SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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

AFFIDAVIT OF MICHAEL PAPA

Index No. 156923/13

Plaintiffs,

-against-

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

Respondents.

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STATE OF NEW YORK)

COUNTY OF SCHENECTADY)

MICHAEL PAPA, ESQ., being duly sworn, deposes and says:

1. I am an attorney at law duly licensed to practice in the State of New York and am an Associate Attorney in the General Counsel's litigation unit at the New York State Workers' Compensation Board ("the Board"). I have held this position for three years, and prior to that time held the position of senior attorney for eight years. In both my current and prior positions, my duties have included overseeing litigation involving the Board, which includes litigation regarding the assessments levied by the Board in furtherance of its operations and the various Funds maintained by the Board pursuant to the New York Workers' Compensation Law ("WCL").

2. I submit this affidavit in support of Defendants' motion to dismiss the complaint brought by American Economy Insurance Company, American Fire and Casualty Company, American States Insurance Company, Employers Insurance Company of Wausau, Excelsior Insurance Company, FirstLiberty Insurance Corp., General Insurance Company of America, Liberty Insurance Corporation, Liberty Mutual Fire Insurance Co., Liberty Mutual Insurance Company, LM Insurance Corporation, Netherlands Insurance Company, The Ohio Casualty Insurance Company, Ohio Security Insurance Company, Peerless Indemnity Insurance Company, Peerless Insurance Company, Wausau Business Insurance Company, Wausau General Insurance Company, Wausau Underwriters Insurance Company, and West American Insurance Company (collectively, "Plaintiffs" or "Liberty Mutual").

3. The Board is the governmental entity charged with the administration of the WCL and its attendant regulations, and has all of the powers and duties set forth in WCL § 142.

4. The Board's mission is to equitably and fairly administer the provisions of the WCL, including workers' compensation benefits, disability benefits, volunteer firefighters'

benefits, volunteer ambulance workers' benefits, and volunteer civil defense workers' benefits on behalf of New York's injured workers and their employers.

5. Workers' compensation benefits provide weekly cash payments for lost wages (also known as "indemnity" payments) as well as the cost of full medical treatment, including rehabilitation, for covered employees who become disabled as a result of an injury or disease causally related to their employment. Benefits may also be paid to qualified dependents of a worker who died as a result of a compensable injury or illness.

6. Pursuant to WCL § 10 and WCL § 50, all employers in New York State shall secure the payment of workers' compensation to their employees. The WCL states that employers may do so in one of the following three ways: (1) by insuring the payment of such compensation from the New York State Insurance Fund ("NYSIF") (WCL § 50(1)); (2) by insuring the payment of such compensation with any insurance carrier authorized to transact such business in New York State (WCL § 50(2)); or (3) by becoming a self-insurer (WCL § 50(3) and WCL § 50(3-a)).

7. NYSIF, insurance carriers,[1] and self-insured employers (collectively, "participants" in the workers' compensation system) are liable for the payment of all workers' compensation obligations of the employers to which the participants provide coverage. Historically, such workers' compensation obligations included not only the payment of indemnity and medical costs to injured workers, but also the payment to the Board of assessments levied pursuant to the Board's statutory authority. WCL §§ 151(2)(b) and 25-a(3).

8. All of the administrative expenses of the Board are recouped by way of assessments. Previously, these assessments were levied against all participants in the workers'

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[1] WCL § 151(2)(b) defines "insurance carrier" as "stock corporations, mutual corporations and reciprocal insurers authorized to transact the business of workers' compensation insurance in this state."

compensation system.

9. In addition, the Board maintains the Reopened Cases Fund ("RCF" or the "Fund") and the Special Disability Fund (collectively, the "Special Funds"). Under certain conditions, a participant in the workers' compensation system is assigned rights for certain workers' compensation claims from these Special Funds. Previously, the Special Funds (including the RCF) were also financed by way of assessments against all participants in the workers' compensation system.

