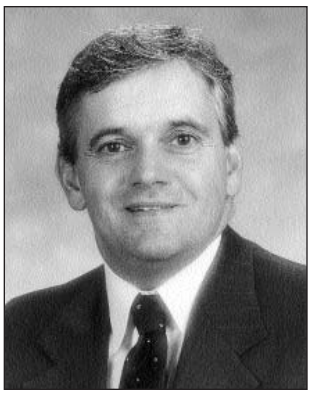
NYSBA WINTER 2001 | VOLUME 22 | NO. 3

ONEONONE

A publication of the General Practice, Solo & Small Firm Section
of the New York State Bar Association

A Message from the Chair



The General Practice Solo & Small Firm Section prides itself on being the "Technology Section" of the New York State Bar Association. Programs, publications and online newsletters are only a few of the many benefits provided to our members. Through our close relationship with the Law Office Economics and Management Department of the Association we have developed many technology-related programs and publications over the last several years. We expect that relationship to continue on into the future and be an even stronger relationship as we go through the transition from being the "General Practice Section" to the "General Practice, Solo & Small Firm Section."

This recent "enhancement" to our Section is more than just a change of name. We are now able to serve and work with an expanded community of practitioners. As the GPS&SF Section, we are able to address the practice needs of all practitioners, from the large firm to the small firm, from corporate counsel to government counsel. The makeup of our Executive Committee alone exemplifies who we are today. Representatives from all areas of practice are working together to share the common needs and concerns all practitioners have in their day-to-day professional lives.

Regardless of one's substantive area of practice we all share one primary goal—to serve our clients in the most efficient and cost-effective manner possible. Today this requires keeping constantly up-to-date with legal technology. Because this task alone could be a full-time job for each one of us, we need to have a common forum where we can not only share concerns and needs, but where we can share solutions. This is where the GPS&SF Section assists its membership throughout the year, year after year.

Programs and Meetings

In addition to our January and Summer programs, in April of this year, the Section presented its "Shaping the Future" program in New York City. Based on the American Bar Association's highly successful "Seizing the Future" programs, which have been presented bi-annually in Phoenix, Arizona, our "Shaping the Future"

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program brought nationally known "futurists" together with leading members of the Bar Association and the bar for a day-long program of sharing ideas about the present and the future of the practice of law in New York State. This is the first time the Association has presented such a program on this subject matter that is so near and dear to all of our hearts—our future. The program was provocative and on-target, and in many cases heated, as practitioners debated on who and what lawyers should be going forward into this new century.

Only three months after this program was presented, we again see a significant change in our practices—the approval of MDPs in New York State. What does this mean for each of us now and after the new rule's November 1st effective date? The Section is already working on an MDP explanatory program for presentation at the Association's Annual Meeting in January.

CyberCafé

In cooperation with the Law Office Economics and Management Department of the Association, our Section provides legal technology programs to Association members throughout the state each year, with the goal being to educate each other in how to better serve our clients. In January of each year, the Section also presents our Annual CyberCafé in conjunction with the Association's Annual Meeting in New York City. Selected vendors come together for one day for "hands-on" presentations of products that may make our lives easier and may put more money in our pockets. Although there are many legal tech shows throughout the country each year, they are in many cases like a Baghdad bazaar—everything and everyone possible hawking any type of services and products to lawyers and law firms, from coffee pot vendors to yellow pad distributors—there are hundreds and hundreds of booths. It is easy to feel lost and intimidated in such surroundings. We try to take who we believe to be the cream of the crop in legal tech and bring them to us for the CyberCafé, where you can have a conversation, see a demonstration and learn about new products and services at your own pace.

wEbrief

The GPS&SF Section introduced "wEbrief" to our membership last year and have recently expanded "wEbrief" access to the entire membership of the Association for a limited period of time. "wEbrief" is an online legal newsletter designed specifically for the New York practitioner. Helpful tips, articles and links to other online services are provided each month. You may find one, two or even more items of interest in each issue of "wEbrief." We also invite contributions for "wEbrief" from Section members who wish to share their own experiences and ideas with other Section members. To subscribe to "wEbrief," visit www.nysba.org/sections/gp/index.html and sign on. You will find it to be a welcome piece of e-mail arriving at your desk from time to time.

Fax Update

One of the most popular benefits provided to our members over the last several years has been our "Fax Update"—an up-to-date summary of recent developments in New York law. "Fax Update" provides case summaries, legislative summaries and even classified notices for attorney positions from time to time. "Fax Update" has been so popular among our membership that we receive resistance each time suggestions are made to incorporate "Fax Update" into our online editions of "wEbrief." Many members prefer to receive this update by fax rather than electronically. Plans are in the works for providing "Fax Update" in both forms—a separate online update as well as the "old-fashioned" way, via fax.

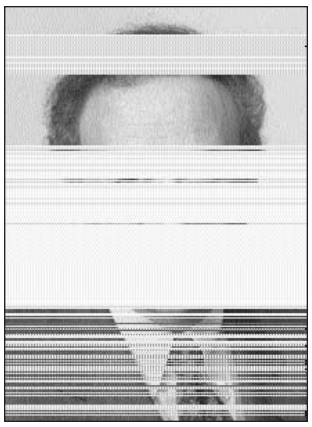
One on One

The GPS&SF Section's *One on One*, is by far, one of the most comprehensive compilations of legal practice articles available to New York attorneys. Experts from all areas of practice regularly contribute articles on the Legislature and the courts, practice management, and all aspects of the law—from estate planning to estate administration, from civil litigation to criminal litigation, from real estate to much, much more. Our goal is to provide not just substantive law, but to provide helpful tips for the day-to-day practice of law. Our annual edition on technology is designed for practitioners who want to know what's new and how it's going to assist them in their practice—clear, concise and to the point—articles written by those who use the technology rather than by those who sell the technology. No fluff.

No one can be all things to all people—but we try our best to provide as many benefits as possible to our members. Regardless of your substantive area of practice, no practitioner can get through his or her day without being affected by other areas of law. The effect of a divorce on a business relationship, the effect of a bankruptcy on a real estate matter, the effect of a lawsuit on everyone. We're all busy and our time for study is very limited, but there is clearly a need to learn more and more each day. The General Practice, Solo & Small Firm Section makes this daunting task a little easier for its members. Substantive law, practice tips, technology programs and products: we're not all things to all practitioners, but we're getting close.

Jeffrey M. Fetter

From the Editor



In our efforts to have *One on One* continue to be a valuable tool to the solo and small firm practitioner, I have endeavored to seek out topics which are interesting, timely and useful. For these reasons, I have included in this edition articles relating to a white-collar crime issue regarding e-mail, a housing cooperative and condominium apartment purchasing issue and a property condition disclosure legislation.

I have also included some workers' compensation issues: one from the General Counsel to the Workers' Compensation Board and one of his attorneys to the Workers' Compensation Board and my usual workers' compensation column. Because of the insurance implications of the World Trade Center 9-11 event, I have included the testimony of the Superintendent of Insurance before the United States House Committee on Financial Services. He outlines how his Department has dealt with the problems relating to some of the major issues of insurance coverage and discusses the various types of coverage that were affected. I hope you find this to be as informative and interesting as I did.

Martin Minkowitz

Section 32: The Evolving Law

By Peter J. Molinaro and Elizabeth A. Lott

Introduction

With the intention of giving claimants the choice of obtaining a fair settlement and relief from potentially lifelong involvement with the workers' compensation system, Governor Pataki signed his 1996 Workers' Compensation Reform legislation which contained an amendment to section 32 designed to authorize fair and just settlements between the parties. The new law reads, in pertinent part, as follows: "No agreement or release except as otherwise provided in this chapter by an employee to waive his right to compensation under this chapter shall be valid."[1]

For 74 years, workers' compensation claimants were prohibited from entering into a settlement agreement which would have finally and permanently waived rights to benefits to which the claimant was entitled pursuant to the Workers' Compensation Law.

The prior version of section 32 embodied a legislative policy which sought to protect injured workers from being swindled out of their rights by unscrupulous people.[2] The problem with the old law is that its absolute prohibition prevented even well-informed and well-advised claimants from receiving a fair settlement of their future rights to benefits.

Section 32, in its current form, is worded in the affirmative—that the agreement it contemplates "shall be approved by the board . . . *unless*."[3] The "unless" refers to a finding by the Board that the agreement is "unfair, unconscionable, or improper as a matter of law."[4] Further, the Board must disapprove if it finds that the agreement "is the result of an intentional misrepresentation of a material fact" or if one of the interested parties requests disapproval.[5]

Thus, the Board has been charged by the Legislature with ensuring that claimants do not enter into unfair, unconscionable or illegal agreements. The Board remains vigilant in this area, as the number of proposed agreements submitted to the Board continues to increase dramatically.[6] This article will explore the parameters of the Board's jurisdiction and several legal issues which have arisen with respect to these agreements, but have yet to be decided by the courts. First, a discussion of the process before the Board and a comparison with the traditional lump sum settlements may be helpful.

The Process

The Board processes section 32 agreements electronically and, depending upon the types of issues, agreements will be approved with or without a meeting.[7] Further, the Board has determined that agreements seeking to constitute the final resolution of the entire right to benefits or those involving an unrepresented claimant, will be reviewed by a Board Commissioner.[8] Any agreement which proposes to settle one or more outstanding issues but not the entire claim, is reviewed by a Workers' Compensation Law Judge.

Thus the standard for Board review for section 32 agreements is very different from the standard of review used in lump sum settlements under WCL § 15(5-b). Section 32 agreements may be submitted regarding any claim, and the agreements *shall be* approved—there are limited circumstances which would result in a disapproval—if the agreement is unfair or unconscionable, improper as a matter of law, or based upon a material misrepresentation of fact.

Lump sum settlements, on the other hand, are restricted to permanent partial or temporary partial disability claims "in which the right to compensation has been established and compensation has been paid for not less than three months, in which the continuance of disability and of future earning capacity cannot be ascertained with reasonable certainty." In such matters the Board "may, in the interest of justice, approve a non-schedule adjustment [i.e., lump sum settlement] agreed to between the claimant and the employer or his insurance carrier."[9] Before the Board (the Board Commissioners also review and approve all lump sum settlements) may approve such agreements, there must also be an examination of the claimant pursuant to WCL § 19, and "approval shall only be given when it is found that the adjustment is fair and in the best interest of the claimant."

Perhaps the most significant difference between lump sum settlements and section 32 agreements is the fact that, once approved by the Board, a section 32 agreement cannot be reopened. Lump sum settlements may be reopened if the Board finds "upon proof that there has been a change in condition or in the degree of disability of claimant not found in the medical evidence and, therefore, not contemplated at the time of the adjustment."[10] Section 32 agreements, however, are

final and conclusive; once a decision approving the agreement is filed and served, it "shall not be subject to review pursuant to section [23] of this article."[11]

Some Legal Issues

Standard of Review

For attorneys both at the Board and practicing before it, section 32 represents uncharted territory. Only one court has ruled on the parameters and meaning of the statute's terms. Thus, the statute grants broad powers to the Board to disapprove an agreement on the basis of unfairness or unconscionability. The standards of "improper as a matter of law" and based upon a "material misrepresentation of fact" are much more definable concepts. Further, the statute indicates that the standards apply to both parties equally. Thus, an agreement may be disapproved if it is unfair to the employer or carrier as well as to the claimant.

These broad standards empower the Board to disapprove agreements which fail to provide payment of medical bills for past treatment, even though the medical provider is not a party to the agreement or has standing to challenge it. Agreements have been disapproved if the attorney fee provided is deemed to be excessive by the Board. Of course, the Board will disapprove an agreement in the event it determines that the claimant is entitled to a larger amount of money, given the seriousness of the injury.

Parties to the Agreement

The statute contemplates only two parties to the agreement, the claimant (or a deceased claimant's dependents) and the employer (or his carrier).[12] Thus, all of the rights contained in the statute—the right to object and the right to appeal a disapproval—inure solely to those parties.[13] The Board will not entertain objections from persons other than those parties listed in the law. Despite requests from some physicians, lawyers, health insurance and disability carriers, special or uninsured employer's funds to be deemed "parties" to the agreement, the Board has denied such requests and will entertain objections from only the claimant or employer/carrier.[14] This does not mean that those other Board constituencies will not be heard. The Board will entertain information from either of these entities in its efforts to perform its review function pursuant to section 32. Many proposed agreements are amended prior to approval to address physician or attorney concerns. If the Commissioner or the Administrative Judge determines that the concerns of the constituent will, if unresolved, impact upon the fairness or conscionability of the agreement for either party, then approval will not be issued until such concerns are resolved.

Other Issues Facing the Board

Quite often, section 32 agreements come before the Board with one or several legal issues which are ancillary to the issue of the agreement itself. One of these issues is the status of the disability carrier who has paid benefits to the claimant, pending a Board determination as to whether the accident arose from claimant's employment.[15] The WCL gives the disability carrier a "claim for reimbursement out of the proceeds of such award (compensation) to the employee."[16] However, in certain instances, the agreements do not refer to an "award" of compensation, but merely payment of an amount of money in exchange for claimant's withdrawal of the claim. Challenges to Board approval of these agreements by disability carriers remain pending in the courts.

"For attorneys both at the Board and practicing before it, section 32 represents uncharted territory."

Perhaps one of the most frequent issues which arise concerns the payment of outstanding medical bills. In many instances the section 32 agreement provides that the "carrier will be responsible for the payment of all outstanding causally related medical bills." Because of the potential for negative impact on claimants, such as being sued for payment by treating physicians long after the section 32 agreement is approved, the Board will attempt to ensure that outstanding bills are paid prior to issuing its approval. Many Commissioners have withheld approval until the agreement adequately assures them that the bills will be paid by the employer or carrier.[17] Practitioners are encouraged to identify these outstanding bills and to provide for payment before submission of the agreement for approval.

Recently, the issue of future treatment for claimant's workplace injury, after the section 32 agreement has been approved, has occupied a great deal of time for practitioners and the Board alike. The Board makes every effort to apprise claimants that health insurers or federal programs such as Medicaid and Medicare will not reimburse for treatment of injuries which arose in the workplace.[18] However, despite the efforts of the Board and the practitioners, some claimants have sought reimbursement from these sources for treatment of workplace injuries. These practices have led to litigation by the federal government in other states.[19] As a result, practitioners have become more creative in structuring agreements for claimants who are more likely to require significant future medical treatment for their injuries. The Board has seen a rise in "compensation

only" agreements which settle only future wage replacement issues but leave the issue of medical treatment open indefinitely. Parties have also seen fit to submit reports from outside experts which offer opinions on the likelihood that the claimant will require future medical treatment and to what extent that treatment will be required. The Board will consider these reports before issuing a decision on the agreement.

"Section 32 of the New York Workers' Compensation Law is revolutionary."

Conclusion

Section 32 of the New York Workers' Compensation Law is revolutionary. To date more than 18,000 section 32 agreements have been approved by the Board—proof that this tool is popular with both claimants and carriers. The Board seeks to honor its role as the overseer of these agreements in order to keep them fair, conscionable and lawful.

Endnotes

1. WCL § 32, 1996 N.Y. Laws, ch. 635 § 73, effective Dec. 9, 1996 (known as Governor Pataki's Employee Safety and Security Action of 1996).
2. It would be contrary to public policy to permit a claimant to waive his or her rights to compensation, and that the claimant is to be protected against his own improvidence or folly. *Surace v. Danna*, 248 N.Y. 18, 22 (1928, Cardozo, J.); *see also Martin v. C.A. Productions Co.*, 8 N.Y.2d 226, 203 N.Y.S.2d 845 (1960).
3. WCL § 32.
4. *Id.*
5. *Id*.
6. In 2000, the Board received 8,917 agreements compared to 1,250 in 1998.
7. The Board has instituted a system of review of section 32 agreements on the papers provided to it. This program is reserved for section 32 agreements that settle previously established cases and only involve represented claimants. For more on this program, see Board Subject No. 046-96, Oct. 10, 2000.
8. Board Subject No. 108, Aug. 1, 1997.
9. WCL § 15(5-b).
10. *Id.*
11. WCL § 32(c).
12. WCL § 32(a).
13. The statute refers to "parties" in subdivision (a) but to "interested parties" in subdivision (b)(3). Some may argue that this indicates contemplation of additional persons who would have a right to object to the agreement, but the statute and legislative history offers no support for that position. The Board has determined that only the "parties" (claimant and employer) have the right to object to the agreement.
14. The Third Department recently ruled that "Notably, since a claimant's attorney is not one of the entities specifically allowed to enter into a waiver agreement (*see* Workers' Compensation Law §32[a]), the Board properly rejected the agreement as improper in light of claimant's refusal to remove his attorney as a party thereto." *Abel v. Wolff and Dungey, Inc.*, ___ A.D.2d ___, (3d Dep't Oct. 25, 2001).
15. *See* WCL § 206(2).
16. *Id*.
17. A common clause which is added to the agreement reads as follows: "Carrier to pay all outstanding causally related medical bills for treatment up to the date of Board approval of this agreement."
18. *See* 42 U.S.C. § 1395y.
19. *Zinman v. Shalala*, 835 F. Supp. 1163 (N.D.Cal. 1993).

The Not-So-Subtle Risk in E-Mail

By Joel Cohen

"If the Congressman doesn't sign it by 5 p.m. today, let me know. I know his price."

The congressman's "price" is not cash or any financial gain. And the e-mail writer neither believes, nor intends to communicate that. Frankly, he intends nothing untoward: the congressman wants to be featured at this year's July 4th fireworks celebration. Probably nothing wrong with that—"politics as usual." Actually, the e-mailer forgot the comment the moment he hit his "send" key. The comment meant nothing.

But to the intended (or forwarded-to) reader, it appears far more sinister. And given the e-mail's innuendo, an unknowing recipient would be foolish to hit "reply" for clarification. In fact, the e-mail recipient may just be unaware that the e-mailer is prone to innocent hyperbole. Thomas Jefferson had "perfect pitch" when interpreting the tone of letters from his sometimes friend John Adams. None of us is Thomas Jefferson.

"[T]he e-mail medium opens a Pandora's Box to countless scenarios where cold words become a sterile substitute for the important dynamic of interpersonal skills."

If the communication occurred in a telephone conversation—a voice mail would cause the same (or worse) problem—typically, the conversation's nuance would have obviated the tension. Any misunderstanding would end promptly. A silence on the other end of the line after the "price" comment would quickly cause the caller to explain his comment's innocence, and clarify his statement.

Further, even if an interchange over the remark was in a phone call without a prompt clarification, there would be no possibility of a verbatim "afterlife." No risk that the e-mail would be pulled up later by an encryption techie, as in *Microsoft* where e-mails proved devastating. Nor might the e-mail be forwarded to business counterparts in nervousness—or even out of a calculated goal of mischief, or worse.

The issue is not limited to the reader wrongly concluding that the e-mailer plans or has already committed a crime. Rather, the e-mail medium opens a Pandora's Box to countless scenarios where cold words become a sterile substitute for the important dynamic of interpersonal skills. Just imagine a "frank" e-mail to a wife who asks her husband if a particularly tight outfit looks good, when she's skipped the gym for two months. An answer to convey the needed advice simply couldn't be properly communicated by e-mail without a personal touch, that only a face-to-face communication might accomplish.

* * *

So when, for example, responding to your client's request for an "update," an e-mail from his counterpart's in-house counsel says that "your contractual offer will be considered on the merits—we'll be back to you," he takes the message as a brush-off. Actually, the writer likes the proposal, and plans to promote it to higher-ups. (Your client may, then, not understanding the e-mail, unilaterally market the proposal successfully to another and buy himself a lawsuit for a supposed breach.)

