amendment.

The Appellate Division reversed and entered a judgment declaring Workers' Compensation Law § 25-a (1-a) unconstitutional "as retroactively applied to policies issued before October 1, 2013" (*American Economy Ins. Co. v State of New York*, 139 AD3d 138, 147

[1st Dept 2016]). The Court concluded that the statutory amendment operated retroactively to the extent that it imposed unfunded liability on plaintiffs "for reopened cases arising from accidents occurring before October 1, 2013 that would have otherwise qualified for transfer under Workers' Compensation Law § 25-a" (*id.* at 143). The Appellate Division reasoned that "the closure of the Fund here, by ending plaintiffs' right to transfer eligible cases to the Fund, retroactively deprived them of the entirety of the benefit of this right and created a new class of unfunded liability" (*id.* at 145). The Court further concluded that "the record fails to reflect that the legislature amended the statute with an understanding of the impact it would have on policies issued before October 1, 2013" (*id.*).

With respect to plaintiffs' constitutional claims, the Appellate Division concluded that the amendment, "as applied retroactively, violates the Contract Clause of the US Constitution because it retroactively impairs an existing contractual obligation to provide insurance coverage '[w]here … the insurer does not have the right to terminate the policy or change the premium rate' " (*id.* at 145-146, quoting *Health Ins. Assn. of Am. v Harnett*, 44 NY2d 302, 313 [1978]). The Court rejected defendants' arguments that the legislation was reasonable and necessary to serve a legitimate public purpose, concluding that the "the legislation's stated purpose of preventing a windfall to insurance carriers was based upon the erroneous premise that premiums already cover this new liability" (*id.* at 146). Finally, the Appellate Division concluded that "[r]etroactive application would also constitute a regulatory taking in violation of the Takings Clause" (*id.*). The Court did not address plaintiffs' due process arguments.

Defendants appealed to this Court as of right pursuant to CPLR 5601 (b) (1). We now reverse.

II.

Defendants first contend that the Fund's closure had only prospective effect, inasmuch as the Fund was closed only to new applications after a nine-month grace period. Defendants therefore argue that the closure altered only plaintiffs' future costs with respect to cases that might reopen at some uncertain future date. Plaintiffs respond that the Appellate Division correctly held that the amendment operated retroactively by imposing " 'new legal consequences to [a relationship] completed before its enactment' " (*American Economy*, 139 AD3d at 143, quoting *Eastern Enterprises v Apfel*, 524 US 498, 532 [1998]).

Both parties rely on the definition of retroactivity contained in *Landgraf v USI Film Products* (511 US 244 [1994]). In that case, the Supreme Court observed that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, … or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment" (*id.* at 269-270). The Court explained that "[e]ven uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct," and that "a statute is not made retroactive merely because it draws upon antecedent facts for its operation" (*id.* at 269-270 n 24 [internal quotation marks omitted]). A statute has "retroactive effect," however, if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new du-

ties with respect to transactions already completed" (*id.* at 280).

We have previously confronted the issue of alleged retroactive impact of amendments to the Workers' Compensation Law. Recently, in *Matter of Raynor v Landmark Chrysler* (18 NY3d 48 [2011]), we noted that "[t]he fact that [an] award may relate to an injury that occurred prior to the enactment of the statute does not render it retroactive" (*id.* at 57). As the Appellate Division observed, however (*see American Economy*, 139 AD3d at 143-144), *Raynor* concerned a legislative amendment that altered only the time and manner of workers' compensation insurance carriers' payments for specified awards, including awards pertaining to injuries that occurred before the law's effective date, and not the amount of those payments (*see Raynor*, 18 NY3d at 57).

In *Becker v Huss Co.* (43 NY2d 527 [1978]), we concluded that an amendment to the Workers' Compensation Law requiring carriers to contribute to a claimant's litigation costs in a third-party action, even with respect to litigation regarding an injury occurring before the law's effective date, might have some retroactive impact on carriers. We recognized that the law "saddl[ed carriers] with financial obligations not contemplated when prior insurance premiums had been computed" (*id.* at 540). We acknowledged the difficulty, however, of defining that retroactive impact, stating that "the amendment neither created a new right nor impaired an existing one, although the reallocation might be characterized verbally either way," and we characterized any "right" the carriers possessed as "inchoate" (*id.* at 542). We noted that, viewing the workers' compensation system broadly, "[t]he allocation of economic benefits and burdens has always been subject

to adjustment" (*id.* at 541). That system "designedly, has flexibility, much greater than that found in the more traditional forms of law. Thus, it is not unusual that carriers or employers have had their burdens shifted or increased with relation to past industrial accidents" (*id.*). We concluded that the legislative amendment should apply to any judgment or settlement entered after the effective date of the legislation, "even if the injury occurred or the third-party action was brought before that date" (*id.* at 542).

Similar to the claim of the carriers in *Becker* that they had been "saddl [ed] … with financial obligations not contemplated when prior insurance premiums had been computed" (*id.* at 540), plaintiffs contend that the 2013 amendment to section 25-a operates retroactively by imposing upon them additional, unfunded costs that were not contemplated by premiums they charged in past policy years, which premiums were approved by the state. Whether this alleged retroactive application of the amendment "attaches new *legal* consequences to events completed before its enactment" (*Landgraf*, 511 US at 270 [emphasis added]) is debatable. Nevertheless, even assuming arguendo that the amendment has retroactive impact to the extent it imposes unfunded liability costs upon plaintiffs under policies finalized before the amendment's effective date, we conclude that this retroactive impact is constitutionally permissible.

III.

As the Supreme Court has stated, "the constitutional impediments to retroactive civil legislation are now modest" (*Landgraf*, 511 US at 272 [emphasis omitted]). "Absent a violation" of a specific constitutional provision, "the potential unfairness of retroactive civil

legislation is not a sufficient reason for a court to fail to give a statute its intended scope" (*id.* at 267).

Moreover, " '[i]t is well settled that acts of the Legislature are entitled to a strong presumption of constitutionality' " (*Matter of County of Chemung v Shah*, 28 NY3d 244, 262 [2016], quoting *Cohen v Cuomo*, 19 NY3d 196, 201 [2012]; *see Farrington v Pinckney*, 1 NY2d 74, 78 [1956]). Plaintiffs bear the ultimate burden of overcoming that presumption by demonstrating the amendment's constitutional invalidity beyond a reasonable doubt (*see County of Chemung*, 28 NY3d at 262; *Overstock.com, Inc. v New York State Dept. of Taxation & Fin.*, 20 NY3d 586, 593 [2013], *cert denied* 571 US —, 134 S Ct 682 [2013]; *LaValle v Hayden*, 98 NY2d 155, 161 [2002]; *Cook v City of Binghamton*, 48 NY2d 323, 330 [1979]). Even treating all allegations in the complaint as true and affording plaintiffs every possible favorable inference, as we must on defendants' motion to dismiss (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we conclude that the amendment is constitutional.

A. Contract Clause

The Contract Clause of the US Constitution "prohibits states from enacting '[l]aw[s] impairing the Obligation of Contracts' " (*Raynor*, 18 NY3d at 58, quoting US Const, art I, § 10 [1]). "The Supreme Court has repeatedly held that this language should not be read literally and that the States retain the power 'to safeguard the vital interests of [their] people' " (*19th St. Assoc. v State of New York*, 79 NY2d 434, 442 [1992], quoting *Home Building & Loan Assn. v Blaisdell*, 290 US 398, 434 [1934]). " 'The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship' " (*id.*, quoting

Energy Reserves Group, Inc. v Kansas Power & Light Co., 459 US 400, 411 [1983]). "In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past" (*Energy Reserves Group*, 459 US at 411). As the Supreme Court "long ago observed: 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them' " (*id.*, quoting *Hudson County Water Co. v McCarter*, 209 US 349, 357 [1908]).

Before determining whether there has been a *substantial* impairment of a contractual relationship, however, we must determine whether there has been *any* impairment of a contractual relationship. Stated another way, the initial inquiry contains "three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial" (*General Motors Corp. v Romein*, 503 US 181, 186 [1992]).

There is no dispute that plaintiffs have a contractual relationship with their insureds in the form of their insurance policies. We conclude, however, that the legislative amendment at issue does not impair that contractual relationship.

We note that, unlike the obvious contractual relationship between plaintiffs and *their insureds*, there is no contract establishing a legal relationship between plaintiffs and the Fund in the record before us. In fact, there is no contract in the record before us whatsoever. Plaintiffs have provided us with a document they refer to as their New York form insurance policy, which they assert contains the relevant contractual terms for pre-

2013 policy periods.[4] This document does not mention the Fund. It does not guarantee plaintiffs the right to transfer reopened cases to the Fund, nor could it bind the Fund to continue to administer those claims. It does not condition plaintiffs' obligation to pay benefits required by the Workers' Compensation Law on the Fund's continuing existence or acceptance of applications to transfer liability costs on reopened cases to the Fund. The closure of the Fund therefore does not impair any term of plaintiffs' contracts with their insureds.

Plaintiffs nevertheless assert that liability for section 25-a claims was excluded from the scope of the policies' coverage. They point to language in the document stating that plaintiffs will pay "promptly when due the benefits required of [the employer-insured] by the Workers' Compensation Law," and defining the Workers' Compensation Law to "include[ ] any amendments to that law which are in effect during the policy period." According to plaintiffs, this language

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[4] The document in the record is entitled "Workers Compensation and Employers Liability Insurance Policy Quick Reference." A disclaimer on that document prominently states: "This Quick Reference is not part of the Workers Compensation and Employers Liability Policy and does not provide coverage. Refer to the Workers Compensation and Employers Liability Policy itself for actual contractual provisions." Thus, the document plaintiffs have provided us is not their contract with their insureds and does not even purport to include that contract's provisions. Nevertheless, plaintiffs ask us to declare that a statute unconstitutionally impairs a contract they have not put before us, and they assert that the Quick Reference contains the contractual provisions on which their demonstration of constitutional invalidity relies. As defendants do not challenge this assertion, we therefore assume, for purposes of this appeal, that this document contains those relevant contractual provisions.

provides coverage only to the extent required by state law as that state law existed during the policy period, and any later amendments to the state law that alter plaintiffs' obligations are not included in the scope of coverage. At the time these policies were finalized, the Fund was accepting obligations on reopened cases that met the requirements for transfer, and therefore, plaintiffs argue, plaintiffs' contracts with their insureds exclude from the scope of coverage any benefits paid on a reopened case that would have qualified for assignment to the Fund before its closure. Accordingly, plaintiffs argue that the 2013 amendment to section 25-a alters the scope of their coverage under the policies.

To the extent plaintiffs' contention can be construed as an argument that their policies do not obligate them to cover liability on reopened cases that would have been assigned to the Fund before the amendment, plaintiffs' interpretation of this policy language is inconsistent with their assertion underpinning their first contention regarding retroactivity, i.e., that the amendment has retroactive effect by imposing unfunded liability upon plaintiffs under policies completed before the amendment's effective date. Their interpretation is also inconsistent with their concession that their insurance policies, written and finalized before the 2013 amendment, obligate them to cover the costs of liability on any reopened case that otherwise would have qualified for transfer to the Fund before the amendment.

In any event, plaintiffs' Contract Clause claim confuses their legal *liability* for reopened cases with their ability to transfer the *costs* of that liability. Plaintiffs' contracts with their insureds obligated them to pay all benefits required of their insureds by the Workers' Compensation Law, including any amendments to that

law which are in effect during the policy period, and thus require plaintiffs to pay all necessary benefits on reopened cases.

Pursuant to those contracts, which consistently assume the risk of legislative change, liability for any benefit required of employers by the Workers' Compensation Law ultimately rested with the carriers. The amendment merely altered the allocation of costs of that liability by removing an avenue for carriers to transfer reopened cases to the Fund, and then to pass assessments for the costs of those cases onto their insureds. Inasmuch as plaintiffs did not contract with their insureds for the right to transfer reopened cases to the Fund, or condition their liability to pay benefits on reopened cases on the Fund's continuing acceptance of those cases, plaintiffs' contracts with their insureds have not been impaired by the amendment. Put differently, there is no provision of plaintiffs' contracts with their insureds relieving them of the obligation to pay an injured worker's benefits in the event that the Fund did not accept a reopened case.

At most, plaintiffs' contracts with their insureds have become less profitable (*see Raynor*, 18 NY3d at 58-59). When plaintiffs calculated their premiums for pre-2013 policy years, those premiums did not include the costs of liability on qualifying reopened cases, as those costs would have been borne by the Fund, and their premiums in those previous policy years are therefore now insufficient to cover the costs of their liability. This risk, however—that the premium charged in any one policy year will be insufficient to cover the costs of a carrier's liability—is a risk inherent in the insurance market, especially in a highly regulated market such as workers' compensation insurance, where "[t]he allocation of economic benefits and bur-

dens has always been subject to adjustment" (*Becker*, 43 NY2d at 541).

Inasmuch as the legislative amendment does not impair any term of plaintiffs' contracts with their insureds, we need not consider whether any impairment is substantial, or whether any substantial impairment is justified by a "significant and legitimate public purpose" (*Energy Reserves Group*, 459 US at 411-412; *see General Motors Corp.*, 503 US at 186-187; *Ballentine v Koch*, 89 NY2d 51, 60-61 [1996]).

Plaintiffs rely on our decision in *Health Ins. Assn. of Am. v Harnett* (44 NY2d 302 [1978]) to support their Contract Clause claim, but *Harnett* is distinguishable. In that case, 1976 legislation mandated "the inclusion of maternity care coverage in health and accident insurance policies issued after January 1, 1977" (*id.* at 306). The Court held that the legislation was "not unconstitutional as to its substantive provisions," inasmuch as it did not violate constitutional due process requirements (*see id.* at 306, 308-312).

The Court further concluded, however, that the legislature "may not constitutionally require the addition of such coverage to policies in existence before that date but thereafter renewed, if the renewal is at the option of the insured alone without the consent of the insurer" (*id.* at 306). We reasoned that our prior decision in *Moore v Metropolitan Life Ins. Co.* (33 NY2d 304 [1973]) was dispositive, insofar as the Court held in *Moore* that " '[w]here … the insurer does not have the right to terminate the policy or change the premium rate without consent of the [insured], renewal, by the payment of premiums merely continues in force the pre-existing policy, and statutes enacted subsequent to its original enactment cannot be applied' " (*Harnett*, 44

NY2d at 313, quoting *Moore*, 33 NY2d at 312). We further concluded that the insurer's right to increase premiums was not sufficient. Rather, "[w]hat is required is a choice open to the insurer to increase premiums or in the alternative, if it so elects, to terminate—thus, fail to renew—the policy and escape the added risk imposed by the statutory modification" (*Harnett*, 44 NY2d at 313).

