September 10, 1986

SUBJECT: INSURANCE

WITHDRAWN

Circular Letter No. 15 (1986)

TO: ALL AUTHORIZED PROPERTY/CASUALTY INSURERS IN NEW YORK STATE
ALL AUTHORIZED PROPERTY/CASUALTY RATE SERVICE ORGANIZATIONS

RE: 11 NYCRR 161.2 TORT REFORM REDUCTIVE COST EFFECT REFILING REQUIREMENT

Pursuant to new Section 2344(g) of the Insurance Law as specified in Regulation No. 129, 11 NYCRR 161.2, dealing with the flexible rating system, insurers and rate service organizations must no later than September 26, 1986 refile rates for non-exempt commercial risk, professional liability and public entity insurance markets, to reflect the likely reductive cost effects reasonably attributable to recently enacted tort reform measures.

These measures, which each affected insurer and rate service organization must consider in terms of their individual effect and collective impact, are itemized in 11 NYCRR 161.2, and described and discussed here. Exempt markets are set out in 11 NYCRR 161.3. Insurers should, of course, carefully read the exact language of each reform, review its historical and legal context and, given the effective dates of particular reforms, focus upon the timing and types of actions, proceedings, claims or causes of actions addressed by each measure.

The purpose of this Circular Letter is to give guidance in evaluating these tort reform measures, in order to help affected insurers and rate service organizations comply in a timely and effective manner with their statutory and regulatory obligations. The importance of these obligations cannot be overemphasized. In response to the urgings of the insurance industry and others for meaningful tort reforms, the New York State Legislature enacted meaningful tort reforms as integral components of omnibus and companion legislation signed into law by the Governor, as Chapters 220, 221, 682 and 750 of the Laws of 1986.

A. The Tort Reform Measures.

In view of the fact that insurers have been leading tort reform advocates and, moreover, have been able to attach substantial increased cost consequences to perceived adverse developments with potential future impact, insurers doing business in New York State must now evaluate and reflect salutary cost reductions brought about by these material changes in the law:

(a) Modification of the Joint and Several Liability Doctrine.

Section 6 of Chapter 682 creates a new Article 16 of the New York Civil Practice Law and Rules (CPLR) in which joint and several liability with respect to non-economic loss, such as pain and suffering, mental anguish and loss of consortium, is eliminated (with specified exceptions) in multi-defendant situations for any defendant found to be no more than fifty percent (50%) liable.

In contrast to the former doctrine where, despite partial or peripheral involvement, a defendant could be held responsible for the whole of a plaintiff's pain and suffering and other non-economic loss, such a defendant is now only responsible for its proportionate or equitable share of those damages.

Although there are a number of statutory exceptions and economic damages remain subject to joint and several liability, this material modification of the joint and several liability doctrine should reduce costs for many liability coverages, with the most significant effect on public entity insurance, products liability, liability coverages for professionals such as architects and engineers, and other coverages where high limits are involved, where 'deep-pocket' phenomena are at play, and where multiple defendants and substantial non-economic damages are not unusual when claims arise.

(b) New Appellate Standard for Review of Verdicts.

Historically, under New York jurisprudence, an appellate court would not intercede to modify the amount of a money judgment in any tort action unless the award was so excessive or inadequate as to "shock the conscience of the court". As a result of Sections 10 and 11 of Chapter 682, which amends CPLR Sections 5501 and 5522, appellate courts in this State have now been given the authority to intercede based upon the legislative instruction that "an award is excessive or inadequate if it deviates materially from what would be reasonable compensation".

This major change, which applies to all actions, can be expected to enhance fairness by reducing the frequency and dimensions of excessive awards and, given the impact of large awards on insurance loss costs, should reduce rates for all liability coverages.

(c) Credit for Collateral Sources.

In the past, the existence of collateral sources could not be mentioned, let alone considered, in most personal injury, property damage or wrongful death actions. Section 36 of Chapter 220 adds new CPLR Section 4545(c) which, in contrast, requires awards in tort actions to be reduced by amounts recoverable from any collateral sources, such as workers' compensation, health insurance, social security, and employee benefits (including wage continuation plans), with appropriate premium offsets. Life insurance, medicare, and certain sources entitled by law to liens are statutory exceptions to collateral source recognition.

This provision will reduce costs by providing for single, rather than redundant, recovery for the injured party, by taking benefits already (or to be) received into account. Even after taking into account contractual liens, it can be expected that this major change will have a substantial reductive effect for virtually all bodily injury liability coverages.

