



**STATE OF NEW YORK  
INSURANCE DEPARTMENT  
160 WEST BROADWAY  
NEW YORK, NEW YORK 10013**

**NOTE: WITHDRAWN EFFECTIVE OCTOBER 11, 2002**

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**Circular Letter No. 8 (1997)  
March 28, 1997**

**TO: All Companies to Write Liability Insurance**

**RE: Policies Covering Injury to Economic Interest**

For several years, one of the fastest growing areas of commercial insurance has been liability coverage of various kinds which can be generally categorized as insurance against loss "arising out of injury to the economic interests of any person". This coverage is included in the definition of personal injury liability insurance found in Section 1113(a)(13) of the New York Insurance Law.

Directors and officers liability, employment liability and various forms of professional liability insurance involve injury to economic interests. As insurance products covering these risks have evolved in response to the needs of the business and professional worlds, New York has lagged behind the rest of the country in approving policy forms. Businesses frequently purchase their liability policies in other States. Businesses and professionals also utilize the surplus lines market to get coverage in New York equivalent to that which is available in the admitted market in other States. One of our top priorities has been to remove unnecessary regulatory procedures inhibiting the growth of a dynamic, competitive market.

A number of companies have filed Directors and Officers Liability forms and Professional Liability forms which contain provisions not currently in use in this State. Rather than respond to these filings on a company by company basis, we have decided to promulgate a regulation so that all companies will be aware of our position and requirements.

A draft of a proposed Regulation is attached hereto. It is being circulated for comment. While the Regulation is under consideration we will review and, if appropriate, approve those forms which conform to the draft Regulation.

A copy of the draft Regulation is attached. Comments may be addressed to William S. Gibson, Deputy Superintendent.

**DRAFT PROPOSED**

**NEW YORK STATE  
INSURANCE DEPARTMENT  
REGULATION 110  
11 NYCRR 72**

**Indemnification of Directors and Officers;  
Commercial Liability Policies;  
Governing Standards**

I, GREGORY V. SERIO, Acting Superintendent of Insurance for the State of New York, pursuant to the authority granted by Sections 201, 301, 1113(a)(13) and (30) and Article 23 of the Insurance Law; and by Section 727 of the Business Corporation Law, Section 727 of the Not-for-Profit Corporation Law and Section 7024 of the Banking Law, do hereby repeal Part 72 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York, (Regulation No. 110), and promulgate the following new Part 72 to take effect immediately upon filing with the Secretary of State, to read as follows:

All matter is new.

Section 72.0 Preamble

(a) Section 727(a)(3) of the Business Corporation Law (BCL), Section 727(a)(3) of the Not-for-Profit Corporation Law (NFPCL) and Section 7024(a)(3) of the Banking Law (BL) give corporations subject thereto the power to obtain insurance for the purpose of indemnifying the directors and officers thereof in instances in which they may not otherwise be indemnified by corporations under the provisions of such laws, provided that the contract of insurance indemnifying such directors and officers (D & O indemnification policy) includes a retention amount (or deductible) and co-insurance, in a manner acceptable to the Superintendent of Insurance.

(b) This Part was originally promulgated in 1985 to establish the various retentions and co-insurance amounts. However, subsection (a) of Section 1113 of the Insurance Law does not include a provision explicitly permitting this kind of insurance to be written in New York and the Insurance Department has been reviewing D & O indemnification policy form filings as a form of liability insurance specified in paragraph (13) of that subsection.

(c) It has become evident, however, that while similar, D & O indemnification insurance is not identical to the insurance contemplated by paragraph (13) and that many of the other provisions of the Insurance Law that relate to liability policies do not permit this coverage to operate as intended. This has led to problems and delays in the approval process as insurers are forced to amend their submissions to comply with provisions that interfere with the intended operation of this type of insurance product.

(d) As the business world has become more complex, including the role of courts and administrative agencies, the scope of insurance coverage required in covering businesses and professional activities, has evolved. Such insurance policies typically include provisions seeking to provide coverage for the cost of defense of administrative actions and other non-pecuniary remedies or relief. Examples of policies which include such provisions are errors and omissions liability, employment practices liability and professional liability.

(e) The purpose of this Part is to establish: (1) standards for D & O indemnification policies; and (2) the conditions under which the scope of coverage in liability policies may include coverage for the cost of defense for administrative actions and non-pecuniary remedies or relief, in order to facilitate the filing and approval of such policy forms. Section 72.1 Minimum Retention Amounts and Co-insurance Percentages for Directors and Officers Indemnification Insurance.

(a) Retention amounts. (1) A D & O indemnification policy providing coverage permitted by BCL section 727(a)(3), NFPCL section 727(a)(3), or BL section 7024(a)(3) shall provide for individual and aggregate retention amounts that are not less than the applicable individual and aggregate amounts, respectively, set forth in subdivision (f) of this section;

(2) If the individual retention amounts, for all directors and officers covered under an indemnification policy who have been found liable or who have been included in a settlement, exceeds the applicable aggregate contained in the policy, then the minimum individual retention amount chargeable to each such director and officer shall be the applicable aggregate limit divided by that total, but the minimum individual retention amount shall in no event be reduced below seventy-five percent of the amount set forth in subdivision (f) of this section.

(b) Co-insurance. (1) A D & O indemnification policy providing coverage permitted by BCL section 727(a)(3), NFPCL section 727(a)(3) or BL section 7024(a)(3) shall make each director and officer a co-insurer of any net (less retention amount) loss, for the first \$1,000,000 of coverage, to an extent no less than the applicable percentage set forth in subdivision (f) of this section.