Harnett is distinguishable from the present case because *Harnett* involved the legislative addition of maternity coverage to insurance policies that previously included no such coverage. The Court held that this was impermissible to the extent that the insurer did not have the option to terminate the policy. Here, by contrast, the legislative amendment does not remove, add, or otherwise alter any term of coverage contained within plaintiffs' insurance policies. Plaintiffs' contracts with their insureds obligate plaintiffs to pay any benefits required of their insureds under the Workers' Compensation Law, and the 2013 amendment to section 25-a does not alter those terms. Rather, as explained above, the amendment merely makes plaintiffs' contracts with their insureds less profitable. The decreased profitability of plaintiffs' contracts—due to the fact that the premiums plaintiffs charged in previous policy years did not account for this subsequent statutory change—does not constitute an impairment of their contracts with their insureds because it does not alter any term of those contractual provisions (*cf. Harnett*, 44 NY2d at 313).

To the extent plaintiffs ask us to read the preexisting statutory provisions regarding the Fund's existence as implied terms of their contracts with their insureds, we decline to do so. As the Supreme Court has explained, "[f]or the most part, state laws are implied into

private contracts regardless of the assent of the parties only when those laws affect the validity, construction, and enforcement of contracts" (*General Motors Corp.*, 503 US at 189). "[C]hanges in [such] laws that make a contract legally enforceable may trigger Contract Clause scrutiny if they impair the obligation of pre-existing contracts, even if they do not alter any of the contracts' bargained-for terms" (*id.*).

Here, by contrast, the 2013 amendment to section 25-a "did not change the legal enforceability of the [insurance] contracts," and "[t]he parties still have the same ability to enforce the bargained-for terms of the [insurance] contracts that they did before" the amendment (*id.* at 190). If, as plaintiffs suggest, we read into their contracts terms that do not exist based on then-existing statutory language, the Contract Clause "would protect against all changes in legislation, regardless of the effect of those changes on bargained-for agreements" (*id.*). That construction "would severely limit the ability of state legislatures to amend their regulatory legislation. Amendments could not take effect until all existing contracts expired, and parties could evade regulation by entering into long-term contracts" (*id.*). Furthermore, the contracts at issue in this case expressly assumed the risk of legislative change.

Inasmuch as the legislature's 2013 amendment to section 25-a did not impair any term of plaintiffs' contracts with their insureds, plaintiffs cannot establish a violation of the Contract Clause.

B. Takings Clause

The Takings Clause of the Fifth Amendment of the US Constitution, "made applicable to the States through the Fourteenth Amendment, … provides that 'private property' shall not 'be taken for public use,

without just compensation'" (*Phillips v Washington Legal Foundation*, 524 US 156, 163-164 [1998], quoting US Const 5th Amend). The New York Constitution similarly provides that "[p]rivate property shall not be taken for public use without just compensation" (NY Const, art I, § 7 [a]).

The threshold step in any Takings Clause analysis is to determine whether a vested property interest has been identified (*see Phillips*, 524 US at 164; *Landgraf*, 511 US at 266; *Alliance of Am. Insurers v Chu*, 77 NY2d 573, 585-587 [1991]). Plaintiffs concede that the mere obligation to pay money, without identification of a vested property interest, cannot constitute a taking (*see James Sq. Assoc. LP v Mullen*, 21 NY3d 233, 247 [2013]; *see also Swisher Intl., Inc. v Schafer*, 550 F3d 1046, 1056 [11th Cir 2008] ["(T)he takings analysis is not an appropriate vehicle to challenge the power of Congress to impose a mere monetary obligation without regard to an identifiable property interest"], *cert denied* 558 US 932 [2009]).[5]

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[5] The Supreme Court's decision in *Eastern Enterprises v Apfel* (524 US 498 [1998]), upon which the Appellate Division relied in holding that a taking had occurred (*see American Economy*, 139 AD3d at 146), is not to the contrary. In *Eastern Enterprises*, a four-Justice plurality of the Supreme Court concluded that the obligation imposed on Eastern to pay money under the Coal Act constituted a taking because it imposed "severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience" (*Eastern Enterprises*, 524 US at 528-529; *see also id.* at 529-537). Five Justices, however, disagreed with the plurality's takings analysis. Justice Kennedy would have held the Coal Act unconstitutional under the Due Process Clause, and he opined that the plurality's Takings Clause analysis was "incorrect and quite unnecessary for decision of the case" (*id.* at 539 [Kennedy, J., concurring in the judgment and dis-

Plaintiffs cannot identify any vested property interest impaired by the legislative amendment, and therefore their takings claim must fail. Plaintiffs assert that they have a constitutionally-protected interest in the value of their contracts with their insureds, and that the diminution in the value of those contracts constitutes a taking. We disagree. "As a general matter, the government does not 'take' contract rights pertaining to a contract between two private parties simply by engaging in lawful action that affects the value of one of the parties' contract rights" (*Palmyra Pac. Seafoods, L.L.C. v United States*, 561 F3d 1361, 1365 [Fed Cir 2009], *cert denied* 559 US 1106 [2010]).

This Court's decision in *Alliance of Am. Insurers v Chu* (77 NY2d 573 [1991]) is distinguishable. In that case, we held that the plaintiff insurers had a vested property interest in the income produced by a security fund to which the insurers were statutorily obligated to contribute. The Court made clear, however, that it was the statutory language itself that granted the insurers a vested property interest (*see id.* at 586-587). For example, the relevant statutes provided that the fund " 'shall be separate and apart from any other fund and from all other state moneys, and the faith and credit of the state of New York is pledged for their safekeeping' " (*id.* at 579), and that "income earned on new con-

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senting in part]). The four dissenting Justices agreed with Justice Kennedy that the Takings Clause did not apply because no specific property interest had been identified (*see id.* at 554-556 [Breyer, J., dissenting]). Subsequent federal decisions wrestling with the import of *Eastern Enterprises* have largely adopted the view of Justice Kennedy and the dissenting Justices with respect to the Takings Clause analysis (*see e.g. West Va. CWP Fund v Stacy*, 671 F3d 378, 386-387 [4th Cir 2011], *cert denied* 568 US 816 [2012]; *Swisher Intl.*, 550 F3d at 1054-1057).

tributions to the fund would be either returned to the contributors or credited toward future contributions" (*id.* at 580). The Court concluded that "these provisions obligated the State to act in good faith with respect to the fund and its contributors and to ensure that the fund's assets and earnings would be available for their intended purposes" (*id.* at 587), and that "these limitations established by the Legislature dictate that the contributions made by plaintiffs were not to become State moneys to do with as it wished" (*id.* at 588). The Court held that the legislature could not thereafter "eliminate the plaintiffs' rights with respect to contributions already made" (*id.* at 589).

Here, by contrast, the "contributions" required to maintain the Fund were made by employer insureds, not by the carriers, inasmuch as the carriers passed through assessments to their insureds. More importantly, no statutory language akin to that at issue in *Alliance of Am. Insurers* exists here. The statutory language providing that the Fund would accept the costs of liability on reopened cases under certain specific circumstances did not provide plaintiffs with any vested right in the Fund's continued acceptance of reopened cases. One cannot claim a vested property interest in continuing to receive a statutory benefit unless statutory language clearly granting a vested right, such as that at issue in *Alliance of Am. Insurers*, is present (*see Roman Catholic Diocese of Albany, N.Y. v New York State Workers' Compensation Bd.*, 96 AD3d 1288, 1289 [3d Dept 2012]). Instead, plaintiffs must identify a vested property interest and then demonstrate how the legislative amendment adversely impacts that property interest. They cannot do so because, like the "right" at issue in *Becker*, any "right" that might be recognized

here was inchoate and subject to contingencies (*see* 43 NY2d at 542).

Inasmuch as plaintiffs have not identified a vested property interest adversely impacted by the amendment, their takings claim fails.

C. Due Process Clause

Finally, we conclude that plaintiffs cannot establish a substantive due process violation. Initially, the parties disagree regarding the standard to be applied to alleged substantive due process violations when retroactive legislation is at issue. Plaintiffs, relying on *Alliance of Am. Insurers*, argue that heightened scrutiny must be applied in the context of retroactive legislation, and that the deferential rational basis standard should be applied only in the context of prospective legislation.

Granted, we stated in *Alliance of Am. Insurers* that "where legislation has retroactive effects, judicial review does not end with the inquiry generally applicable to economic regulation, i.e., whether the legislation has a rational basis" (77 NY2d at 586). The cases we relied on for that proposition, however, were themselves relying on the "vested rights doctrine," i.e., the axiom that "the Legislature is not free to impair vested or property rights" (*Matter of Hodes v Axelrod*, 70 NY2d 364, 370 [1987]; *see Matter of Chrysler Props. v Morris*, 23 NY2d 515, 518-519 [1969]). As explained, plaintiffs have not identified a vested right here. In any event, we have primarily interpreted *Alliance of Am. Insurers* as a takings case, not a due process case (*see e.g. Raynor*, 18 NY3d at 58; *Matter of Walton v New York State Dept. of Correctional Servs.*, 13 NY3d 475, 489-490 [2009]).

In the context of a substantive due process challenge to retroactive legislation, we apply the same rational basis scrutiny as the Supreme Court. That test requires "a legitimate legislative purpose furthered by rational means" (*General Motors Corp.*, 503 US at 191). Although the justifications that suffice for the prospective nature of a legislative enactment may not suffice for its retroactive nature, the test of due process for retroactive legislation "is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose" (*Pension Benefit Guaranty Corporation v R. A. Gray & Co.*, 467 US 717, 730 [1984]).

Assuming that the 2013 amendment to section 25-a has some retroactive impact, we conclude that the retroactive impact is justified by a rational legislative purpose (*see id.*). As the Memorandum in Support indicated, the closure of the Fund was intended to "save New York businesses hundreds of millions of dollars in assessments per year" (Mem in Support, 2013-2014 NY St Executive Budget, Public Protection and General Government Article VII Legislation at 29). Defendants assert that if the Fund was closed only to reopened cases arising from injuries that occurred after the effective date of the legislation, the Fund would have incurred substantial new liabilities for many years, given the duration of many workers' compensation cases. Defendants contend that, during this extended period, the assessments required to maintain the Fund would have continued to increase, and the relief to businesses sought by the legislature would have been indefinitely delayed. This constitutes a sufficient showing "that the retroactive application of the legislation is itself justified by a rational legislative purpose" (*Pension Benefit Guaranty Corporation*, 467 US at 730).

Plaintiffs assert that the statement in the Memorandum in Support—that the premiums carriers charged already cover this liability—was incorrect, and that our due process analysis should end there. This argument misunderstands the nature of a due process inquiry. "A challenged statute will survive rational basis review so long as it is rationally related to *any conceivable* legitimate State purpose" (*Myers v Schneiderman*, 30 NY3d 1, 15 [2017] [internal quotation marks omitted and emphasis added]).

As stated, closing the Fund would save New York businesses hundreds of millions of dollars in assessments every year. In addition, the parties agree that claims on reopened cases can be administered more efficiently by insurance carriers.[6] Delaying the Fund's closure so that it could pay benefits on every qualifying reopened case arising from an injury occurring before the amendment's 2013 effective date would have delayed this intended legislative benefit to New York businesses and employers for years, if not decades. We therefore conclude that any retroactive impact of the legislation is justified by a rational legislative purpose (*see Pension Benefit Guaranty Corporation*, 467 US at 730). Plaintiffs therefore cannot establish a substantive due process violation.

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[6] The savings to New York employers in the form of reduced and eventually eliminated assessments required to maintain the Fund would be offset, to some degree, by increased workers' compensation insurance premiums. Nevertheless, the parties and the amici curiae agree that the net result would be savings to New York businesses, inasmuch as carriers can administer claims on reopened cases more efficiently than the Fund. Furthermore, the Fund's closure would eliminate litigation over whether reopened cases qualified for transfer to the Fund, certainly a source of inefficiency in the administration of reopened cases.

Accordingly, the order of the Appellate Division should be reversed, without costs, and judgment granted in favor of defendants declaring that Workers' Compensation Law § 25-a (1-a) as applied to policies issued before October 1, 2013 is not unconstitutional.

Chief Judge DiFiore and Judges Rivera, Stein, Garcia, Wilson and Feinman concur.

Order reversed, without costs, and judgment granted in favor of defendants declaring that Workers' Compensation Law § 25-a (1-a) as applied to policies issued before October 1, 2013 is not unconstitutional.

APPENDIX B

SUPREME COURT, APPELLATE DIVISION,
FIRST DEPARTMENT, NEW YORK

Nos. 16095, 16096, 456

AMERICAN ECONOMY INSURANCE COMPANY ET AL.,
Plaintiffs-Appellants,

v.

STATE OF NEW YORK ET AL.,
Defendants-Respondents.

April 14, 2016
[31 N.Y.S.3d 456]

OPINION OF THE COURT

SAXE, J.

Plaintiffs are private insurance companies that underwrite workers' compensation insurance policies in New York. In this action, they challenge the validity and constitutionality of a 2013 amendment to Workers' Compensation Law § 25–a to the extent it imposes liability on them with respect to policies issued before October 1, 2013. We hold that the challenged provision impermissibly imposes on plaintiffs significant additional liability retroactively with respect to those past contracts, and that they are entitled to judgment in their favor.

In 1933, the legislature added to the Workers' Compensation Law a provision establishing a special fund for the payment of workers' compensation benefits

to employees whose cases were closed and later reopened (the reopened case fund, or the Fund) (*see* Workers' Compensation Law § 25–a, as added by L 1933, ch 384, § 2). The "statutory scheme contemplate[d] that the Special Fund [would] step into the shoes of the insurance carrier and succeed to its rights and responsibilities" (*Matter of De Mayo v. Rensselaer Polytech Inst.*, 74 N.Y.2d 459, 462–463, 548 N.Y.S.2d 630, 547 N.E.2d 1157 [1989]). The reopened case fund was initially financed by one-time charges imposed on employers or insurers for every case of injury or death, until in 1948 the Workers' Compensation Board was authorized to collect annual assessments from workers' compensation insurers as needed to maintain the Fund at a prescribed minimum balance (Workers' Compensation Law § 25–a[3]).