(d) Periodic Payment of Future Damages.

Section 9 of Chapter 682 creates a new CPLR Article 50-B, which provides that, in actions where awards for future damages (economic as well as non-economic) exceed $ 250,000, payments above that amount shall be made to the plaintiff periodically on a structured basis, rather than in a lump sum at the time of the verdict, instructing the court to enter a lump sum payment only upon consent of the parties and, subsequently, if necessary in its discretion to avoid hardship.

For large future awards, this reform, while ensuring that victims will be fully compensated and have continuing care, will result in savings to insurers in light of the time value of money and the fact that, except for future earnings, these annuitized payments will be made only on an actual (rather than

projected) life basis. While this change should result in reduced costs and rates for all liability coverages, the reductions can be expected to be even larger for coverages characterized by high limits or by high awards.

(e) Required Itemized Verdicts

Sections 7 and 8 of Chapter 682 add CPLR Rule 4111 (f) and amend CPLR Section 4213 to provide that, in both jury and non-jury actions, special and general damages shall be itemized and further allocated as to past and future damages. This required clarity will facilitate application of the new rules regarding appellate review, periodic payment, and collateral sources, and thus help implement their cost savings.

(f) Penalty for Frivolous Litigation.

Pursuant to Section 35 of Chapter 220, CPLR Section 3303-a has been amended to provide that, whenever a court determines that any tort action or defense was begun or has been continued frivolously, the opposing successful party will be awarded costs and attorney fees up to $ 10,000.

This sanction against frivolous litigation should reduce the number of cases settled principally for nuisance value, thereby reducing loss costs. Since it should also reduce claim frequency itself, and thus reduce litigation expenses (thereby decreasing allocated loss adjustment expenses), there should be beneficial reductive impact flowing from this reform upon insurance rates.

(g) Immunity for Uncompensated Non-Profit Directors & Officers.

Sections 11, 12 and 13 of Chapter 220 add a new Section 720-a to the Not-for-Profit Corporation Law, and also add CPLR Rules 3211(a)(11) and 3016(h), to create a qualified immunity for uncompensated directors and officers of IRC Section 501(c)(3) not-for-profit organizations.

Thus every director and officer fitting this description is now immune from liability, unless that director or officer has been grossly negligent or has acted in a manner that was intended to inflict harm. This immunity is bolstered by procedural protections to filter out unwarranted claims; if an unwarranted action is pursued, it may also be subject to frivolous litigation sanctions. Of course, legal defense remains essential and some non-profit officers may be compensated. Although there are exceptions from this immunity, those exceptions such as proceedings brought by the Attorney General or by the organization are rare in the non-profit setting.

Designed to encourage qualified individuals to serve their communities, this immunity should facilitate the availability and enhance the affordability of liability coverage for non-profit directors and officers. A significant reductive impact upon both loss and loss adjustment costs can be expected. While this immunity affects only this particular market, rate reductions in this market should be substantial.

(h) Extending the Rights of Toxic Torts Victims.

Sections 1 through 5 of Chapter 682 modify the statute of limitations applicable to personal injury actions for damages resulting from the latent effects of exposure to a toxic substance. As a result, the three-year limitation period within which to bring such an action will be computed from the date the injury is (or should have been with due diligence) discovered, providing greater fairness to victims, compared to the former rule in New York when time began to run from exposure to the toxic substance.

These provisions also revive, for actions commenced within one year from July 30, 1986 (the effective

date of Chapter 682), time-barred tort claims arising from the latent effects of exposure to five specified toxins -- DES, tungsten carbide, asbestos, chlordane and polyvinyl chloride. The statute of limitations is also adjusted in certain cases where the cause of the injury has only recently been discovered (due, for example, to advances in scientific knowledge).

While these toxic tort statute of limitations provisions may tend to increase, rather than decrease, costs, generally it should only have such an effect on those markets there coverage for latent effects of exposures to toxic substances is involved, such as the exempt market of pollution liability. In addition, the change to a discovery rule in toxic substance actions simply brings New York (which had occupied a distinct minority position) in line with virtually every other jurisdiction; thus the impact of discovery rules may well be reflected in current rates, which in these areas are typically based upon countrywide experience due to interstate commerce. Further, the one-year revival of the causes of action for the five specified substances can have no effect on future occurrences and, therefore, no effect on rate levels.

(i) Alteration of Intoxication Standard.

