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Court of Appeals

of the

State of New York

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

Plaintiffs-Respondents,

– against –

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

Defendants-Appellants.

BRIEF OF *AMICI CURIAE* AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES AND NEW YORK INSURANCE ASSOCIATION, INC., IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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Amici curiae American Insurance Association ("AIA"), Property Casualty Insurers Association of America, National Association of Mutual Insurance Companies and New York Insurance Association, Inc., submit this Brief in connection with the appeal of Defendants-Appellants The State of New York, The New York State Department of Financial Services ("DFS"), Benjamin Lawsky and State of New York Workers' Compensation Board (collectively, "Appellants") from the Decision and Order of the Appellate Division, First Department, dated and entered April 14, 2016, awarding judgment to the Plaintiffs-Respondents in this action.

INTRODUCTION

Appellants correctly report that the insurance industry supported closing the Fund for Reopened Cases (the "Fund") in early 2013—and, specifically, that *amicus* AIA opined that the Fund "add[ed] costs to the system without providing … benefits to injured workers."[1] However, Appellants make two errors about the basis and the terms of the industry's support—errors that also infect the fundamental premises of their case. Clarifying those errors establishes that the Appellate Division's Decision and Order should be affirmed.

[1] Brief for Appellants ("Br.") at 17, 57, *quoting* American Insurance Association, "AIA Endorses Gov. Cuomo's Workers' Compensation Proposals" (Jan. 23, 2013) (the "AIA Release"), available at http://www.aiadc.org/media-center/all-newsreleases/aia-endorses-gov-cuomos-workers-compensation-proposals%20355438 (last accessed October 21, 2016).

First, Appellants misapprehend the "costs" that were the basis for the industry's support. It is Appellants' belief that the Fund added costs to the system by providing a "subsidy to carriers." Appellants contend, that is, that workers' compensation insurers had "contractual obligations" to pay awards on reopened cases *before* the Fund was closed, but that the Fund nevertheless paid the awards for which the insurers were liable. The same faulty contention underlies Appellants' arguments on this appeal, concerning the issue of retroactivity: they maintain that closing the Fund to claims based on past accidents does not "alter carriers' 'pre-existing liability,'" because they believe those carriers *already* had "obligations" to pay for "past injury."

In fact, the Fund was not a "subsidy to carriers," because insurers did not have the obligations Appellants claim. Workers' compensation insurance obligates insurers to pay benefits that are required of employers by the Workers' Compensation Law. That law generally requires employers to "secure compensation" for injured employees—either through insurance policies or through self-insurance—but it also makes the obligation to fund awards for reopened cases an *exception* to that requirement. Insurers had no "preexisting liability" for reopened cases, because (as this Court has explained) the statute which created the Fund "save[d] employers and insurance carriers" from that very liability.

Second, Appellants mistakenly assume that the insurance industry's position on "costs" could justify not only closing the Fund, but also doing so retroactively. They quote AIA's statement in the course of arguing that closing the Fund serves a legitimate policy goal: "lifting unnecessary burdens on insured businesses." In Appellants' view, those "burdens" consisted of having to pay assessments to the Fund for "obligations" that insurers already owed. In fact, that was not the "burden" which insured businesses bore.

The actual way the Fund added costs to the system was through inefficiency: it charged employers assessments which were, in the aggregate, greater than the likely total cost of insurance premiums that could pay for the same coverage. Closing the Fund prospectively will eliminate those added costs. However, closing the Fund to claims based on past accidents (*i.e.*, accidents that occurred when employers' only obligation regarding reopened cases consisted of paying surcharges or assessments to the Fund) will merely shift the cost of reopened cases from the Fund—which was created to bear those costs, and which expressly assumed that obligation—to insurers—who did not contract to bear those costs, and who are forbidden by law from recouping them out of future premiums. The insurance industry's support for closing the Fund obviously did not extend to that unwarranted transfer of private assets for public use.

For both these reasons, the decision of the Appellate Division should be affirmed.

QUESTIONS PRESENTED

1. Did the Fund for Reopened Cases "subsidize" workers' compensation insurance carriers, by paying awards for which those carriers were independently liable?

2. Does closing the Fund for Reopened Cases to claims based on accidents that occurred in years for which employers have already paid surcharges or assessments promote the goal of lessening the burden on employers that awards for those claims represent?