(2) A D & O indemnification policy may provide that the director or officer shall be a co-insurer of the loss, in an amount or proportion to be agreed upon between the insurer and the corporation, for that part of a net loss exceeding \$1,000,000.

(c) No retention amount or co-insurance is required where:

(1) directors or officers may be indemnified by the corporation pursuant to the provisions of BCL article 7, NFPCL article 7 or BL article 7, other than those provisions specified in paragraph (1) of this subdivision; or

(2) an indemnification policy is issued to, and for, the corporation itself;

or

(3) an indemnification policy is issued directly to a director or officer of a corporation.

(d) Retention amounts and co-insurance are both required, in accordance with this Part, for D & O indemnification policies issued to corporations formed under the Insurance Law, Religious Corporation Law, Cooperative Corporation Law, Transportation Corporation Law, or any other law of this State, where provisions of such laws make such corporations subject to BCL section 727 or NFPCL section 727.

(e) A D & O indemnification policy issued to a foreign corporation, if exempt under BCL section 1320 or NFPCL section 1321, need not provide for a retention amount or coinsurance percentage.

(f) Minimum schedule.

Type of corporation	Minimum Retention Amounts Individual Aggregate	Minimum Co-Insurance Percentage
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(1) For corporations subject to the B.L. or B.C.L. (including insurance corporations, transportation corporations, etc. and with:

(i) assets greater than \$20,000,000:	\$5,000 \$50,000	0.5%
(ii) assets greater than \$10,000,000 up to \$20,000,000:	4,000 40,000	0.4%
(iii) assets greater than 5,000,000 up to \$10,000,000:	3,000 30,000	0.3%

(iv) assets of \$5,000,000 or less:	2,000	20,000	0.2%
(2) Corporations subject to the Cooperative Corporations Law:	100	1,000	0.1%
(3) Corporations subject to the Religious Corporations Law:	100	1,000	0.1%
4) Corporations subject to the NFPCL	100	1,000	0.1%

Section 72.2 Minimum Standards for Directors and Officers Indemnification Policies.

(a) Having reviewed all pertinent statutes, as well as reviewing D & O indemnification policies sold in other jurisdictions, the Superintendent has determined, pursuant to paragraph (30) of subsection (a) of Section 1113 of the New York Insurance Law that D & O indemnification insurance is substantially similar to "personal injury liability insurance" as that term is defined in subparagraph (13) of paragraph (a) of Section 1113 of the Insurance Law because such policies cover injury to economic interests, and therefore, for the purposes of the Insurance Law, shall be deemed to be included in that kind of insurance.

(b) No D & O indemnification policy may be delivered or issued for delivery in this State, unless it contains in substance the following provisions:

(1) A provision that the insolvency or bankruptcy of the person insured, or the insolvency or bankruptcy of the person's estate, shall not release the insurer from the payment of damages for injury sustained or loss occasioned during the life and within the coverage, of such policy; and

(2) A provision that no direct action may be brought against the insurer unless the terms and conditions of the policy have been met, and the amount of the insured's obligation has been finally determined either by judgment against the insured or by written agreement of the insureds, the claimants and the insurer;

(3) A provision indicating the name, address and telephone number of the person or office in this State, authorized to accept notice of claim; and

(4) A provision that failure to give any notice required to be given by such policy within the time prescribed therein shall not invalidate any claim made by the insured if it shall be shown not to have been reasonably possible for the insured to give such notice within the prescribed time and that notice was given as soon as was reasonably possible.

(c) A D & O indemnification policy delivered or issued for delivery in this State:

(1) may permit the allocation of defense costs among covered and non-covered parties; and

(2) unless the policy provides that the insurer has a duty to defend the insured, may permit the allocation of defense costs among covered and non-covered allegations.

Section 72.3 Legal Representation for Administrative Actions and Non-Pecuniary Remedies or Relief.

(a) The superintendent has determined, pursuant to paragraph (30) of subsection (a) of Section 1113 of the New York Insurance Law that insurance coverage for the cost of defense of administrative actions and non-pecuniary remedies or relief, under the conditions set forth hereinafter, is substantially similar to "personal injury liability insurance" as that term is defined in subparagraph (13) of paragraph (a) of Section 1113 of the Insurance Law because such policies cover injury to economic interests, and therefore, for the purposes of the Insurance Law, shall be deemed to be included in that kind of insurance.

(b) A liability policy delivered or issued for delivery in this State insuring a natural person may provide coverage for the costs of legal representation of the insured natural person in administrative proceedings and other nonjudicial

dispute resolution forums, and may also provide for the cost of legal representation of the insured natural person in litigation where the remedies or relief sought are non-pecuniary in nature, provided:

- (1) The coverages are included in a liability policy as an added types of coverage under the policy; and
- (2) The matter before the administrative or other body involves allegations which could form the basis of a claim of legal liability against the insured which would be covered under the policy; and
- (3) The coverage does not provide for the indemnification of any penalties or other monetary amounts that the insured may become obligated for as the result of such proceedings; and
- (4) The claim involves allegations which could form the basis of a claim of legal liability against the insured for pecuniary damages (exclusive of punitive damages) covered under the policy and the non-pecuniary relief being sought serves to mitigate all or part of such pecuniary damages; and
- (5) The limit of liability for such costs of defense shall not exceed \$100,000.00 in any one proceeding.
- (6) No policy providing coverage authorized pursuant to this section shall provide coverage unless the allegations, if established, arise out of the happening of a fortuitous event.
- (7) No policy providing coverage authorized pursuant to this section shall provide coverage if the allegations, if established, constitute the elements of a crime or misdemeanor, or if the coverage would be against the public policy of this state