Chapter 750 became effective August 1, 1986 and changes the former prohibition in the Alcoholic Beverage Control law against providing liquor to "any intoxicated person or to any person, actually or apparently, under the influence of liquor" to the new standard of "any visibly intoxicated person". Under the former provision, establishments such as hotels, motels, restaurants, taverns and bars could be held, in effect, strictly liable for any ensuing accidents involving an individual, served liquor at the establishment, who turned out to be actually, even though not apparently, under the influence. The change to a visible intoxication standard should have a material impact on the availability and cost of liquor law liability coverage, although its effects are confined to this particular area.

Individually and collectively, these provisions can be expected to have favorable impact upon claim frequency and severity and, as noted, upon litigation costs and other loss adjustment expenses. While these tort reform measures generally speak in terms of jury awards, judgments or verdicts, their existence and operation should have similar ramifications on the settlement process by which most claims are resolved.

B. Refiling Guidelines.

New Section 2344(g) of the Insurance Law, and implementing Regulation 129, 11 NYCRR 161.2, require that, no later than Friday, September 26, 1986, insurers and rate service organizations refile rates reflecting tort reform reductive effects for all non-exempt commercial risk, professional liability and public entity insurance markets, using the prescribed form (Form 129-A, with Schedules) annexed to this Circular Letter. Please note that:

(a) Pursuant to 11 NYCRR 161.2, the next rate revision for exempt markets and for personal lines markets must reflect tort reform savings appropriate to each such market; and

(b) Pursuant to 11 NYCRR 161.9, prescribed forms for future rate revisions (Form 129-B, superseding Circular Letter No. 16 (1984) forms) and 'a' rate submissions (Form 129-C) are also annexed to this Circular Letter.

Please note the following guidelines for the tort reform refilings required on or before September 26, 1986:

(a) This required refiling is not the appropriate place to address rate changes based upon other grounds, and issues apart from reflecting the tort reforms cited in this Circular Letter should be dealt with in separate, subsequent filings;

(b) The refiling should be made on a market-by-market basis for every market that has not been exempted from flex-rating pursuant to 11 NYCRR 161.3;

(c) The rate changes due to tort reform should be appropriate for the particular markets;

(d) Commercial multiple peril package policy rates should include the changes appropriate for the monoline components in the package.

(e) Rate changes may be reflected in each market by filing revised rate pages or, in the alternative, filing a New York Exception Page revised rule.

C. Tort Reform Reductive Impact.

The tort reform measures embodied in the omnibus and companion legislation have been carefully analyzed by the Department, considering all relevant circumstances, including consideration of the cost effects discussed in this Circular Letter. On the basis of the Department's evaluation, experience and expertise, and for the purpose of providing guidance to affected insurers and rate service organizations, the Superintendent sets forth here his best judgment of the likely reductive cost effects reasonably attributable to these tort reform measures.

In the Superintendent's view, these percentage values in terms of the average net reductive effect (ANRE) for each market as a whole, representing the appropriate combined impact of all tort reform measures cited in this Circular Letter, in the stated market are as follows:

	Average Net Reductive Effect
(1) Municipal liability:	-10%
(2) Public School liability:	-7%
(3) Child Care liability:	-7%
(4) Non-Profit Philanthropic & Civic Activity liability:	-7%
(5) Public Officials liability:	-5%
(6) Non-Profit IRC § 501(c)(3) Directors & Officers liability:	-20%
(7) Other Directors & Officers liability:	-3%
(8) Professional liability:	-5%
(9) Other Errors & Omissions liability:	-5%
(10) Recreational liability:	-7%
(11) Other Owners, Landlords & Tenants liability:	-7%
(12) Other Manufacturers and Contractors liability:	-7%
(13) Products liability:	-7%
(14) Completed Operations liability:	-7%
(15) Liquor Law liability:	-12%
(16) Non-Livery Commercial Motor Vehicle Policies:	-5%
(17) Business Owners Policies (BOP):	-5%
(18) Business Auto Policies (BAP):	-5%
(19) High Limits Excess Liability Renewal Policies:	-10%
(20) 'a' Rated Renewal Policies:	-**

(21) All other liability: -7%

** See basic coverage involved for pertinent ANRE.

Accordingly, insurers and rate service organizations may, by citing this Circular Letter as support, without providing further support, refile rates adopting and reflecting these changes. An insurer may also, with appropriate justification, vary percentage rate reductions within a particular market, based upon size of limits, classifications, or type of coverage, provided that those variations sum back to the ANRE value for that market. If an insurer's distribution of risks by class or limits differs substantially from industry averages resulting in different ANRE values, the insurer should detail such differences and the resulting effect.