10. As discussed in greater detail below, the RCF pays compensation and medical benefits on claims that meet certain criteria indicative of an extended period of inactivity and after all interested parties, including the Fund itself, have had an opportunity to challenge whether or not those criteria have been met. Pursuant to WCL § 25-a(3), in the event that the RCF falls below the required minimum balance, the Board is required to levy assessments "in the respective proportions established in the prior fiscal year under the provisions of [WCL § 151]."

11. Pursuant to pre-amendment WCL § 25-a(3), RCF assessments were levied upon participants "[a]nnually as soon as practicable after January 1st in each year." for their respective shares of the total RCF assessment amount for the prior calendar year. From January 1, 2001, to January 1, 2014, these shares were allocated among each individual carrier based upon their relative market shares of either all workers' compensation "direct written premiums" or "standard premium." See WCL §§ 25-a(3), 151(2)(b).

12. The WCL provided a mechanism whereby insurance carriers were able to recover the costs of the RCF assessments paid by them via surcharges to their employer insureds. No corresponding mechanism existed for individual self-insured employers to defray the costs of the RCF assessments levied upon them. Thus, the costs of all Board assessments, including RCF

assessments, are ultimately borne by employers (individual self-insured employers and employer insureds).

13. An employer which secures the payment of workers' compensation by purchasing an insurance policy from a commercial carrier does not directly provide payment of compensation to injured workers. Rather, the carrier pays all of its insureds' workers' compensation obligations.

14. Thus, an employer which secured the payment of workers' compensation by purchasing an insurance policy from a commercial carrier was not a "participant" in the workers' compensation system and, therefore, was not subject to assessments issued by the Board pursuant to WCL § 25-a. Rather, an employer's insurer was the participant against which the Board levied the assessments. See WCL §§ 25-a(3), 151(2)(b).

15. An insurance carrier which provides workers' compensation coverage to its insureds bills those employers a "premium" for such coverage. The amounts of the premiums charged by an insurance carrier in consideration for providing its insureds with workers' compensation coverage are known as "rates."

16. The rates are calculated based upon the type of work performed by the employees of the insured. For example, coverage for employees engaged in hazardous activities is billed at a higher rate than coverage for employees not engaged in hazardous work. These rates are proposed annually by the Compensation Insurance Rating Board ("CIRB") and approved by the New York State Department of Financial Services ("DFS").

17. Once a claim is transferred to the RCF, the carrier no longer makes payments on the claim, and the claims expenses are not reported to CIRB and do not form the basis of the rates charged by carriers to their insured. However, prior to such transfer, the carrier is

responsible for making payments on the claim, and the costs associated therewith are reported to CIRB for the purpose of allowing the costs to be factored into the rates which the carriers are permitted to charge their employer insureds. Thus, for any claim that has not yet been accepted into the RCF, the insurer remains responsible for its payment, but will be able to charge additional premiums to their insureds as a result thereof.

18. While calculating proposed premium rates is CIRB's primary function, prior to the enactment of the Business Relief Act, it also performed the secondary function of calculating "surcharges."

19. In addition to a premium, a carrier also billed its insureds a "surcharge" which was designed to provide the carrier with funds to offset amounts paid by the carrier in response to any assessments levied by the Board upon it, including the RCF assessment.

20. Pursuant to pre-amendment WCL § 151(2)(b) carriers were directed to collect such assessments from their employer policyholders through a surcharge based on premium in accordance with rules set forth by CIRB. Under the amended WCL § 151, assessments will now be made directly upon employers (with insurers collecting these assessments from their employer insureds on the Board's behalf).

21. The RCF pays compensation and medical benefits on claims that meet certain criteria indicative of an extended period of inactivity and after all interested parties, including the Fund itself, have had an opportunity to challenge whether or not those criteria have been met. The original intent of the RCF was to provide carriers relief in a small number of "stale" cases where liability "unexpectedly" arises after having been closed for many years.