Why was counsel's note so sterile? Simply, the higher-ups or "business people" are a bunch of *negativos*. He might air his true thoughts by telephone where tone is better communicated, but omits them from a writing that might come home to haunt him. Perhaps, he is paranoid about bosses—the "business guys"—scanning the company e-mail and concluding that "he has some damned nerve to think he's making ultimate *business* decisions around here." Or, he just doesn't want a written record of thoughts he would freely air by telephone. Maybe, it's just generational.

Other possibilities for e-mail miscommunication: The e-mailer's written style is impersonal. Or, he's prone to inadvertently misleading understatement or exaggeration when writing. Possibly, he has a waiter's personality: he out loud tells the group that everything on the menu is great, but, when you ask about the salmon, he whispers that he wouldn't order it "today."

* * *

Or, alternatively: Because of time constraints you're unable to talk to your law partner, business counterpart or friend about an extremely sensitive subject. E-mail is your preferred mode of prompt communication. You label a sensitive e-mail "EXTREMELY CONFIDENTIAL"—and it doesn't even have to be a privileged or work-product situation. Nonetheless, the recipient doesn't see confidentiality as you do: he's an inveterate *forwarder*.

Your problem is not an office e-mail scanner. No! Your addressee routinely breaches the confidentiality that you (or others) would impose. The innermost thoughts that you share with only one person are only as secure as the addressee wants them to be.

I frequently remonstrate with a lawyer friend ("you know who you are") who's an inveterate "forwarder." His rote response is that you should be willing to stand for a written version of anything you're willing to say orally—even if you actually intended only one person to read your remarks. I suppose I'm an "enabler" since, knowing his belief system, I still, occasionally, communicate with him by e-mail. (He's frequently hard to reach by telephone, but always has his e-mail turned on—I mean "always.")

While too many responsible people can't share his "truth *iber alas*" motif, e-mailing him is risky—unless you're willing to potentially let the whole world read the unvarnished truth that you've intended to share only with him. And bear in mind—this friend intends no mischief.

Imagine the countless Internet account holders who, even without intending mischief or malice, simply lack the sensitivity to appreciate that e-mail is simply a tool, not a constant substitute for interpersonal exchange. While, indeed, an invaluable tool, it's not a license to repeat, potentially to the world, what the writer intended as confidential.

Professor Jeffrey Rosen says in his recently published *The Unwanted Gaze*, that letters, and now, even more so, e-mails because they're so quickly and casually dashed off, lack contextual accompaniments—"sound of voice, tone, gesture, facial expression"—they can be misinterpreted more easily than speech. Because e-mail captures a range of extremely subjective and informal private emotions, the possibilities for misinterpretation become even more acute: "E-mail combines the intimacy of the telephone with the retrievability of a letter"; in fact, the retrievability of an e-mail has become far greater, even putting aside the decrypters of the world.

Why is this issue so important for lawyers, particularly those in general practice? Simple! The lawyer is the client's ultimate confidante—he or she is the client's counselor, advisor or *consiglieri* in the finest sense of the word. The lawyer is obliged not only to keep the client's secrets, but also, in an especially dynamic world where information has become so easily available to antagonists, adversaries or straight-out snoopers, to receive information from the client in its most pristine and accurate form with the least likely possibility of getting into the wrong hands. The lawyer must be sure that when he obtains information from—or imparts it to—the client the most accurate means of communicating what are frequently "subjective" impressions is being employed.

"Imagine the countless Internet account holders who, even without intending mischief or malice, simply lack the sensitivity to appreciate that e-mail is simply a tool, not a constant substitute for interpersonal exchange."

And, perhaps, more important, it is the lawyer's duty, even more so than the Internet philosophers, polemicists and gurus that we see on television or read in *The New York Times* weekly "Circuits" section, to communicate to our clients the abundant risks in e-mail.

To wit: "Knowing what can happen once you press 'send' key, the lesson is simple: *Be extra careful out there."*

This message requires no clarification, subtlety or nuance.

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Property Condition Disclosure Act Enacted

By Karl B. Holtzschue

New Law Effective March 1, 2002

On November 13, 2001, Governor Pataki signed into law the Property Condition Disclosure Act (PCDA), which becomes effective on March 1, 2002.[1] The PCDA adds a new article 14 to the Real Property Law, which requires that a Property Condition Disclosure Statement (PCDS) be delivered by the seller to the buyer of residential real property prior to the signing by the buyer of a binding contract of sale. As described below, the original bill[2] was substantially revised before its final enactment.

According to the legislative findings in the PCDA, the Legislature concluded that the prior ad hoc process for home sales created conflicts and misunderstandings and that the PCDS can supplement information provided by professional inspections and tests to provide sellers and buyers with a better basis for negotiation of a purchase and sale agreement. The PCDA does not diminish the responsibility of buyers to carefully examine the property and public records pertaining to the property.

Definitions

As defined in section 461 of the PCDA, "residential real property" means real property improved by a one- to four-family dwelling, but *not*: (a) unimproved real property upon which such a dwelling is to be constructed; (b) condominium units or cooperative apartments; or (c) property in a homeowners' association that is not owned in fee simple by the seller. "Real estate purchase contract" means, with respect to residential real property: (a) a contract for purchase or exchange; (b) a lease with an option to purchase; (c) a lease with obligation to purchase; or (d) an installment land sale contract. "Binding contract of sale" means a real estate purchase contract or offer that would, upon signing by the seller and subject to satisfaction of any contingencies, require the buyer to accept a transfer of title. "Knowledge" means only *actual* knowledge of a defect of condition by the seller. The original version of the PCDA also included "constructive" knowledge of the seller, but that was removed in the final bill, primarily due to the objections of the Real Property Law Section of the New York State Bar Association.

Property Condition Disclosure Statement

Under section 462, the seller is required to complete and sign the PCDS and cause it to be *delivered to the buyer* (or buyer's agent) *prior to the signing by the buyer* of a binding contract of sale. A *copy* of the PCDS, containing the signatures of the seller and buyer, must be *attached* to the real estate purchase contract. The PCDA expressly states that nothing in the article is intended to prevent the parties from entering into "agreements of any kind or nature with respect to the physical condition of the property" to be sold, including, but not limited to, agreements for the sale of real property "as is." The primary purpose of that statement seems to be to allow continuation of the standard practice of including an "as is" clause in contracts of sale. The standard clause states that the buyer has inspected the property and accepts it "as is" in its present condition and state of repair, subject to reasonable use, wear, tear and natural deterioration between the date of the contract and the date of the closing (transfer of title).[3] Thus, having received the PCDS before signing the contract of sale and assuming that the PCDS is true and complete, the buyer agrees to accept the present condition of the property. Not included in the final bill was a suggestion by the Real Property Law Section that would have allowed the parties to limit any potential damages or remedies by express agreement. It is not clear how far the final language would allow the parties to go in adding other language "with respect to the physical condition of the property."

48 Questions Asked

The PCDA has 48 questions, listed in four groups: (1) general (1-9); (2) environmental (10-19); (3) structural (20-25); and (4) mechanical (26-47) (Question 48 asks about the school district). In addition to answering "YES" or "NO," if the question is not applicable, the seller may check "NA"; if the answer is unknown, the seller may check "UNKN." The *general* questions include: how long has the property been owned and occupied; what is the age of the structure (with a note about lead paint if built before 1978);[4] does anyone else have rights to use or occupy the property (other than as stated in the public record); has anyone claimed title or denied the seller access to the property; are there electric or gas surcharges; are there certificates of occupancy?

The *environmental* questions are prefaced by a note to the seller, giving nonexclusive lists of petroleum products and hazardous and toxic substances and stating that hazardous or toxic substances are "products that could pose short- or long-term danger to personal health or the environment." This is a significant improvement over the use of defined terms in the original bill that were only contained in the statute, not in the PCDS itself (so that a seller would be unaware of the definitions), and made cross-references to environmental statutes and regulations published elsewhere. Though the new questions include lists that are expressly stated to be nonexclusive, they go a long way to making the PCDS more user-friendly. The standard as to hazardous or toxic sub-

stances implies that only uses of products that pose dangers should be considered (presumably, small spills of gasoline for a lawn mower would not be reportable). The questions ask about location in a designated floodplain and a designated wetland, matters that are not always easy for a layman to determine precisely.[5] The condition of fuel storage tanks must be disclosed, one of the most likely sources of problems. Questions are also asked about conditions of which the seller may not be aware, such as landfill, asbestos, lead plumbing and radon. The environmental questions ask about testing as well as spills.

The *structural* questions address water or smoke damage, infestation or damage by pests and testing therefor, and type of roof. The questions about the roof and structural systems both ask about known "*material defects.*" There is no definition of that term because the draftsmen could not come up with one that was acceptable to everyone. The longer but still vague definition in the original bill was rejected because it was not set forth in the PCDS itself and was not particularly helpful anyway.[6] Presumably, "material defects" will be limited in practice and in the courts to only those that really matter to a buyer, either by reason of a significant cost to cure or a significant impact on the occupants (such as a gas leak). Buyers are most likely to seek help from the brokers in attempting to answer these questions, and it is hoped that they will encourage sellers to answer them sensibly as well as truthfully.

The questions as to *mechanical* systems and services ask about water source, testing for water quality and/or flow rate, sewage system and electric service. The sewage system and electric service questions again use the "*material defects*" standard. Standing water is the standard on flooding, drainage or grading problems and basement seepage (as suggested by the Real Property Law Section). The 16 questions about plumbing, heating and other mechanical systems also use the "*material defects*" standard.[7] Question 48 about the school district was tacked on at the end because of the importance of the information and litigation over it.[8]

The most troublesome questions for sellers are clearly those related to environmental matters and those relating to material defects. The questions about asbestos, lead plumbing, and pest infestation and damage also expose the seller to second-guessing.

The seller is required to sign a certification that the information in the PCDS is true and complete. The buyer is required to sign an acknowledgment that the PCDS is not a warranty and not a substitute for home, pest, radon or other inspections or testing of the property, or inspection of the public records.

Section 462(3) makes clear that the article does not require a seller to undertake or provide any investigation or inspection of the home or to check public records.

Exemptions

Section 463 lists 14 exemptions from the requirement to deliver a PCDS, such as transfers pursuant to a court order, due to foreclosure, by a fiduciary, by a co-owner or spouse, by a governmental entity or of a newly-constructed property not previously inhabited.

Revised PCDS

If a seller acquires knowledge which renders materially inaccurate a PCDS previously provided, section 464 requires the seller to deliver a *revised* PCDS to the buyer as soon as practicable. Note that the "material" standard is again used. Presumably, a revised PCDS will be required only for significant changes. Section 464 makes clear that a revised PCDS is not required to be provided after transfer of title or occupancy by the buyer, whichever is earlier.

Two Remedies: $500 Credit or Actual Damages for Willful Failure

Section 465 provides two basic remedies. *First*, if the *seller fails to deliver* a PCDS before the buyer signs a binding contract of sale, the buyer is to receive upon the transfer of title a *credit of $500* against the purchase price.[9] This is similar to the remedy in Connecticut, where the amount is $300.[10] This provision allows the seller to treat it as a "buy-out" of the obligation to provide a PCDS and the resulting potential for claims by the buyer.[11] It has apparently operated this way in Connecticut, according to some reports. The "buy-out" does not accomplish all the disclosure objectives of the rest of the PCDA, but it does, in effect, provide funding for inspections and tests and for some repairs.

Second, a seller who provides a PCDS (or provides or fails to provide a revised PCDS) is liable *only* for a *willful* failure to perform as required by the PCDA (that is, to provide a PCDS that is true and complete). For a willful failure, the seller is liable for *actual* damages suffered by the buyer (e.g., not punitive damages).[12] Thus, a failure that is not willful (merely negligent, for example) will not subject the seller to liability. The goal of the sponsors[13] was to catch liars, not elderly sellers who were confused by the questions, forgetful or inadvertently mistaken. Together with the actual knowledge requirement, this standard reduces the original objection to the bill by the Real Property Law Section as a potential trap for the unwary seller. It better passes the "grandmother" test proposed by the Real Property Law Section (could your

grandmother understand and successfully answer this questionnaire without unfair exposure to later claims of error?).

Rescission and Statute of Limitations

Note that subsection 2 also states that the remedy of actual damages is "in addition to any other existing equitable or statutory remedy." In other words, the addition of this new statutory duty and remedy of actual damages is not exclusive of existing remedies, the principal one being rescission. The refusal of the sponsors to limit rescission rights and their refusal to impose a one-year statute of limitations on claims under the PCDA were strongly protested by the Real Property Law Section. On rescission, the Section proposed: (1) expressly prohibiting rescission after the transfer of title (to give security to mortgagees and title insurance companies); (2) allowing the buyer three business days to rescind if a PCDS was not received within seven days after the buyer signed the contract; and (3) allowing the buyer three business days to rescind if a PCDS was received after signing but before the transfer of title, following precedents in several other states. The sponsors adamantly refused to agree to any limits on existing remedies. This concept of not limiting existing remedies is expressly stated in section 467.

The Real Property Law Section also vigorously supported addition of a one-year statute of limitations on claims under the PCDA. The sponsors refused to agree to this limit on remedies. The result is that the applicable statute of limitations should be three years, under CPLR 214(2) for actions to recover on a liability created or imposed by statute.[14] The duty to make the disclosures required by the PCDA is a new statutory requirement that imposes a duty on the seller that did not exist under prior case law.[15] The general rule under existing case law was that the seller had no duty to volunteer any information to the buyer. Among the very few exceptions to the rule were cases involving underground sewage systems[16] and buried hazardous waste.[17] The PCDA thus imposes a new duty and potential liability on the seller.

Duty of Agent

Section 466 provides that an agent representing a seller as listing broker has the duty to "timely" inform the seller of the seller's obligations under the PCDA. An agent representing a buyer (or if the buyer is not represented, the agent representing the seller and dealing with the buyer) has the same duty to timely inform the buyer, but in any event before the buyer signs a binding contract. If the agent performs those duties, the agent has no liability to any party for a violation of the PCDA. Note, however, that the seller's agent has a duty under the agency disclosure act to disclose to the buyer "facts known to the agent materially affecting the value or desirability of the property."[18] Consequently, a seller should be aware of this duty of the agent before making any disclosures to his agent.

Legislative History

On April 30, 1991, the National Association of Realtors announced a nationwide policy to encourage enactment of statutes requiring disclosure by sellers. It was successful in many states over the next few years.[19] The PCDA was introduced in the New York Legislature at the urging of the New York State Association of Realtors (NYSAR) as early as 1998 and again in 1999 as A.1173 and S.5039. As then proposed, the PCDA: (1) required delivery of a PCDS before the *seller* signed the contract; (2) de-fined "knowledge" to include "*constructive*" knowledge; (3) contained in the statute (but not in the PCDS) complex definitions of "defect," "environment," "hazardous substance," "petroleum" and "release," with the environmental definitions referring to other statutes and regulations; (4) in-cluded catch-all questions; (5) provided a remedy of actual damages; and (6) had no penalty for nondelivery of the PCDS. On May 10, 1999, NYSAR issued a Memorandum in Support of the bill, noting that 29 states had similar laws and claiming that they had reduced litigation and enhanced consumer satisfaction. On July 8, 1999, the Real Property Law Section issued a Legislation Report in opposition to Senate Bill S.5039-A, objecting to the number of items, the use of catch-all questions, the lack of a penalty for failure to deliver a PCDS, the exclusion of condominiums and cooperatives, the timing of delivery and uncertainty as to rescission.

On July 17, 1999, a Task Force on Disclosure for the Real Property Law Section was formed, with the author as chair. The Task Force had several meetings to analyze and propose modifications of A.1173-C. On February 16, 2000, the Task Force recommended modifications to require delivery to the buyer before signing, defining defect to be the greater of $2,500 or one percent of the price, deletion of constructive knowledge, limiting the questions to 13, inclusion of a disclaimer option and a $500 penalty for failure to deliver a PCDS. On March 1, 2000, the Task Force met with representatives of NYSAR to discuss and attempt to agree on modifications. After other discussions and exchanges of drafts, the Executive Committee of the Real Property Law Section voted to approve the Task Force's draft, with a couple of modifications, including addition of rescission rights. No further discussions occurred with NYSAR, but on June 5 and 14, 2000, respectively, the Senate and Assembly passed A.1173-C and S.5039-A without modification. On June 28, the Real Property Law Section wrote to the Governor urging a veto. After a meeting with and numerous communications with the Office of Counsel to the Governor,[20] the Governor vetoed the bill in December, stating that his staff stood ready to work on improvements to the bill.

On January 16, 2001, the PCDA was prefiled as A.1762 by the Assembly sponsor in the same form as the prior year. The Executive Committee of the Real Property Law Section approved its own version of the PCDA on January 24, 2001. The Executive Committee of the New York State Bar Association approved that version on April 3, 2001, adding a right of the seller to "opt-out" of providing a PCDS. On May 3, 2001, NYSAR sent a draft of proposed ammendments to A.1762, including deleting constructive knowledge, clarifying the time of delivery and adding a $750 credit to the buyer at the closing if the seller failed to deliver a PCDS. On May 14 the author sent a letter to Senior Assistant Counsel to the Governor William E. McCarthy commenting on the NYSAR draft and referring to the Governor's veto message. Later in May, the sponsors met with Mr. McCarthy to negotiate modifications to the bill.[21] After many memoranda and e-mails, a compromise was agreed on by the sponsors and the Office of Counsel to the Governor, including a reduction of the credit to $500, and on June 13 the Senate passed the compromise bill as S.5339-A. Senator Libous' Sponsor's Memorandum that accompanied the bill notes that the PCDA changes the common law by requiring the seller to give answers to questions. The bill was sent on June 13 to the Assembly Committee on the Judiciary, where it was held up, apparently due to concern about the $500 credit and concerns over its impact on elderly sellers. On October 22, 2001, it was released and passed by the Assembly.