Different ANRE values than those set forth in this Circular Letter can be incorporated, if the tort reform rate refiling is accompanied by Justification specific to the insurer, particular to the market, and acceptable to the Superintendent pursuant to Section 2344(g)(2) and (3) of the Insurance Law. Thus, any insurer refiling rates that would reflect ANRE values more or less than those set forth here must submit with its refiling full justification, which will receive thorough review in order to determine acceptability to the Superintendent.

Pursuant to 11 NYCRR 161.2(c), refiled rates reflecting tort reform savings take effect October 1, 1986 for new business and December 1, 1986 for renewals. In the event that the Superintendent determines the filed ANRE value for a market to be unacceptable, the insurer may within thirty (30) days after receipt of such determination request a hearing and use rates adjusted for the reductive effect it has filed, provided that it mails or delivers the mandatory endorsements required by 11 NYCRR 161.2(h). If, after any hearing, it is found that the insurer's rates do not appropriately reflect tort reform savings, the insurer will be required by 11 NYCRR 161.2(h) and Section 2344 of the Insurance law to, inter alia, reduce its rates and make appropriate refunds to all affected policyholders retroactive to the respective June 28, 1986, July 30, 1986, and August 1, 1986 effective dates of Chapters 220, 682 and 750 of the Laws of 1986.

The guidance contained in this Circular Letter is based upon present analysis and information; the Department's analysis will be ongoing. Insurers and rate service organizations should take special notice of the 11 NYCRR 161.7(d)(2) requirement to modify their statistical systems for purposes of monitoring and measuring, on an ongoing basis, the impact of these tort reform measures.

If you have any questions, please contact Deputy Superintendent Richard Hsia (212-602-0414) or William VonSeggern (212-602-0360), Supervising Actuary, Property & Casualty Insurance Bureau, in the Department's New York City Office.

Very truly yours,

JAMES P. CORCORAN

SUPERINTENDENT OF INSURANCE

REPORT OF CHANCES IN RATES AND RATING RULES DUE TO TORT REFORMS

This filing should ONLY include rate changes pursuant to 11 NYCRR 161.2 requirements. No other rate or rule changes should be included.

A. Name & Address of Insurer or Rate Service Organization:

B. NAIC Company Code: C. Company File No.:

D. Insurer Federal Employer Identification Number:

E. Non-Exempt Markets Subject to Flex-Rating:

(1) Municipal liability
(2) Public School liability
(3) Child Care liability
(4) Non-Profit Philanthropic & Civic Activity liability
(5) Public Officials liability
(6) Non-Profit IRC § 501(c)(3) Directors & Officers liability
(7) Other Directors & Officers liability
(8) Professional liability
(9) Other Errors & Omissions liability
(10) Recreational liability
(11) Other Owners, Landlords & Tenants liability
(12) Other Manufacturers and Contractors liability
(13) Products liability
(14) Completed Operations liability
(15) Liquor Law liability
(16) Non-Livery Commercial Motor Vehicle Policies
(17) Business Owners Policies (BOP)
(18) Business Auto Policies (BAP)
(19) High Limits Excess Liability Renewal Policies
(20) "a" Rated Renewal Policies
(21) All other liability

Form 129-A Schedule(s) for the Reductive Cost Effects (Per 11 NYCRR 161.2) must be completed for each non-exempt market subject to flex-rating.

I, , a duly authorized officer of the , do hereby affirm that the foregoing information, including all attached exhibits, schedules and other supporting information, is true to the best of my knowledge and belief.

Date: September, 1986

Signature of Authorized Officer

Print Name of Authorized Officer

( )

Title Direct Telephone Number

FORM 129-A SCHEDULE FOR REDUCTIVE COST EFFECTS (Per 11 NYCRR 161.2)
PERTAINING TO REPORT OF CHANGES IN RATES AND RATING RULES DUE TO TORT REFORMS

For each non-exempt market subject to flex-rating, please furnish the following information or material:

1. Name of Insurer or Rate Service Organization (RSO):

2. Market:

3. Policy form (check one): Claims made [] Occurrence [] Both []

* 4. If your company has provided, or is providing, this market fill in the annual written premiums in terms of monoline policies, package policies and total writings for the 1985 calendar year:

	Written Premiums
Monoline policies:	$
Package policies:	$
Total Writings:	$

* 5. Has your company withdrawn from this market at any time in the two-year period preceding June 30, 1986? Yes [] No []

* 6. Has your company entered, or is it planning to enter this market (a market from which your company withdrew or has not previously written)? Yes [] No []

* 7. Does your company have any rates on file with the Insurance Department pertaining to this market? If yes, enter the latest date of such filing. Yes [] No []

Date / /

* 8. The resulting manual rates or rating rules, after the tort reform reductive effects are applied to the current rates, should be attached.