Plaintiffs explain that the existence of the Fund meant that reopened workers' compensation claims were not included when insurers' premium rates were calculated by the New York Compensation Insurance Rating Board (CIRB) and approved by the New York State Department of Financial Services (DFS). They also assert that because reopened claims were handled and paid by the reopened case fund rather than by insurers, insurers did not maintain reserves to cover future reopened claim losses. Defendants do not disagree, except to the extent they assert that it was only once a reopened claim was actually transferred to the Fund that the claims were left off the calculation of rates chargeable to the insureds; they say that "prior to such transfer, the carrier is responsible for making payments on the claim, and the costs associated therewith are reported to CIRB for the purposes of allowing the costs to be factored into the rates which the carriers are permitted to charge their employer insureds."

On March 29, 2013, the legislature enacted a number of reforms to the Workers' Compensation Law as part of a "Business Relief Bill" contained in the 2013–2014 New York State Executive Budget. These reforms, presented as money-saving changes, included the challenged amendment to the Workers' Compensation Law, which closed the reopened case fund to newly reopened claims as of January 1, 2014 (*see* Workers' Compensation Law § 25–a[1–a]; 2013 McKinney's Session Laws of N.Y., ch 57, S 2607–D, part GG, § 13). Any reopened claims that would have been transferred to the Fund under the former law would become the obligation of the carrier.

In a memorandum in support of the governor's 2013–2014 New York State Executive Budget, with regard to the portion of the "Business Relief Bill" that concerned the reopened case fund, it was suggested that the Fund was not needed "because the premiums [the insurers] have charged already covers this liability" (see Mem in Support of 2013–14 New York State Executive Budget, Public Protection and General Government Article VII Legislation, at 29, https://www.budget.ny.gov/pubs/archive/fy1314archive/eBudget1314/ fy1314artVIIbills/PPGG—ArticleVII—MS.pdf, accessed March 28, 2016). The memorandum went on to characterize the Fund as creating a windfall for insurers.

In this declaratory judgment action, plaintiffs dispute the foregoing characterization of the Fund contained in that memorandum (i.e., that the premiums they charged already covered liability for reopened cases). Rather, they point out, with respect to those workers' compensation policies that were issued before October 1, 2013, the premiums they charged to employers, as authorized by DFS, would not have been calcu-

lated to cover liability for future reopened claims, since at that time such claims were expected to be subject to transfer to the Fund for payment. In contrast, for policies written on or after October 1, 2013, DFS approved an increase in premiums to address the additional liability resulting from the closure of the Fund to future reopened cases; however, that premium increase would not cover policies issued before October 1, 2013. Yet, because these policies are occurrence-based, meaning that they provide coverage for accidents that occur during the policy term regardless of when the claim is made, a benefit payable on a reopened claim made after January 1, 2014 but arising out of an accident that occurred before October 1, 2013, will impose on the insurer a liability that was not contemplated when the premium for the pre-October 1, 2013 policy was calculated.

Thus, plaintiffs assert, Workers' Compensation Law § 25–a(1–a) improperly shifts liability to insurers for claims reopened after January 1, 2014 involving injuries that occurred before October 1, 2013, although such claims were not included in the calculations of either the premium rates they charged for those policies or the reserves they maintained in order to pay claims. They argue that the amendment imposes on them unfunded liability for claims in reopened cases that arise from accidents or injuries that occurred before October 1, 2013, since premium rates are prospective in nature and the insurers cannot recoup the costs of this added liability, which they estimate at $62 million.

In moving to dismiss and for a declaration in their favor, defendants argue that the Fund's closure to new applications merely altered the handling of cases that reopen after January 1, 2014, and did not have any impermissible retroactive effect. Plaintiffs cross-moved for summary judgment and a declaration in their favor.

The motion court granted defendants' motion, holding that the statute does not have an improper retroactive effect; in response to plaintiffs' argument regarding the imposition of new liabilities not contemplated when their authorized premiums were calculated, the court reasoned that the statute only governs benefits awarded after its passage, and "[t]he fact that the benefits [for reopened claims relating to injuries occurring before October 1, 2013] may relate to an injury that occurred prior to the enactment of § 25–a(1–a) does not render it retroactive" (citing *Matter of Raynor v. Landmark Chrysler*, 18 N.Y.3d 48, 936 N.Y.S.2d 63, 959 N.E.2d 1011 [2011]).

Discussion

"It is a fundamental canon of statutory construction that retroactive operation is not favored by courts and statutes will not be given such construction unless the language expressly or by necessary implication requires it" (*Majewski v. Broadalbin–Perth Cent. School Dist.*, 91 N.Y.2d 577, 584 [1998], citing *Jacobus v. Colgate*, 217 N.Y. 235, 240, 111 N.E. 837 [1916, Cardozo, J.], *and Landgraf v. USI Film Products*, 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 [1994]). "[T]he date that legislation is to take effect is a separate question from whether the statute should apply to claims and rights then in existence" (*Majewski*, 91 N.Y.2d at 583, 673 N.Y.S.2d 966, 696 N.E.2d 978).

The question of whether the new statute would have a retroactive effect requires the court to consider "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed" (*Landgraf v. USI Film Products*, 511 U.S. at 280, 114 S.Ct. 1483, 128 L.Ed.2d 229).

"[This] ban on retrospective legislation embrace[s] all statutes, which, though operating only from their passage, affect vested rights and past transactions," and thus "every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation ... in respect to transactions or considerations already past, must be deemed retrospective" (*id.* at 268–269, 114 S.Ct. 1483 [internal quotation marks omitted]). "[T]he court must ask whether the new provision attaches new legal consequences to events completed before its enactment" (*id.* at 269–270, 114 S.Ct. 1483).

Therefore, the central question here is whether closing the Fund to new applications and requiring the insurers to handle and pay on reopened claims arising out of accidents that occurred before October 1, 2013 impermissibly "attache[d] new legal consequences to events completed before its enactment" (*id.* at 270, 114 S.Ct. 1483).

In concluding that the challenged statutory provision did not take away or impair vested rights, the motion court failed to treat the allegations in the complaint as true and afford plaintiffs all favorable inferences. It is essentially undisputed that the premiums charged for policies prior to October 1, 2013 took into account the transfer to the Fund of reopened claims under the former Workers' Compensation Law § 25–a, and thus, did not account for potential future liability relating to such claims, which were expected to qualify for a transfer to the Fund. The Fund's closure failed to provide for the unfunded liability it imposes on plaintiffs for reopened cases arising from accidents occurring before October 1, 2013 that would have otherwise qualified for transfer under Workers' Compensation Law § 25–a, and they cannot make up this shortfall.

"Thus, even though the [statute] mandates only the payment of future ... benefits, it nonetheless 'attaches new legal consequences to [a relationship] completed before its enactment' " (*Eastern Enterprises v. Apfel*, 524 U.S. 498, 532, 118 S.Ct. 2131, 141 L.Ed.2d 451 [1998] quoting *Landgraf v. USI Film Products*, 511 U.S. at 270, 114 S.Ct. 1483).

The motion court's reliance on *Matter of Raynor v. Landmark Chrysler*, 18 N.Y.3d 48, 936 N.Y.S.2d 63, 959 N.E.2d 1011 was misplaced. There, the Court considered an insurance carrier's challenge to the requirement that, pursuant to a 2007 amendment to Workers' Compensation Law § 27(2) (*see* L 2007, ch 6, § 46), it deposit into the Aggregate Trust Fund the full present value of a lifetime permanent partial disability award for a 2004 injury (*id.* at 54–55, 936 N.Y.S.2d 63, 959 N.E.2d 1011). The Court rejected the carrier's argument that this application of the 2007 amendment was improperly retroactive (*id.* at 55, 936 N.Y.S.2d 63, 959 N.E.2d 1011). Observing that the carrier had always been liable for the full amount of the permanent partial disability award, and, moreover, that even before that amendment, the Workers' Compensation Board already had the discretion to require a carrier to deposit the present value of such an award into the ATF (*see id.* at 54, 57, 936 N.Y.S.2d 63, 959 N.E.2d 1011), the Court explained that this application of the 2007 amendment to Workers' Compensation Law § 27(2) "neither altered the carrier's preexisting liability nor imposed a wholly unexpected new procedure. It merely changed the time and manner of payments" (*id.* at 57, 936 N.Y.S.2d 63, 959 N.E.2d 1011). Those circumstances fundamentally distinguish *Raynor* from the present case, where the challenged amendment to the statute, as applied to injuries occurring before October 1, 2013, actually "al-

tered the carrier's preexisting liability" (*id.*), imposing on plaintiffs substantial new retroactive liability that have not and cannot be offset by premium increases.

Defendants characterize the challenged amendment as a mere "allocation of economic benefits and burdens [that] has always been subject to adjustment," as in *Becker v. Huss Co.*, 43 N.Y.2d 527, 541, 402 N.Y.S.2d 980, 373 N.E.2d 1205 [1978]. *Becker* considered an amendment to Workers' Compensation Law § 29 applicable to workers' compensation carriers, which already had a lien on any recovery obtained in litigation brought by the compensation-claimant against a third party (*id.* at 538, 402 N.Y.S.2d 980, 373 N.E.2d 1205). The amendment imposed on carriers a requirement that they contribute to the expenses of that litigation from which they benefited (*id.* at 539, 402 N.Y.S.2d 980, 373 N.E.2d 1205). The State Insurance Fund (SIF), as a workers' compensation lienor, challenged the amendment insofar as it applied to litigation then pending, involving accidents before the effective date of the amendment; the SIF argued that such retroactive application would "creat[e] a new set of rights, ... upset[ting] the cost-price balance on which it operated and impair[ing] its section 29 liens" (*id.*). The Court recognized that the amendment "saddl[ed] [the carriers] with financial obligations not contemplated when prior insurance premiums had been computed" (*id.* at 540, 402 N.Y.S.2d 980, 373 N.E.2d 1205), but rejected the SIF's claim that the amendment had an improper retroactive impact. It explained that "[t]he amendment at issue, presaged for some years, is just another adjustment in the allocation of the financial benefits and burdens," and, importantly, that it "neither created a new right *nor impaired an existing one* " (*id.* at 542, 402 N.Y.S.2d 980, 373 N.E.2d 1205 [emphasis added]).

In particular, the Court observed that "[t]he carrier always benefited from the third-party action; the amendment simply requires it to bear the cost of that benefit" (*id.*).

Unlike the SIF in *Becker*, which retained the benefit of recouping its compensation payments by acting as a lienor in the compensation-claimant's third-party action, and was simply made to cover costs incurred in obtaining that benefit, the closure of the Fund here, by ending plaintiffs' right to transfer eligible cases to the Fund, retroactively deprived them of the entirety of the benefit of this right and created a new class of unfunded liability.

There have been circumstances in which a legislature has clearly indicated a considered determination to retroactively affect an entity's rights or liabilities by a new statutory enactment, and in such circumstances even such incontrovertible retroactive impacts may be permissible. For that reason, defendants' reliance on *Matter of Hogan v. Lawlor & Cavanaugh Co.*, 286 App.Div. 600, 604, 146 N.Y.S.2d 119 [3d Dept.1955] is misplaced. There, in rejecting the argument of a workers' compensation carrier that the challenged statute impermissibly, retroactively "impose[d] liability upon the carrier [where] ... the insurance premiums collected by it from its insured had been based upon liability of a less burdensome character," the Court explained that the legislature had clearly considered and intended to increase the carriers' burden in pending compensation cases such as the one at issue in *Hogan*.

Here, in contrast, the record fails to reflect that the legislature amended the statute with an understanding of the impact it would have on policies issued before October 1, 2013. Indeed, the memorandum in support

of the Business Relief Bill reflects the incorrect belief that the increased costs to carriers for pre-October 1, 2013 claims were already taken into account in the calculation of those premiums.

Plaintiffs also established that the amendment, as applied retroactively, violates the Contract Clause of the U.S. Constitution because it retroactively impairs an existing contractual obligation to provide insurance coverage "[w]here * * * the insurer does not have the right to terminate the policy or change the premium rate" (*Health Ins. Assn. of Am. v. Harnett*, 44 N.Y.2d 302, 313, 405 N.Y.S.2d 634, 376 N.E.2d 1280 [1978] [internal quotation marks omitted] [asterisks in original]; *see* U.S. Const., Art. I, § 10, cl 1). Defendants failed to show that the impairment is "reasonable and necessary to serve" "a significant and legitimate public purpose * * * such as the remedying of a broad and general social or economic problem" (*19th St. Assoc. v. State of New York*, 79 N.Y.2d 434, 443, 583 N.Y.S.2d 811, 593 N.E.2d 265 [1992] [internal quotation marks omitted] [asterisks in original]). Indeed, the legislation's stated purpose of preventing a windfall to insurance carriers was based upon the erroneous premise that premiums already cover this new liability.

Retroactive application would also constitute a regulatory taking in violation of the Takings Clause (*see* U.S. Const.Amend V; N.Y. Const., Art. I, § 7 [a]; *Eastern Enterprises*, 524 U.S. at 528–529, 118 S.Ct. 2131 ["it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience"]).

Plaintiffs have therefore established that the amendment, as applied retroactively to policies issued before October 1, 2013, is unconstitutional.

As to defendants' assertion that should this Court find that the complaint states a cause of action, summary judgment should be denied due to the existence of "[n]umerous issues of fact," defendants neither opposed the cross motion nor established the existence of triable issues of fact precluding summary judgment. The issues of fact they now allege to exist are purely speculative, unsupported by reference to the record, and improperly raised for the first time on appeal. Defendants did not submit any evidence to contradict plaintiffs' evidence as to the economic impact of the Fund's closure on plaintiffs, or to support their claim that issues exist as to "the extent to which [plaintiffs] benefitted from other changes in the 2013 legislation," or the nature and value of such benefit.

Accordingly, based on the record, plaintiffs established their entitlement to summary judgment on their claims for declaratory relief. However, plaintiffs' application for an injunction is denied, since "[w]hen [the] Court articulates the constitutional standards governing [S]tate action, we presume that the State will act accordingly" (*Matter of Maron v. Silver*, 14 N.Y.3d 230, 261, 899 N.Y.S.2d 97, 925 N.E.2d 899 [2010]). The request in plaintiffs' briefs for an award of attorneys' fees is denied, since plaintiffs advance no supporting argument for such relief in the main body of their briefs, and no reason for such an award is apparent.