22. In general, liability on a reopened case may transfer to the RCF if "an application for compensation is made... after a lapse of seven years from the date of the injury or death and

also a lapse of three years from the date of the last payment of compensation." See WCL § 25-a(1). However, the process for the shifting of liability from a carrier to the Fund is far from the simple and rote reopening of a claim after the passage of the seven and three year time limits. Rather, the WCL provides for an involved process where the Board, as well as a statutory "defender" of the Fund, and all other interested parties participate in administrative proceedings, and if necessary appellate review of those proceedings by the Appellate Division, Third Department.

23. As an initial matter, the Board may reopen a case to consider the issue of liability under WCL § 25-a upon: (1) the claimant's filing of an application for compensation; (2) the filing of a medical report indicating a change of condition; (3) the carrier's filing of a request, on a form RFA-2, to transfer liability to the Fund when there is proof that further medical or indemnity benefits are payable; (4) any party's raising the issue of WCL § 25-a liability at a hearing; or (5) the Board's raising the issue on its own motion. *Matter of DEL Labs*, 2009 NY Wrk Comp 2940 8739.

24. A reopening is not premature under any of these circumstances; conversely, if none of the above conditions are met, the Board may deny reopening. Thus, there is the threshold issue of whether or not an application to reopen a claim will even be heard.

25. In other words, a carrier cannot request a case be reopened for the purpose of WCL § 25-a just because the requirements have been met. There must be some type of liability (either medical or indemnity) to transfer. However, if the case is already opened and the issue of WCL § 25-a is raised prior to January 1, 2014, WCL § 25-a eligibility can be litigated even if there is no current liability to be transferred.

26. Pursuant to WCL § 25-a(5) (which refers to "any committee, board or

organization representative of the interest of employers or insurance carriers"), a Special Funds Conservation Committee ("SFCC") formed by insurance carriers was created in 1938 to act as a statutory "defender" of the RCF. The SFCC appears as a party of interest in all cases before the Board where a participant is seeking to transfer claims liability to the Fund.

27. WCL § 25-a(5) provides that when there is a claim for compensation from the Fund, the Chair of the Workers' Compensation Board (Chair) shall appoint an individual to represent the RCF in any proceeding. The statute further provides that "the chair of the board may designate such attorney as the representative of such fund in any proceedings brought to enforce a claim against the fund."

28. For purposes of WCL § 25-a, the SFCC functions like an "insurance carrier" and the provisions of the WCL "with respect to procedure and the right to appeal shall be preserved … to such fund through its representative." (WCL § 25-a[2]).

29. As an "insurance carrier" its "first obligation upon the reopening of a claim is to consider the threshold 'passage of time' issue that controls the shift of liability (see Workers' Compensation Law § 25-a[1]) and to decide whether the circumstances warrant 'a proper defense of the application'" (*Matter of Collier v Brightwater Beer & Soda Distributor*, 147 AD2d 868 [1989], aff'd 75 NY2d 949 [1990] [citations omitted]).

30. The Board's rules on adjournment (12 NYCRR 300.10), applications for review and rehearing (12 NYCRR 300.15), and Full Board Review (12 NYCRR 300.16) extend to SFCC. Additionally, SFCC may request hospital records (12 NYCRR 325-1.11) and issue subpoenas (WCL § 119).

31. The SFCC is given notice by the Board of all proceedings involving the rights and obligations of the Fund, and may apply to the Chair for authority to hire experts and defray the

expense of witnesses as may be necessary to a proper defense of any claim. Any expenses authorized by the Chair are a charge against the Fund [WCL §25-a(5)].

32. It is critical to understand that, under the WCL, the Board has "full power and authority to determine all questions in relation to the payment of claims presented to it for compensation under the provisions of [the WCL]." (WCL § 20). This includes both the threshold issue of whether the liability for the payment of a workers' compensation claim may be transferred from a participant to the Fund, as well as determinations as to propriety of reimbursement requests for monies already expended on those claims. WCL § 25-a(9)(e).