9. Tort reform reductive effect (amount or percentage): Percentage %
Amount $

10. Method of Implementing Tort Reform Reductive Effects:
(a) Change in Base Rate %
(b) Change in Increased Limits Factors %
(c) Other (specify)

11. Basis for Company's Tort Reform Reductions:
Please set forth, or attach, any analysis, information or explanation supporting this filing:
(a) [] Rate Service Organization Advisory. Ref. No.
(b) [] Insurance Dept. Circular Letter No. 15 (1986)
(c) [] Other (explain)

* If this information is not yet available, the asterisked items may be left blank. This same form must then be resubmitted with ALL information by October 15, 1986.

REPORT OF CHANGES IN RATES AND RATING RULES

A separate report must be completed for each affected insurance market. This filing must be fully supported with statistical or other information.

Part I. COMPANY INFORMATION.
A. Name & Address of Insurer or Rate Service Organization:
B. NAIC Company Code C. Company File No.
D. Insurer Federal Employer Identification Number

Part II. MARKET INFORMATION.
A. Market Affected:
Policy form (check one): Claims made [] Occurrence [] Both []
B. Insurance Coverage Within Affected Market:
Line:
Subline:
Class:
Subclass:
C. Is this filing for a new program or does it include rates for which your company does not presently have rates in effect? Yes [] No []
D. Is any portion of this filing subject to flex-rating? If the answer to question D is "No", go on to Part IV. Yes [] No []

Part III. FLEX-RATING INTERROGATORIES.
A. What percentage flex-band applies to this filing?
B. Does this revision result in rate level changes that would exceed the flex-band applicable to this market? Yes* [] No []
C. Does this revision contain any changes in class, territory, increased limits factors or similar rating factors which affect the rates of any individual insured by more than + or - 20% in addition to the overall statewide rate revision? Yes* [] No []
D. Has your company made three (3) or more filings affecting this market in the preceding twelve (12) months? Yes* [] No []

* IMPORTANT

IF THE ANSWER IS "YES" IN RESPONSE TO B, C, OR D IN PART III, THE FILING IS SUBJECT TO THE SUPERINTENDENT'S PRIOR APPROVAL.

FORM FOR "a" RATE SUBMISSIONS

A. Name & Address of Insurer:

B. NAIC Company Code: C. Company File No.:
D. Federal Employer Identification Number:
E. Insurance Market Affected: Umbrella [] Excess [] "a" Rate []
Policy form (check one): Claims made [] Occurrence []
F. Type of Coverage:
G. New Business [] Renewal Business []
H. Name & Address of Insured:

I. Type of Insured's Operation:
J. Policy Effective Dates: From / / To / /

K. Rate Charged:	RATE	EXPOSURE BASE	EXPOSURES	TOTAL
Bodily Injury (BI):		per		
Property Damage (PD):		per		
Building Coverage:		per		
Contents Coverage:		per		
Other (Specify):		per		

per

per

TOTAL PREMIUM $

L. Overall premium (for policies not rated on a per unit of exposure basis):

$

M. Specific basis for rate or premium charged, identifying and explaining each significant element of judgment employed in the 'a' rate development, for this risk:

N. What is the type of reinsurance, and the cost of reinsurance, affecting the rating of this risk?

O. Is this risk subject to flex-rating? Yes[] No []

P. If this policy is a renewal subject to flex-rating, does the current rate or overall premium charge differ from that of the expiring policy by more than + or - 30%? Yes [] No [] If YES, how much? %

IMPORTANT

IF ANSWER IN RESPONSE TO "P" IS "YES", THE FILING IS SUBJECT TO THE SUPERINTENDENT'S PRIOR APPROVAL.

Q. Has the "a" rate premium for this risk been adjusted for the reductive effects of tort reform, as provided in 11 NYCRR 161.2? Yes [] No []

R. What would the "a" rate premium for this risk have been, without adjustment for the reductive effects of tort reform? $

I, , a duly authorized officer of the , do hereby affirm that the foregoing information including all attached exhibits, schedules and other supporting information is true to the best of my knowledge and belief.

Date:

Signature of Authorized Officer

Print Name of Authorized Officer

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Title Direct Telephone Number