Accordingly, the judgment of the Supreme Court, New York County (Donna M. Mills, J.), entered September 29, 2014, dismissing the complaint, should be reversed, on the law, without costs, the complaint rein-

stated, and a judgment entered in favor of plaintiffs declaring that Workers' Compensation Law § 25–a(1–a) as retroactively applied to policies issued before October 1, 2013 is unconstitutional. The Clerk is directed to enter an amended judgment accordingly. The appeal from the order of the same court and Justice, entered August 20, 2014, which granted defendants' motion to dismiss the complaint and denied plaintiffs' cross motion for summary judgment, should be dismissed, without costs, as subsumed in the appeal from the judgment.

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 58

Index No. 156923/13
July 28, 2014

AMERICAN ECONOMY INSURANCE COMPANY, AMERICAN FIRE AND CASUALTY COMPANY, AMERICAN STATES INSURANCE COMPANY, EMPLOYERS INSURANCE COMPANY OF WAUSAU, EXCELSIOR INSURANCE COMPANY, FIRST LIBERTY INSURANCE CORP., GENERAL INSURANCE COMPANY OF AMERICA, LIBERTY INSURANCE CORPORATION, LIBERTY MUTUAL FIRE INSURANCE CO., LIBERTY MUTUAL INSURANCE COMPANY, LM INSURANCE CORPORATION, NETHERLANDS INSURANCE COMPANY, THE OHIO CASUALTY INSURANCE COMPANY, OHIO SECURITY INSURANCE COMPANY, PEERLESS INDEMNITY INSURANCE COMPANY, PEERLESS INSURANCE COMPANY, WAUSAU BUSINESS INSURANCE COMPANY, WAUSAU GENERAL INSURANCE COMPANY, WAUSAU UNDERWRITERS INSURANCE COMPANY, AND WEST AMERICAN INSURANCE COMPANY,

Plaintiffs,

- against -

THE STATE OF NEW YORK, THE NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, BENJAMIN M. LAWSKY, in his official capacity as superintendent of the New York State Department of Financial Services, AND STATE OF NEW YORK WORKERS' COMPENSATION BOARD,

Defendants.

HON. DONNA M. MILLS, JSC.:

Defendants The State of New York (the "State"), The New York State Department of Financial Services ("DFS"), Benjmin M. Lawsky, in his official capacity as Superintendent of the New York State Department of Financial Services, and State of New York Workers' Compensation Board ("WCB") move, pursuant to CPLR 3211(a)(7), to dismiss the Complaint, and for judgment declaring that the recent amendment to Workers' Compensation Law §25-a is constitutional.

Plaintiffs American Economy Insurance Company, American Fire and Casualty Company, American States Insurance Company, Employers Insurance Company of Wausau, Excelsior Insurance Company, First Liberty Insurance Corp., General Insurance Company of America, Liberty Insurance Corporation, Liberty Mutual Fire Insurance Co., Liberty Mutual Insurance Company, LM Insurance Corporation, Netherlands Insurance Company, The Ohio Casualty Insurance Company, Ohio Security Insurance Company, Peerless Indemnity Insurance Company, Peerless Insurance Company, Wausau Business Insurance Company, Wausau General Insurance Company, Wausau Underwriters Insurance Company, and West American Insurance Company cross-move, pursuant to CPLR 3211(c), for summary judgment declaring an amendment to Workers' Compensation Law §25-a impermissibly retroactive and unconstitutional as applied to bar applications relating to injuries arising prior to January 1, 2014, and enjoining defendants from enforcing the amendment to Workers' Compensation Law §25-a with respect to applications relating to injuries arising prior to January 1, 2014.

BACKGROUND

Plaintiffs, 20 insurance carriers authorized to provide workers' compensation insurance to New York employees, bring this declaratory judgment action challenging an amendment to New York Workers' Compensation Law §25-a, and seeking to permanently enjoin defendants, the State and others charged with implementing the workers' compensation system, from enforcing the amendment.

The Complaint includes the following factual allegations. New York State's workers' compensation system is governed by the Workers' Compensation Law. The law requires employers to procure workers' compensation insurance to guarantee payment of benefits to their employees who are injured or disabled during the course of their employment. Employers may obtain coverage from approved insurance carriers or the New York State Insurance Fund ("NYSIF"), a not-for-profit State agency established to provide low-cost workers' compensation insurance. Additionally, employers may obtain approval from the WCB to act as self-insurers. The approved insurance carriers, self-insured employers, and the NYSIF (collectively, the "participants") are liable for payment of all workers' compensation obligations of the employers for which they provide coverage. In fact, the standard-form insurance policies require participants to pay all benefits for which employers become liable under the Workers' Compensation Law.

The WCB has continuing jurisdiction over workers' compensation claims, even after the claims are closed. Closed cases may be reopened to determine claimants' ongoing eligibility for benefits. Another [illegible] the New York Compensation Insurance Rating Board

("NYCIRB"), is authorized by DFS to collect workers' compensation data and develop loss costs. NYCIRB collects loss, premium, and payroll data from each carrier in the State, summarizes the information, and recommends annual reductions or increases in premium rates to DFS.

In 1933, the State eliminated a three-year limitations period for reclassification of previously closed workers' compensation cases. The State also created the Fund for Reopened Cases ("Fund"), codified as Workers' Compensation Law §25-a, to shift workers' compensation liability from participants to a fund specially financed. Specifically, § 25-a provided for Fund liability "after a lapse of seven years from the date of injury ... and also a lapse of three years from the date of the last payment of compensation" (Workers' Compensation Law §25-a[1]). The purpose of §25-a was to transfer liability for workers' compensation obligations from the participants to the Fund. The statute permitted the imposition of liability only in cases that had been closed and were reopened by fresh application, and conditioned liability on the lapse of a specified period of time.

The Fund was maintained by annual assessments on the participants (Workers' Compensation Law §25a[3]). The participants were permitted to pass along the costs of their assessments to employers in the form of surcharges.

The 2013-2014 New York State Budget included the "Business Relief Act," which, *inter alia*, proposed an amendment to §25-a to change the process for paying for reopened workers' compensation claims. The Memorandum in Support of the Business Relief Bill proposing the amendment states, in part:

> [The Bill] would close the Reopened Case Fund (Fund) (WCL §25-a) to any new claims. Closing the Fund would save New York businesses hundreds of millions of dollars in assessments per year. The Fund provides payments directly to claimants and health providers when the claimant's case is reopened under certain circumstances. The original intent of the Fund was to provide carriers relief in a small number of cases where liability unexpectedly arises after a case has been closed for many years. However, carriers do not need this relief because the premiums they have charged already cover this liability. This reform prevents a windfall for such carriers

(Memo in Support, Mem of Law, Exh D, p. 29). The Legislature passed the 2013-2014 Budget on March 28, 2013, and the amendment to §25-a was enacted, as proposed.

The amendment provides, in part:

> 1-a. Any award which shall be made against such special fund after the effective date of this act ... upon such an application for compensation or death benefits shall not be retroactive for a period of disability or for death benefits longer than the two years immediately preceding the date of filing of such application. No application by a self-insured employer or an insurance carrier for transfer of liability of a claim to the fund for reopened cases shall be accepted by the board on or after the first day of January, two thousand fourteen except that the board may make a finding after such date

> pursuant to section 23 of this article upon a timely application review.

(Workers' Compensation Law §25-a[1-a]). Section 25-a(1-a) took effect immediately, but, by its terms, delayed closing the Fund to new claims beginning January 1, 2014. In addition, the Fund remained open only to pay claims in reopened cases where the application for transfer of liability was made prior to January 1, 2014.

Plaintiffs commenced this action challenging the validity and constitutionality of §25-a(1-a). Plaintiffs claim that the amendment imposes retroactive liability on participants and subjects them to losses, while unfairly benefitting insureds, who have already paid reduced premiums based on the assumption that certain claims would be transferred to the Fund. Plaintiffs also assert the losses associated with the reopened, unfunded claims were not considered when setting premium rates. According to plaintiffs, the amendment could result in as much as $1.6 billion in losses, including roughly $62 million in retroactive liability, which would be bourne primarily by the participants. The Complaint alleges that §25-a(1-a) violates the United States Constitution's Contract Clause (first cause of action); Due Process Clause of the Fourteenth Amendment (second cause of action); and Takings Clause of the Fifth Amendment (third cause of action).

Defendants seek to dismiss the Complaint, as well as a declaration that §25-a(1-a) [illegible] move for judgment declaring that the statute is unconstitutional, and to enjoin defendants from enforcing the statute.

DISCUSSION

On a motion to dismiss, pursuant to CPLR 3211(a)(7), the pleading is to be afforded a liberal construction (*see* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine whether the facts as alleged fit within any legally cognizable legal theory (*Leon v Martinez*, *supra*). The court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id.*, quoting *Guggenheimer v Ginsberg*, 43 NY2d 268 [1977]).

As stated, the Complaint seeks a declaration that the amendment to Workers' Compensation Law §25-a is impermissibly retroactive and in violation of the Contracts, Due Process, and Takings Clauses of the United States Constitution. Plaintiffs claim that the amendment is unconstitutional because it applies retroactively to impose liability for reopened claims with a date of injury or disablement prior to January 1, 2014.

A statute has retroactive effect if it attaches new legal consequences to events completed before its enactment (*see Landgraf v USI Film Prods.*, 511 US 244, 270 [1994]). "It is a fundamental canon of statutory construction that retroactive operation is not favored by courts and statutes will not be given such construction unless the language expressly or by necessary implication requires it" (*Majewski v Broadalbin-Perth Cent. Sch. Dist.*, 91 NY2d 577, 584 [1998]). The clearest indicator of legislative intent is the statutory text (*Matter of Raynor v Landmark Chrysler*, 18 NY2d 48, 56 [2011]). Thus, the starting point in any case of inter-

pretation must always be the language itself, giving effect to the plain meaning thereof (*id.*).

Here, the plain language of the text of §25-a(1-a), closing the Fund to reopened workers' compensation claims filed up to nine months after its enactment, cannot be said to apply retroactively. Nor is there any indication that the Legislature intended the challenged amendment to have any retroactive application. On the contrary, the nine-month postponement in closing the Fund furnishes clear evidence that the Legislature intended the amendment to have a prospective application (*see Matter of Deutsch v Catherwood*, 31 NY2d 487, 489-490 [1973]). There would be no need for any postponement if the Legislature intended for the amendment to have retroactive effect (*id.*). The fact that liability may relate to an injury that occurred prior to the enactment of the statute does not render it retroactive (*Matter of Raynor v Landmark Chrysler, supra*).

Nevertheless, plaintiffs contend that §25-a(1-a) imposes on participants significant retroactive liability and new duty with respect [to pre-2014--illegible] that, to the extent that §25-a(1-a) closes the Fund to reopened claims arising from pre-2014 injuries, it imposes significant, new retroactive liability on insurance carriers. They assert that prior to the amendment, they were free of §25-a liability, and their State-approved premiums and loss reserves were calculated based on the continuing existence of the Fund. They also claim that the amendment impermissibly increases their preexisting liability by imposing a new obligation with respect to past injuries.

Contrary to plaintiffs' assertions, §25-a(1-a) only governs benefits awarded after its passage. The fact that the benefits may relate to an injury that occurred

prior to the enactment of §25-a(1-a) does not render it retroactive (*see Matter of Raynor v Landmark Chrysler, supra*). A statute is not retroactive when made to apply to future transactions merely because such transactions relate to or are founded upon antecedent events (*id.*). Furthermore, plaintiffs' assertions of inequity due to the overturning of settled expectations as a result of the amendment are without merit, as §25-a(1-a) neither altered plaintiffs' preexisting liability, nor imposed new legal consequences (*see id.*).

Plaintiffs' constitutional challenges to §25-a(1-a) must also fail. As stated, plaintiffs contend that the amendment violates the Contracts, Due Process, and Takings Clauses of the United States Constitution.

The Contracts Clause of the United States Constitution prohibits states from passing laws impairing the obligations of contracts (US Const, art 1, §10[1]; *Energy Reserves Group, Inc. v Kansas Power & Light Co.*, 459 US 400, 411 [1983]). Plaintiffs essentially argue that the amendment substantially impairs their pre-2014 contracts with insureds, serves no significant public purpose, and uses unreasonable and inappropriate means. However, plaintiffs fail to allege the existence of any contracts which entitle them to continue shifting workers' compensation liability to the Fund. Moreover, the amendment does not constitute a substantial impairment of any such contract. At best, the amendment merely renders plaintiffs' policies with their insureds less profitable. In any event, any purported impairment is justified by the stated purpose of the amendment, namely, to close the Fund to new applications as of January 1, 2014 and save businesses substantial amounts in annual assessments. As such, the Court conclude that the amended statute does not violate the Contracts Clause of the United States Constitution.

Likewise, the amended statute does not violate substantive and procedural due process. The Due Process Clause of the Fourteenth Amendment prohibits states from depriving any person of life, liberty or property, without due process of law (US Const. Amend XIV; *Zinermon v Burch*, 494 US 113, 125 [1990]). State statutes are conferred an exceedingly strong presumption of constitutionality (*Lighthouse Shores Inc. v Islip*, 41 NY2d 7, 11 [1976]).

To establish a claim for violation of substantive due process, a party must establish a cognizable, vested property interest, and that the governmental action was wholly without legal justification (*see Bower Assoc. v Town of Pleasant Val.*, 2 NY3d 617, 627 [2004]). Here, however, the Complaint fails to allege any facts to establish a fundamental right or protected property interest of which plaintiff have been deprived by the enactment of §25-a(1-a). The assertion that the statute exposes plaintiffs to substantial and unexpected burdens is unavailing because the statute does not increase the amount the carriers owe (*see Matter of Raynor v Landmark Chrysler, supra*). Furthermore, plaintiffs fail to allege any facts to establish that the amended statute is without legal justification and not supported by a rational legislative purpose.

The claim of lack of procedural due process must also fail. Insurance carriers are accorded procedural due process at every step, as they are entitled to contest, first at hearings before workers' compensation law judge, then at appeals to the Board, and ultimately to the Appellate Division, their liability, the classification of the workers' injuries, and the amount of the awards (*see* Workers' Compensation Law §23). Furthermore, insurance carriers receive notice and an opportunity to

be heard regarding all proposed settlements (*see* Workers' Compensation Law §32).

The Takings Clause prohibits the government from taking private property for public use without providing just compensation (*see* US Const Amend V). The amended statute does not violate this clause. The statute neither increases the amount of compensation owed to claimants; nor does it appropriate the carriers' assets for the use of the State (*see Connolly v Pension Benefit Guar. Corp.*, 475 US 211, 215 [1986]).