33. Under WCL § 25-a, a participant is required to timely notify the Board if it believes that a workers' compensation claim, for which it has been paying compensation benefits, is one that qualifies for reimbursement from the Fund. [WCL § 25-a(1)]. After a hearing at which all parties of interest may be heard, including the participant and the SFCC, the Board determines whether the workers' compensation claim is one which satisfies the statutory criteria qualifying it for transfer of liability to the Fund.

34. The Board's determination is rendered by a Workers' Compensation Law Judge (WCLJ). If the WCLJ determines that the workers' compensation claim qualifies for transfer, only then is the liability for the claim is transferred from the participant to the Fund.

35. Importantly, should any party disagree with the WCLJ's decision concerning the eligibility of a workers' compensation claim for Fund relief, the aggrieved party may seek administrative review of the WCLJ's decision to a Board Panel consisting of three Commissioners (see 12 NYCRR 300.13 et seq; see WCL § 23). If a party remains aggrieved upon the conclusion of the administrative review process, the aggrieved party may request further administrative review of the Board Panel's decision by the Full Board ("Full Board

Review"), and/or seek judicial review of the Board Panel's decision by filing a direct appeal to the Appellate Division's Third Department, which has exclusive jurisdiction to hear appeals of workers compensation claim. (WCL § 23). No appeal may be made to the Third Department unless and until the aggrieved party has exhausted its administrative remedies before the Board. (WCL § 23).

36. A very complex body of case law has developed in the Appellate Division, Third Department with respect to whether and when a liability is to be accepted for transfer to the RCF. For example, the Third Department has held that:

- liability on a reopened case may be eligible for transfer to the Fund if "an application for compensation is made ... after a lapse of seven years from the date of the injury or death and also a lapse of three years from the date of the last payment of compensation." (WCL § 25-a [1]; see *Matter of Casey v Hinkle Iron Works*, 299 NY 382 [1949]);

- to be considered an advance payment of compensation[2] within the meaning of WCL §25-a(1) (which, if made within three years from an application to reopen a claim, will result in rejection of transfer to the RCF), the payments must be discretionary and in excess of what the employer is required to pay *(Matter of Feldman v Presbyterian Hospital*, 114 AD2d 549 [1985]; *Matter of Urban v NYS Letchworth Village*, 91 AD2d 1090 [1983]);

- payments of a claimant's medical treatment are not considered "compensation," and thus such payments made within three years of an application to reopen would not bar a finding of WCL § 25-a liability. Jones v HSBC, 304 A.D.2d 864 (3d Dep't 2003);

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[2] Under the WCL, "last payment of compensation" is defined as follows:

> For the purposes of this section the date of the last payment of compensation shall be deemed to mean the date of actual payment of the last installment of compensation previously awarded; provided, however, that where the case is disposed of by the payment of a lump sum (i.e. section 32 agreement or schedule loss of use award), the date of last payment for the purpose of this section shall be considered as the date to which the amount paid in the lump sum settlement would extend if the award had been made on the date the lump sum payment was approved at the maximum compensation rate which is warranted by the employee's earning capacity as determined by the board under section fifteen of this chapter.

See WCL § 25-a(7).

- after a case has closed, payments made by the employer for causally related lost time and light duty at full wages, if made with a recognition of liability, can constitute an advance payment of compensation relieving the Fund from liability (see *Matter of Foglia v New York City Hous. Auth.*, 132 AD2d 762 [1987]);

- in order to shift liability under WCL § 25-a, there is no requirement that there be a formal opening of a claim or a prior formal award (see *Matter of Scheulen v New York Times Co.*, 105 AD2d 502 [1984]), and rather, "a case may be 'opened' by voluntary advance payments of compensation which, in effect, constitute an informal award.... When these payments cease, the case is 'closed' and the subsequent filing of a stale 'initial' claim is the equivalent to a reopening of the case" (see *Matter of Loiacono v Sears, Roebuck & Co.*, 230 AD2d 351 [1997] citing *Matter of Riley v Aircraft Products Manufacturing Corp.*, 40 NY2d 366 [1976]);[3]