POINT I

APPELLANTS CLOSED THE FUND IN A WAY THAT IMPOSES NEW OBLIGATIONS ON PAST TRANSACTIONS

This case concerns a 2013 amendment to Section 25-a of the Workers' Compensation Law ("WCL"), which closed the Fund for Reopened Cases to claims asserted after January 1, 2014.[2] Before it was closed, the Fund was required to pay awards for workers' compensation claims that were determined to have been made at least seven years after the underlying accident, and at least three years after the last previous payment ("Reopened Claims"). WCL, § 25-a. It funded those awards through assessments and surcharges that were ultimately paid by employers—including insured employers. (*See* Br. at 11-12.)

In this appeal, Appellants contend that workers' compensation insurance carriers independently had a "liability" to pay the same awards—a liability that arose under "their own preexisting insurance contracts." (Br. at 36.)[3] For that reason, they assert that the Fund "functioned as an ongoing subsidy" to workers' compensation insurers. (*Id.* at 52.)[4]

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[2] 2013 N.Y. Laws, ch. 57 (the "2013 Amendment").

[3] *See also* Br. at 23 (carriers had "'preexisting liability' for these cases"); Br. at 34 (closing the Fund requires carriers to "face ... nothing more than carriers' preexisting contractual responsibilities"); Br. at 35 (the 2013 Amendment "preserves carriers' preexisting liability"); Br. at 38 ("The sole effect of the Fund's closure is ... to require carriers to retain their preexisting contractual responsibilities").

[4] *See also* Br. at 3 (the Fund was "effectively subsidizing a portion of carriers' payment obligations"); Br. at 58 (the Fund "primarily benefitted carriers").

Thus, when Appellants cite *amicus* AIA's statement that the Fund "add[ed] costs to the system without providing any benefits to injured workers" (Br. at 57), they suggests that those "costs" consisted of the "subsidy" employers allegedly provided to their insurers, through the surcharges and assessments the employers paid to the Fund. The same suggestion underlies Appellants' assertion that the 2013 Amendment did not operate retroactively, because closing the Fund to older claims supposedly "did not alter carriers' 'preexisting liability.'" (Br. at 33.)

These contentions are incorrect. The Fund did not function as a "subsidy," because insurers did not previously have "liability" for awards involving Reopened Claims, and Appellants' arguments about retroactivity are in error.

A. Employers' Obligations for Reopened Claims

New York's Workers' Compensation Law imposes no-fault liability on employers for workers who are injured, disabled or killed in the course of employment. The law expresses this liability as a requirement that employers "secure compensation" for injured employees. WCL, § 10. Employers may satisfy this statutory obligation to "secure compensation" in only three ways: by purchasing workers' compensation insurance from an authorized insurer; by purchasing a policy from the State Insurance Fund; or by self-insuring. WCL, § 50. Put another way, the insurance which employers are required to purchase

under Section 50 of the WCL covers the obligation to "secure compensation" that is imposed by Section 10.

In 1933, the WCL was amended to add a new provision, Section 25-a, dealing with Reopened Claims. 1933 N.Y. Laws, ch. 384 (the "1933 Amendments"). The new section authorized awards of benefits for Reopened Claims, but only where a claim has been reviewed by at least four members of the Workers' Compensation Board, and approved by at least three of them. The law also created a new Fund for Reopened Cases, and it stated that, "*if* an award is made" in connection with a Reopened Claim, "it shall be against" that Fund. WCL, § 25-a (emphasis added). The Fund paid the awards out of surcharges and assessments collected from insured businesses and other employers. (*See* Br. at 11-12.)

The same 1933 Amendments that added Section 25-a to the WCL, and thereby created the Fund, also amended Section 10—the section that creates employers' compensation obligations.[5] As amended, Section 10 still provided that "[e]very employer ... shall ... secure compensation to his employees ... for ... injury" in the ways that are specified in Section 50. But the 1933 Amendments modified this language, by adding: "except as otherwise provided in section twenty-five-a ... ." L. 1933, c. 384, § 1. Thus, Section 10 now reads:

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[5] *See* Record on Appeal at p. R75. (Citations to the Record on Appeal will be in the form, "R.__.")

> *Every employer ... shall* in accordance with this chapter, *except as otherwise provided in section twenty-five-a hereof, secure compensation to his employees* and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury … .

WCL, § 10 (emphasis added).

These details have a significance the Appellants have overlooked. The Fund was created to guarantee the payment of awards for Reopened Claims, "where the employer had gone out of business, … or the insurance carrier had become insolvent." *Matter of Tipton v. Lang's Bakery*, 250 A.D. 696, 698-99, *aff'd* 275 N.Y. 572 (1937). The 1933 Amendments *could have* pursued that goal by making the Fund nothing more than a backstop to employers and insurers in those limited circumstances. Instead, the amendments went much further. They mandated that *all* awards for Reopened Claims "shall be against" the Fund. At the same time, they added language to make it clear that Reopened Claims are an "except[ion]" to the general obligations that Section 10 imposes on employers and their insurers—*i.e.*, the obligations that had to be covered by workers' compensation insurance policies.

Matter of Tipton, which Appellants cite in their Brief (Br. at 8), confirmed this point. In that case, the Third Department considered the effect of a 1935 amendment to the WCL, which extended the time in which certain claims could be made without falling within the scope of Section 25-a. In deciding that the

amendment could not be applied retroactively, the Appellate Division (in a decision affirmed by this Court) stated expressly that employers have no further obligation to employees after the time limits of Section 25-a have expired:

> [B]y the terms of [Section 25-a] *the rights of the parties hereto became fixed* three years after the last payment of compensation, and seven years after the accident .... Thereupon the employer had *fulfilled all of the terms* of the Workmen's Compensation Law and *met all the obligations* imposed thereby. *The employer then stood relieved of all liability to make further payments* in this case; and the Workmen's Compensation Law no longer applied to it.

250 A.D. at 698 (emphasis added).

The reason the employer "stood relieved of all liability" was that "the liability" for Reopened Claims had been "imposed" on the Fund:

> The purpose of ... § 25-a "is to *impose on the Special Fund the liability for truly 'stale' claims*" when seven years have lapsed since the date of the ... injury and three years have lapsed since the claimant was last compensated.

Matter of Jansch v. Sagamore Children's Fund, 302 A.D.2d 851, 852, (3d Dep't 2003) (emphasis added), *quoting Matter of Gantz v. Wallace & Tiernan Lucidol Div.*, 41 A.D.2d 991, 992 (3d Dep't 1973).

It is instructive to contrast these features of the 1933 Amendments with the corresponding provisions governing New York's Special Disability Fund, which was closed under a law enacted in 2007, and to which Appellants' Brief repeatedly refers. (*See* Br. at 12-15, 56, 67, 71.) The Special Disability Fund (also known as the "Second Injury Fund") encouraged employers to hire workers with pre-existing medical conditions, such as a permanent, partial disability: if the worker suffered a

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new injury or disability, and if that malady was made more severe by the worker's original condition, the employer could obtain reimbursement for benefits it incurred after 260 weeks. WCL, § 15(8)(d).

The statute which created the Special Disability Fund, WCL § 15, also refers to employers' duties under WCL §§ 10 and 50: it provides that reimbursement is available *only* for employers who have "secured the payment of compensation as required under the provisions of section fifty of this chapter." *Id.* After it was enacted in 1922, Section 15 was amended more than 50 times—including once in 1933. Yet, unlike the 1933 Amendments relating to the Fund for Reopened Cases, *none* of the amendments to Section 15 carved out an exception to the employer's obligation to "secure compensation" under Section 10. And Section 15, unlike Section 25-a, states that "[a]ny award under this subdivision shall be made *against the employer or his or her insurance carrier*"— *not* against the fund that might ultimately pay the award. WCL, § 15(8)(f) (emphasis added).

As these contrasts make clear, the 1933 Amendments, while creating the Fund for Reopened Cases, also carefully established that employers' obligation to "secure compensation" through insurance or self-insurance *did not apply* to Reopened Claims. Those claims became an "except[ion]" to that obligation—because employers provided for benefits on all Reopened Claims by the payments they made to the Fund, *rather than* through the insurance arrangements described

in Section 50. Having provided for Reopened Claims by their payments to the Fund, employers "stood relieved of all liability."