Conclusion

Convincing the Governor to veto a flawed consumer protection bill based on reasoned criticism was an impressive achievement.[22] The final bill is much improved, even though it lacks limitations on remedies that would have made it more evenly balanced between buyers and sellers. The Real Property Law Section has good reason to be proud of the effort put into analysis and modification of this bill.[23]

Endnotes

1. A.1762-A, S.5339-A of 2001 passed by the Senate on June 13 and the Assembly on Oct. 22, 2001, attached as Exhibit A.
2. A.1173-C of 2000.
3. *See, e.g.*, par. 12 of the NYSBA Residential Contract of Sale (Blumberg form 125).
4. If the building was built before 1978, federal law requires delivery of a lead warning statement, including a ten-day inspection period that may be shortened or waived, and an EPA informational pamphlet. 42 U.S.C.A. § 4852d.
5. The Real Property Law Section unsuccessfully objected to these questions on the ground that floodplain and wetlands maps are often hard to read and should be the sole responsibility of the buyer.
6. Also rejected was a suggestion by the Real Property Law Section that a dollar threshold of the greater of $2,500 or 1 percent of the price be used to define "material."
7. The Real Property Law Section unsuccessfully suggested use of the commonly-used contract standard of "working order."
8. *See, e.g., Casey v. Masullo Bros. Builders Inc.*, 630 N.Y.S.2d 599, 600 (3d Dep't 1995) (fact issues for jury: whether reasonable inquiry would reveal the truth; if the facts were peculiarly with the knowledge of the seller and the seller willfully misrepresented, the failure to ascertain the truth by inspection the public records will not be fatal), citing *Todd v. Pearl Woods, Inc.*, 248 N.Y.S.2d 975, 977 (2d Dep't 1964) (sewer district cost assessment).
9. The sponsors of the bill originally proposed $750, but the number was reduced in the negotiations with the Governor's counsel.
10. Conn. Gen. Stat. Ann. § 20-327b.
11. When approving a version of the PCDA proposed by the Real Property Law Section, the Executive Committee of the New York State Bar Association added a provision allowing the seller to "opt-out" of providing a PCDS without any credit to the buyer. The "buy-out" performs a similar function.
12. Under the California disclosure statute, actual damages has been held to mean compensatory damages, rather than damages as measured by the benefit-of-bargain rule. *Saunders v. Taylor*, 50 Cal. Rptr. 2d 345, 347, 42 Cal. App. 4th 1538 (App. 4th Dist. 1996).
13. The principal sponsor in the Senate was Senator Libous and in the Assembly, the principal sponsor was Assemblyman Brodsky (sometimes referred to herein as the "sponsors").
14. *See, e.g., Hartnett v. N.Y. City Transit Auth.*, 657 N.E.2d 773, 779, 633 N.Y.S.2d 758 (1995); *Gaidon v. Guardian Life Ins. Co.*, 2001 N.Y. LEXIS 1060 No. 52, 53 (New York Court of Appeals May 8, 2001), 750 N.E. 2d 1078; *People v. Parkway Mobile Homes*, Inc., 666 N.Y.S.2d 335, 337 (2d Dep't 1997).
15. *See* Karl B. Holtzschue, *Caveat Emptor in Warren's Weed New York Real Property* (2001); Karl B. Holtzschue on Real Estate Contracts § 2.2.11.1 (PLI 2001); or Karl B. Holtzschue, 1 New York Practice Guide: Real Estate § 2.11[5] (2001).
16. *Young v. Keith*, 492 N.Y.S.2d 489, 491 (3d Dep't 1985), a case that is rarely cited or followed.
17. *Hi Tor Indus. Park, Inc. v. Chemical Bank*, 494 N.Y.S.2d 751, 752 (2d Dep't 1985) (underground storage tanks); *Tahini Invs. v. Bobrowski*, 470 N.Y.S.2d 431, 433 (2d Dep't 1984) (representation of premises as principally a horse farm, buried drums of hazardous waste found).
18. Real Property Law § 443.
19. Pancak, Miceli & Sirmans, *Residential Disclosure Law*: *The Further Demise of Caveat Emptor*, 24 Real Est. L.J. 291 (1996) (27 states); Washburn, *Residential Real Estate Disclosure Legislation*, 44 DePaul L. Rev. 381 (1995).
20. James M. McGuire, Counsel to the Governor, and William E. McCarthy, Senior Assistant Counsel to the Governor.
21. Also present was a representative of NYSAR and the author, at the invitation of counsel to the Governor.
22. The author and the Real Property Law Section are grateful to Messrs. McGuire and McCarthy for their leadership and willingness to listen to the Section's comments on this legislation.
23. On behalf of the Section, the author thanks the many Section members who contributed to this effort.

Karl B. Holtzschue is an attorney in New York City, a member of the Executive Committee of the Real Property Law Section of the New York State Bar Association, an Adjunct Professor at Fordham Law School, an author of books on real estate and a frequent lecturer.

APPENDIX

STATE OF NEW YORK

5339--A

2001-2002 Regular Sessions

IN SENATE

May 17, 2001

Introduced by Sen. LIBOUS -- read twice and ordered printed, and when printed to be committed to the Committee on Rules -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the real property law, in relation to disclosure of defects by owners of residential real property upon the sale thereof

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

Section 1. Legislative findings. The legislature hereby finds and declares that residential real estate consumers, both buyers and sellers would benefit from a mechanism intended to increase their ability to obtain information concerning a home purchase and sale. The legislature recognizes that home ownership sales are often complicated by misunderstandings arising from an ad hoc transfer process and conflicting information. A uniform document that regularizes disclosure can supplement information provided by professional inspections and tests to provide sellers and buyers with a better basis for negotiating a purchase and sales agreement. A uniform disclosure statement will alert both buyers and sellers to aspects of properties which may require attention: environmental, structural, mechanical or other potential problem areas, particularly those not readily observable by a visual inspection of the property.

This act is not intended to and does not diminish the responsibility of buyers to carefully examine the property which they intend to purchase and public records pertaining to the property and, in fact, highlights the importance of professional inspections and environmental tests. This act is not intended to and does not limit existing responsibilities by a seller, buyer or agent concerning the condition of the property or potential liabilities or remedies at law, statute or in equity.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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This act will significantly improve the transfer process and better serve the interests of all parties to a home purchase. It will increase clarity regarding the nature of the property and will provide greater certainty to contracts entered into by better informed buyers and sellers.

§ 2. The real property law is amended by adding a new article 14 to read as follows:

ARTICLE 14

PROPERTY CONDITION DISCLOSURE IN THE SALE OF RESIDENTIAL REAL PROPERTY

Section 460. Short title.
461. Definitions.
462. Property condition disclosure statement.
463. Exemptions.
464. Revision.
465. Remedy.
466. Duty of an agent.
467. Liability.

§ 460. Short title. This article shall be known and may be cited as the "property condition disclosure act".

§ 461. Definitions. As used in this article, the following terms shall have the following meanings:

1. "Agent" means a person who is licensed as a real estate broker or a real estate salesperson pursuant to section four hundred forty-a of this chapter and is acting in a fiduciary capacity.

2. "Binding contract of sale" means a real estate purchase contract or offer that would, upon signing by the seller and subject to satisfaction of any contingencies, require the buyer to accept a transfer of title.

3. "Knowledge" means only actual knowledge of a defect or condition on the part of the seller of residential real property.

4. "Real estate purchase contract" means any of the following:

(a) a contract which provides for the purchase and sale or exchange of residential real property;

(b) a lease with an option to purchase residential real property;

(c) a lease-with-obligation-to-purchase agreement for residential real property; or

(d) an installment land sale contract for residential real property.

5. "Residential real property" means real property improved by a one to four family dwelling used or occupied, or intended to be used or occupied, wholly or partly, as the home or residence of one or more persons, but shall not refer to (a) unimproved real property upon which such dwellings are to be constructed, or (b) condominium units or cooperative apartments, or (c) property in a homeowners' association that is not owned in fee simple by the seller.

6. "Transfer of title" means delivery of a property executed instrument conveying title to residential real property and shall include delivery of a real estate purchase contract that is a lease or installment land sale contract.

§ 462. Property condition disclosure statement. 1. Except as is provided in section four hundred sixty-three of this article, every seller of residential real property pursuant to a real estate purchase contract shall complete and sign a property condition disclosure statement as prescribed by subdivision two of this section and cause it, or a copy thereof, to be delivered to a buyer or buyer's agent prior to the signing by the buyer of a binding contract of sale. A copy of the property condition disclosure statement containing the signatures of both

seller and buyer shall be attached to the real estate purchase contract.
Nothing contained in this article or this disclosure statement is intended to prevent the parties to a contract of sale from entering into agreements of any kind or nature with respect to the physical condition of the property to be sold, including, but not limited to, agreements for the sale of real property "as is".

2. The following shall be the disclosure form:

PROPERTY CONDITION DISCLOSURE STATEMENT

NAME OF SELLER OR SELLERS:

PROPERTY ADDRESS:

THE PROPERTY CONDITION DISCLOSURE ACT REQUIRES THE SELLER OF RESIDENTIAL REAL PROPERTY TO CAUSE THIS DISCLOSURE STATEMENT OR A COPY THEREOF TO BE DELIVERED TO A BUYER OR BUYER'S AGENT PRIOR TO THE SIGNING BY THE BUYER OF A BINDING CONTRACT OF SALE.

PURPOSE OF STATEMENT: THIS IS A STATEMENT OF CERTAIN CONDITIONS AND INFORMATION CONCERNING THE PROPERTY KNOWN TO THE SELLER. THIS DISCLOSURE STATEMENT IS NOT A WARRANTY OF ANY KIND BY THE SELLER OR BY ANY AGENT REPRESENTING THE SELLER IN THIS TRANSACTION. IT IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR TESTS AND THE BUYER IS ENCOURAGED TO OBTAIN HIS OR HER OWN INDEPENDENT PROFESSIONAL INSPECTIONS AND ENVIRONMENTAL TESTS AND ALSO IS ENCOURAGED TO CHECK PUBLIC RECORDS PERTAINING TO THE PROPERTY.

A KNOWINGLY FALSE OR INCOMPLETE STATEMENT BY THE SELLER ON THIS FORM MAY SUBJECT THE SELLER TO CLAIMS BY THE BUYER PRIOR TO OR AFTER THE TRANSFER OF TITLE. IN THE EVENT A SELLER FAILS TO PERFORM THE DUTY PRESCRIBED IN THIS ARTICLE TO DELIVER A DISCLOSURE STATEMENT PRIOR TO THE SIGNING BY THE BUYER OF A BINDING CONTRACT OF SALE, THE BUYER SHALL RECEIVE UPON THE TRANSFER OF TITLE A CREDIT OF FIVE HUNDRED DOLLARS AGAINST THE AGREED UPON PURCHASE PRICE OF THE RESIDENTIAL REAL PROPERTY.

"RESIDENTIAL REAL PROPERTY" MEANS REAL PROPERTY IMPROVED BY A ONE TO FOUR FAMILY DWELLING USED OR OCCUPIED, OR INTENDED TO BE USED OR OCCUPIED, WHOLLY OR PARTLY, AS THE HOME OR RESIDENCE OF ONE OR MORE PERSONS, BUT SHALL NOT REFER TO (A) UNIMPROVED REAL PROPERTY UPON WHICH SUCH DWELLINGS ARE TO BE CONSTRUCTED OR (B) CONDOMINIUM UNITS OR COOPERATIVE APARTMENTS OR (C) PROPERTY ON A HOMEOWNERS' ASSOCIATION THAT IS NOT OWNED IN FEE SIMPLE BY THE SELLER.

INSTRUCTIONS TO THE SELLER:

(a) ANSWER ALL QUESTIONS BASED UPON YOUR ACTUAL KNOWLEDGE.

(b) ATTACH ADDITIONAL PAGES WITH YOUR SIGNATURE IF ADDITIONAL SPACE IS REQUIRED.

(c) COMPLETE THIS FORM YOURSELF.

(d) IF SOME ITEMS DO NOT APPLY TO YOUR PROPERTY, CHECK "NA" (NON-APPLICABLE). IF YOU DO NOT KNOW THE ANSWER CHECK "UNKN" (UNKNOWN).

SELLER'S STATEMENT: THE SELLER MAKES THE FOLLOWING REPRESENTATIONS TO THE BUYER BASED UPON THE SELLER'S ACTUAL KNOWLEDGE AT THE TIME OF SIGNING THIS DOCUMENT. THE SELLER AUTHORIZES HIS OR HER AGENT, IF ANY, TO PROVIDE A COPY OF THIS STATEMENT TO A PROSPECTIVE BUYER OF THE RESIDENTIAL REAL PROPERTY. THE FOLLOWING ARE REPRESENTATIONS MADE BY THE SELLER AND ARE NOT THE REPRESENTATIONS OF THE SELLER'S AGENT.

GENERAL INFORMATION

1. HOW LONG HAVE YOU OWNED THE PROPERTY?

2. HOW LONG HAVE YOU OCCUPIED THE PROPERTY?

3. WHAT IS THE AGE OF THE STRUCTURE OR STRUCTURES? NOTE TO BUYER--IF THE STRUCTURE WAS BUILT BEFORE 1978 YOU ARE ENCOURAGED TO INVESTIGATE FOR THE PRESENCE OF LEAD BASED PAINT.

4. DOES ANYBODY OTHER THAN YOURSELF HAVE A LEASE, EASEMENT OR ANY OTHER RIGHT TO USE OR OCCUPY ANY PART OF YOUR PROPERTY OTHER THAN THOSE STATED IN DOCUMENTS AVAILABLE IN THE PUBLIC RECORD, SUCH AS RIGHTS TO USE A ROAD OR PATH OR CUT TREES OR CROPS. YES NO UNKN NA

5. DOES ANYBODY ELSE CLAIM TO OWN ANY PART OF YOUR PROPERTY? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

6. HAS ANYONE DENIED YOU ACCESS TO THE PROPERTY OR MADE A FORMAL LEGAL CLAIM CHALLENGING YOUR TITLE TO THE PROPERTY? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

7. ARE THERE ANY FEATURES OF THE PROPERTY SHARED IN COMMON WITH ADJOINING LAND OWNERS OR A HOMEOWNERS ASSOCIATION, SUCH AS WALLS, FENCES OR DRIVEWAYS? YES NO UNKN NA (IF YES DESCRIBE BELOW)

8. ARE THERE ANY ELECTRIC OR GAS UTILITY SURCHARGES FOR LINE EXTENSIONS, SPECIAL ASSESSMENTS OR HOMEOWNER OR OTHER ASSOCIATION FEES THAT APPLY TO THE PROPERTY? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

9. ARE THERE CERTIFICATES OF OCCUPANCY RELATED TO THE PROPERTY? YES NO UNKN NA (IF NO, EXPLAIN BELOW)

ENVIRONMENTAL

NOTE TO SELLER - IN THIS SECTION, YOU WILL BE ASKED QUESTIONS REGARDING PETROLEUM PRODUCTS AND HAZARDOUS OR TOXIC SUBSTANCES THAT YOU KNOW TO HAVE BEEN SPILLED, LEAKED OR OTHERWISE BEEN RELEASED ON THE PROPERTY OR FROM THE PROPERTY ONTO ANY OTHER PROPERTY. PETROLEUM PRODUCTS MAY INCLUDE, BUT ARE NOT LIMITED TO, GASOLINE, DIESEL FUEL, HOME HEATING FUEL, AND LUBRICANTS. HAZARDOUS OR TOXIC SUBSTANCES ARE PRODUCTS THAT COULD POSE SHORT- OR LONG-TERM DANGER TO PERSONAL HEALTH OR THE ENVIRONMENT IF THEY ARE NOT PROPERLY DISPOSED OF, APPLIED OR STORED. THESE INCLUDE, BUT ARE NOT LIMITED TO, FERTILIZERS, PESTICIDES AND INSECTICIDES, PAINT INCLUDING PAINT THINNER, VARNISH REMOVER AND WOOD PRESERVATIVES, TREATED WOOD, CONSTRUCTION MATERIALS SUCH AS ASPHALT AND ROOFING MATERIALS, ANTIFREEZE AND OTHER AUTOMOTIVE PRODUCTS, BATTERIES, CLEANING SOLVENTS INCLUDING SEPTIC TANK CLEANERS, HOUSEHOLD CLEANERS AND POOL CHEMICALS AND PRODUCTS CONTAINING MERCURY AND LEAD.

NOTE TO BUYER - IF CONTAMINATION OF THIS PROPERTY FROM PETROLEUM PRODUCTS AND/OR HAZARDOUS OR TOXIC SUBSTANCES IS A CONCERN TO YOU, YOU ARE URGED TO CONSIDER SOIL AND GROUNDWATER TESTING OF THIS PROPERTY.

10. IS ANY OR ALL OF THE PROPERTY LOCATED IN A DESIGNATED FLOODPLAIN? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

11. IS ANY OR ALL OF THE PROPERTY LOCATED IN A DESIGNATED WETLAND? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

12. IS THE PROPERTY LOCATED IN AN AGRICULTURAL DISTRICT? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

13. WAS THE PROPERTY EVER THE SITE OF A LANDFILL? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

14. ARE THERE OR HAVE THERE EVER BEEN FUEL STORAGE TANKS ABOVE OR BELOW THE GROUND ON THE PROPERTY? YES NO UNKN NA IF YES, ARE THEY CURRENTLY IN USE? YES NO UNKN NA LOCATION(S) ARE THEY LEAKING OR HAVE THEY EVER LEAKED? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

15. IS THERE ASBESTOS IN THE STRUCTURE? YES NO UNKN NA (IF YES, STATE LOCATION OR LOCATIONS BELOW)

16. IS LEAD PLUMBING PRESENT? YES NO UNKN NA (IF YES, STATE LOCATION OR LOCATIONS BELOW)

17. HAS A RADON TEST BEEN DONE? YES NO UNKN NA (IF YES, ATTACH A COPY OF THE REPORT)

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18. HAS MOTOR FUEL, MOTOR OIL, HOME HEATING FUEL, LUBRICATING OIL OR ANY OTHER PETROLEUM PRODUCT, METHANE GAS, OR ANY HAZARDOUS OR TOXIC SUBSTANCE SPILLED, LEAKED OR OTHERWISE BEEN RELEASED ON THE PROPERTY OR FROM THE PROPERTY ONTO ANY OTHER PROPERTY? YES NO UNKN NA (IF YES, DESCRIBE BELOW)

19. HAS THE PROPERTY BEEN TESTED FOR THE PRESENCE OF MOTOR FUEL, MOTOR OIL, HOME HEATING FUEL, LUBRICATING OIL, OR ANY OTHER PETROLEUM PRODUCT, METHANE GAS, OR ANY HAZARDOUS OR TOXIC SUBSTANCE? YES NO UNKN NA (IF YES, ATTACH REPORT(S))

STRUCTURAL

20. IS THERE ANY ROT OR WATER DAMAGE TO THE STRUCTURE OR STRUCTURES? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

21. IS THERE ANY FIRE OR SMOKE DAMAGE TO THE STRUCTURE OR STRUCTURES? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

22. IS THERE ANY TERMITE, INSECT, RODENT OR PEST INFESTATION OR DAMAGE? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

23. HAS THE PROPERTY BEEN TESTED FOR TERMITE, INSECT, RODENT OR PEST INFESTATION OR DAMAGE? YES NO UNKN NA (IF YES, PLEASE ATTACH REPORT(S))

24. WHAT IS THE TYPE OF ROOF/ROOF COVERING (SLATE, ASPHALT, OTHER)? ANY KNOWN MATERIAL DEFECTS? HOW OLD IS THE ROOF? IS THERE A TRANSFERABLE WARRANTEE ON THE ROOF IN EFFECT NOW? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

25. ARE THERE ANY KNOWN MATERIAL DEFECTS IN ANY OF THE FOLLOWING STRUCTURAL SYSTEMS: FOOTINGS, BEAMS, GIRDERS, LINTELS, COLUMNS OR PARTITIONS. YES NO UNKN NA (IF YES, EXPLAIN BELOW)

MECHANICAL SYSTEMS & SERVICES

26. WHAT IS THE WATER SOURCE (CIRCLE ALL THAT APPLY - WELL, PRIVATE, MUNICIPAL, OTHER)? IF MUNICIPAL, IS IT METERED? YES NO UNKN NA

27. HAS THE WATER QUALITY AND/OR FLOW RATE BEEN TESTED? YES NO UNKN NA (IF YES, DESCRIBE BELOW)

28. WHAT IS THE TYPE OF SEWAGE SYSTEM (CIRCLE ALL THAT APPLY - PUBLIC SEWER, PRIVATE SEWER, SEPTIC OR CESSPOOL)? IF SEPTIC OR CESSPOOL, AGE? DATE LAST PUMPED? FREQUENCY OF PUMPING? ANY KNOWN MATERIAL DEFECTS? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

29. WHO IS YOUR ELECTRIC SERVICE PROVIDER? WHAT IS THE AMPERAGE? DOES IT HAVE CIRCUIT BREAKERS OR FUSES? PRIVATE OR PUBLIC POLES? ANY KNOWN MATERIAL DEFECTS? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

30. ARE THERE ANY FLOODING, DRAINAGE OR GRADING PROBLEMS THAT RESULTED IN STANDING WATER ON ANY PORTION OF THE PROPERTY? YES NO UNKN NA (IF YES, STATE LOCATIONS AND EXPLAIN BELOW)

31. DOES THE BASEMENT HAVE SEEPAGE THAT RESULTS IN STANDING WATER? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

ARE THERE ANY KNOWN MATERIAL DEFECTS IN ANY OF THE FOLLOWING (IF YES, EXPLAIN BELOW. USE ADDITIONAL SHEETS IF NECESSARY):

32. PLUMBING SYSTEM? YES NO UNKN NA

33. SECURITY SYSTEM? YES NO UNKN NA

34. CARBON MONOXIDE DETECTOR? YES NO UNKN NA

35. SMOKE DETECTOR? YES NO UNKN NA

36. FIRE SPRINKLER SYSTEM? YES NO UNKN NA

37. SUMP PUMP? YES NO UNKN NA

38. FOUNDATION/SLAB? YES NO UNKN NA

39. INTERIOR WALLS/CEILINGS? YES NO UNKN NA
40. EXTERIOR WALLS OR SIDING? YES NO UNKN NA
41. FLOORS? YES NO UNKN NA
42. CHIMNEY/FIREPLACE OR STOVE? YES NO UNKN NA
43. PATIO/DECK? YES NO UNKN NA
44. DRIVEWAY? YES NO UNKN NA
45. AIR CONDITIONER? YES NO UNKN NA
46. HEATING SYSTEM? YES NO UNKN NA
47. HOT WATER HEATER? YES NO UNKN NA
48. THE PROPERTY IS LOCATED IN THE FOLLOWING SCHOOL DISTRICT UNKN
NOTE: BUYER IS ENCOURAGED TO CHECK PUBLIC RECORDS CONCERNING THE PROPERTY (E.G. TAX RECORDS AND WETLAND AND FLOOD PLAIN MAPS)
THE SELLER SHOULD USE THIS AREA TO FURTHER EXPLAIN ANY ITEM ABOVE. IF NECESSARY, ATTACH ADDITIONAL PAGES AND INDICATE HERE THE NUMBER OF ADDITIONAL PAGES ATTACHED.