- when an informal opening of a case has occurred, it may be considered closed when the claimant has been discharged by the treating physician as essentially nonsymptomatic (*see Loiacono*, 230 AD2d 351 [1997]); the claimant has returned to work (*see Natale*, 17 AD3d 877 [2005]), even with symptomatic medical treatment authorized (see e.g. *Matter of Mackey v Murray Roofing*, 24 AD3d 1149 [2005]; *Matter of Andrus v Purolator Prods.*, 301 AD2d 762 [2003]); or no action has taken by the Board and no payments for compensation have been made to the claimant (see Rodriguez, 53 AD3d 728 [2008]); and

- in order for WCL §25-a to apply, a claim must meet the statutory time requirements and there must have been a "true closure" of the case (*Casey v Hinkle Iron Works*, 299 NY 382 [1949]).

37. The last of these issues is among the most heavily litigated under WCL § 25-a, and neither use of the term "closed" nor of the phrase "no further action" is necessarily dispositive on the issue of whether a case is "truly closed." Instead, a fact-based determination is made as to whether further proceedings were actually contemplated by the Board at the time the matter was purportedly closed (*see Matter of Jones v HSBC*, 304 AD2d 864 [2003]; *Matter of Andrus v Purolator Prods.*, 301 AD2d 762 [2003]; *Matter of Pegoraro v Tessy Plastics Corp.*, 287 AD2d 909 [2001], lv dismissed and denied 98 NY2d 669 [2002]; *Matter of Kirschner v*

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[3] While the payment of medical expenses is not a payment of compensation for WCL § 25-a purposes, the payment of a claimant's medical expenses may constitute an informal opening under the provisions of WCL § 25-a (see *Loiacono,* 230 AD2d 351 [1997]; see also *Matter of Natale v New York City Dept. of Correction*, 17 AD3d 877 [2005]; *Matter of Rodriguez v Greenfield Die Casting*, 53 AD3d 728 [2008]).

Rowe, Walsh Assoc., 144 AD2d 191 [1988]; *Matter of Buffum v Syracuse Univ.*, 12 AD3d 887 [2004]).

38. "For purposes of determining true closure and calculating time periods for Workers' Compensation Law § 25-a purposes, the further proceedings contemplated at the time of 'closure' should concern issues related to the payment of 'compensation,' which does not include payments for medical treatment or care (see Workers' Compensation Law § 13 [a]; *Matter of Casey v Hinkle Iron Works*, 299 NY 382 [1949]; *Matter of Jones v HSBC*, 304 AD2d 864); thus, for example, where the claimant is found to be permanently disqualified from receiving further lost wage benefits, pursuant to WCL § 114-a, for purposes of WCL § 25-a, a case is truly closed *(Matter of Palermo v Primo Coat Corp.*, 88 AD3d 1042 [2011]). See also, *Matter of Mackey v Murray Roofing*, 24 AD3d 1149 [2005] [case closed where weekly benefits suspended due to incarceration, despite possible future request for reinstatement of benefits],

39. However, compare *Matter of Granberry v JCCA Edenwald*, 33 AD3d 1102 [2006] [case not truly closed where issue of lost wages for certain time periods unresolved], and *Matter of Stanford v Lewis County Opportunities*, 33 AD3d 1098 [2006] [case not truly closed where issue of concurrent employment unresolved], and *Matter of Carubia v Colt Indus.*, 12 AD3d 827 [2004] [case not truly closed where issue of permanency not resolved], and *Matter of Jones v HSBC*, supra [matter closed where the claimant awarded schedule loss of use and all temporary rates made permanent, despite continuation of contemplated medical treatment regimen])" (*Matter of Bates v Finger Lakes Truck Rental*, 41 AD3d 957 [2007]).