B. Insurers Had No "Liability" for Reopened Claims

These facts also establish that, before the 2013 Amendment, workers' compensation *insurers* had no "liability" for awards involving Reopened Claims. New York workers' compensation insurance policies typically provide: "We will pay … the benefits required of [the insured employer] by the workers compensation law."[6] For the reasons just given, the WCL's requirement that employers "secure compensation" for injured workers did not extend to Reopened Claims; to the contrary, employers "stood relieved of all liability" for such claims. *Matter of Tipton*, 250 A.D. at 698. Consequently, Reopened Claims did not fall within the scope of workers' compensation coverage.

Numerous cases have recognized that the 1933 Amendments relieved *both* employers *and* their insurers of liability for cases falling within Section 25-a. Most clearly, in *Matter of Riley v. Aircraft Products Mfg. Corp.*, 40 N.Y.2d 366, 369 (1976), this Court explained (emphasis added):

> The purpose of section 25-a is to save employers *and insurance carriers* from liability … for stale claims … .

[6] New York Compensation Insurance Rating Board, *New York Manual for Workers Compensation & Employers Liability Insurance* (2008), Form WC 00 00 00 C, at p. 1 (available at http://x.nycirb.org/library/) (last accessed October 21, 2016).

Accord Wetterau v. Canada Dry, 124 A.D.3d 1165, 1166 (3d Dep't 2015) (same); *Matter of Zechmann v. Canisteo Volunteer Fire Dept.*, 85 N.Y.2d 747, 752 (1995) ("The primary purpose of section 25-a(1) is to transfer liability … from employers *and carriers* to the Special Fund …") (emphasis added); *Watkins v. Cornwall Press, Inc.*, 270 A.D. 615, 617 (3d Dep't 1946) ("The purpose of … the Special Fund … [is] to … cushion the burden to the employer *and carrier* by *relieving them from a continuing liability*") (emphasis added).

The record in this case establishes these facts in a different way. The New York Compensation Insurance Rating Board ("CIRB") is a non-profit association appointed by one of the Appellants, the Superintendent of the DFS, to collect workers' compensation data. (R. 251-52.) The CIRB uses that data to calculate loss costs, which it submits for approval to the DFS. (R. 254-55.) Insurers' rates (which must also be approved by the DFS) are calculated, in part, by multiplying the CIRB's approved loss costs by carrier-specific "loss cost multipliers." (*id.*; R. 517.)

Before the 2013 Amendment, the loss costs developed by the CIRB did not include any of the benefits that the Fund paid in connection with Reopened Claims. (R. 258.) That is, the cost to carriers of providing workers' compensation insurance was calculated *net of* the cost of benefits paid by the Fund. (*Id.*) As a result, the approved rates charged by workers' compensation insurers did not take

account of any potential losses associated with Reopened Claims. (*Id.*) Following enactment of the 2013 Amendment, the CIRB changed this procedure, and that change caused it to propose a 4.5% increase in loss costs—a proposal that was ultimately approved by the DFS. (R. 354-55, 358-59.)

The omission of Fund payments from loss costs before 2013 would have been clearly erroneous (and, presumably, would not have been approved by the DFS), if, as Appellants now contend, insurers had always been subject to a "liability"—even a contingent liability—for Reopened Claims. Thus, the actions of Appellant DFS in approving the CIRB's loss costs confirm that no such "liability" existed.

Finally, Appellants' observation that the closing of the Fund was supported by *amicus* AIA, an insurance trade association (Br. at 57), is obviously inconsistent with their claim that the Fund "primarily benefitted carriers." (*Id.* at 58.) AIA's position was indeed that the Fund added costs to the system, but *not* by "subsidizing … carriers' payment obligations." (Br. at 3.) The actual basis for AIA's position is discussed in detail in Point II, below.

C. <u>The 2013 Amendment Operates Retroactively</u>

The foregoing facts further establish that the 2013 Amendment operates retroactively. A statute operates retroactively if it "creates a new obligation, imposes a new duty, or attaches a new disability, in respect of transactions or

considerations already past." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994). *Accord Barenboim v. Starbucks Corp.*, 21 N.Y.3d 460, 472 n.4 (2013) (a statute operates retroactively if it "increase[s] a party's liability for past conduct, or impose[s] new duties with respect to transactions already completed").