The request for injunctive relief prohibiting defendants from enforcing the amendment to Workers' Compensation Law §25-a is denied. Section 25-a(1-a) expressly and unambiguously allows applications for transfer of claims to the Fund only until January 1, 2014. Plaintiffs seek to require the Board to consider all applications relating to injuries occurring before January 1, 2014, regardless of when the application is made. Given the Legislature's express intent to close the Fund to new application as of January 1, 2014, such injunctive relief would be an unwarranted intrusion on the Legislature's function and a contravention of the plain language of the statute.

In sum, plaintiffs' challenges to Workers' Compensation Law §25-a(1-a) as being impermissibly retroactive and violating the Contracts, Due Process, and Takings Clauses of the United States Constitution lack merit. Thus, the Complaint is dismissed. In addition, plaintiffs' request for declaratory and injunctive relief is denied.

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted and the Clerk is directed to enter judgment

dismissing the Complaint in this action, together with costs and disbursements to defendants, as taxed by the Clerk upon presentation of a bill of costs; and it is further

ORDERED that the cross motion is denied in its entirety.

Dated: 7/28/14

ENTER:

/s/ DMM
J. S. C.

DONNA M. MILLS, J.S.C.

APPENDIX D

CONSTITUTIONAL PROVISIONS

Contracts Clause, U.S. Const. art. I, § 10

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Takings Clause, U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Due Process Clause, U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

New York Workers' Compensation Law § 10(1)

§ 10. Liability for compensation

1. Every employer subject to this chapter shall in accordance with this chapter, except as otherwise provided in section twenty-five-a hereof, secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury, except that there shall be no liability for compensation under this chapter when the injury has been solely occasioned by intoxication from alcohol or a controlled substance of the injured employee while on duty; or by wilful intention of the injured employee to bring about the injury or death of himself or another; or where the injury was sustained in or caused by voluntary participation in an off-duty athletic activity not constituting part of the employee's work related duties unless the employer (a) requires the employee to participate in such activity, (b) compensates the employee for participating in such activity or (c) otherwise sponsors the activity.

* * *

APPENDIX F

New York Workers' Compensation Law § 25-a (2011)

§ 25-a. Procedure and payment of compensation in certain claims; limitation of right to compensation

Effective: October 3, 2011 to March 28, 2013

1. Notwithstanding other provisions of this chapter, when an application for compensation is made by an employee or for death benefits in behalf of the dependents of a deceased employee, and the employer has secured the payment of compensation in accordance with section fifty of this chapter, (1) after a lapse of seven years from the date of the injury or death and claim for compensation previously has been disallowed or claim has been otherwise disposed of without an award of compensation, or (2) after a lapse of seven years from the date of the injury or death and also a lapse of three years from the date of the last payment of compensation, or (3) where death resulting from the injury shall occur after the time limited by the foregoing provisions of (1) or (2) shall have elapsed, subject to the provisions of section one hundred and twenty-three of this chapter, testimony may be taken, either directly or through a referee and if an award is made it shall be against the special fund provided by this section. Such an application for compensation or death benefits must be made on a form prescribed by the chairman for that purpose and must, if a change in condition is claimed, be accompanied by a verified medical or surgical report setting forth facts on which the board may order a hearing. Any award which shall be made against such special fund after the effective date of this act[1] upon

[1] April 24, 1933.

such an application for compensation or death benefits shall not be retroactive for a period of disability or for death benefits longer than the two years immediately preceding the date of filing of such application.

2. Claims for further services or treatment rendered or supplies furnished as required by section thirteen hereof shall be paid from such fund when such service, treatment or supplies shall be authorized by the chairman. In cases where a surgical operation has previously been authorized by the board pursuant to the provisions of subdivision five of section thirteen-a of this chapter, no further authorization therefor by the chairman under this section shall be required. The provisions of this chapter with respect to procedure and the right to appeal shall be preserved to the claimant and to the employer originally liable for the payment of compensation and to such fund through its representative as hereinafter provided.

3. Any awards so made shall be payable out of the special fund heretofore created for such purpose, which fund is hereby continued and shall be known as the fund for reopened cases. The employer, or, if insured, his insurance carrier shall pay into such fund, or, in the case of awards made on or after July first, nineteen hundred sixty-nine, either into such fund or the uninsured employers' fund under section twenty-six-a of this article in accordance with the provisions thereof, for every case of injury causing death for which there are no persons entitled to compensation the sum of three hundred dollars where such injury occurred prior to July first, nineteen hundred forty and the sum of one thousand dollars where such injury shall occur on or after said date and prior to April first, nineteen hundred forty-five, and the sum of fifteen hundred dollars where such injury shall occur on or after April first,

nineteen hundred forty-five and prior to September first, nineteen hundred seventy-eight and the sum of three thousand dollars where such injury shall occur on or after September first, nineteen hundred seventy-eight, and in each case of death resulting from injury sustained on or after July first, nineteen hundred forty and prior to September first, nineteen hundred seventy-eight, where there are persons entitled to compensation but the total amount of such compensation is less than two thousand dollars exclusive of funeral benefits, the employer, or, if insured, his insurance carrier, shall pay into such fund, or, in the case of awards made on or after July first, nineteen hundred sixty-nine and prior to September first, nineteen hundred seventy-eight, either into such fund or the uninsured employers' fund under section twenty-six-a of this article in accordance with the provisions thereof, the difference between the sum of two thousand dollars and the compensation, exclusive of funeral benefits, and in each case of death resulting from injury sustained on or after September first, nineteen hundred seventy-eight, the employer, or if insured, his insurance carrier shall pay into such fund or the uninsured employers' fund under section twenty-six-a of this article in accordance with the provisions thereof, the difference between the sum of five thousand dollars and the compensation, exclusive of funeral benefits actually paid to or for the dependents of the deceased employee together with any expense charge required by section twenty-seven of this article; provided, however, that where death shall occur subsequent to the periods limited by subdivision one of this section no payment into such special fund nor to the special fund provided by subdivision nine of section fifteen nor to the uninsured employers' fund provided by section twenty-six-a of this article shall be required. In addition to the assessments made against all insurance

carriers for the expenses of administering this chapter provided for under the provisions of section one hundred fifty-one of this chapter, and the payments above provided, the employer, or, if insured, his insurance carrier, shall pay the sum of five dollars into said fund for each case in which an award is made pursuant to the provisions of paragraphs a to s inclusive of subdivision three of section fifteen of this chapter, by reason of injury sustained between July first, nineteen hundred forty and June thirtieth, nineteen hundred forty-two, both dates inclusive, and the sum of ten dollars for each such case by reason of injury sustained between July first, nineteen hundred forty-two and June thirtieth, nineteen hundred fifty, both dates inclusive, which payment shall be in addition to any payment of compensation to the injured employee as provided in this chapter.

There shall be maintained in the special fund at all times assets at least equal in value to the sum of (1) the value of awards charged against such fund, (2) the value of all claims that have been reopened by the board as a charge against such fund but as to which awards have not yet been made, (3) effective January first, nineteen hundred seventy-one, the total supplemental benefits paid from such fund as reimbursement pursuant to subdivision nine of this section during the calendar year immediately preceding, and (4) a reserve equal to ten per cent of the sum of items (1) and (2) of this paragraph. For the purpose of accumulating funds for the payment of supplemental benefits pursuant to subdivision nine of this section, the chairman shall impose against all carriers an assessment in the sum of five million dollars to be collected in the respective proportions established in the fiscal year commencing April first, nineteen hundred sixty-eight, under the provi-

sions of section one hundred fifty-one of this chapter for each carrier. Annually, as soon as practicable after January first in each year, the chairman shall ascertain the condition of the fund and whenever the assets shall fall below the prescribed minimum as herein provided the chairman shall assess and collect from all insurance carriers, in the respective proportions established in the prior fiscal year under the provisions of section one hundred fifty-one of this chapter for each carrier, an amount sufficient to restore the fund to the prescribed minimum. The chairman before making an assessment as provided in this section shall give thirty days' notice to the representative of the fund, designated pursuant to subdivision five of this section, that an itemized statement of the condition of the fund is open for his inspection. The superintendent of financial services may examine into the condition of the fund at any time on his own initiative or on request of the chairman or representative of the fund.

Such assessment and the payments made into said fund shall not constitute an element of loss for the purpose of establishing rates for workers' compensation insurance as provided in the insurance law but shall for the purpose of recoupment be treated as separate costs by carriers. Carriers shall assess such costs on their policyholders in accordance with rules set forth by the New York workers' compensation rating board, as approved by the superintendent of financial services.

The provisions of this subdivision shall not apply with respect to policies containing coverage pursuant to section thirty-four hundred twenty of the insurance law relating to every policy providing comprehensive personal liability insurance on a one, two, three or four family owner-occupied dwelling.

4. The commissioner of taxation and finance shall be the custodian of such special fund for reopened cases and shall invest any surplus monies thereof in securities which constitute legal investments for savings banks under the laws of this state and in interest bearing certificates of deposit of a bank or trust company located and authorized to do business in this state or of a national bank located in this state secured by a pledge of direct obligations of the United States or of the state of New York in an amount equal to the amount of such certificates of deposit, and may sell any of the securities or certificates of deposit in which such fund is invested, if necessary for the proper administration or in the best interest of such fund. Disbursements from such fund for compensation provided by this section shall be paid by the commissioner of taxation and finance upon vouchers signed by the chairman.

The commissioner of taxation and finance, as custodian of such fund, annually as soon as practicable after January first, shall furnish to the chairman a statement of the fund, setting forth the balance of monies in the said fund as of the beginning of the year, the income of the fund, a summary of payments out of the fund on account of compensation ordered to be paid by the board, medical and other expense, and all other charges against the fund, and setting forth the balance of the fund remaining to its credit on December thirty-first. Such statement shall be open to public inspection in the office of the chairman, and a copy thereof shall be transmitted by the chairman to the superintendent of financial services. The superintendent of financial services may examine into the condition of such fund at any time on his own initiative or on request of the chairman or representative of the fund. He shall verify the receipts and disbursements of the fund, and shall

ascertain the liability of the fund upon all cases in which awards of compensation have been made and charged against said fund and shall render a report of such facts to the chairman. Such report shall also be open to public inspection in the office of the chairman.

5. When an application for compensation is made under this section, the chairman shall appoint a representative of such fund in such proceedings and, insofar as practicable, such representative shall be a person designated by the employer originally liable for the payment of compensation, or his insurance carrier, but whenever it shall appear to the chairman that through any committee, board or organization or representative of the interest of the insurance carriers an attorney has been appointed to act for and on behalf of such carriers generally to represent such fund in any proceedings brought hereunder, the chairman shall designate such attorney as the representative of the fund in proceedings brought to enforce a claim against such fund. Such representative may apply to the chairman for authority to hire such medical or other experts and to defray the expense thereof and of such witnesses as are necessary to a proper defense of the application within an amount in the discretion of the chairman and, if authorized, it shall be a charge against the special fund provided herein.

6. Notwithstanding any other provision of this chapter, no award of compensation or death benefits shall be made against said special fund or against an employer or an insurance carrier where application therefor is made after a lapse of eighteen years from the date of the injury or death and also a lapse of eight years from the date of the last payment of compensation.

7. For the purposes of this section the date of the last payment of compensation shall be deemed to mean the date of actual payment of the last installment of compensation previously awarded; provided, however, that where the case is disposed of by the payment of a lump sum, the date of last payment for the purpose of this section shall be considered as the date to which the amount paid in the lump sum settlement would extend if the award had been made on the date the lump sum payment was approved at the maximum compensation rate which is warranted by the employee's earning capacity as determined by the board under section fifteen of this chapter.

8. The provisions of this section shall not apply to any open case pending before the board on April twenty-fourth, nineteen hundred thirty-three or to any closed case in which an application for reopening was received prior to such date, or to awards for deficiency compensation made pursuant to section twenty-nine of this chapter, nor shall it apply during the pendency of an appeal provided for by section twenty-three of this chapter; provided, however, that such provisions shall be retroactive in effect except as to payments into the special fund provided for an employer or his insurance carrier, and except as otherwise herein provided.

9. (a) Notwithstanding any other provision of this chapter, every employee who is receiving workers' compensation under this chapter for a permanent and total disability resulting from an accidental injury or occupational disablement which occurred prior to January first, nineteen hundred seventy-nine and every widow or widower who is receiving death benefits under this chapter on account of the death of his or her spouse prior to January first, nineteen hundred seventy-nine shall receive supplemental benefits upon appli-

cation therefor to the board, which shall be payable in the first instance by the employer or its insurance carrier in accordance with the provisions of this subdivision. These supplemental benefits shall commence on July first, nineteen hundred ninety and shall continue during the period of such permanent total disability or entitlement to death benefits.

(b) If such employee, widow or widower is receiving the statutory maximum benefit in effect at the time of the accidental injury or death, the supplemental benefit shall be an amount which, when added to the regular benefit established for the case, shall equal the maximum weekly benefit in effect for a permanently totally disabled employee, widow or widower whose claim arose on January first, nineteen hundred seventy-nine.

(c) If such employee, widow or widower is receiving a weekly benefit which is less than the statutory maximum benefit which was in effect on the date of the accidental injury or death, the supplemental benefit shall be an amount equal to the difference between the regular benefit being received and a percentage of the maximum benefit in effect on January first, nineteen hundred seventy-nine, determined by multiplying the latter benefit by a fraction, the numerator of which is the regular benefit and the denominator of which is the statutory maximum benefit in effect at the time of the accidental injury or death.

(d) In the event the supplemental benefit computed under this subdivision amounts to less than five dollars, then the supplemental benefit allowed shall be a minimum of five dollars, less the amount, if any, by which the combination of such supplemental benefit and the regular benefit exceeds the maximum weekly benefit in effect for a permanently totally disabled employee,

widow or widower whose claim arose on January first, nineteen hundred seventy-nine.

(e) The employer or his insurance carrier paying the supplemental benefits required under this subdivision shall claim reimbursement for each such case from the reopened cases fund under this section, commencing one year from the date of the first such payment and annually thereafter while such supplemental payments continue, on a form prescribed by the chairman.

(f) The special disability fund created under subdivision eight of section fifteen and the reopened cases fund created under section twenty-five-a and the aggregate trust fund created under section twenty-seven of this chapter shall be deemed to be insurance carriers for purposes of this subdivision, other than the payment of the assessment under the provisions of subdivision three of this section.

(g) Whenever payment of the supplemental benefits prescribed hereunder is not made by the insurance carrier by reason of the insolvency of such insurance carrier, or in the case of a self-insurer, by reason of the insolvency of such self-insurer or the discontinuance of its operations, such payment shall be made directly out of the reopened cases fund under this section by the commissioner of taxation and finance upon vouchers approved by the chairman of the workmen's compensation board.