40. Indeed, In *Matter of Rathbun v D'Ella Pontiac Buick GMC, Inc.*, 61 AD3d 1293 (2009), the court considered the issue of "whether, at the time claimant was authorized to undergo the surgical procedure on her right wrist in July 2003, further proceedings were

contemplated on this claim", (*id.* at 1294 [internal quotation marks and citations omitted]). In ruling there was true closure, the court held that "a finding that a case has been truly closed can be made where symptomatic medical treatment is authorized, even if the claimant's condition may change or worsen in the future and could bring about a reopening of the case" (*id.* [internal quotation marks and citations omitted]). However, unresolved issues can also indicate no true closure, see *Matter of Aposporos v NYNEX*, 46 AD3d 1016 [2007] (when a claim for a specific body part is asserted as compensable, and the claim remained unresolved); *Matter of Hartwell v Amphenol Interconnect Products*, 51 AD3d 1245 [2008] (when a finding is made that prima facie medical evidence exists for an injury or disability, the claim may not be deemed closed until the issue regarding the injury/disability is resolved; and *Matter of Guarino v Town of Islip Highway Department*, 133 AD2d 881 [1987] (when a case is closed pending production of sufficient medical evidence).

41. For these reasons, the process for the transfer of liability from a carrier to the RCF is far from an automatic one occurring simply by virtue of the seven- and three-year prerequisites of WCL § 25-a being met. Although Plaintiffs seem to imply that the Fund automatically accepts liability for any claim that is "reopened" (Complaint ¶¶ 2, 58-60), nothing could be further from the truth.

42. As established above, nearly every application to have liability for a "reopened" claim transferred to the Fund becomes the subject of quasi-judicial proceedings. The Fund itself is a party of interest to all such proceedings, and has the obligation to defend all such attempted transfers of liability.

43. Moreover, all parties in interest to such proceedings have the ability to appeal any decision with respect to the transfer of such liability, initially on an administrative level, then

directly to the Appellate Division, Third Department, and further, ultimately to the Court of Appeals.

44. Indeed, far from being the ministerial act the Plaintiffs would have the court believe, nearly all "reopened claims" become the subject of lengthy trials.

45. As demonstrated above, the issue of the ability of a particular claim to be transferred to the liability of the Fund is one of the most complex and factually specific issues in the workers' compensation system.

46. Notably, the workers' compensation system is in and of itself so complicated that the Legislature has seen fit to divest Supreme Court of its primary jurisdiction over all matters and instead designate the Appellate Division, Third Department as a specialized tribunal. See WCL § 23.

47. While the intent of the Fund was to provide relief for a relatively small number of "stale" claims that arise "unexpectedly," in recent years carriers have been pushing ever greater claims and liabilities to the Fund. Carriers, unlike individual self-insured employers, have no disincentive to push more liabilities to the Fund, and in fact receive a windfall from doing so. This is because carriers shed these liabilities once they are transferred to the RCF, yet (unlike individual self-insured employers) are able to defray the costs of the increased RCF assessments necessary to fund these liabilities by way of surcharges to their employer insureds. Individual self-insured employers, by contrast, must pay these assessments themselves. Accordingly, with no disincentive to push as much liability to the Fund as possible, the Fund's liabilities have increased exponentially over the last several years.

48. One way in which carriers have pushed liability to the Fund is through the increasingly prevalent practice of indemnity-only settlements pursuant to WCL § 32. Effective

December 9, 1996, Chapter 635 of the Laws of 1996 amended WCL § 32 to allow a claimant (or his/her dependents in a death case) to enter into a binding agreement with a carrier or employer settling upon and determining the compensation and other benefits due to the claimant. If approved by the Board, the settlement is binding on all the parties and not subject to review under WCL § 23. This provision was added to expedite the adjudication of issues or entire claims, while assuring the rights of the claimants and all other parties.