Appellants deny that the 2013 Amendment imposes new duties on insurers with respect to transactions that have already been completed. They assert that the amendment affects only *new applications* to the Fund, *not* insurance contracts that were written and executed in the past. (Br. at 29-39.) As for those contracts, Appellants contend that the amendment did not alter their terms, but merely "unsettle[ed] carriers' expectations" that their "preexisting liability" for Reopened Cases would continue to be "subsidized" by the Fund. (*Id.* at 39-45.)

Both these arguments rest on the assumption that the Fund was a "subsidy," because benefits for Reopened Claims were already covered by insurers' "contractual obligation[s]." In connection with the first argument, Appellants assert (Br. at 33; emphasis in original):

> [T]he Fund's closure to new applications did not alter carriers' "'preexisting liability.'" ... Rather, the legislation required carriers to *retain their contractual obligation to make benefit payments in reopened cases*, if and when those benefits were required in the future.

(*See also id.* at 38.) In support of the second, they similarly contend (Br. at 40; emphasis added):

> When insurance carriers issued their policies, they may well have hoped that the Fund would remain open forever to *absorb their payment obligations in reopened cases*. But that expectation was simply an assumption that the status quo would continue … .

Because insurers previously had *no* "payment obligations in reopened cases," both arguments fail. As discussed above, the reason premiums for workers' compensation insurance did not previously account for costs related to Reopened Claims was not any unwarranted "assumption" about "the status quo," but, rather, that responsibility for those costs were an express exception to the obligations that insurance was required to cover. That is, carriers did not charge employers to insure Reopened Claims, because employers—having already paid surcharges or assessments to the Fund—were *not* required to provide for those claims through either insurance or self-insurance. The employers had "fulfilled all of the terms of the Workmen's Compensation Law and … stood relieved of all liability." *Matter of Tipton*, 250 A.D. at 698. And this fact "save[d] employers *and insurance carriers* from liability … for stale claims." *Matter of Riley*, 40 N.Y. at 369 (emphasis added).

Furthermore, insurers were not alone in believing their premiums should be determined in this way. The loss costs that generated those premiums—and which deliberately excluded payments for Reopened Claims—were calculated independently by the CIRB and approved by Appellant DFS.

In *U.S. Fidelity & Guaranty Co. v. McKeithen*, 226 F.3d 412 (5th Cir. 2000), the United States Court of Appeals for the Fifth Circuit addressed an argument similar to the one Appellants make here. *McKeithen* challenged a change to the mechanism for funding Louisiana's Second Injury Fund ("SIF"). Although the state did not deny that the change in that case had a retroactive effect on insurers who had left the state's market, it argued that those insurers had had no reasonable expectation that the change would not be imposed. 226 F.3d at 418.

The Court found no merit in that claim (*id.*; emphasis added):

> None of these factors—extensive regulation, SIF's pay-as-you-go status, or other states' policies—made it objectively reasonable to expect that Louisiana would decide to *shift the cost of funding the SIF* … to insurers who … could not recoup the costs of this *forced underwriting. … There was no evidence that the cost of financing the SIF was ever intended to be borne by insurers* … .

Here, too, the shift of financial responsibility for Reopened Claims from the Fund to insurers does more than just "unsettle" supposedly unreasonable expectations; it purports to impose "liability … for stale claims." Because, contrary to Appellants' arguments, no such liability was "preexisting," the statute operates retroactively. *Barenboim v. Starbucks Corp.*, 21 N.Y.3d at 472 n.4.

POINT II

CLOSING THE FUND RETROACTIVELY DOES NOT ADVANCE THE PUBLIC PURPOSE OF THE 2013 AMENDMENT

Although the 2013 Amendment operates retroactively, Appellants argue that it is valid nevertheless, because it serves a legitimate public purpose, and because it does not violate protected rights. (Br. at 53-67.) On the first point, Appellants assert that the 2013 Amendment "lift[ed] unnecessary burdens on insured businesses." (*Id.* at 56.) On the second, they argue again that Reopened Claims *already* fell within "carriers' obligations to pay benefits." (*Id.* at 59.) Because both arguments depend on the erroneous assumption that the Fund was a "subsidy" for insurance carriers, both of them are fatally flawed.