_____

_____

_____

_____

SELLER'S CERTIFICATION: SELLER CERTIFIES THAT THE INFORMATION IN THIS PROPERTY CONDITION DISCLOSURE STATEMENT IS TRUE AND COMPLETE TO THE SELLER'S ACTUAL KNOWLEDGE AS OF THE DATE SIGNED BY THE SELLER. IF A SELLER OF RESIDENTIAL REAL PROPERTY ACQUIRES KNOWLEDGE WHICH RENDERS MATERIALLY INACCURATE A PROPERTY CONDITION DISCLOSURE STATEMENT PROVIDED PREVIOUSLY, THE SELLER SHALL DELIVER A REVISED PROPERTY CONDITION DISCLOSURE STATEMENT TO THE BUYER AS SOON AS PRACTICABLE. IN NO EVENT, HOWEVER, SHALL A SELLER BE REQUIRED TO PROVIDE A REVISED PROPERTY CONDITION DISCLOSURE STATEMENT AFTER THE TRANSFER OF TITLE FROM THE SELLER TO THE BUYER OR OCCUPANCY BY THE BUYER, WHICHEVER IS EARLIER.

SELLER DATE _____

SELLER DATE _____

BUYER'S ACKNOWLEDGMENT: BUYER ACKNOWLEDGES RECEIPT OF A COPY OF THIS STATEMENT AND BUYER UNDERSTANDS THAT THIS INFORMATION IS A STATEMENT OF CERTAIN CONDITIONS AND INFORMATION CONCERNING THE PROPERTY KNOWN TO THE SELLER. IT IS NOT A WARRANTY OF ANY KIND BY THE SELLER OR SELLER'S AGENT AND IS NOT A SUBSTITUTE FOR ANY HOME, PEST, RADON OR OTHER INSPECTIONS OR TESTING OF THE PROPERTY OR INSPECTION OF THE PUBLIC RECORDS.

BUYER DATE _____

BUYER DATE _____

3. Nothing in this article shall require a seller to undertake or provide for any investigation or inspection of his or her residential real property or to check any public records.

§ 463. Exemptions. A property condition disclosure statement shall not be required in connection with any of the following transfers of residential real property:

1. A transfer pursuant to a court order, including, but not limited to, a transfer order by a probate court during the administration of a decedent's estate, a transfer pursuant to a writ of execution, a transfer by a trustee in bankruptcy or debtor-in-possession, a transfer as a result of the exercise of the power of eminent domain, and a transfer that results from a decree for specific performance of a contract or other agreement between two or more persons;

2. A transfer to mortgagee or an affiliate or agent thereof by a mortgagor by deed in lieu of foreclosure or in satisfaction of the mortgage debt;

3. A transfer to a beneficiary of a deed of trust;

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4. A transfer pursuant to a foreclosure sale that follows a default in the satisfaction of an obligation that is secured by a mortgage;

5. A transfer by a sale under a power of sale that follows a default in the satisfaction of an obligation that is secured by a mortgage;

6. A transfer by a mortgagee, or a beneficiary under a mortgage, or an affiliate or agent thereof, who has acquired the residential real property at a sale under a mortgage or who has acquired the residential real property by a deed in lieu of foreclosure;

7. A transfer by a fiduciary in the course of the administration of a decedent's estate, a guardianship, a conservatorship, or a trust;

8. A transfer from one co-owner to one or more other co-owners;

9. A transfer made to the transferor's spouse or to one or more persons in the lineal consanguinity of one or more of the transferors;

10. A transfer between spouses or former spouses as a result of a decree of divorce, dissolution of marriage, annulment, or legal separation or as a result of property settlement, agreement incidental to a decree of divorce, dissolution of marriage, annulment or legal separation;

11. A transfer to or from the state, a political subdivision of the state, or another governmental entity;

12. A transfer that involves newly constructed residential real property that previously had not been inhabited;

13. A transfer by a sheriff; or

14. A transfer pursuant to a partition action.

§ 464. Revision. If a seller of residential real property acquires knowledge which renders materially inaccurate a property condition disclosure statement provided previously, the seller shall deliver a revised property condition disclosure statement to the buyer as soon as practicable. In no event, however, shall a seller be required to provide a revised property condition disclosure statement after the transfer of title from the seller to the buyer or occupancy by the buyer, whichever is earlier.

§ 465. Remedy. 1. In the event a seller fails to perform the duty prescribed in this article to deliver a disclosure statement prior to the signing by the buyer of a binding contract of sale, the buyer shall receive upon the transfer of title a credit of five hundred dollars against the agreed upon purchase price of the residential real property.

2. Any seller who provides a property condition disclosure statement or provides or fails to provide a revised property condition disclosure statement shall be liable only for a willful failure to perform the requirements of this article. For such a willful failure, the seller shall be liable for the actual damages suffered by the buyer in addition to any other existing equitable or statutory remedy.

§ 466. Duty of an agent. An agent representing a seller of residential real property as a listing broker shall have the duty to timely inform each seller represented by that agent of the seller's obligations under this article. An agent representing a buyer of residential real property, or, if the buyer is not represented by an agent, the agent representing a seller of residential real property and dealing with a prospective buyer, shall have the duty to timely (in any event, before the buyer signs a binding contract of sale) inform such buyer of the buyer's rights and obligations under this article. If an agent performs the duties and obligations imposed upon him or her pursuant to this section, the agent shall have no further duties under this article and shall not be liable to any party for a violation of this article.

§ 467. Liability. Nothing contained in this article shall be construed as limiting any existing legal cause of action or remedy at law, in statute or in equity.

§ 3. This act shall take effect on the first day of March in the year next succeeding the year in which it shall have become a law and shall apply to any real estate purchase contract entered into on or after such date.

Cooperatives and Condominiums

By Alison R. Hirsch and Richard Siegler

Due Diligence in Apartment Purchases

Unlike in a fee simple residential transaction, counsel representing a prospective apartment purchaser must provide far more in the way of services than contract negotiation and title closing. Indeed, the work of the co-op purchaser's attorney commences *before* a contract is negotiated. The hybrid nature of co-op ownership, consisting of shares of a cooperative housing corporation and the accompanying proprietary lease, means that, in addition to an investigation of the seller's title, the purchaser's attorney should also perform the "due diligence" normally associated with a stock purchase transaction, to ensure that the corporation in which the client is investing is financially and otherwise sound. Moreover, the unique shared-ownership component of a co-op building, with its complex interplay of policies, politics and personalities, requires the attorney to be sensitive to other issues that are not normally associated with the purchase of fee simple residences.

In contrast to the typical home buyer, the prospective purchaser of a co-op apartment must initially be vetted and approved by the co-op's board of directors, which has an almost unfettered right to reject potential applicants. Once the purchaser becomes a tenant-shareholder, his or her use and occupancy of the unit is thereafter subject to a whole system of regulation and approval over which the board generally has a broad discretion and which can be a maze of pitfalls and surprises for the unwary. As a result, the co-op purchaser's attorney is required to take on many of the functions normally associated with a real estate broker, matching the needs of his client with the requirements of a co-op, both for the initial approval of the client's application to purchase as well as the client's future use and enjoyment of the apartment.

While the condominium purchaser is not technically subject to the approval of a board of managers (but rather a right of first refusal on the part of the board to purchase the apartment), many condominium boards are increasingly demanding the same kinds of application information. Accordingly, many of the same concerns discussed here and much of the due diligence required for a co-op is also applicable to a condominium purchase.

Client Interview

Even before the co-op purchaser's attorney investigates the co-op corporation, the attorney should interview the client to elicit some basic information regarding the client's needs and expectations. While an attorney cannot be expected to foresee every contingency, some initial questioning can prevent future recriminations. For example, a client who is purchasing a co-op apartment with the intention of residing there with his/her beloved pet poodle will not be happy if it later transpires that the co-op does not permit pets. An initial client interview should, at a minimum, extract the following information:

1. Who are the intended occupants (purchaser, members of family, others)?
2. What is the purpose of purchase (residence/investment/business)?
3. Does the client have pets?
4. Is financing contemplated and, if so, how much?
5. What is the extent of proposed apartment alterations?
6. What are the sources of the purchaser's income and the amount and categories of his/her assets?
7. Has the purchaser been previously rejected by a co-op board?
8. Is additional space (such as storage bin, garage space, maid's room) a requirement?
9. Does the purchaser have specific appliance requirements? (washer/dryer or Jacuzzi)?
10. Does the client have a good credit history?
11. Does the client have a history of being involved in litigation?

Armed with this information, the attorney can then turn to the co-op to conduct a due diligence investigation to ensure that not only will the client's needs be met, but also that the purchaser will, in the future, be satisfied with living under the conditions imposed by the co-op.

Due Diligence

Due diligence investigation into a co-op should take three forms: (1) document review, (2) appropriate inquiry, and (3) physical inspection. While the extent to which an attorney is involved is typically limited to the document review and, to a lesser extent, personal inquiry, the client should be advised and encouraged to pursue all three types of investigation prior to signing a contract of sale.

Document Review

Application Materials

A full set of the co-op's application materials should be obtained and reviewed. In addition to listing the types of information the co-op board will be looking to evaluate, the application materials frequently contain information as to significant co-op policies and procedures (e.g., with respect to financing, subletting, pets, prohibited appliances and alterations). The application also typically lists the types of fees and/or expenses attendant on the apartment purchase (such as application and move-in fees, transfer fees and any "flip tax" payable by the purchaser or seller).

Offering Plan and Amendments

The co-op's original offering plan and amendments as filed with the New York State Department of Law,[1] are a good starting point for document review, particularly if the plan is still current, since this will contain the form of proprietary lease, by-laws and house rules, as well as a legal opinion as to the income tax consequences of an investment in the co-op and an engineer's report as to the physical condition of the building and the major building systems. The offering plan and its amendments will also disclose the nature of any tax abatements or exemptions, underlying mortgages and other major agreements by which the co-op is bound, information regarding pending lawsuits as well as information on the sponsor and its history, all of which can have a significant impact on the co-op and its finances.

So long as the sponsor retains ownership of units, the sponsor is required to file an amendment at least annually with the Department of Law.[2] The amendment will indicate whether the sponsor is current on its maintenance and other obligations to the co-op as well as other co-op buildings in which the sponsor has an interest. If the sponsor appears to be in financial difficulties and is unable to meet its obligations to the co-op, this can cause severe financial hardship to the other shareholders, who may be required to contribute to the resulting shortfall in operating income. Where a sponsor or "holder of unsold shares" controls a large block of shares in the co-op, of concern to an outside purchaser is the special treatment accorded to such shares, often taking the form of an exemption from the controls and regulations imposed on other shareholders. This special treatment can sometimes have a negative impact on the co-op, such as when the holder is enabled to dispose of the apartments without board approval to an undesirable purchaser.

If the offering plan is no longer current, the attorney should ensure that the forms of documents contained in the plan are up-to-date, and should obtain and review any amendments.

Financial Statements

The attorney should obtain and review the most recent certified financial statements prepared by the co-op's independent public accountant, since this will provide essential information as to the co-op's financial standing and stability.

The balance sheet will reveal the extent of the co-op's current assets (including the amount of the co-op's reserve fund) as well as the amount of underlying mortgage indebtedness or other financing. While it is impossible to predict whether the amount of reserves will be adequate to meet future contingencies, a prudently managed co-op should maintain sufficient reserves to cover at least three months of normal operating expenses.

The co-op's income statement will provide an indication of whether the co-op is generating sufficient income to meet its operating expenses (before depreciation, which is a non-cash item). If the co-op is only barely meeting its expenses, there is a strong likelihood that maintenance will need to be increased in the near future. Line items such as legal expenses can indicate the possibility of litigation or shareholder disputes. A comparison of line items with the prior year can also provide evidence of potential problems. For example, a sharp increase in the amount of maintenance arrears could mean shareholder defaults or negligent management practices.

The attorney should read the notes to the financial statements, which provide detailed information regarding the co-op's underlying financing, including mortgage interest rate and maturity and disclosure of any J-51 or section 421a real-estate tax abatements or exemptions.[3] These items can have a significant impact on a purchaser's investment in a co-op: A co-op which has low maintenance as a result of favorable financing terms or real estate tax abatements and exemptions may have to significantly increase maintenance charges when the mortgage matures and the real estate benefits are no longer available.

The notes to the financial statements will also highlight any ongoing litigation to which the co-op is a party and the possible impact on the co-op's finances, as well as any major capital expenditures.

An attraction of co-op ownership is the availability of certain income tax benefits to shareholders. In order to maintain these benefits, the co-op must comply each year with section 216 (the "80/20 Rule") of the Internal Revenue Code;[4] that is, more than 80 percent of the co-op's gross income must be derived each year from "tenant-stockholders" in order for the co-op to pass on to each shareholder that shareholder's proportionate share of the co-op's expense for real estate taxes and mortgage interest. The financial statements will provide

insight as to the co-op's compliance with these provisions and the continued availability of income-tax deductions to shareholders.

The Audit Accounting Guide for Common Interest Realty Associations (CIRAs),[5] prepared by the American Institute of Certified Public Accountants, has recommended that both co-op and condominium boards compile information as to the condition of major building components and systems and describe how the board intends to implement and finance any future capital improvements or repairs. However, very few housing entities in the New York metropolitan area have to date undertaken the compilation since the guide was recommended five years ago. Many boards are concerned about liability as a result of the disclosure of such information. As a result, the intended result of disclosure of building conditions has been frustrated.

Minutes

Most co-ops allow a prospective purchaser's attorney to review the minutes of meetings of boards of directors and shareholders. Where a co-op keeps full and accurate minutes, a review of these documents can provide some insight into the working of the co-op. Minutes of meetings can highlight pending or threatened litigation, proposed assessments or maintenance increases, internal disputes, problems with leaks or building systems, or even supply evidence of mismanagement. Minutes can also indicate quality of life issues such noisy neighbors or problematic pets.

There are some co-ops which, as a matter of policy, refuse to allow prospective purchasers to review the minutes of their board meetings. While this frequently acts as a deterrent to prospective purchasers and their counsel, who may view this as an indication that the co-op "has something to hide," counsel should remember that a co-op is a "close" corporation and is not obligated to disclose information to the public. Moreover, while minutes can sometimes be a useful tool in uncovering potential problems, they are a subjective and not a verbatim record of proceedings and can contain as much or as little information as the preparer wishes to include. Accordingly, an attorney can usually obtain the required information from other sources, including questioning the managing agent.

Co-op Documents

The purchaser's attorney should obtain and review the co-op's current proprietary lease, house rules, by-laws, and certificate of incorporation. While these documents frequently appear to be "standard" in form, they can in fact vary considerably from co-op to co-op and a full review is recommended.

A review of these documents will provide valuable information as to major polices of the co-op with respect to subletting, assignment, "flip" tax provisions, apartment alterations and pets. If the documents provide no express direction on any of these matters, but leave the decision to the discretion of the board, further investigation will be necessary. For example, most proprietary leases give the board absolute discretion to grant or withhold consent to subletting for any reason or no reason. Further investigation may reveal that the co-op has historically refused to allow subletting. Other co-ops have adopted "policies" limiting the period of subletting or imposing a sublet fee for the privilege.

While the certificate of incorporation is rarely reviewed by attorneys, it is good practice to read this document for unusual provisions which might limit a shareholder's rights.[6]

Alteration Agreement

In recent years, many co-ops have adopted more stringent apartment alteration agreements for use when a shareholder intends to make major renovations. While the proprietary lease contains general provisions on alteration policies, this is a key area of contention between existing shareholders wishing to reduce noise, dust and debris, and new shareholders intent on major apartment reconstruction. Thus, extensive alteration agreements are frequently the result.

Particularly if a client is contemplating a major renovation, it is critical to review the co-op's alteration agreement prior to signing a contract of sale. Certain co-ops even limit the timing of renovations to a period of a few weeks over the summer when many tenants are away. The client should be made aware of the co-op's policies so that he or she can plan accordingly. Similarly, if the client's plans involve installation of major appliances or relocation of rooms, it is advisable to determine if the co-op's alteration agreement allows for this.

Certificate of Occupancy

A certificate of occupancy ("c/o") is a document that certifies that a building complies with the provisions of zoning/and or building ordinances. For one reason or another, many co-ops in New York City do not have a fully accurate c/o, frequently the result of having failed to obtain appropriate amendments to reflect apartment combinations or additions. Particularly if a client is seeking to purchase a unit in a smaller building or a unit which appears to have been combined, it is good practice to review the co-op's certificate of occupancy for the apartment in question. An incorrect certificate of occupancy may impact on the continued usage of the apartment. Additionally, it may affect a co-op or purchaser's ability to obtain future financing, as well as involve the co-op in expenses which may, in turn, lead to increased maintenance charges.

Recognition Agreement

If the client contemplates financing, it is important to ascertain the co-op's shareholder-loan policy. Lenders making loans secured by a pledge of co-op shares and a collateral assignment of the proprietary lease usually require the co-op to provide a "recognition agreement" whereby the co-op recognizes in advance the right of the lender to sell the interest of a defaulting borrower in the apartment to a third party who meets the approval of the board.[7] While many co-ops routinely enter into "recognition agreements" to facilitate loans to shareholders, the New York courts have held that there is no obligation on the co-op to execute such an agreement to facilitate a co-op loan.[8] If the co-op will not execute a recognition agreement, this may impact on the client's ability to obtain financing.

Physical Inspection

The client should always be advised to thoroughly inspect the unit and the building prior to signing a contract of sale. The standard co-op contract of sale provides that the unit is transferred in "as is" condition as of the date of the contract, with the exception of appliances which are generally required to be in "working order" at closing.[9] Since the terms "as is" and "working order" are subjective and open to interpretation, a prospective purchaser would be well advised to conduct a vigilant inspection, which should include running the appliances, checking water pressure and looking under areas concealed by furnishings for possible defects.