APPENDIX G

New York Workers' Compensation Law § 25-a

§ 25-a. Procedure and payment of compensation in certain claims; limitation of right to compensation

Effective: March 29, 2013

1. Notwithstanding other provisions of this chapter, when an application for compensation is made by an employee or for death benefits in behalf of the dependents of a deceased employee, and the employer has secured the payment of compensation in accordance with section fifty of this chapter, (1) after a lapse of seven years from the date of the injury or death and claim for compensation previously has been disallowed or claim has been otherwise disposed of without an award of compensation, or (2) after a lapse of seven years from the date of the injury or death and also a lapse of three years from the date of the last payment of compensation, or (3) where death resulting from the injury shall occur after the time limited by the foregoing provisions of (1) or (2) shall have elapsed, subject to the provisions of section one hundred twenty-three of this chapter, testimony may be taken, either directly or through a referee and if an award is made it shall be against the special fund provided by this section. Such an application for compensation or death benefits must be made on a form prescribed by the chair for that purpose and must, if a change in condition is claimed, be accompanied by a verified medical or surgical report setting forth facts on which the board may order a hearing.

1-a. Any award which shall be made against such special fund after the effective date of this act upon such an application for compensation or death benefits

shall not be retroactive for a period of disability or for death benefits longer than the two years immediately preceding the date of filing of such application. No application by a self-insured employer or an insurance carrier for transfer of liability of a claim to the fund for reopened cases shall be accepted by the board on or after the first day of January, two thousand fourteen except that the board may make a finding after such date pursuant to section twenty-three of this article upon a timely application for review.

2. Claims for further services or treatment rendered or supplies furnished as required by section thirteen hereof shall be paid from such fund when such service, treatment or supplies shall be authorized by the chairman. In cases where a surgical operation has previously been authorized by the board pursuant to the provisions of subdivision five of section thirteen-a of this chapter, no further authorization therefor by the chairman under this section shall be required. The provisions of this chapter with respect to procedure and the right to appeal shall be preserved to the claimant and to the employer originally liable for the payment of compensation and to such fund through its representative as hereinafter provided.

3. Any awards so made shall be payable out of the special fund heretofore created for such purpose, which fund is hereby continued and shall be known as the fund for reopened cases. The employer, or, if insured, his insurance carrier shall pay into such fund, or, in the case of awards made on or after July first, nineteen hundred sixty-nine, either into such fund or the uninsured employers' fund under section twenty-six-a of this article in accordance with the provisions thereof, for every case of injury causing death for which there are no persons entitled to compensation the sum of

three hundred dollars where such injury occurred prior to July first, nineteen hundred forty and the sum of one thousand dollars where such injury shall occur on or after said date and prior to April first, nineteen hundred forty-five, and the sum of fifteen hundred dollars where such injury shall occur on or after April first, nineteen hundred forty-five and prior to September first, nineteen hundred seventy-eight and the sum of three thousand dollars where such injury shall occur on or after September first, nineteen hundred seventy-eight, and in each case of death resulting from injury sustained on or after July first, nineteen hundred forty and prior to September first, nineteen hundred seventy-eight, where there are persons entitled to compensation but the total amount of such compensation is less than two thousand dollars exclusive of funeral benefits, the employer, or, if insured, his insurance carrier, shall pay into such fund, or, in the case of awards made on or after July first, nineteen hundred sixty-nine and prior to September first, nineteen hundred seventy-eight, either into such fund or the uninsured employers' fund under section twenty-six-a of this article in accordance with the provisions thereof, the difference between the sum of two thousand dollars and the compensation, exclusive of funeral benefits, and in each case of death resulting from injury sustained on or after September first, nineteen hundred seventy-eight, the employer, or if insured, his insurance carrier shall pay into such fund or the uninsured employers' fund under section twenty-six-a of this article in accordance with the provisions thereof, the difference between the sum of five thousand dollars and the compensation, exclusive of funeral benefits actually paid to or for the dependents of the deceased employee together with any expense charge required by section twenty-seven of this article; provided, however, that where death shall occur subse-

quent to the periods limited by subdivision one of this section no payment into such special fund nor to the special fund provided by subdivision nine of section fifteen nor to the uninsured employers' fund provided by section twenty-six-a of this article shall be required. In addition to the assessments made against all insurance carriers for the expenses of administering this chapter provided for under the provisions of section one hundred fifty-one of this chapter, and the payments above provided, the employer, or, if insured, his insurance carrier, shall pay the sum of five dollars into said fund for each case in which an award is made pursuant to the provisions of paragraphs a to s inclusive of subdivision three of section fifteen of this chapter, by reason of injury sustained between July first, nineteen hundred forty and June thirtieth, nineteen hundred forty-two, both dates inclusive, and the sum of ten dollars for each such case by reason of injury sustained between July first, nineteen hundred forty-two and June thirtieth, nineteen hundred fifty, both dates inclusive, which payment shall be in addition to any payment of compensation to the injured employee as provided in this chapter.

There shall be maintained in the special fund at all times assets at least equal in value to the sum of (1) the value of awards charged against such fund, (2) the value of all claims that have been reopened by the board as a charge against such fund but as to which awards have not yet been made, (3) effective January first, nineteen hundred seventy-one, the value of total supplemental benefits to be paid from such fund as reimbursement pursuant to subdivision nine of this section, and (4) a reserve equal to ten per cent of the sum of items (1), (2) and (3) of this paragraph. Annually, as soon as practicable after January first in each year, the chair shall

ascertain the condition of the fund and whenever the assets shall fall below the prescribed minimum as herein provided the chair shall collect an amount sufficient to restore the fund to the prescribed minimum. Commencing on the first of January, two thousand fourteen, the amount collected from all employers required to obtain workers' compensation coverage to maintain the financial integrity of the fund may be paid over a period of time at the discretion of the chair based upon an analysis of the financial condition of the fund. Such payment as determined by the chair shall be included in the assessment rate established pursuant to subdivision two of section one hundred fifty-one of this chapter. The chair shall promulgate regulations to administer claims whose liability has been transferred to the fund for reopened cases. Such regulations may include exercise of the chair's authority to administer existing claims, to procure management for those claims, or to sell such liability. The chair may examine into the condition of the fund at any time on his or her own initiative or on request of the attorney of the fund.

The provisions of this subdivision shall not apply with respect to policies containing coverage pursuant to section thirty-four hundred twenty of the insurance law relating to every policy providing comprehensive personal liability insurance on a one, two, three or four family owner-occupied dwelling.

4. The commissioner of taxation and finance shall be the custodian of such special fund for reopened cases and shall invest any surplus monies thereof in securities which constitute legal investments for savings banks under the laws of this state and in interest bearing certificates of deposit of a bank or trust company located and authorized to do business in this state or of a national bank located in this state secured by a pledge

of direct obligations of the United States or of the state of New York in an amount equal to the amount of such certificates of deposit, and may sell any of the securities or certificates of deposit in which such fund is invested, if necessary for the proper administration or in the best interest of such fund. Disbursements from such fund for compensation provided by this section shall be paid by the commissioner of taxation and finance upon vouchers signed by the chairman.

The commissioner of taxation and finance, as custodian of such fund, annually as soon as practicable after January first, shall furnish to the chairman a statement of the fund, setting forth the balance of monies in the said fund as of the beginning of the year, the income of the fund, a summary of payments out of the fund on account of compensation ordered to be paid by the board, medical and other expense, and all other charges against the fund, and setting forth the balance of the fund remaining to its credit on December thirty-first. Such statement shall be open to public inspection in the office of the chairman, and a copy thereof shall be transmitted by the chairman to the superintendent of financial services. The superintendent of financial services may examine into the condition of such fund at any time on his own initiative or on request of the chairman or representative of the fund. He shall verify the receipts and disbursements of the fund, and shall ascertain the liability of the fund upon all cases in which awards of compensation have been made and charged against said fund and shall render a report of such facts to the chairman. Such report shall also be open to public inspection in the office of the chairman.

5. For applications by self-insured employers or insurance carriers for transfer of liability for compensation to the fund for reopened cases under this section,

received by the board prior to the first day of January, two thousand fourteen, the chair shall appoint an attorney in such proceedings to represent such fund in proceedings brought to enforce a claim against such fund. Such attorney may apply to the chair for authority to hire such medical or other experts and to defray the expense thereof and of such witnesses as are necessary to a proper defense of the application within an amount in the discretion of the chair and, if authorized, it shall be a charge against the special fund provided herein.

6. Notwithstanding any other provision of this chapter, no award of compensation or death benefits shall be made against said special fund or against an employer or an insurance carrier where application therefor is made after a lapse of eighteen years from the date of the injury or death and also a lapse of eight years from the date of the last payment of compensation.

7. For the purposes of this section the date of the last payment of compensation shall be deemed to mean the date of actual payment of the last installment of compensation previously awarded; provided, however, that where the case is disposed of by the payment of a lump sum, the date of last payment for the purpose of this section shall be considered as the date to which the amount paid in the lump sum settlement would extend if the award had been made on the date the lump sum payment was approved at the maximum compensation rate which is warranted by the employee's earning capacity as determined by the board under section fifteen of this chapter.

8. The provisions of this section shall not apply to any open case pending before the board on April twenty-fourth, nineteen hundred thirty-three or to any

closed case in which an application for reopening was received prior to such date, or to awards for deficiency compensation made pursuant to section twenty-nine of this chapter, nor shall it apply during the pendency of an appeal provided for by section twenty-three of this chapter; provided, however, that such provisions shall be retroactive in effect except as to payments into the special fund provided for an employer or his insurance carrier, and except as otherwise herein provided.

9. (a) Notwithstanding any other provision of this chapter, every employee who is receiving workers' compensation under this chapter for a permanent and total disability resulting from an accidental injury or occupational disablement which occurred prior to January first, nineteen hundred seventy-nine and every widow or widower who is receiving death benefits under this chapter on account of the death of his or her spouse prior to January first, nineteen hundred seventy-nine shall receive supplemental benefits upon application therefor to the board, which shall be payable in the first instance by the employer or its insurance carrier in accordance with the provisions of this subdivision. These supplemental benefits shall commence on July first, nineteen hundred ninety and shall continue during the period of such permanent total disability or entitlement to death benefits.

(b) If such employee, widow or widower is receiving the statutory maximum benefit in effect at the time of the accidental injury or death, the supplemental benefit shall be an amount which, when added to the regular benefit established for the case, shall equal the maximum weekly benefit in effect for a permanently totally disabled employee, widow or widower whose claim arose on January first, nineteen hundred seventy-nine.

(c) If such employee, widow or widower is receiving a weekly benefit which is less than the statutory maximum benefit which was in effect on the date of the accidental injury or death, the supplemental benefit shall be an amount equal to the difference between the regular benefit being received and a percentage of the maximum benefit in effect on January first, nineteen hundred seventy-nine, determined by multiplying the latter benefit by a fraction, the numerator of which is the regular benefit and the denominator of which is the statutory maximum benefit in effect at the time of the accidental injury or death.

(d) In the event the supplemental benefit computed under this subdivision amounts to less than five dollars, then the supplemental benefit allowed shall be a minimum of five dollars, less the amount, if any, by which the combination of such supplemental benefit and the regular benefit exceeds the maximum weekly benefit in effect for a permanently totally disabled employee, widow or widower whose claim arose on January first, nineteen hundred seventy-nine.

(e) The employer or his insurance carrier paying the supplemental benefits required under this subdivision shall claim reimbursement for each such case from the reopened cases fund under this section, commencing one year from the date of the first such payment and annually thereafter while such supplemental payments continue, on a form prescribed by the chairman.

(f) The special disability fund created under subdivision eight of section fifteen and the reopened cases fund created under section twenty-five-a and the aggregate trust fund created under section twenty-seven of this chapter shall be deemed to be insurance carriers for purposes of this subdivision, other than the pay-

ment of the assessment under the provisions of subdivision three of this section.

(g) Whenever payment of the supplemental benefits prescribed hereunder is not made by the insurance carrier by reason of the insolvency of such insurance carrier, or in the case of a self-insurer, by reason of the insolvency of such self-insurer or the discontinuance of its operations, such payment shall be made directly out of the reopened cases fund under this section by the commissioner of taxation and finance upon vouchers approved by the chairman of the workmen's compensation board.

APPENDIX H

New York Workers' Compensation Law § 50(1)-(3)

§ 50. Security for payment of compensation

Effective: April 10, 2017

An employer shall secure compensation to his employees in one or more of the following ways:

1. By insuring and keeping insured the payment of such compensation in the state fund, or

2. By insuring and keeping insured the payment of such compensation with any stock corporation, mutual corporation or reciprocal insurer authorized to transact the business of workers' compensation insurance in this state through a policy issued under the law of this state.

3. By furnishing satisfactory proof to the chair of his financial ability to pay such compensation for himself, or to pay such compensation on behalf of a group of employers in accordance with subdivision ten of this section, in which case the chair shall require the deposit with the chair of such securities as the chair may deem necessary of the kind prescribed in subdivisions one, two, three, four and five, and subparagraph (a) of paragraph three of subdivision seven of section two hundred thirty-five of the banking law, or the deposit of cash, or the filing of irrevocable letters of credit issued by a qualified banking institution as defined by rules promulgated by the chair or the filing of a bond of a surety company authorized to transact business in this state, in an amount to be determined by the chair, or the posting and filing as aforesaid of a combination of such securities, cash, irrevocable letters of credit and surety bond in an amount to be determined by the

chair, to secure his liability to pay the compensation provided in this chapter. Any such surety bond must be approved as to form by the chair. If an employer or group of employers posts and files a combination of securities, cash, irrevocable letters of credit and surety bond as aforesaid, and if it becomes necessary to use the same to pay the compensation provided in this chapter, the chair shall first use such securities or cash or irrevocable letters of credit and, when the full amount thereof has been exhausted, he shall then require the surety to pay forthwith to the chair all or any part of the penal sum of the bond for that purpose. The chair may also require an agreement on the part of the employer or group of employers to pay any awards commuted under section twenty-seven of this chapter, into the special fund of the state fund, as a condition of his being allowed to remain uninsured pursuant to this section. The chair shall have the authority to deny the application of an employer or group of employers to pay such compensation for himself or to revoke his consent furnished, under this section at any time, for good cause shown. The employer or group of employers qualifying under this subdivision shall be known as a self-insurer.