49. Although WCL § 32 settlements are a useful tool for resolving issues among like minded parties, in recent years they have become a vehicle for insurance carriers seeking to improperly shift their medical obligations over to the Fund through execution of "indemnity only" settlement agreements.

50. "Indemnity only" WCL § 32 settlements with injured workers have the effect of cutting off non-medical payments to injured workers, but allowing for medical care to continue. Carriers have then sought to transfer liability for the medical portions of such claims to the RCF after the passage of three years from the date of the last indemnity payment,[4] even though the claims had never truly been closed.

51. Thus, far from its initial intended purpose of absorbing costs for "a small number of cases where liability unexpectedly arises," the RCF had become increasingly saddled with liabilities for claims for medical costs that technically meet the statutory requirements, but which were not "unexpected." This has caused the Funds' liabilities to spiral exponentially and

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[4] WCL § 25-a(7) provides that, "where the case is disposed of by the payment of a lump sum, the date of last payment for the purpose of [WCL § 25-a(1)] shall be considered as the date to which the amount paid in the lump sum settlement would extend if the award had been made on the date the lump sum payment was approved at the maximum compensation rate which is warranted by the employee's earning capacity." See WCL § 25-a(7). However, even if required to temporally account for the value of their lump sum indemnity settlements, insurers remained incentivized to enter into such settlements, as they established a finite point in time three years after which a potential transfer to the RCF could occur.

uncontrollably.

52. As of December 31, 2006 the Fund required $292,544,552 in indemnity reserves and $478,259,063 in medical reserves and required an assessment of approximately $95 million.

53. As of December 31, 2007 the Fund required $314,139,720 in indemnity reserves and $477,209,315 in medical reserves and required an assessment of approximately $100 million.

54. As of December 31, 2008 the Fund required $330,501,139 in indemnity reserves and $461,096,806 in medical reserves and required an assessment of approximately $181 million.

55. As of December 31, 2009 the Fund required $341,721,369 in indemnity reserves and $545,939,667 in medical reserves and required an assessment of approximately $267 million.

56. As of December 31, 2010 the Fund required $359,980,410 in indemnity reserves and $670,282,171 in medical reserves and required an assessment of approximately $322 million.

57. As of December 31, 2011 the Fund required $371,328,186 in indemnity reserves and $684,317,680 in medical reserves and required an assessment of approximately $250 million.

58. As of December 31, 2012 the Fund required $405,584,883 in indemnity reserves and $748,324,119 in medical reserves and required an assessment of approximately $314.3 million.

59. Thus, in the last seven years alone, the total liabilities of the Fund increased significantly, and assessments necessary to fund the RCF have skyrocketed, from less than $100

million in 2006, to its current state of nearly $315 million. As set forth above, these costs, while initially borne by insurance carriers, were then passed on to the employers by virtue of surcharges on policies, and thus, carriers received a significant windfall by pushing as many cases to the RCF as possible. Notably, the medical portion of the RCF's reserves has outstripped indemnity reserves by nearly a two to one margin.

60. Workers' compensation claims involve workplace injuries, and thus present the potential need for medical treatment (and the corresponding need for payment of costs associated therewith) many years after the original injury. Insurers refer to claims with such potential as "long tail" claims. Thus, it is necessary for the RCF to remain in existence after January 1, 2014, albeit solely in order to fund the payment of already transferred claims which, by their very nature, could require payments for decades into the future. However, the Board has determined that there will be no RCF assessment levied on employers for calendar year 2014. Rather, consistent with the provisions of WCL § 25-a(3), the Fund will be evaluated on an actuarial basis. Depending on the results of the actuarial valuation, and the Fund reserve balance, there may or may not be further RCF assessments in the year 2015 or thereafter.

Michael Papa, Esq.

Sworn to before me this
11th day of October, 2013

NOTARY PUBLIC

JENNIFER ESSEGIAN
NOTARY PUBLIC STATE OF NEW YORK
RENSSELEAR COUNTY
LIC. #01ES6168478
COMM. EXP. 6/11/2015