In the case of a smaller co-op (usually less than 20 units), a client should consider having a licensed architect or engineer inspect both the apartment and the building, especially if the purchase price is substantial. A major defect in the building or the systems of a smaller co-op can have a significant financial impact on its shareholders since there are a limited number of persons to share the resulting expense.

A purchaser should also be made aware of the presence of hazardous substances, such as asbestos or lead-based paint. Inquiry should be made both of the seller and the managing agent as to the existence of these substances. Although federal, state and city laws may impose disclosure responsibility on an apartment seller for the presence of hazardous substances, it is certainly prudent for a purchaser to investigate these matters, lest the seller or the co-op seek to escape responsibility.

Inquiry

Once the attorney has reviewed all of the documents, it is good practice to contact the co-op's managing agent, building manager, architect or even counsel, if appropriate, to update, clarify and supplement information gleaned from the document investigation. As well as discussing issues highlighted by the co-op's documents, the attorney should review with such professionals the co-op's policies and procedures with respect to all of the matters discussed above to ensure that the co-op's practices do, in fact, conform with its stated policies.

Conclusion

While there are limits to the amount of investigation that can be accomplished by an attorney and even the most thorough due diligence cannot guarantee that a co-op purchase will be free of the risks inherent in co-op ownership, the experienced attorney can significantly reduce the pitfalls and surprises that unwary co-op purchasers frequently confront.

Endnotes

1. N.Y. General Business Law § 352-e.
2. Gen. Bus. Law § 352-e(8).
3. New York City Administrative Code § 11-243 (formerly § J-51); N.Y. Real Property Tax Law §§ 421(a), 489.
4. I.R.C. § 216(b)(i).
5. AICPA Audit and Accounting Guide for Common Interest Realty Associations (1992).
6. N.Y. Business Corporation Law § 613 provides that certain limitations on the right of shareholders to vote may be contained in the certificate of incorporation.
7. The form of recognition agreement requested by each lender may be different, but the most widely used form is the so-called "Aztech Form," a document first issued and printed in 1973 and revised by the Joint Committee of the Real Property Law Section of the New York State Bar Association Condominium and Cooperative Committee and the Special Committee on Cooperative and Condominium Law of The Association of the Bar of the City of New York and printed on Blumberg form T394. This document is acceptable to virtually all banks and co-op corporations in New York City.
8. *Brown v. 930 Fifth Ave. Corp.*, N.Y.L.J., (Mar. 27, 1985) p. 7, col. 1. (Sup. Ct., N.Y. Co.).
9. Blumberg Form M 123—Contract of Sale of Cooperative Apartment prepared by the Committee on Condominiums and Cooperatives of the Real Property Law Section of the New York State Bar Association § 3.4.

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Causal Relationship and Computer-Related Injuries

By Martin Minkowitz

The terms "computer keyboard," "workstation" and "monitor" have all become a familiar part of our work environment. Even the word "mouse" has taken on a different meaning. Along with our new emerging, constantly advancing technology, is a newly emerging and constantly advancing concern for workers sustaining injuries which arise out of and in the course of the use of this equipment.

It is not unusual to have workers spending their entire workday sitting in a workstation at a computer keyboard and monitor. Injuries claimed by such workers are generally to neck, shoulders, arms and hands (such as carpal tunnel syndrome). To be compensable, the Workers' Compen-sation Board must find that the injury was causally related to the employment. It must be proven by the claimant that the disability was the result of an occupational disease or an accidental injury which occurred in the course of employment. To establish a case for compensation benefits, the claimant must prove that there was an accident, that timely notice was given to the employer and that there was a "causal relationship between the accident and the employment." The term "causal relationship" (ANCR pronounced Anchor) in the workers' compensation forum means that the claimant must prove or the employer, if contesting, disprove that the event which caused the injury or death was a risk that was related to the employment and flowed from the work, was a natural consequence of and directly connected to it.

The question of whether an injury arose from an occupational disease or an accident was an issue in *Farcasin v. PDG Inc. et al.*[1] In that case, the claimant's responsibilities required him to spend his workday at a workstation in front of a computer keyboard and monitor. He had been promised by his employer that he would be given a new computer with a larger screen and an ergonomically designed workstation before he started his employment. He started working, but he was never given what he was promised.

A month after starting his job, he alleged that he was experiencing pain in his neck and shoulders radiating down into his arms and hands. A month later, he left employment alleging no improvement even after medical treatment, and filed a claim for workers' compensation benefits.

The Board's Workers' Compensation Law Judge found that the employer's failure to keep its promise to provide him with the ergonomically correct workstation and a more up-to-date computer had resulted in the claimant's sustaining an occupational disease.

"To establish a case for compensation benefits, the claimant must prove that there was an accident, that timely notice was given to the employer and that there was a 'causal relationship between the accident and the employment.'"

The employer appealed, and the Board amended its decision and changed its opinion that the injury resulted from an occupational disease and found instead that it was an accidental injury.

On appeal to the court, the Appellate Division properly found that the Board, in its continuing jurisdiction,[2] certainly had the right to modify its prior decisions, even on its own initiative, if it believed that justice required such action.

It could also do so even if there was a pending appeal before it.[3]

The term "injury" is defined in the law as "accidental injuries arising out of and in the course of the employment and such disease or infection as may naturally and unavoidably result therefrom."[4] However, since there is no statutory definition of "accidental injury," the court referred to existing

case law. There it provides that a causally related accident need not be one where the claimant experienced a "sudden collapse," but could be sufficiently established by medical evidence which proved that the claimant's repetitive acts which were required by his employment caused his debilitating injury.[5] An accidental injury can be one which accrues gradually over a reasonably defined period of time.[6]

Computer-related injuries will generally occur over a period of time. If the symptoms of an injury accrue gradually over a reasonably definite period of time, it can be an accidental injury, as long as the disability resulted from a special condition peculiar to the injured worker's workplace.[7]

Even if the injury was the result of developing a disability from a latent condition or aggravation of a condition, of the worker, it may be found to be such an accident which caused the injury, that is compensable under the Workers' Compensation Law.

Compensation awards to those who sustain cumulative injuries are not new. Such claims have been established in the law as being compensable for more than 50 years. Repeated noises causing deafness, repeated stress causing heart and mental disease, and repetitive physical movement causing injuries such as carpal tunnel syndrome and similar stress injuries have been sustained as compensable under the Workers' Compensation Law.

Endnotes

1. ___ A.D.2d ___ (2001).
2. *See* WCL § 123.
3. *Baker v. Niagara Mohawk Power Corp.*, 7 A.D.2d 788.
4. *See* WCL § 2(7).
5. *Johannesen v. New York City Dept. of Housing, Pres. & Dev.*, 84 N.Y.2d 129; *Friedlander v. New York City Health & Hospitals Corp.*, 246 A.D.2d 137.
6. *See also Rich v. Pace Univ.*, 703 N.Y.S.2d 565 (2000).
7. *Middleton v. Coxsackie Corr. Facility*, 38 N.Y.2d 130.

Martin Minkowitz is a partner with Stroock & Stroock & Lavan in New York City. A former Deputy Superintendent and General Counsel of the New York State Insurance Department and former General Counsel with the NYS Workers' Compensation Board, Mr. Minkowitz is an Adjunct Professor at New York Law School and is the author of the commentaries to McKinney's Worker's Compensation Law.

Testimony of New York State Insurance Department Before U.S. House Committee on Financial Services

September 26, 2001

Testimony by Gregory V. Serio
Superintendent of Insurance, New York State Insurance Department

I. Introduction

In 1860, the original seal of the New York State Insurance Department—"Alter Alterius Onera Portate" or "Bear ye one another's Burdens"—eloquently expressed the fundamental public interest that is the very essence of insurance. At no time in the history of this country has that phrase been more important—or more reassuring. While none of us will ever be the same as a result of the events of September 11th, I have no doubt that insurance will be one of the life preservers that keeps us afloat.

Insurance touches all of our lives in a multitude of ways. It is an essential element in everyday life that secures our standard of living and the stability of our families as well as our property rights. All Americans feel the protecting arm of some form of insurance and find great solace that, when adversity strikes, their insurance policy is there to help them with their financial recovery.

On September 11th a disaster struck that neither our country nor the insurance industry had dared to contemplate. In its aftermath the industry and its regulators have faced a daunting challenge that cuts across virtually all lines of insurance in an unprecedented manner. It has been estimated that the insurance industry provides between 70 and 95% of the recovery dollars that are provided for victims and communities struck by a natural disaster—in this unnatural disaster the risk and the burden on the industry might grow even larger.

For the New York State Insurance Department ("Department") this challenge was made even more difficult by the proximity of the Department's downtown Manhattan office to "Ground Zero" as well as the personal loss of one of our own—former Superintendent Neil D. Levin.

When Governor Pataki nominated me for the position of Superintendent on April 10th of this year, I began the process of succeeding Neil who led the Department for over four years. Neil left to become the Executive Director of the Port Authority of New York and New Jersey and he was excited about the new challenges he would be facing in this position. Sadly, Neil was attending a meeting at Windows on the World on the 107th floor of Tower One on September 11th. Personally, I lost a valued colleague and a good friend on that day—I will miss Neil's guidance and insight regarding the rapid changes in financial services regulation. But, I am comforted with the knowledge that the vision and leadership that Neil brought to the Department, including the creation of our Capital Markets Bureau, have not only improved our regulation of the insurance industry but have served as the foundation we have used to respond to this crisis. The Department's response to this disaster, in so many ways, is Neil Levin's true legacy.

II. The Devastation

The attack on the World Trade Center's ("WTC") twin towers impacted virtually all lines of insurance—property, life, business interruption, health, workers' compensation, and liability are some of the many insurance products that have and will be impacted. Total insured losses will include the destruction of the WTC towers and other WTC properties; business and personal property of tenants and their employees; workers' compensation for injured workers; claims for lost business income; the cost of establishing alternative, temporary operations at off-site locations; loss of life; and liability for negligent acts. The most recent total loss estimates have ranged from $30 billion to $58 billion on a combined basis for all lines of insurance. This estimate is well above Hurricane Andrew's total loss of approximately $20 billion, and is almost certain to increase.

I cite loss estimates with respect to this disaster with a degree of trepidation. Historically, early estimates of catastrophic losses have been low with substantial revisions upward as more information becomes available. In addition, I would characterize our present status as information gathering and early assessment. I would, therefore caution the committee to not rely on these estimates as the final word of the Department with respect to the disaster.

Property Coverage

Property insurance policies generally cover damage from fire, explosion, smoke, or other property or liability losses that occur. Such insurance policies may exclude war, but this is generally defined as an action by a sovereign nation. In light of increased global terrorism, some commercial insurance policies may have exclusions for damage caused by terrorist attacks.

The Department's research and discussions with the individual insurers, have determined that these exclusions are not applicable to this disaster and/or that the exclusions will not be invoked to avoid payment in this instance.

It is estimated that the WTC complex itself was worth between $5 billion and $5.5 billion. The owner, the Port Authority of New York and New Jersey, had, pursuant to a 99-year lease, recently rented the majority of the complex to a real estate consortium called WTC Partners. The total available insurance coverage is yet to be determined, but, clearly, early indications are that insurers will be reimbursing claimants for a large percentage of this property loss and that limits in property policies may be reached.

Several buildings surrounding the WTC are also total losses either because they collapsed along with or in the immediate aftermath of the collapse of the WTC towers. There is also substantial property damage to many of the surrounding buildings. I would note, however, that this is a dynamic situation as access to the area is still restricted and inspections of some sites still need to be completed. The buildings that have collapsed include One WTC, Two WTC, Five WTC, and Seven WTC. Other buildings that have major damage or partial collapses include One Liberty Plaza, Four WTC, Six WTC, One World Financial Center, Two World Financial Center, Three World Financial Center, the Federal Building, 140 West Street, East River Savings Bank and the Millennium Hotel.

It is a fundamental concept of insurance for insurers to spread the risk of adverse events among number of reinsurers. All indicators are that all losses resulting from the disaster were shared by a large number of reinsurers.

Homeowners Property Coverage and Additional Living Expenses

Homeowners, condominium and cooperative apartment owners residing in the vicinity of the WTC complex have suffered damage to their homes or apartments. Others in the evacuated area, while not having direct damage to their buildings or apartment's contents, have been forced to find alternative housing and will incur other costs.

Damage to buildings is in many cases evident but remains to be completely assessed. Physical damage to apartment complexes such as Battery Park City and those north of the WTC on neighboring Greenwich Street may be significant. Condominium and cooperative owners share in the losses to the building. They, as well as apartment renters, may have damage to personal property and contents. The true measure of such losses will not be known until the occupants are allowed back into their homes and insurance adjusters can assess the damage. The area impacted included 9,000 residents of Battery Park City, all of whom suffered damage to their residences and/or were forced to evacuate their homes for weeks after the disaster.

Coverage is available in the standard homeowners, condominium, co-op and tenants policies for Additional Living Expenses. Where there is a loss from a covered peril which makes that part of the premises where the insured resides unfit to live in, the policies provide coverage for Additional Living Expense. This means that any reasonable necessary increase in living expenses incurred by the insured to maintain a normal standard of living for the household will be covered.

Furthermore, many in the area that were forced to evacuate because of the order of a civil authority, are covered for the Additional Living Expenses as described above for no more than two weeks, even if there is no actual damage to the premises. Payment will be for the shortest time required to repair or replace the damage or, if the insured permanently relocates, the shortest time required for the household to settle elsewhere.

Workers' Compensation Coverage

Any employee injured on the job—except firefighters and police officers—will benefit from mandatory workers' compensation coverage. Workers' compensation claims have been estimated to be as high as $5 billion. This $5 billion estimate, indeed any estimate, is extremely preliminary since a maximum payout or maximum benefit per-claim will depend on many variables, such as the number of dependents and their ages. Under New York law the family of a worker killed on the job is entitled to $10,000 for funeral expenses. A surviving spouse would be entitled to up to $400 a week for the rest of his/her life, unless they remarry, in which case, the benefit is cut off after two years. Surviving children will receive up to $400 a week until the age of 21, but the benefit would continue under certain exceptions, such as if the surviving child is in school or is disabled.

New York's Workers' Compensation Law defines any injury in the workplace as arising out of and occurring during employment. The law would also provide workers' compensation coverage for employees fleeing imminent peril in the workplace and employees commuting to work at the time provided that they worked in the WTC complex. New York City's police and fire departments have their own compensation system with benefits that will be accorded pursuant to that system. Accidental Death Benefits and Accidental Disability benefits available to the heroic members of our City's police and fire departments are as follows:

Accidental Death Benefit—If death results as the result of an accident in the performance of duty, a life annuity to the spouse of ½ the member's final salary, but in no case less than ½ the full salary of a full grade firefighter or police officer.

Accidental Disability—75% of final salary plus the return of the member's accumulated contributions paid in a lump sum. In addition Tier 1 members receive an annuity based on 1/60 of average salary earned in the period after completing the 20 or 25 years minimum service.

The Department has a key role in ensuring the ability of the New York City pension funds to pay these claims. Since the disaster, the Department has been closely monitoring the funds to ensure expedited payments.

Business Interruption Coverage

Business owners within the WTC complex may have Business Interruption Coverage for business income losses caused by physical damage to property at their premises. Business owners in the surrounding areas also may have such coverage. This coverage can mean the difference between staying in business and not staying in business for many small businesses that do not have the financial strength to withstand multiple weeks without customers. In the large area west of Broadway and south of 14th street and then Canal Street in lower Manhattan (the restricted zone), many of the businesses, while not physically damaged by the destruction, were unable to reopen due to access restrictions imposed under civil authority. The standard form in New York for Business Interruption Coverage also provides for reimbursement for loss of business income suffered as a result of actions taken by civil authorities that prevent access to the insured's premises. The standard form provides coverage for up to three weeks after the first seventy-two hours after the action by the civil authorities, but those coverages may vary.

Many businesses in the surrounding areas also may have experienced business income losses that were unrelated to the denial of access by the civil authorities or occurred after the civil authority restrictions were lifted. Unfortunately, the standard form of Business Interruption Coverage in New York requires that the business suffer direct physical damage to property at the insured's premises in order to trigger coverage. Losses caused directly or indirectly by the interruption of utility services are also excluded by the standard policy but can be purchased as additional coverage. It is not known at this time how many businesses purchased such endorsements or how many claims will be made under this coverage.

It should be noted that many businesses will not have obtained coverage under the standard form and that there are several other available coverages aside from the standard form, which may provide coverage to the affected businesses. Each situation must be addressed on a case by case basis. It is clear, however, that many businesses will not be protected by the safety net afforded by Business Interruption Coverage or Civil Authority Insurance.

Liability Coverage

As a general matter, Liability Coverage provides protection for negligent acts or omissions. The full extent and nature of liability arising out of the disaster can not be determined at present due to the long-tail nature of such exposure. The inevitable lawsuits have yet to be filed and experience has shown that such lawsuits can take years to reach any resolution. Multiple parties including the Port Authority, WTC Partners, United and American Airlines, individual business and building management, as well as state and federal governments will likely face lawsuits for acts or omissions that resulted in damages, injuries or death. The property/casualty insurance industry will bear the lion's share of the cost of defending these lawsuits as well as the payment of damages. Some industry experts have estimated that the liability costs could constitute one-third of the industry total for reimbursement of all damages arising out of the disaster.

It should be noted that, in New York, punitive damages, if awarded, are generally not covered pursuant to a contract of insurance. Whether such damages will, or can, be awarded in connection with the disaster is yet to be determined.

Life Insurance Coverage

The stress of this disaster on the property insurance industry was exacerbated by the dramatic loss of life and the significant exposure imposed on the life insurance industry. Those killed in the disaster were covered by the same kinds of policies all Americans use: both individual and group policies. Individual policies are typically obtained according to individual circumstance. Group coverage typically is generally obtained as part of an employee's benefits package. Many employers provided coverage with death benefit protection equal to a worker's salary or twice their salary. The total claims that will be presented as a result of the disaster can not be determined at the present time although industry analysts have estimated life insurance claims will total $4-$6 billion.

Fortunately, the life insurance industry in New York is financially strong and diverse, with $3.1 trillion in assets and liquid reserves ready to respond to this tragedy. To put the life insurance industry's exposure from the September 11th terrorist attacks into perspective: in the year 2000, the life insurance industry nationally paid a total of $44.1 billion dollars in death benefits on 3.8 million life insurance policies. Put another way: on average, the life insurance industry paid death benefits on nearly 10,500 life policy claims nationally every day last year.

A key issue with respect to life insurance relates to proof of claim. A death certificate is normally used in submitting a claim for life insurance benefits. Due to the circumstances surrounding the disaster there will, in many instances, be difficulty in securing the necessary death certificate. The Department has worked with the life insurance industry to overcome this difficulty by providing for a standardized affidavit to be used in lieu of a death certificate. This affidavit will streamline the payment process for consumers in their time of need. (See Appendix I)

The latest claim estimates are well within the capacity of the life insurance industry. However, it is still too early to determine the ultimate death claim exposure. In addition to not knowing the actual number of victims involved, the amount and different types of life coverage (individual, group, COLI, accidental death, etc.) on each victim and the amount and collectability of reinsurance is unknown.

Health & Disability Insurance Coverage

The impact on the health insurance market will be significantly less than that felt by the property/casualty and life insurance industries. Although a great number of people were injured in the WTC tragedy, many of the health claims will be covered by workers' compensation. For the claims falling outside of workers' compensation, the Department does not believe that any one insurer will bear an unusually high financial burden.