If for any reason the status of an employer or group of employers under this subdivision is terminated, the securities or the surety bond, or the securities, cash, or irrevocable letters of credit and surety bond, on deposit referred to herein shall remain in the custody of the chair for such time as the chair may deem proper and warranted under the circumstances. In lieu thereof, and at the discretion of the chair, the employer, his or her heirs or assigns or others carrying on or liquidating such business, may execute an assumption of workers' compensation liability insurance policy as described herein. Separately, the chair may execute an assump-

tion of workers' compensation liability insurance policy as described herein on behalf of the special funds created under the provisions of subdivisions eight and nine of section fifteen and section twenty-five-a of this chapter, and notwithstanding any provision to the contrary the chair may execute an assumption of workers' compensation liability insurance policy on behalf of the uninsured employers' fund. An assumption of workers' compensation liability policy referred to herein shall secure such further and future contingent liability as may directly or indirectly arise from prior injuries to workers and be incurred by reason of any change in condition of such workers warranting the board making subsequent awards for payment of additional compensation. Such policy shall be in a form approved by the superintendent of financial services and issued by the state fund or any insurance company licensed to issue this class of insurance in this state or, upon application by the chair, any other insurance company deemed by the superintendent of financial services to be an acceptable issuer. In the event that such policy is issued by an insurance company other than the state fund, then said policy shall be deemed of the kind specified in paragraph fifteen of subsection (a) of section one thousand one hundred thirteen of the insurance law and covered by the workers' compensation security fund as created and governed by article six-A of this chapter. It shall only be issued for a single complete premium payment in advance and in an amount deemed acceptable by the chair and the superintendent of financial services. In lieu of the applicable premium charge ordinarily required to be imposed by a carrier, said premium shall include a surcharge in an amount to be determined by the chair to: (i) satisfy all assessment liability due and owing to the board and/or the chair under this chapter; and (ii) satisfy all future assessment liability

under this section, and which surcharge shall be adjusted from time to time to reflect any changes to the assessment of group self-insured employers, including any changes enacted by the chapter of the laws of two thousand eleven amending sections fifteen and one hundred fifty-one of this chapter. Said surcharge shall be payable to the board simultaneous to the execution of the assumption of workers' compensation liability insurance policy. However, the payment of said surcharge does not relieve the carrier from any other liability, including liability owed to the superintendent of financial services pursuant to article six-A of this chapter. When issued such policy shall be non-cancellable without recourse for any cause during the continuance of the liability secured and so covered.

* * *

APPENDIX I

New York Workers' Compensation Law § 151(1)-(2) (2011)

§ 151. Administrative expenses

Effective: October 3, 2011 to March 28, 2013

1. The chairman, as soon as practicable after September first in each year, shall submit to the director of the budget for his approval an estimated budget of expenditures for the succeeding fiscal year. There may not be expended by the board for purposes of administration more than the amounts specified in such budget for each item of expenditure, except as authorized by the director of the budget. If there be officers or employees of the board whose duties relate partly to the general work of the board and partly to the work of the department of labor, and in case there is other expense which is incurred jointly on behalf of the general work of the board and the department of labor, an equitable apportionment of the expense shall be made and the part thereof which is applicable to the board shall be chargeable thereto. The board shall include in its annual report to the governor a statement showing the expense of administering the workmen's compensation law for the preceding fiscal year.

2. (a) The chair and department of audit and control annually as soon as practicable after April first shall ascertain the total amount of expenses, including in addition to the direct costs of personal service, the cost of maintenance and operation, the cost of retirement contributions made and workers' compensation premiums paid by the state for or on account of personnel, rentals for space occupied in state owned or state leased buildings, such additional sum as may be certi-

fied to the chair and the department of audit and control as a reasonable compensation for services rendered by the department of law and expenses incurred by such department, for transfer into the training and education program on occupational safety and health fund created pursuant to chapter eight hundred eighty-six of the laws of nineteen hundred eighty-five and section ninety-seven-c of the state finance law, for the New York state occupational health clinics network, for the department of labor occupational safety and health program and for transfer into the uninsured employers' fund pursuant to subdivision two of section twenty-six-a of this chapter, and all other direct or indirect costs, incurred by the board during the preceding fiscal year in connection with the administration of this chapter, except those expenses for which an assessment is authorized pursuant to subdivision five of section fifty and sections two hundred twenty-eight and three hundred twenty-five of this chapter.

(b) An itemized statement of the expenses so ascertained shall be open to public inspection in the office of the board for thirty days after notice to the state insurance fund, all insurance carriers and all self-insurers affected thereby, before the board shall make an assessment for such expenses. The chair shall assess upon and collect a proportion of such expenses as hereinafter provided from each insurance carrier, the state insurance fund and each self-insurer. The assessment for such expenses shall be allocated to (i) self-insurers and the state insurance fund based upon the proportion that the total compensation payments made by all self-insurers and the state insurance fund in such year bore to the total compensation payments made by all self-insurers, the state insurance fund, and all insurance carriers and (ii) insurance carriers based upon the pro-

portion that the total compensation payments made by all insurance carriers in such year bore to the total compensation payments by all self-insurers, the state insurance fund and all insurance carriers. The portion of the assessment for such expenses allocated to self-insurers and the state insurance fund that shall be collected from each self-insurer and the state insurance fund shall be a sum equal to the proportion of the amount which the total compensation payments of each such self-insurer or the state insurance fund in such year bore to the total compensation payments made by all self-insurers and the state insurance fund. The portion of the assessment for such expenses allocated to insurance carriers that shall be collected from each such insurance carrier shall be a sum equal to that proportion of the amount which the total standard premium by each such insurance carrier bore to the total standard premium reported by all insurance carriers for the calendar year which ended with the state fiscal year. The amounts so secured shall be used for the payment of the expenses of administering this chapter.

For purposes of this paragraph, "standard premium" shall mean the premium as defined for the purposes of this assessment by the superintendent of financial services, in consultation with the chair of the board and the workers' compensation rating board. The amounts so secured shall be used for the payment of the expenses of administering this chapter.

For the purposes of this paragraph, the term "insurance carrier" shall include only stock corporations, mutual corporations and reciprocal insurers authorized to transact the business of workers' compensation insurance in this state and the term "self-insurer" shall include any employer or group of employers permitted to pay compensation directly under the provisions of

subdivision three, three-a or four of section fifty of this chapter. For the purposes of this section, a "self-insurer" shall be: (i) an employer authorized to self-insure under subdivision three of section fifty of this chapter, or active groups authorized pursuant to subdivision three-a of section fifty of this chapter, a group of employers authorized to self-insure under paragraph ten of subdivision three-a of section fifty of this chapter; or (ii) a public employer as set forth in paragraph a of subdivision four of section fifty of this chapter authorized to self-insure under subdivision three, three-a or four of section fifty or article five of this chapter, whether individually or as a group.

(c) Assessments for the special disability fund, the fund for reopened cases and for the operations of the board shall not constitute elements of loss but shall for collection purposes be treated as separate costs by carriers. All insurance carriers, including the state insurance fund, shall collect such assessments from their policyholders through a surcharge based on premium in accordance with rules set forth by the New York workers' compensation rating board, as approved by the superintendent of financial services. Such surcharge shall be considered as part of premium for purposes prescribed by law including, but not limited to, computing premium tax, reporting to the superintendent of financial services pursuant to section ninety-nine of this chapter and section three hundred seven of the insurance law, determining the limitation of expenditures for the administration of the state insurance fund pursuant to section eighty-eight of this chapter and the cancellation by an insurance carrier, including the state insurance fund, of a policy for non-payment of premium.

* * *

APPENDIX K

EXCERPTS OF
2013 Sess. Law News of N.Y. Ch. 57 (S. 2607-D)
(McKINNEY'S)

2013 SESSION LAW NEWS OF NEW YORK
236th LEGISLATURE

Additions are indicated by **Text**; deletions by ~~Text~~.
Vetoes are indicated by ~~Text~~; stricken material by ~~**Text**~~.

CHAPTER 57
S. 2607–D
BUDGET—IMPLEMENTATION—EDUCATION, HOUSING, LABOR AND FAMILY ASSISTANCE

Approved March 29, 2013, effective as provided in section 3

* * *

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§ 1. This act enacts into law major components of legislation which are necessary to implement the state fiscal plan for the 2013–2014 state fiscal year. Each component is wholly contained within a Part identified as Parts A through HH. The effective date for each particular provision contained within such Part is set forth in the last section of such Part. Any provision in any section contained within a Part, including the effective date of the Part, which makes a reference to a section "of this act", when used in connection with that particu-

lar component, shall be deemed to mean and refer to the corresponding section of the Part in which it is found. Section three of this act sets forth the general effective date of this act.

* * *

§ 13. Subdivisions 1, 3 and 5 of section 25–a of the workers' compensation law, subdivisions 1 and 5 as amended by chapter 113 of the laws of 1946, subdivision 3 as amended by chapter 6 of the laws of 2007, and the second and third undesignated paragraphs of subdivision 3 as further amended by section 104 of part A of chapter 62 of the laws of 2011, are amended to read as follows:

<< NY WORK COMP § 25–a >>

* * *

1–a. Any award which shall be made against such special fund after the effective date of this act upon such an application for compensation or death benefits shall not be retroactive for a period of disability or for death benefits longer than the two years immediately preceding the date of filing of such application. **No application by a self-insured employer or an insurance carrier for transfer of liability of a claim to the fund for reopened cases shall be accepted by the board on or after the first day of January, two thousand fourteen except that the board may make a finding after such date pursuant to section twenty-three of this article upon a timely application for review.**

* * *

APPENDIX K

EXCERPTS OF
2013-14 NEW YORK STATE EXECUTIVE BUDGET

PUBLIC PROTECTION AND GENERAL
GOVERNMENT ARTICLE VII LEGISLATION

MEMORANDUM IN SUPPORT

* * *

Part O—Workers Compensation Reform: Business Relief Bill

Purpose:

This legislation would dramatically reform the Workers' Compensation Board's (Board) assessment process so that employers would pay their assessments directly to the Board through their carrier. It would also establish a bonding program to address insolvent group self-insured trusts, eliminate mandatory deposits into the aggregate trust fund and close the Reopened Case Fund. Finally, it would provide efficiencies to the Board and result in a significant economic benefit to businesses in the State.

Statement in Support. Summary of Provisions. Existing Law, and Prior Legislative History:

The primary provisions of the bill are as follows:

Pass Through Assessments. It would amend the Workers' Compensation Law (WCL) by simplifying the assessment process on employers so that carriers can charge customers directly for the exact amount owed to the Board.

Close the Reopened Case Fund. It would close the Reopened Case Fund (Fund) (WCL § 25-a) to any new

claims. Closing the Fund would save New York businesses hundreds of millions of dollars in assessments per year. The Fund provides payments directly to claimants and health providers when the claimant's case is reopened under certain circumstances. The original intent of the Fund was to provide carriers relief in a small number of cases where liability unexpectedly arises after a case has been closed for many years. However, carriers do not need this relief because the premiums they have charged already cover this liability. This reform prevents a windfall for such carriers.

Aggregate Trust Fund (ATF). It would eliminate mandatory deposits to the ATF and close the fund to new deposits. The ATF was originally intended to protect a claimant in the event a carrier defaulted in its payments. The Workers' Compensation Guarantee Fund is now responsible for ensuring such payments, so these transfers are no longer necessary.

Bonding Program. It would establish a program to cover defaults of group self-insured trusts by authorizing the issuance of bonds backed by the new Workers' Compensation Assessment to purchase liabilities resulting from such defaults. Bonding would provide a mechanism to sell these liabilities. The WCL § 50-5 assessment, which is an assessment on the healthy self-insurance community to provide cash to pay claims for defaulted groups, will grow significantly over the next several years. The bonding program would mitigate the impact of defaulted groups on the healthy self-insurance community. The bonds issued for this purpose will not constitute a debt of the State or a State-supported obligation within the meaning of any constitutional or statutory provision.

State Insurance Fund (SIF) Assessment Reserves. It would amend WCL § 151 so that the assessment reserves held by SIF would no longer be necessary and would be transferred to the Board. The Board would be authorized to release up to $250 million for general operating purposes and up to $500 million for capital purposes.

Management of the Special Disability Fund. It would confirm the Board's authority to oversee the Special Disability Fund. The bill would give the Chair of the Board the authority to appoint an attorney to represent and defend the fund.

State Insurance Fund (SIF). It would revise the investment authority of SIF to provide greater security for investment of funds held as reserves while permitting greater diversification on investment of funds held as surplus. The bill also repeals an inoperative and superfluous version of WGL § 88.

Minimum Compensation Benefit. It would increase the minimum compensation benefit amount from $100 per week to $150 per week. This amount has not changed since 2007, and unlike the maximum benefit amount, it is not tied to an index. Therefore, it is necessary to periodically increase the minimum benefit rate to conform to the automatic increases in the maximum benefit rate. Less than 10% of claims are impacted by the minimum compensation benefit provision.

Miscellaneous Provisions. It would repeal WCL § 146 requiring the Board's principal office to be in the City of Albany; allow for single arbitrator panels in determining medical disputes valued over $1,000; amend the time period to file a discretionary full board review to thirty days; allow group trusts to post their full securi-

ty in a 114 trust; and establish a standard of review for appeals in alternative dispute resolution cases.

Budget Implications:

Enactment of this bill is necessary to implement the 2013-14 Executive Budget. This bill would end the disconnect between assessment collections and payments to the Board by carriers and eliminate the long term assessment liability for self-insured employers, providing approximately $500 million in relief to businesses and municipalities. It offers a bonding solution to the group self-insurance trust problem without placing a $900 million obligation on the self-insurance community. In addition, the Financial Plan for SFY 2013-14 includes $250 million for operating purposes and $500 million for capital purposes from the release of the assessment reserves no longer required to be held by SIF.

Effective Date:

This bill would take effect immediately. However, no application by a self-insured employer or an insurance carrier for transfer of liability of a claim to the fund for reopened cases would be accepted by the Board on or after the first day of January, 2014. The Board would not direct a mandatory deposit into the ATF 30 days after the bill becomes law. Finally, the provision establishing a time period for the filing of full board reviews will take effect 90 days after the bill becomes law.

APPENDIX L

WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY QUICK REFERENCE

Important: This Quick Reference is not part of the Workers Compensation and Employers Liability Policy and does not provide coverage. Refer to the Workers Compensation and Employers Liability Policy itself for actual contractual provisions.

PLEASE READ THE WORKERS COMPENSATION AND EMPLOYERS LIABILITY POLICY CAREFULLY.

WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY

In return for the payment of the premium and subject to all terms of this policy, we agree with you as follows:

GENERAL SECTION

A. The Policy

This policy includes at its effective date the Information Page and all endorsements and schedules listed there. It is a contract of insurance between you (the employer named in item 1 of the Information Page) and us (the insurer named on the Information Page). The only agreements relating to this insurance are stated in this policy. The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy.

B. Who Is Insured

You are insured if you are an employer named in Item 1 of the Information Page. If that employer is a partnership, and if you are one of its partners, you are insured, but only in your capacity as an employer of the partnership's employees.

C. Workers Compensation Law

Workers Compensation Law means the workers or workmen's compensation law and occupational disease law of each state or territory named in Item 3.A, of the Information Page. It includes any amendments to that law which are in effect during the policy period. It does not include any federal workers or workmen's compensation law, any federal occupational disease law or the

provisions of any law that provide nonoccupational disability benefits.

D. State

State means any state of the United States of America, and the District of Columbia.

E. Locations

This policy covers all of your workplaces listed in Items 1 or 4 of the Information Page; and it covers all other workplaces in Item 3.A, states unless you have other insurance or are self-insured for such workplaces.

PART ONE - WORKERS COMPENSATION INSURANCE

A. How This Insurance Applies

This workers compensation insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

1. Bodily injury by accident must occur during the policy period.
2. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.

B. We Will Pay

We will pay promptly when due the benefits required of you by the workers compensation law.

C. We Will Defend

We have the right and duty to defend at our expense any claim, proceeding or suit against you for

benefits payable by this insurance. We have the right to investigate and settle these claims, proceedings or suits. We have no duty to defend a claim, proceeding or suit that is not covered by this insurance.

D. We Will Also Pay

We will also pay these costs, in addition to other amounts payable under this insurance, as part of any claim, proceeding or suit we defend:

1. reasonable expenses incurred at our request, but not loss of earnings;
2. premiums for bonds to release attachments and for appeal bonds in bond amounts up to the amount payable under this insurance;
3. litigation costs taxed against you;
4. interest on a judgment as required by law until we offer the amount due under this insurance; and
5. expenses we incur.

E. Other Insurance

We will not pay more than our share of benefits and costs covered by this insurance and other insurance or self-insurance. Subject to any limits of liability that may apply, all shares will be equal until the loss is paid. If any insurance or self-insurance is exhausted, the shares of all remaining insurance will be equal until the loss is paid.

F. Payments You Must Make

You are responsible for any payments in excess of the benefits regularly provided by the workers compensation law including those required because:

1. of your serious and willful misconduct;
2. you knowingly employ an employee in violation of law;
3. you fail to comply with a health or safety law or regulation; or
4. you discharge, coerce or otherwise discriminate against any employee in violation of the workers compensation law.

If we make any payments in excess of the benefits regularly provided by the workers compensation law on your behalf, you will reimburse us promptly

G. Recovery From Others

We have your rights, and the rights of persons entitled to the benefits of this insurance, to recover our payments from anyone liable for the injury. You will do everything necessary to protect those rights for us and to help us enforce them.

H. Statutory Provisions

These statements apply where they are required by law.

1. As between an injured worker and us, we have notice of the injury when you have notice.
2. Your default or the bankruptcy or insolvency of you or your estate will not relieve us of our duties under this insurance after an injury occurs.
3. We are directly and primarily liable to any person entitled to the benefits payable by this insurance. Those persons may enforce our duties; so may an agency authorized by law. Enforcement may be against us or against you and us.

4. Jurisdiction over you is jurisdiction over us for purposes of the workers compensation law. We are bound by decisions against you under that law, subject to the provisions of this policy that are not in conflict with that law.

5. This insurance conforms to the parts of the workers compensation law that apply to:

    a. benefits payable by this insurance;

    b. special taxes, payments into security or other special funds, and assessments payable by us under that law.

6 Terms of this insurance that conflict with the workers compensation law are changed by this statement to conform to that law.

Nothing in these paragraphs relieves you of your duties under this policy.

PART TWO - EMPLOYERS LIABILITY INSURANCE

A. How This Insurance Applies

This employers liability insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury Includes resulting death.

1. The bodily injury must arise out of and in the course of the injured employee's employment by you.

2. The employment must be necessary or incidental to your work in a state or territory listed in Item 3.A, of the Information Page.

3. Bodily injury by accident must occur during the policy period.

4. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.

5. If you are sued, the original suit and any related legal actions for damages for bodily injury by accident or by disease must be brought in the United States of America, its territories or possessions, or Canada.

B. We Will Pay

We will pay all sums that you legally must pay as damages because of bodily injury to your employees, provided the bodily injury is covered by this Employers Liability Insurance.

The damages we will pay, where recovery is permitted by law, include damages:

1. For which you are liable to a third party by reason of a claim or suit against you by that third party to recover the damages claimed against such third party as a result of injury to your employee;

2. For care and loss of services; and

3. For consequential bodily injury to a spouse, child, parent, brother or sister of the injured employee; provided that these damages are the direct consequence of bodily injury that arises out of and in the course of the injured employee's employment by you; and

4. Because of bodily injury to your employee that arises out of and in the course of employment,

claimed against you in a capacity other than as employer.

C. Exclusions

This insurance does not cover:

1. Liability assumed under a contract. This exclusion does not apply to a warranty that your work will be done in a workmanlike manner;
2. Punitive or exemplary damages because of bodily injury to an employee employed in violation of law;
3. Bodily injury to an employee while employed in violation of law with your actual knowledge or the actual knowledge of any of your executive officers;
4. Any obligation imposed by a workers compensation, occupational disease, unemployment compensation, or disability benefits law, or any similar law;
5. Bodily injury intentionally caused or aggravated by you;
6. Bodily injury occurring outside the United States of America, its territories or possessions, and Canada. This exclusion does not apply to bodily injury to a citizen or resident of the United States of America or Canada who is temporarily outside these countries;
7. Damages arising out of coercion, criticism, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination against or termination of any employee, or any personnel practices, policies, acts or omissions;

8. Bodily injury to any person in work subject to the Longshore and Harbor Workers' Compensation Act (33 USC Sections 901-950), the Nonappropriated Fund Instrumentalities Act (5 USC Sections 8171-8173), the Outer Continental Shelf Lands Act (43 USC Sections 1331-1356a) the Defense Base Act (42 USC Sections 1651-1654), the Federal Coal Mine Safety and Health Act (30 USC Sections 801-945), any other federal workers or workmen's compensation law or other federal occupational disease law, or any amendments to these laws;

9. Bodily injury to any person in work subject to the Federal Employers' Liability Act (45 USC Sections 51-60), any other federal laws obligating an employer to pay damages to an employee due to bodily injury arising out of or in the course of employment, or any amendments to those laws;

10. Bodily injury to a master or member of the crew of any vessel;

11. Fines or penalties imposed for violation of federal or state law; and

12. Damages payable under the Migrant and Seasonal Agricultural Worker Protection Act (29 USC Sections 1801-1872) and under any other federal law awarding damages for violation of those laws or regulations issued there under, and any amendments to those laws.

D. We Will Defend

We have the right and duty to defend, at our expense, any claim, proceeding or suit against you for damages payable by this insurance. We have the right

to investigate and settle these claims, proceedings and suits.

We have no duty to defend a claim, proceeding or suit that is not covered by this insurance. We have no duty to defend or continue defending after we have paid our applicable limit of liability under this insurance.

E. We Will Also Pay

We will also pay these costs, in addition to other amounts payable under this insurance, as part of any claim, proceeding, or suit we defend:

1. Reasonable expenses incurred at our request, but not loss of earnings;
2. Premiums for bonds to release attachments and for appeal bonds in bond amounts up to the limit of our liability under this insurance.
3. Litigation costs taxed against you;
4. Interest on a judgment as required by law until we offer the amount due under this insurance; and
5. Expenses we incur.

F. Other Insurance

We will not pay more than our share of damages and costs covered by this insurance and other insurance or self-insurance. Subject to any limits of liability that apply, all shares will be equal until the loss is paid. If any Insurance or self-insurance is exhausted, the shares of all remaining insurance and self-insurance will be equal until the loss is paid.

G. Limits of Liability

Our liability to pay for damages is limited. Our limits of liability are shown in Item 3.B, of the Information Page. They apply as explained below.

1. Bodily Injury by Accident. The limit shown for "bodily injury by accident—each accident" is the most we will pay for all damages covered by this insurance because of bodily Injury to one or more employees in any one accident. A disease is not bodily injury by accident unless it results directly from bodily injury by accident.

2. Bodily Injury by Disease. The limit shown for "bodily injury by disease—policy limit" is the most we will pay for all damages covered by this insurance and arising out of bodily injury by disease, regardless of the number of employees who sustain bodily injury by disease. The limit shown for "bodily injury by disease—each employee" is the most we will pay for all damages because of bodily injury by disease to any one employee.

Bodily injury by disease does not include disease that results directly from a bodily injury by accident.

3. We will not pay any claims for damages after we have paid the applicable limit of our liability under this insurance.

H. Recovery From Others

We have your rights to recover our payment from anyone liable for an injury covered by this insurance. You will do everything necessary to protect those rights for us and to help us enforce them.

I. Actions Against Us

There will be no right of action against us under this insurance unless:

1. You have complied with all the terms of this policy; and
2. The amount you owe has been determined with our consent or by actual trial and final judgment.

This insurance does not give anyone the right to add us as a defendant in an action against you to determine your liability. The bankruptcy or insolvency of you or your estate will not relieve US of our obligations under this Part.

PART THREE - OTHER STATES INSURANCE

A. How This Insurance Applies

1. This other states insurance applies only if one or more states are shown in Item 3.C, of the Information Page.
2. If you begin work in any one of those states after the effective date of this policy and are not insured or are not self-insured for such work, all provisions of the policy will apply as though that state were listed in Item 3.A of the Information Page.

3 We will reimburse you for the benefits required by the workers compensation law of that state if we are not permitted to pay the benefits directly to persons entitled to them.

4 If you have work on the effective date of this policy in any state not listed in Item 3.A, of the Information Page, coverage will not be afford-

ed for that state unless we are notified within thirty days.

B. Notice

Tell us at once if you begin work in any state listed in Item 3 C of the Information Page.

PART FOUR - YOUR DUTIES IF INJURY OCCURS

Tell us at once if injury occurs that may be covered by this policy. Your other duties are listed here.

1. Provide for immediate medical and other services required by the workers compensation law.
2. Give us or our agent the names and addresses of the injured persons and of witnesses, and other information we may need.
3. Promptly give us all notices, demands and legal papers related to the injury, claim, proceeding or suit.
4. Cooperate with us and assist us, as we may request, in the investigation, settlement or defense of any claim, proceeding or suit.
5. Do nothing after an injury occurs that would interfere with our right to recover from others.
6. Do not voluntarily make payments, assume obligations or incur expenses, except at your own cost.

PART FIVE - PREMIUM

A. Our Manuals

All premium for this policy will be determined by our manuals of rules, rates, rating plans and classifica-

tions. We may change our manuals and apply the changes to this policy if authorized by law or a governmental agency regulating this insurance.

B. Classifications

Item 4 of the Information Page shows the rate and premium basis for certain business or work classifications. These classifications were assigned based on an estimate of the exposures you would have during the policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy.

C. Remuneration

Premium for each work classification is determined by multiplying a rate times a premium basis. Remuneration is the most common premium basis. This premium basis includes payroll and all other remuneration paid or payable during the policy period for the services of:

1. all your officers and employees engaged in work covered by this policy; and
2. all other persons engaged in work that could make us liable under Part One (Workers Compensation Insurance) of this policy. If you do not have payroll records for these persons, the contract price for their services and materials may be used as the premium basis. This paragraph 2 will not apply if you give us proof that the employers of these persons lawfully secured their workers compensation obligations.

D. Premium Payments

You will pay all premium when due. You will pay the premium even if part or all of a workers compensation law is not valid.

E. Final Premium

The premium shown on the Information Page, schedules, and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy. If the final premium is more than the premium you paid to us, you must pay us the balance. If it is less, we will refund the balance to you. The final premium will not be less than the highest minimum premium for the classifications covered by this policy.

If this policy is canceled, final premium will be determined in the following way unless our manuals provide otherwise:

1. If we cancel, final premium will be calculated pro rata based on the time this policy was in force. Final premium will not be less than the pro rata share of the minimum premium.
2. If you cancel, final premium will be more than pro rata; it will be based on the time this policy was in force, and increased by our short-rate cancelation table and procedure. Final premium will not be less than the minimum premium.

F. Records

You will keep records of information needed to compute premium. You will provide us with copies of those records when we ask for them.

G. Audit

You will let us examine and audit all your records that relate to this policy. These records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data. We may conduct the audits during regular business hours during the policy period and within three years after the policy period ends. Information developed by audit will be used to determine final premium. Insurance rate service organizations have the same rights we have under this provision.

PART SIX - CONDITIONS

A. Inspection

We have the right, but are not obliged to inspect your workplaces at any time. Our inspections are not safety inspections. They relate only to the insurability of the workplaces and the premiums to be charged. We may give you reports on the conditions we find. We may also recommend changes. While they may help reduce losses, we do not undertake to perform the duty of any person to provide for the health or safety of your employees or the public. We do not warrant that your workplaces are safe or healthful or that they comply with laws, regulations, codes or standards. Insurance rate service organizations have the same rights we have under this provision.

B. Long Term Policy

If the policy period is longer than one year and sixteen days, all provisions of this policy will apply as though a new policy were issued on each annual anniversary that this policy is in force.

C. Transfer of Your Rights and Duties

Your rights or duties under this policy may not be transferred without our written consent. If you die and we receive notice within thirty days after your death, we will cover your legal representative as insured.

D. Cancelation

1. You may cancel this policy. You must mail or deliver advance written notice to us stating when the cancelation is to take effect.
2. We may cancel this policy. We must mail or deliver to you not less than ten days advance written notice stating when the cancelation is to take effect. Mailing that notice to you at your mailing address shown in Item 1 of the Information Page will be sufficient to prove notice.
3. The policy period will end on the day and hour stated in the cancelation notice.
4. Any of these provisions that conflict with a law that controls the cancelation of the insurance in this policy is changed by this statement to comply with the law.

E. Sole Representative

The insured first named in Item 1 of the Information Page will act on behalf of all insureds to change this policy, receive return premium, and give or receive notice of cancelation.

In witness whereof, _____ has caused this policy to be signed by its President and its Secretary.

/s/ Dexter R. L[illegible] /s/ David M J[illegible]
SECRETARY PRESIDENT