The total number of health insurance and disability claimants are not known with any certainty at this time. The Department believes, however, that there will be relatively few when compared with the property/casualty and life claimants. We expect the disaster to have little impact on premium rates and availability of health insurance and disability insurance in New York State. The approximately 30 HMOs that operate in New York State are active participants in the individual, small group and large group health insurance markets and there are well in excess of 100 insurers that offer long term and/or short term disability insurance on an individual and group basis. The latter type of coverages are readily available throughout New York State with many options for varying degrees and levels of coverage.

Reinsurance

The reinsurance market is, in many ways, the life blood of the insurance market. The spreading and diversification of risks in all lines of insurance is critical to continued availability and affordability. Based on all of my conversations and analysis conducted by the Department, including conversations with Lloyd's, the reinsurance industry has the asset base and the liquidity to pay claims. I am also assured that the reinsurance industry will not invoke exclusions in an effort to avoid obligations. Without question, we expect that the disaster will cause hardening in the reinsurance market. This hardening will be the result of the drain in capital that the disaster will cause as well as the perceived increase in exposure to terrorist related activity. This could be seen in increasing insurance costs, the insertion of terrorism exclusions in reinsurance treaties and, ultimately, difficulty in obtaining certain types of coverage. The aviation market has been the first to see these effects and others are sure to follow.

III. The Department Responds

The Department's main office, located in New York City's financial district, was evacuated and closed following the WTC disaster. The Department's senior staff operated out of offices in midtown Manhattan, and other functions were transferred to its offices in Albany from September 11th through September 16th. While the date and horrors associated with September 11th will be forever etched in our minds, the Department will also remember another date—September 17th. It was on September 17th, less than one week after the disaster, that the Department re-opened its Manhattan office. On that day, more than half of the Department staff voluntarily reported to work in our downtown Manhattan offices, located just blocks from the disaster. The Department's ability to continue to protect the public and to ensure the solvency of the industry was the result of prudent disaster preparedness planning undertaken well before September 11th under the leadership of Governor Pataki and a strong commitment by all Department employees to the agency's mission.

In the immediate aftermath of the disaster Governor Pataki directed all state agencies to ease the burdens on all of those personally affected by the tragic event. The Department immediately began assessing how best to facilitate industry response to the affected area, assure the timely payment of claims without dispute, and determine what, if any, solvency implications for insurers might arise.

Under the leadership of Governor Pataki and Mayor Giuliani, coordination among the various public and private sectors began instantly, particularly the New York City's Office of Emergency Management ("OEM") and New York's State Emergency Management Organization ("SEMO"). The Insurance Department was front-and-center in the unified response to this disaster.

Insurance Emergency Operations Center

In early 2001 the Department announced the development of the Insurance Emergency Operations Center (IEOC) to be linked via a multitude of communications channels to the New York State Emergency Management Operations Center in Albany in the event of a disaster. The IEOC enables the insurance community to provide earlier evaluations of damages arising from such events

and to accelerate the payment of claims of disaster victims.

The IEOC was activated within one hour of the disaster and within 24 hours senior executives from 15 major insurance companies were seated in our war room in Albany. The IEOC command center was staffed in Albany by agency personnel and representatives of the largest homeowner and commercial property underwriters in the Greater New York Metropolitan Area. The team began compiling information from the insurance community across the State that included gathering damage assessments and coordinating response efforts. The team expanded operations and continued to provide real-time information to the State in accordance with the IEOC plan. In addition, the team facilitated the provision of claims estimates and the payment of claims as they were presented to individual companies. Videoconferencing and remote satellite video links from the field connected SEMO, the Department's command center and the Office of the Director of State Operations within the Governor's Office.

The IEOC also acts as an information clearinghouse for consumers. Because senior managers from major insurance companies are housed in one room as members of the IEOC, the Department is able to get responses to consumer questions directly from the industry. Conversely, the Department is able to share with the industry concerns and questions that are being received on the dedicated toll-free disaster hotline in order for the industry to better serve the public. Up to the minute Situation Reports from the "bunker" at SEMO were also disbursed via the Department's Web site and confidential information was provided on the "password protected" area of the Web for the insurance companies.

These Situation Reports included the following categories of information:

- Buildings destroyed/damaged
- Building inspections
- Utilities
- Transportation/roadways
- Disaster worker authorization
- Adjuster access
- Records of deceased
- Restricted neighborhoods
- Field office locations
- Catastrophe team/vehicle locations
- Disaster areas defined
- Air quality/worker safety
- Damaged vehicles
- Public information sources
- Shelters, temporary housing locations
- Press releases/notices from Officials
- Claims counts from NY State Insurance Department
- Permits, Licenses, Credentialing
- Reports from NY State Insurance Department

The IEOC was the first critical step in responding to the disaster.

Capital Markets (Solvency Concerns)

Ensuring the solvency and claims-paying ability of our insurers is one of the primary focuses of the Department. With the expanding reach of the capital markets over the past decade, the ability to assess the impact of the capital markets on insurers is critical to carrying out this key function. The Department is one of the few insurance regulators in the country to have a Capital Markets Bureau devoted solely to monitoring and assessing the impact of the capital markets on the insurance industry. The Bureau contains experts in financial risk assessment and management. All members of the Bureau have extensive knowledge of the capital markets drawn from years of experience at leading Wall Street broker-dealers and investment banks. Members of the Bureau work seamlessly with examiners in each of the Department's regulatory bureaus (i.e., property, life and health) to monitor the liquidity and solvency of insurers.

The Bureau was critical in the Department's efforts to assess the impact of the disaster, and the resultant economic fallout, on the financial condition of the insurance industry. On Thursday, September 13, 2001, members of the Bureau, along with their counterparts from the regulatory bureaus, met with outside financial advisors to map out a strategy for assessing the impact of the disaster. Working from lists of the largest writers in the New York metropolitan area the Bureau was able to narrow the focus of their investigation to approximately 10 property, 16 life and 13 reinsurers that would bear the largest losses. Loss and claim information at this early stage was virtually non-existent so the Bureau focused on the impact on these companies of a dramatic downturn in the scheduled Monday opening of the capital markets. Utilizing both private and publicly available information the Bureau developed various scenarios including various combinations of a 15% downturn in equities, a 30% downturn in equities, a decrease in value of bonds in NAIC classes 2-6 of 8% or 16%, and a 4% or 8% increase in the value of bonds in NAIC class 1. The Bureau also

used publicly available information to determine possible claims exposure from the disaster.

This analysis had three purposes. First, the Bureau was able to assess the impact of changes in the capital markets on the overall value of the assets held by each company thereby impacting each company's capital, surplus, and reserves. Second, by reviewing each portfolio the Bureau was able to determine the liquidity of the assets held by each company and, therefore, the ability of each company to pay claims on a timely basis. Finally, the Bureau determined the impact of dramatic changes in the capital markets on the Risk Based Capital Ratio of each company. The Risk Based Capital Ratio formula is used universally by state insurance regulators to determine whether a company has the amount of required capital necessary to maintain solvency based on the inherent risks in the insurer's operations.

The hard work of the Bureau throughout the week following the disaster meant that the Department was well prepared to not only assess the impact on each company of negative information regarding increasing claims and downturns in the capital markets but, also, to properly manage and gauge the torrent of information coming out of the rating agencies and financial analysts. Information regarding the capital markets was readily available and could be incorporated into our models as the situation developed. Some selective information regarding the claims and liabilities of individual companies also became available through public releases or private telephone calls. We have found gathering information with respect to claims and liabilities, however, to be more difficult.

Over the past week the Bureau, working with the pertinent regulatory bureau, has drafted short questionnaires to be sent to insurers designed to elicit information regarding the claims and liabilities of each company. (See Appendix II)

Our ongoing preliminary analyses, however, have been reassuring with respect to the overall health of the insurance industry and its ability to weather these difficult times. The average asset allocation of P&C insurers (licensed in New York State) is 27% in stocks, 47% in NAIC Class 1 bonds, and 6% in NAIC 2-6 bonds. The value of these assets has fallen an estimated 2% since the WTC disaster, on average. Due to a different asset composition (4% in stocks, 58% in NAIC Class 1 bonds, and 19% in NAIC Class 2-6 bonds) for life insurance companies, the market impact of the past weeks' events was negligible; the rise in value of NAIC 1 bonds, due to a fall in interest rates, compensates for the loss in other asset classes. For some individual companies (with larger holdings in equities and high-yield bonds) the market impact is more negative. Combined with the claims from the WTC disaster, their capital levels may fall to a level which causes enhanced monitoring by the Department, but in no event do we now foresee a scenario that is likely to lead to insolvency.

Outreach to the Industry

As the Department evacuated its offices in lower Manhattan, disaster preparedness plans had already begun in the Department's Albany offices in upstate New York. As outlined above, the IEOC served as the primary connection between the Department and the industry in assessing the impact of the disaster on the industry and on affected individuals. It soon became apparent, however, that the scope and nature of the disaster required frequent high-level communications.

Outreach commenced with a survey of the CEOs of major insurance institutions that afternoon. In particular, I focused on our licensees that were most directly impacted by the disaster through loss of their offices. Key among these entities was Empire Blue Cross Blue Shield—the largest health insurer in New York. Empire Blue Cross Blue Shield had its headquarters in the WTC. The Department has kept in close contact with Empire regarding the status of employees and business operations. Our latest information is that all but 9 of the 1,847 Empire employees are safe. Senior management has been relocated to their Melville, Long Island office. Operations and Services have been transitioned to alternate locations. All electronic claims are being processed and cash flow is sufficient at this time. Paper claims submitted from September 7-11 were destroyed and must be resubmitted. All other paper claims are being handled in Empire's Albany office.

I also reached out to Marsh USA and Aon, two of this nation's largest brokerage firms. While the human cost has been unacceptably high, I was pleased that both companies' disaster preparedness plans allowed them to continue operations. Other insurance entities that had operations located in WTC Towers One or Two include: AIG Aviation Brokerage, Allstate, Continental Insurance, Fireman's Fund, Guy Carpenter, Hartford Steam Boiler, Kemper, MetLife, SCOR U.S. Corporation and Seabury and Smith. The Department has undertaken efforts, in conjunction with the New York City and New York State Economic Development Offices, to assist insurance entities dislocated by the disaster in finding necessary space so as to continue their operations.

My staff and I then proceeded to arrange conference calls, meetings, and individual telephone calls with senior level personnel at all impacted insurance and reinsurance entities. Calls were arranged with property and life reinsurers, property and life insurers, Lloyds, as well as the insurance brokerage community. Companies contacted in these initial 48 hours included American International Group, Swiss Re, Chubb, Allianz, Traveler's, Allstate, State Farm, Metropolitan Life, and a

group of all major property/casualty domestic reinsurers.

In undertaking these communications I had three objectives. First, I wanted to open the lines of communication between the Department and each impacted insurance entity relating specifically to the disaster. Second, I wanted to determine the financial impact on each insurance entity and obtain a general sense of the ability of the industry to pay the expected claims. Finally, I wanted to have the opportunity to remind each individual company, and the industry collectively, of their obligation to the consumer and the expectation of the Department that they would pay claims expeditiously and without raising non-applicable exclusions. Over the two weeks since the disaster I have repeated this process, both on an individual and a group basis so that, as I sit before you today, I can say that the message that I first received—that the industry is financially sound, to weather this disaster and committed to meeting all of its obligations relating to it—is as strong and clear today as it was on September 11.

The response from the industry has been, in one word, extraordinary. Each and every company that I spoke with indicated that they had the solvency and the liquidity to withstand the claims that would result from the disaster. In addition, they all indicated that they would not be relying on any "act of war" or "terrorism" exclusion to avoid paying claims even if such an exclusion would otherwise be applicable to the disaster. The Department's experience has shown that the companies are, indeed, honoring their commitments.

The Department has also worked with the industry on initiatives designed to speed the provision of health care to victims injured in the disaster while on-the-job without the necessity of following traditional workers' compensation claims processes. In addition, the Department has issued over 125 temporary Adjuster licenses to speed the payment of claims by insurers. In this effort I am pleased to report that the Department reached new heights of efficiency. Thanks to the use of the internet, the vast majority of these licenses were issued within one-hour of the application being received. This is important to consumers because adjusters are critical to companies being able to ascertain the extent of the damage and, ultimately, to pay claims.

Industry Directives

The Department also issued a number of directives to the industry. Circular Letters were mailed and posted to the Web site in the ordinary Circular Letter sections and in the special World Trade Center Disaster Information section to ensure that the industry and consumers could easily access pertinent information. The Department issued the following Circular Letters and directives:

- In compliance with Circular Letter #11, issued May 10, 2001, insurers are required to submit "Disaster Loss Data" reports immediately after an incident. The first report was due September 17 and updated reports are required every two days. Included in the reports are total claims, average dollar value per claim, and total dollar value of claims on both commercial and personal lines. The IEOC collects these reports by both fax and e-mail and I am kept apprised of the contents of the reports on a real-time basis. Information from the reports is transmitted to emergency managers so that they can assess the mix of insured and uninsured losses. (See Appendix III)
- Circular Letter #26, issued on September 12th, directed all authorized insurers to be mindful of the difficulties faced by residents and businesses in the disaster area. The Circular Letter reminded insurers that the Superintendent had the ability to exercise his emergency authority to declare a moratorium precluding the termination or suspension of policies or other adjustments to cancellations and non-renewals. While I have not deemed such emergency action to be necessary, I will invoke such power when, and if, it becomes necessary to protect the public from losing necessary insurance coverage. (See Appendix IV)
- Circular Letter #29, issued on September 22nd, ensured the continuity of health insurance coverage for reservists and their families called to active duty in the protection of our country. Health insurers were reminded that they must continue to provide coverage for the dependents of reservists, at the option of the reservist, and that they must provide for a continuation of coverage, without penalty, once the reservist returns from active duty. (See Appendix V)
- Circular Letter #28, issued on September 24th, requires all insurers to pay death claims, even in the absence of a death certificate, provided that the claimant provides a standardized affidavit in lieu of the death certificate. The issuance of this Circular Letter became necessary in the instant disaster because of the delays in identifying victims of the disaster and the resulting delays in issuance of the death certificate. (See Appendix VI)

Consumer Services

Immediately following the tragic events on September 11th the Department activated additional consumer service centers and hotlines to assist those impacted by the WTC tragedies. The additional services were designed to assist families with questions about their insurance coverage, the process of filing insurance claims and ensuring that claims are paid in a timely fashion. We

remain committed to helping in any way we can to ease the burden of this terrible tragedy.

On Wednesday, September 12th a dedicated toll-free disaster hotline was made available to assist all New Yorkers and the insurance community with questions on claims, procedures, and general insurance concerns. The hotline is staffed by Consumer Services Representatives from the Department and available seven days a week between the hours of 8 a.m. and 8 p.m. at 1-800-339-1759. In addition, the Department's Web Site is updated on a daily basis to provide the insurance community and the public with up-to-date information on insurance-related issues and contact numbers. Furthermore, the Department's executive, frauds, and consumer services bureaus are operating on a 7-day schedule and Department representatives are at the state's IEOC on a 24-hour a day basis.

In addition to the Albany and New York offices that are available to serve the people of New York State, we opened additional offices to offer personal walk-in services to residents of the Westchester and Long Island areas that may have been impacted by the disaster. These satellite offices act as claim assistance centers to provide those impacted by the disaster with direct contact with, and the assistance of, Department personnel. Department staff are available to answer questions regarding claims, procedures and all disaster-related insurance questions seven days a week from 8 a.m.–8 p.m. at the following locations:

Manhattan
Pier 94
54th Street and 12th Avenue
Cubicle A-15

Westchester County
75 South Broadway (across from the Westchester Mall)
White Plains
Only open from Monday-Friday

Nassau County
NYS Insurance Department Office
200 Old Country Road
Mineola
516-248-5886

Suffolk County
Suffolk State Office Building
250 Veterans Memorial Highway, 1st Floor
Hauppauge, New York 11788

In addition to Department staff, representatives from insurance companies are available at Pier 94 in NYC. These company representatives assist New Yorkers as they begin to file claims as a result of the disaster and can issue checks to consumers immediately. Having insurance company representatives representing all lines of insurance as well as consumer service representatives from the Department provides affected New Yorkers with quick and easy access to insurance companies. This center is an effort to ensure the expedited payment of claims.

The Department worked closely with the insurance community to deploy Catastrophe Vehicles in downtown Manhattan. The insurance company "CAT Vans" serve as mobile insurance claim offices that can provide immediate assistance to policyholders, including cutting checks on site.

In fact, only a few days after the disaster I was able to visit many of the CAT Vehicles to offer thanks for the prompt response into the area and to help to garner an effective location for the van. Each van contains computers, onboard databases with necessary policyholder information, photocopiers, fax machines, printers and additional equipment imperative for processing claims instantly. The vans are outfitted with satellite technology through high-speed data communications. This equipment enables the companies to provide service to customers anywhere, and at anytime, without depending on phone lines, towers, or other telecommunication services that may be unavailable during a catastrophe. Generators allow the vehicles to operate in areas without electricity.

At present, insurance companies with CAT locations in Manhattan are as follows:

Allstate Insurance Company
SP Parking Corp.
735 6th Avenue, between 24th & 25th Streets

State Farm
Parking lot of 310 West Broadway

Travelers
388 Greenwich Street

Zurich American
East Side Marriott (between 48th-49th Streets on Lexington). Zurich is in the process of obtaining office space nearer to "ground zero."

In addition, 72 insurers have provided the Department with Catastrophe Center Hotlines and additional information on claims processing which can be accessed though our Web site. It is also important to note that countless insurers have taken out full-page messages in New York newspapers to announce toll-free numbers.

To date, I am encouraged by the industry's response and the responsible judgment they are exercising in making determinations regarding claims made against policies insuring those impacted by the disaster. We want to assure insurance consumers that we will continue to assist them in their claims and we will continue to

encourage the industry to continue to respond in good faith by making timely claims payments.

As a final matter, the Department has been called upon to assist in facilitating the payment of claims pursuant to the Federal Public Service Officers Death Benefits program. The program provides benefits of up to $150,000 to the families of police officers and firefighters killed in the line of duty. The Department will work with the Fire Department and United States Department of Justice to assure that the families of these heroes receive their benefits in a timely manner.

III. Current State of Affairs

While 15 days have elapsed since that day, the financial impact of the disaster is still evolving. Because of access restrictions at the site, insurance adjusters have been unable to enter the affected area to begin the evaluation process. In the meantime, the Department created an industry task force consisting of nine members including a representative from the Disaster Coalition (member of the IEOC), the Department's Special Counsel to the Frauds Bureau, a Federal Emergency Management Agency's inspection coordinator, a representative from Property Claims Service and adjusters from five of the major insurers affected by this catastrophe.

On September 22nd, the task force was led through the restricted site for a six-hour walk-thru which resulted in the creation of an assessment report. The assessment report, designed by the industry inspectors that participated in the walk-thru, will be shared with the industry, CAT teams and company executives. Additionally, during the walk-thru, photos were taken and interviews with building managers were conducted. Providing access to the site for this task force and the resulting assessment report will result in more efficient claims processing and payment.

While these assessment reports will assist in the efforts of the insurance industry to provide regulators with information regarding claims and losses, reliable numbers may not be known for some time. It is important to realize that lower Manhattan is a crime scene. This alone makes it difficult to determine the true extent of the losses.

As outlined above, our preliminary analyses indicate that the insurance and reinsurance industry, as a whole, have sufficient assets and liquidity to handle claims arising out of the disaster. We also have no reason to believe that the companies will invoke exclusions. There has been much talk in the media of "terrorism" and "act of war" exclusions. We have had no indication from the industry that such exclusions will be invoked. In fact, a number of insurers have stated that they either do not have such exclusions in their policies or that they would not invoke them even if applicable.

The Department is also undertaking a review of the New York City Firefighters Retirement Fund, which is regulated by the Department, for the purposes of assisting the fund's managers in estimating the impact on the fund of such a significantly large loss of life among the ranks of firefighters.

IV. Conclusion

In closing, I must state that the Department has been overwhelmed by the response of our fellow state insurance regulators. On a conference call just three days after the disaster, numerous insurance regulators offered us everything from human resources to systems support. What helped the most, however, was the knowledge that there were other insurance regulators across the country pulling for us and praying for the victims of this senseless tragedy.

Thank you, Mr. Chairman, for the opportunity to appear before this Panel today. I hope my message, which was a simple one, has been received. The Department believes that we have responded to this event in a professional, expedient and compassionate manner. We believe that the insurance industry has acted with their contractual and moral obligations to policyholders, and we believe that our response demonstrates the validity and strength of the state system of insurance regulation.

But we are a long way from the conclusion of this sad chapter in our history. It will take the combined efforts of the public and private sector before the true healing can begin. Thank you.

APPENDICES

APPENDIX I	**Sample Life Affidavit in Lieu of Death Certificate**
APPENDIX II	**Sample Questionnaire for Insurers**
APPENDIX III	**Circular Letter #11**
APPENDIX IV	**Circular Letter #26**
APPENDIX V	**Circular Letter #29**
APPENDIX VI	**Circular Letter #28**

Affidavit in Lieu of Death Certificate

Appendix I

STATE OF)

S.S.:

COUNTY OF)

I, _____, currently residing at

_____,

(telephone number: _____), being first duly sworn, do hereby depose and say as follows:

1. That I am the _____of the Insured,
(Relationship to the Insured)

_____.
(Name of the Insured)

2. That the insured was either employed in the World Trade Center or the Pentagon, or was in such buildings or in their immediate vicinity when the events of September 11, 2001, occurred; or was a crew member or passenger on any of the airline flights involved in the disasters on that date; or was a police officer, firefighter, emergency medical service provider, or rescue volunteer at one of those building sites on that date.

3. That I affirm that I have not seen or heard from the Insured since September 11, 2001, and that barring his or her death, he or she would have been in contact with me or someone else.

4. That I affirm that I am unable to secure a death certificate for the Insured from the Chief Medical Examiner or other appropriate authority at this time.

5. That I understand that the _____
(Name of Insurer)
may secure further information to verify or corroborate my statements herein, relating to these disasters.

6. That I affirm that the statements made herein are true and I make this affidavit under penalties of perjury.

_____
AFFIANT

Subscribed and sworn to before me

This _____ day of _____, 2001.

_____
NOTARY

DISASTER LOSS DATA—

Appendix II

CATASTROPHE LOSS #

DATE:

COMPANY NAME:

CONTACT NAME:

PHONE:

COUNTY NAME:

CLAIMS INFORMATION:

COMMERCIAL:	**PERSONAL:**
TOTAL CLAIMS:	TOTAL CLAIMS:
AVERAGE DOLLAR VALUE PER CLAIM:	AVERAGE DOLLAR VALUE PER CLAIM:
TOTAL DOLLAR VALUE OF ALL CLAIMS:	TOTAL DOLLAR VALUE OF ALL CLAIMS:

ADJUSTERS IN AREA:

DRAFTING AUTHORITY:
DOLLAR LIMIT:

OTHER CONSIDERATIONS:

AREAS HARDEST HIT:

Appendix III

STATE OF NEW YORK
INSURANCE DEPARTMENT
AGENCY BUILDING ONE
EMPIRE STATE PLAZA
ALBANY, NY 12257

Circular Letter No. 11 (2001)
May 10, 2001

To: All Property/Casualty Insurers Licensed to Do Business in New York State

Re: New York State Insurance Disaster Coalition

In keeping with New York Governor George E. Pataki's mandate to anticipate potential problems for the citizens of New York State, this Circular Letter is intended to identify and organize specific Insurance Department and insurance industry resources to serve victims of natural disasters and other state emergencies. (This letter supersedes Circular Letter 1996-5)

When an emergency or disaster situation occurs, this Department is looked upon to provide the Governor and the State Emergency Management Office (SEMO) with critical information regarding the amount and extent of property losses, as well as other damage assessments. Based on this information the Governor determines whether and when to request a federal disaster declaration and how to prioritize the deployment of state assets.

The insurance community has been identified as a key resource to providing early assessments of damages arising from disasters. Insurers play an important role in quantifying the magnitude of losses—insured and uninsured—and determining both the degree and duration of insurer response to losses. Accordingly, all licensed property/casualty insurers are requested to assist this Department in obtaining the information needed to accomplish the above objective—both before and after disasters strike.

Furthermore, a "New York State Insurance Disaster Response Plan" has been developed by a public-private disaster coalition under the joint direction of the New York Department of Insurance, State Emergency Management Office, and the Institute for Business & Home Safety. The plan provides complete instructions for insurance disaster responders and can be found in the Emergency Disaster Information section of the Insurance Department's web site at www.ins.state.ny.us/disaster.htm. Insurance company catastrophe team leaders should be notified of the availability and content of this site.

The success of the New York State Insurance Disaster Response Plan and fulfillment of its critical mission require knowledgeable personnel operating in a partnering environment and within the larger incident command structure. Incorporation of the Insurance Disaster Response Plan into individual company catastrophe plans and a cooperative NYSID/Industry process of continuing evaluation and change are critical to this process, and therefore must be institutionalized.

In order to expedite New York's response time to catastrophes and facilitate the recovery of those who have insured losses, this plan provides the opportunity to forge a new private/public disaster planning team that will result in a comprehensive strategy for cooperation, communication and the leveraging of resources. The Insurance Department urges all property/casualty insurers to read the attached circular letter and participate in the Insurance Disaster Coalition. Broad range participation is essential.

Acknowledgment of this letter and instructions should be sent no later then June 1, 2001 to
Paul Orkwis, Principal Insurance Examiner
New York State Insurance Department
Agency Building 1
Empire State Plaza
Albany, NY 12257
Porkwis@ins.state.ny.us

Acknowledgment should include the respondent's full name and title, company name, telephone number and email address. Any questions concerning this letter may be directed to Mr. Orkwis at (518) 474-9837, or by e-mail.

Very truly yours,

_____
Gregory V. Serio
Superintendent

Attach.

A. Pre-Disaster Data/Information Survey

Accurate, timely and consistent information is of critical importance to the State Emergency Management Office during disasters. To ensure that insurance industry information is readily available during disasters, effective the date of this Circular Letter, the Department requests the following information be provided by insurers:

- **Annual Report**—All licensed property/casualty insurers provide to the Department's Market Section of the Property Bureau an annual report listing—by New York county—property exposure information, as of December 31, for personal lines (non-auto) and commercial lines (non-auto) for each licensed member within an insurance company group.

  This information is to be provided for the following categories: total building and contents insurance in force for the lines indicated and total number of policies. Each insurer must provide the information by New York county by completing the reporting_diskette.

  The report for the year 2001 is due within sixty (60) days after the publication of this letter, and due thereafter each year on April 1. It is the responsibility of the insurer to honor this annual reporting deadline. The prescribed method for submitting reports can be found in the Department's web site at **www.ins.state.ny.us/disaster.htm.**

- **Insurance Company Disaster Liaisons**—On or before June 15, 2001, each licensed property insurer shall provide to the Department's Consumer Services Bureau the name of the designated disaster liaison(s), along with that person's telephone and cell phone number(s) (for during business and after business hours), email address and/or pager number, if applicable. Any change in the liaison(s) and/or contact information should be reported immediately to the Consumer Services Bureau. (Appendix B.)

- **Communications Network**—Insurance industry representatives of the NYS Insurance Disaster Coalition are requested to provide the Department with Internet links of not-for-profit web sites that are beneficial to the public before, during and after a disaster.

- **Insurance Company Disaster Plan**—In a subsequent communiqué, the NYS Department of Insurance will be issuing an electronic template for insurers to complete and submit a copy of their Disaster Response Plan. Upon receipt of that notification, insurers will be asked to submit their plan to the Consumer Services Bureau within sixty (60) days.

This plan will ask for such information as: How will the company handle the increase in the number of claims? Will the claims be handled by the local office structure, or through the establishment of a catastrophe claims office/center? Will the company 'import' claim representatives and adjusters from other areas? How will the company train its staff in emergency procedures and New York-specific insurance coverages? How will the company distribute catastrophe claims information, or communicate generally, with its policyholders?

In addition, each insurer will be asked to provide the name and contact information for the person designated to coordinate catastrophe loss response and activity in the State of New York, as well as to name that person's back up. Contact information should include work and cell phone numbers, email addresses, and after hours contact numbers.

Any changes to this plan are to be reported to the Consumer Services Bureau by June 1 of each subsequent year.

All pre-disaster information may be sent by U.S. mail to the Department's Albany Consumer Services Bureau, attention Paul Orkwis, or by email to porkwis@ins.state.ny.us.

POST-DISASTER DATA/INFORMATION

Insurers are requested to notify the Department whenever they activate, or may activate, their Hurricane/Windstorm Deductible as a result of a certain storm or event. When available, they may use the Disaster Coalition e-mail address (nys_insurance_disaster_coalition@ins.state.ny.us); or they may notify the Department via facsimile, at (518) 486-1503, attention Salvatore Castiglione or Paul Orkwis.

B. Insurance Adjuster Temporary Permits

Section 2108(n) of the Insurance Law provides that:

> . . . the superintendent, in order to facilitate the settlement of claims under insurance contracts involving widespread property losses arising out of a conflagration or catastrophe common to all such losses, may issue a temporary permit for a term not exceeding one hundred twenty days to any person whether he be a resident of this state or a non-resident, to act as an independent adjuster on behalf of an authorized insurer, provided any insurer shall execute and file in the office of the superintendent a written application for the permit in the form prescribed by the superintendent, which application shall contain information as he may require and shall certify that the person named therein to be designated in on the temporary permit is qualified by experience and training to adjust claims arising under insurance contracts issued by the insurer. The superintendent may in his discretion renew such permit for an additional term or terms as may be necessary to adjust such claims.

Attached is a copy of the Temporary Adjuster Permit Application. (Appendix C-1, C-2.) Using this application will enable licensed insurers to certify that the application is submitted for the purposes identified in the law.

The Permit application calls for information regarding the occurrence that necessitates the temporary permit. This enables insurers to apply for temporary permits earlier, rather than waiting for a disaster declaration as was previously required.

Completed application(s) should be sent by facsimile to the Department's Licensing Services Bureau at (518) 474-5048, where it will be reviewed and acted upon immediately. Temporary permit(s) will be faxed to the insurer submitting the application(s).

This temporary licensing procedure will facilitate prompt services to those citizens suffering losses. Permit applications may also be downloaded from the Department's web site listed above for completion and submission to the Licensing Services Bureau. In the very near future, insurers will be able complete and submit these applications over the Internet and receive approval likewise.

C. Insurance Company Disaster Liaisons

Upon the Department's activation by SEMO due to a State Emergency Disaster situation (as defined by the SEMO Disaster Emergency Activation Levels listed below), a representative from the Department's Consumer Services Bureau may activate designated Insurance Disaster Liaisons representing the ten largest underwriters in the emergency or disaster areas. Participating companies will be determined based on the above Pre-Disaster Reports.

Subsequently, Liaisons should be prepared to participate in the State's Disaster Response Plan as follows:

- A teleconference will be held following the occurrence of a natural disaster—prior to the activation of the Department of Insurance Emergency Operations Center (IEOC)—to discuss the disaster and activation plans.
- Upon the activation of the IEOC by SEMO, Insurance Disaster Liaisons or their designees will be expected to staff the IEOC at either of its two locations: Empire State Plaza, Agency Building One, Albany, NY; or 25 Beaver Street, NY, NY.
- Consumer Services Bureau will provide a fully equipped IEOC for Liaisons' use at either of the aforementioned locations. Included are data ports and telephone lines, along with electronic and videoconferencing links to the SEMO emergency operations center.
- The Consumer Services Bureau will continue to coordinate communications among company and association contacts through ongoing teleconference calls to plan staffing of the IEOC for the actual or threatening (as in the case of hurricanes) emergency; individually discuss with each insurer's liaison the company's catastrophe operations; individually review each insurer's response plans; and discuss catastrophe operations and emerging issues.

- Liaisons may be expected to remain on duty at the IEOC for as long as SEMO's Emergency Operations Center remains at Level 4 or higher activation.

D. Liaison Duties and Responsibilities

- Liaisons should have a qualified back up. Both will preferably be a member of the insurer's catastrophe team, or a manager-level employee, who are familiar with company protocols and have access to critical information.
- Provide coverage data and loss statistics by New York county that summarizes commercial and personal lines separately.
- Transmit information on the disaster from the insurance industry to emergency response officials and also back to other industry representatives.
- Should be authorized and knowledgeable in company internal information systems and sources, and authorized to access such systems so that applicable, timely information can be provided to SEMO via the Insurance Department.

Emergency Operation Center Hours of Operation

Normal hours of operation when Liaisons will be on duty are 7:00 a.m. to 6:00 p.m., or for such time periods as necessary to assist with the effective management of the disaster. Depending on the level of the disaster this may be a seven-day a week commitment.

Coverage Data and Loss Statistics

In the ensuing days after a disaster, Liaisons will be required to provide specific statistics from each licensed insurer. These statistics will be periodically updated on an as needed basis, but not less than monthly.

Reports will be consolidated by CSB staff for submission to SEMO and the Governor's office only.

- Commercial insurance data—to include figures for the total number of losses and total claim amount (paid and/or reserved) by New York county.
- Personal insurance data—to include figures for total number of losses and total claim amounts (paid and/or reserved) under the categories of homeowners, automobile, other and National Flood Insurance Program-Write Your Own by New York county.
- Number of available adjusters.
- Other aspects of catastrophe claim operations and customer service issues. (Appendix D)

E. Confidentiality

All of the above reports and statistics are to be compiled and summarized by Insurance Department personnel for internal Department use. Reports submitted to SEMO and the Governor will be on an aggregate basis with no individual company information identified in those reports.

Insurance Department personnel will be advised by Insurance Department management that all such information provided by publicly-traded insurers must be kept strictly confidential; that such information may be material, non-public information; and that trading in securities on the basis of material, non-public information is prohibited under the federal securities law.

At the time of submission, insurers should request an exception from disclosure under Section 89(5) of the Public Officers Law (Freedom of Information Law—FOIL) for any information or reports they submit to the Insurance Department that they believe are trade secrets or commercial information which, if disclosed, would cause substantial injury to their competitive position.

In the event that a request is received by the Department for the release of information pursuant to FOIL and the insurer requested an exception from disclosure upon submission, the insurer will be notified and given the opportunity to respond to the Department in accordance with FOIL and Regulation 71 (11 NYCRR 241.6).

F. Access to Disaster Areas

In order to facilitate the settlement of claims and gathering of loss information, law enforcement officials working in designated emergency areas will recognize a license issued by this Department to adjusters, agents, and brokers. Insurance company personnel will be recognized by their company ID and photo ID. Law enforcement officials will grant access to emergency areas to those personnel who possess and display appropriate documentation—after SEMO determines that the emergency area is safe for non-emergency personnel.

A. Insurance Personnel Identification

A picture identification document, such as a driver's license or company photo ID tag, should be displayed on the adjuster's person along with the NYS Insurance Department Temporary Adjuster Permit. Agents and brokers will be identified via their agent or brokers license along with their photo ID. All other insurance company personnel will be identified via their insurance company ID or a photo ID.

Law enforcement officials will also recognize a document issued by an insurer to a regular salaried employee designated by that insurer to adjust losses on its behalf in the disaster area. Again, these individuals must display a photo identification document as well.

Names and identifying information for persons receiving temporary permits will be made available to law enforcement officials through SEMO. IEOC personnel will be responsible for notifying SEMO representatives when access to an emergency area that has been declared safe is not granted to an authorized adjuster. Adjusters will request assistance from the IEOC in these instances.

EMERGENCY ACTIVATION LEVELS:

NY STATE EMERGENCY MANAGEMENT OFFICE (SEMO)

The following Emergency Activation Levels have been established for the operation of the New York State Emergency Operations Center (EOC):

LEVEL 1

Normal operations during business hours: 9:00 a.m. to 5:00 p.m. with after-hours calls handled by the State Emergency Coordination Center.

LEVEL 2

This level triggered by weather warnings, identified threats from man-made sources, and emerging local events. SEMO and relevant agencies on standby 24-hours daily. SEMO staff on campus to assist State Emergency Coordination Center staff with local inquiries for technical support.

LEVEL 3

This level triggered when local community or region requests state assistance. Depending on the extent of the state affected, relevant agency's report to the EOC and a State Disaster Declaration is considered. SEMO staff on campus 8:00 a.m. to 6:00 p.m. daily. Select staff available 24-hours daily to assist State Emergency Coordination Center staff with local inquiries for technical support and state resource assistance. All Disaster Preparedness Commission (DPC) Agencies on 24-hour alert.

LEVEL 4

This level triggered by declaration of State Disaster. Relevant state agencies reside at EOC during working hours and after hours, as necessary. All other Disaster Preparedness Commission (DPC) Agencies on-call status for 24-hours daily. Information gathered for possible FEMA Federal Disaster Assistance request. Decision-level SEMO staff at EOC 24-hours daily.

LEVEL 5

This level triggered when event exceeds statewide capacity; significant federal resources mobilized. All DPC agencies active at EOC; center staffed 24-hours daily. SEMO staff 12-hour shifts, seven days a week.

APPENDIX A

Pre Disaster Survey General Instructions

This survey can be completed by downloading the various files in Lotus 123 or Microsoft Excel from the Department's Web Site located at http://www.ins.state.ny.us/disaster.htm.

Each version of the survey (Lotus 123® or Microsoft Excel®) contains three files:

1. "Readme"—this file contains instructions on how to complete the two required report files. The report files request data on a countywide basis for:

   Amount of Insurance In-force (Gross Exposure)
   Number of Polices In-force

2. "CommRpt"—contains a table for entering the required information covering the commercial property portion of the premiums, reported on Page 15 of the New York Annual Statement, for the following lines:

   01—Fire
   02.1—Allied Lines
   02.2—Multiple Peril Crop
   02.3—Federal Flood
   03—Farmowners Multiple Peril
   05.1—Commercial Multiple Peril (Non-Liability Portion)
   12—Earthquake

3. "PersRpt"—contains a table for entering the required information covering the personal property portion of the premiums, reported on Page 15 of the New York Annual Statement, for the following lines:

   01—Fire
   02.1—Allied Lines
   02.3—Federal Flood
   03—Farmowners Multiple Peril
   04—Homeowners Multiple Peril
   12—Earthquake

Those insurers unable to download the files from the Web Site may submit the attached sheet to request a diskette by US Mail, or by an e-mail message addressed to vmazzare@ins.state.ny.us to request the files by return e-mail.

Responses must be submitted to the Department in an electronic format. Hardcopy survey responses are not required and any hardcopy survey responses submitted without the required diskette will not be processed. Survey responses should be accurately completed in accordance with the instructions and returned within **60 days** after publication of the Circular Letter:

New York State Insurance Department
Property Bureau—2nd Floor
25 Beaver Street
New York, NY 10004
Attn: Vincent Mazzarella

As an alternative, you may also submit the file through the Internet by attaching it to e-mail addressed to .

Questions as to the content of the survey (coverages, etc.) may be directed to:

Ms. Lucy Cilione
Principal Insurance Examiner
Phone: (212) 480-5501
E-mail: lcilione@ins.state.ny.us

Any questions as to the technical aspects of the diskette filing may be directed to:

Mr. Vincent Mazzarella
Senior Insurance Examiner
Phone: (212) 480-5590
E-mail: vmazzare@ins.state.ny.us

Your cooperation in furnishing timely and accurate responses is essential to the success of this endeavor and is appreciated by the Department and the people of New York.

B. Diskette Order Form

Enter the following information:

Insurer	
Name	
Address	
City	
State	
Zip code	

Contact Person	
Salutation (Mr., Ms., etc.)	
Last name	
First, MI	
Address—(if different from insurer)	
City	
State	
Zip code	
Telephone #	
E-mail address	

Diskette format requested (check one)

Lotus 123® [ ]

Microsoft Excel® [ ]

Appendix A1

NEW YORK STATE INSURANCE DEPARTMENT
INSTRUCTIONS
FOR COMPLETION OF SPECIAL REPORT DISKETTE
(EXCEL VERSION)

1. The "CommRep.xls" an "PersRep.xls" files contain the table for entering information on Commercial and Personal Property Lines, respectively, required to complete this Special Report.

2. It is strongly recommended that you immediately back-up the "CommRep.xls" an "PersRep.xls" files to your hard drive before inputting any data.

3. Please rename the "CommRep.xls" file, by saving it with the five-digit NAIC number of the reporting insurer, followed by the letter "C." For example, if your NAIC number is 12345, you would save the file as "12345C.xls." Similarly, rename the "PersRep.xls" file, by saving it with the five-digit NAIC number of the reporting insurer, followed by the letter "P." Therefore, if your NAIC number is 12345 you would save the file as "12345P.xls." Create as many files and use as many diskettes as necessary to complete reports on all of the entities in your reporting group.

4. After naming and saving the file(s), open one spreadsheet file, and before entering any other data, complete the General Information section. In the highlighted blue cells enter your company's name, NAIC and group number, etc. You should enter information only in the cells highlighted in blue, all other cells in the file are protected, and no entries should be made into them.

5. **DO NOT CHANGE THE POSITION OR CONTENT OF ANY CELLS ON THIS DISKETTE.**

6. In the next section—Data Required—Your Company Name, NAIC and Group # will be filled-in automatically if you have properly completed "Step 4." In this section (Data Required) you are instructed as to the lines of business that must be included in the data reported (those instructions are repeated below in bold typeface). Please note, when completing the Personal Lines file (PersRep.xls) you should:

   Include data on the total building and contents in-force, to reflect the personal lines portion of policies related to the premiums reported on Page 15 of the New York Annual Statement, for the following lines:

   01—Fire
   02.1—Allied Lines
   02.3—Federal Flood
   03—Farmowners Multiple Peril
   04—Homeowners Multiple Peril
   12—Earthquake

   Please note, when completing the Commercial Lines file (CommRep.xls) you should:

   Include data on the total building and contents in-force, to reflect the personal lines portion of policies related to the premiums reported on Page 15 of the New York Annual Statement, for the following lines:

   01—Fire
   02.1—Allied Lines
   02.2—Multiple Peril Crop
   02.3—Federal Flood
   03—Farmowners Multiple Peril
   05.1—Commercial Multiple Peril (Non-Liability Portion)
   12—Earthquake

   Also, in this section (for both the Personal and Commercial Lines Files) you will find the main data entry table. The table contains three columns:

   County
   Amount of Insurance In-force (Gross Exposure)
   Number of Polices In-force

The first column, labeled County, has been completed by the Department. This column contains a listing of all the counties in New York State. In the next two columns, highlighted in blue—indicating they are to be completed by you,—the insurer—you must provide: the Amount of Insurance in Force (the dollar value of your Gross Exposure); and the Number of Policies In-force in each of the counties listed, for all of the respective coverages noted above.

7. The final section of the file (Section 3) contains the Affirmation. The name of the Responsible Corporate Officer should be entered in the blue highlighted space provided. Next, the affirmation should be printed following the instructions in step (8) below. Then, the printed affirmation must be signed by the Responsible Corporate Officer. A separate affirmation must be submitted for each reporting company.

8. The table below contains the range names which will help you to print the various parts of this survey for your records. The Affirmation is the only printed document you should submit to the Department. Use the appropriate range name to select the desired print items, then print as you normally would.

To Print	Hit	Select Range
Section I General Information	F5 (GoTo)	Info
Section II Data Required	F5 (GoTo)	TABLE
Section III Affirmation	F5 (GoTo)	Affirm

9. When saving the files to a diskette, for submission to the Department, please be certain you have used your five-digit NAIC# and the proper letter suffix discussed in step (3) above. If you have no data to report:

   You are not required to submit Excel report files for entities having no data to report. Instead, in a cover letter, state which company or companies have nothing to report. Give the Name, NAIC number, and Group number of each company and indicate which reports (Commercial and/or Personal Lines) are not being filed electronically.

10. Please label your diskette in the following manner:

    NYSID—Emergency Response Task Force Report
    Company or Group Name(s)
    Company NAIC Number(s)
    Group Number

11. Diskettes should be addressed to:

    NEW YORK STATE INSURANCE DEPARTMENT
    25 BEAVER STREET
    NEW YORK, NY 10004
    Attn.: Vincent Mazzarella, Senior Examiner
    MARS Unit, 2nd Floor

12. If you experience technical difficulties in using this diskette, please contact Vincent Mazzarella by phone at (212) 480-5590, or by e-mail at vmazzare@ins.state.ny.us.

Appendix IV

STATE OF NEW YORK
INSURANCE DEPARTMENT
AGENCY BUILDING ONE
EMPIRE STATE PLAZA
ALBANY, NY 12257

Circular Letter No. 26 (2001)
September 12, 2001

To: All Authorized Insurers

Re: Claims Handling and Cancellation/Non-Renewal of Policies in the New York Metropolitan Area

The loss of life and property at the World Trade Center complex, and the resulting emergency response, has caused considerable hardship and has disrupted the lives of thousands of residents and businesses in the New York Metropolitan Area. The long process of recovery has just begun, but it will be several weeks—if not months—before all of the damage can be assessed and the situation returned to some level of normalcy.

Insurers should be mindful of the difficulties the residents and businesses of this area have endured and will continue to endure in the near future. In particular, adjusters and underwriters should exercise care and responsible judgment in making determinations regarding claims, cancellations and non-renewals of policies insuring those impacted by this loss.

Pursuant to Insurance Law Section 3425(p) the Superintendent may declare a moratorium precluding termination of policies, or suspend or otherwise adjust the provisions relating to their cancellation or non-renewal, in areas of the State that have been declared by the President or the Governor to be in a state of emergency due to disaster or catastrophe.

The cooperation of all insurers in this matter will assist the Superintendent in his assessment of the situation, and in determining whether or not it will be necessary to exercise the emergency authority granted by Section 3425(p).

Very truly yours,

_____

Gregory V. Serio
Superintendent

Appendix V

STATE OF NEW YORK
INSURANCE DEPARTMENT
AGENCY BUILDING ONE
EMPIRE STATE PLAZA
ALBANY, NY 12257

Circular Letter No. 29 (2001)
September 22, 2001

TO: All Insurers Authorized to Write Accident and Health Insurance in New York State, Including Article 43 Corporations and Health Maintenance Organizations

RE: New York Insurance Law Protections for Members of the Reserves Called to Active Duty

STATUTORY REFERENCES: Insurance Law Sections 3216(c)(13), (14); 3221(n), (o); 4304(i), (j); and 4305(g), (h)

On September 14, 2001, President Bush issued an Executive Order authorizing activation of members of the United States Military Reserves to active duty. The purpose of this Circular Letter is to remind insurers, Article 43 Corporations and Health Maintenance Organizations (HMOs) of their obligations under the New York Insurance Law to afford such military personnel special rights of conversion, continuation and suspension of health insurance coverage. These protections are in addition to the rights of continuation and conversion otherwise available pursuant to the Insurance Law.

I. Individual Coverage Issued Pursuant to Sections 3216 or 4304 of the Insurance Law.

Members of the Reserves, including the National Guard, who hold individual health insurance policies, and who enter active duty or have their active duty extended, are afforded supplemental rights to suspend their coverage during such period of active duty. Commercial insurers should consult Section 3216(c)(13) and (14) of the Insurance Law for the details of these rights. Article 43 Corporations and HMOs should consult Section 4304(i) and (j) of the Insurance Law. In general, the law provides for the following:

1. Upon written request, Reservists are entitled to have coverage suspended during a period of active duty. Furthermore, insurers, Article 43 Corporations and HMOs must refund any unearned premiums for the period of such suspension.

2. Upon termination of active duty Reservists are entitled to resume their coverage. The Reservist must make a written request to resume the coverage and remit the required premium within sixty days of termination of active duty. The resumption of coverage must be with no limitations or conditions imposed as a result of such active duty. However, limitations may be imposed with respect to conditions that arose during active duty and are determined by the Secretary of Veterans Affairs to have been incurred in the line of duty. In addition, if there was a waiting period in place at the time of call to active duty which had not been satisfied, the waiting period balance may be imposed.

3. Resumption of suspended coverage must be retroactive to the date of termination of active duty.

II. Group Coverage Issued Pursuant to Sections 3221 or 4305 of the Insurance Law.

Members of the Reserves, including the National Guard, who are covered under group policies, and who enter active duty or have their active duty extended, are afforded supplemental rights to continue, convert and/or suspend their coverage. Commercial insurers should consult Sections 3221(n) and (o) of the Insurance Law for the details of these rights. Article 43 Corporations and HMOs should consult Sections 4305(g) and (h) of the Insurance Law. In general, the law provides for the following:

1. A Reservist called to active duty may elect to continue his or her group coverage, including family coverage, by making a written request and paying to the group policyholder up to 100% of the premium for the coverage.

2. If a Reservist does not elect continuation rights, group coverage is suspended while the Reservist is on active duty. (It should be noted that an employer may treat Reservists as active employees to maintain coverage under the employer's group plan.)

3. If a Reservist elects continuation of coverage, or if coverage is suspended, and the Reservist dies while on active duty, the surviving spouse and children are entitled to conversion rights. Conversion rights are also available to children upon reaching age limitations for dependent status. Furthermore, conversion rights are also available upon divorce or annulment if occurring while on active duty.

4. Continuation is not available for those who become covered or could be covered by Medicare or other group coverage (except for that available to active duty members of the uniformed services).

5. Reservists who return to work after active duty are entitled to resume participation under the employer's plan without the imposition of limitations or conditions. However, limitations may be imposed with respect to conditions that arose during active duty and are determined by the Secretary of Veterans Affairs to have been incurred in the line of duty. In addition, if there was a waiting period in place at the time of call to active duty which had not been satisfied, the waiting period balance may be imposed.

6. For Reservists who opted for suspension of group coverage and return to employment, coverage is retroactive to the effective date of termination of active duty.

7. For Reservists who do not return to employment upon return to civilian status, the Reservist is entitled to the standard conversion and continuation rights provided by Sections 3221(e) and (m) or 4305(d) and (e) of the Insurance Law.

Please direct all inquiries concerning this Circular Letter to Thomas Fusco, Associate Insurance Attorney, Health Bureau, New York State Insurance Department, Agency Building 1, Empire State Plaza, Albany, New York 12257 or by e-mail at tfusco@ins.state.ny.us.

_____
Charles S. Henricks
Co-Chief, Health Bureau

_____
Thomas C. Zyra
Co-Chief, Health Bureau

Appendix VI

STATE OF NEW YORK

INSURANCE DEPARTMENT
AGENCY BUILDING ONE
EMPIRE STATE PLAZA
ALBANY, NY 12257

Circular Letter No. 28 (2001)
September 24, 2001

TO: All licensed life insurers, fraternal benefit societies, employee welfare funds, retirement systems, governmental supplemental annuity funds, and reinsurers (Insurers)

RE: Use of Affidavit in Lieu of a Death Certificate with Respect to Life Insurance Claims Arising Out of the September 11 Disasters in New York City, the Pentagon and Pennsylvania

The tremendous loss of life on September 11th, and the difficult circumstances surrounding such loss, are likely to result in a delay in the ability to obtain death certificates. Normally, Insurers rely on a death certificate when processing claims. Under the present circumstances, however, it is clear that a more expeditious method of certification of death must be developed in order to streamline the payment of needed benefits to family members and other designated beneficiaries.

With respect to death claims arising out of the disasters that occurred in New York City, the Pentagon, and Pennsylvania on September 11, 2001, all Insurers must accept a fully executed affidavit in the form as attached, in lieu of a death certificate if such certificate is not available.

Insurers may utilize other information as well to complete the claim process but they must accept the attached affidavit in lieu of a death certificate in appropriate circumstances.

Gregory V. Serio
Superintendent of Insurance

Community Service and Healing

By Stephen P. Gallagher

As we struggle to come to terms with the enormity of the events of September 11th and their horrific toll, I would like you to know that the General Practice, Solo & Small Firm Section continues its efforts to assist in the relief efforts.

We have spoken with hundreds of our members who have contacted us to help families of those directly affected by the terrorist attacks. We would like to learn more about Association members who have survived or have been involved in the relief efforts. Our hope is that we can reach out to the entire legal community as appropriate.

"We have spoken with hundreds of our members who have contacted us to help families of those directly affected by the terrorist attacks."

Within 24 hours after the terrorist attacks of September 11th, NYSBA took the lead in serving as a central clearinghouse for information related to relief efforts for lawyers, and legal processes. We coordinated efforts with the New York metropolitan area associations, and those in the surrounding counties.

Steve Krane, President of the NYSBA, contacted the leadership of all Sections to invite the officers to bring together a team to respond to any question related to disaster recovery efforts. Jeff Fetter, Chair of the GP/Solo Section said, "with the number of solo and small firm practitioners in the World Trade Center and immediate surrounding area, we knew we were going to be deeply involved in relief efforts."

Within days of the tragedy, the Association set up a Web page for Disaster Recovery. We also set up a hot line both for victims and for volunteers who wanted to help. As director of the Law Office Economics and Management Department, and liaison to the GP/Solo Section, I was asked to help coordinate efforts to help displaced lawyers find temporary office space, and to find computers and technology consultants to help practitioners get back on their feet. The outpouring of support from Section members was truly rewarding to me.

Growth of an Electronic Community

Much has been written in recent years about how difficult it is becoming to survive as a sole practitioner. Where firm practice enables individuals to work in teams, sole practitioners need to build their own communities of support just to keep current with changes in the law. With the emergence of electronic networks, the speed of change can only accelerate. I never fully appreciated the importance of electronic communities to sole practitioners until I experienced the impact of "Legal Tech Aid"—the electronic community that emerged from the ashes of the World Trade Center.

I was one of a half dozen individuals here at the Bar Center assigned to respond to calls and e-mails from lawyers seeking assistance in relocating their offices. Within hours of setting up our hot lines, I began receiving approximately 200 e-mails a day, so we knew we had to find a way to reach out to our volunteers. We needed to create a community.

As reported in the Technology Edition (November 2001) of the *State Bar News*, we were able to build an electronic community using a combination of e-mail and telephone contacts; mailing lists and discussion groups; other Web-based services; and years of personal contact with solo and small firm practitioners.

For those of you who have heard me speak or read any of my articles in *One on One*, or the *State Bar News* over the years, you are probably getting tired of hearing me talk about how important it is for you to go online for both e-mail and Internet access. As you may recall, telephone service was interrupted for weeks following the attacks, and the only way we could connect volunteers with individuals in need of our services was through the Internet.

Since September 11th, I am more convinced than ever that "communities of shared interest" will be going online, and if you do not have Internet access, you will be unable to participate in these emerging communities.

Joining the GP/Solo & Small Firm Community

1. This is the year to join other GP/Solo & Small Firm Section members at the NYSBA's Annual Meeting on Tuesday, January 22, 2002, at the

Marriott Marquis in New York City. I may write about how you need to become a "high-TECH" lawyer, but the Annual Meeting gives you a perfect opportunity to refine your "high-TOUCH" skills.

2. Plan to attend the CyberCafé portion of the Section's Tuesday afternoon meeting, or plan on returning to New York City for Legal Tech the week following the NYSBA Annual Meeting. The CyberCafé will bring together a number of technology vendors that have been very supportive of our Legal Tech Aid initiative.
3. Subscribe to the Section's electronic newsletter "wEbrief." Go online to the GP/Solo & Small Firm Section home page at www.nysba.org/sections/gp/index.html and sign yourself up for this news alert that is sent out once a month.
4. The Law Office Economics and Management Committee has invited Leona Beane, a longtime member of the Section to participate in an hour-long program, Disaster/Business Recovery Planning, on Wednesday, January 23, 2002, at 10 a.m. Leona had worked in the World Trade Center area, so her experiences should be invaluable. Anthony Davis, Chair of Legal Education and Admission to the Bar Committee will join Leona for this important program. Anthony advises lawyers and law firms on legal profession and legal ethics issues, and in the area of law firm risk management and loss control.
5. Would you please help us? If you have been affected by recent events in lower Manhattan or if you have information about other lawyers who need our support, please share this information with us and reach out to these individuals on the Section's behalf.

As we continue to face trials and challenges in the months ahead, I invite you to join the Section's community of healing and service. You may call me at (518) 487-5595 if you need help in going online.

Stephen P. Gallagher is Director of the Law Office Economics & Management Department at the New York State Bar Association.

Please fax this form, if you know of anyone needing assistance related to the World Trade Center disaster, to the attention of Stephen P. Gallagher at (518) 487-5694.

Colleague who may still need help:

Name: _____

Firm: _____

Current/Temporary Address: _____

_____

Daytime Phone: # _____Evening Phone: # _____

E-mail address: _____

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Explanation: _____

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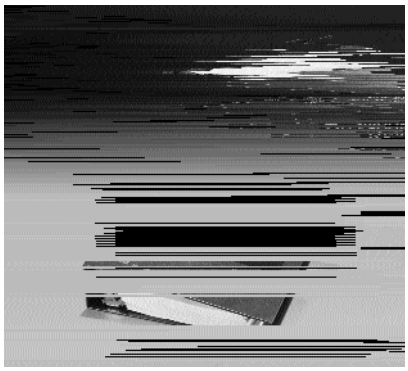
New York Lawyer's Deskbook *Second Edition*



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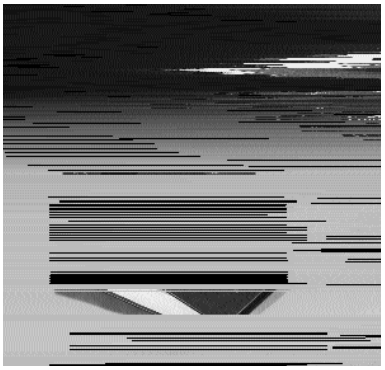

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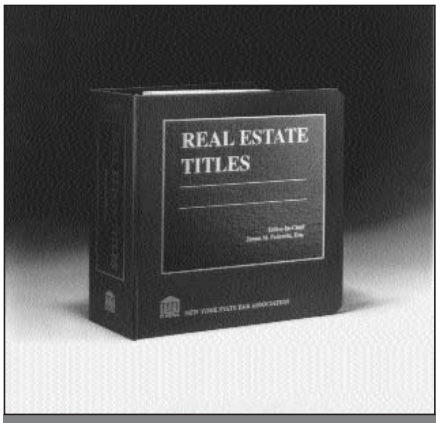

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ISSN 0733-639X

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