A. Retroactive Application Does Not Benefit Insured Employers

When appellants cite *amicus* AIA's statement that the Fund "add[ed] costs to the system without providing any benefits to injured workers," they do so in support of an argument that the 2013 Amendment "lift[ed] unnecessary burdens on insured businesses." (Br. at 56-57.) But, as discussed, Appellants misapprehend the nature of the costs and burdens at issue. Analysis of the actual costs does not support closing the Fund *retroactively*.

Before the enactment of the 2013 Amendment, the Legislature was justified in concluding that the Fund added costs to the workers' compensation system, because it allocated the risks associated with Reopened Claims less efficiently than

traditional insurance—with the result that many employers unduly subsidized *other employers*. In March 2013, the CIRB projected that closing the Fund would significantly *increase* insurers' loss costs, causing a corresponding increase in the premiums paid by insured businesses. (R. 219.) Yet the CIRB predicted that insured businesses would still *save* money overall, because insurers can cover the cost of reopened cases more efficiently than did the Fund (*id.*; emphasis added):

> The increase in loss costs … will be largely *offset* by a reduced Reopened Case Fund assessment. … [T]his bill is expected to result in *overall net savings* in employers' costs.

That "overall net savings" was a sound reason for replacing one mechanism for covering Reopened Claims (the Fund) with another (workers' compensation insurance) which allocated the risk more efficiently. The 2013 Amendment accomplished that replacement with respect to claims covered by policies issued *after* the effective date of the statute. For this reason, in the statement quoted by Appellants, AIA announced that it supported closing the Fund "to new cases." (*See* AIA Release.)

But the same calculation cannot justify closing the Fund to claims based on accidents that occurred *before* the amendment: contrary to Appellants' assumptions, insurers had no previous liability for Reopened Claims, and so they did not allocate the risk for those claims at all. Equally important, insured businesses have *already* paid surcharges or assessments to cover the cost of

Reopened Claims from accidents that occurred before 2014; forcing insurers to pay those awards would not lift any "burden" from those businesses. Retroactive application of the 2013 Amendment harms insurers, but it does not confer any corresponding benefit on insured businesses.

What retroactive application would actually accomplish is giving the *Government* access to Fund assets, by forcing insurers to bear the costs those assets were supposed to cover. It compels what the *McKeithen* court called "a transfer of [insurers'] assets to … third parties for public use." 226 F.3d at 417. Even Appellants do not claim such a compelled transfer could be a "significant and legitimate public purpose."[7]

It is also important to observe that the Fund could easily have been closed in a manner that would not impose these retroactive burdens on insurers. The closing of the Special Disability Fund effectively increased the financial obligations of employers and insurers, but, unlike the 2013 Amendment, it did *not* increase insurers' obligations under any policies that had already been issued. The Fund was closed to *most* claims as of July 1, 2007. WCL, § 15(8)(h)(2)(a). But it remained open to new claims that were based on accidents which had occurred

[7] The most Appellants can say on this subject appears in a footnote (Br. at 45 n.10) about new employers. Absent retroactive application, Appellants contend, new employers might subsidize older ones, by paying *both* higher insurance premiums *and* whatever new assessments might be needed to make up for future shortfalls in the Fund. In making that argument, Appellants implicitly concede that *most* employers will receive *no* benefit from the retroactive application of the 2013 Amendment. And Appellants have proffered no evidence that the Legislature gave any consideration to this argument when the 2013 Amendment was enacted.

before that date for another three years, until July 1, 2010. *Id.* By that time, any claims based on accidents that had occurred before July 2007 would have been time-barred. WCL, § 28. Thus, the fund was closed in a way that affected only those insurance policies which were written *after* the 2007 amendment to Section 15(8) had been enacted.

In sum, *retroactive* application of the 2013 Amendment does not achieve any of the "public purposes" Appellants ascribe to it, and it is not necessary to implement the portions of the amendment which do pursue those goals. AIA, together with the broader insurance industry, supported closing the Fund "to new cases." (*See* AIA Release.) Its support did not extend to a "transfer of [insurers'] assets … for public purposes."

B. Retroactivity Impairs Insurers' Constitutional Rights

Appellants deny that a retroactive closing of the Fund affects insurers' rights under the Constitution's Contract and Takings Clauses (Br. at 58-67), but, once again, their arguments incorrectly assume that insurers had a "preexisting liability" to pay benefits for Reopened Claims.

According to the Appellants, the Contract Clause is not implicated in this case, because "the Fund's closure to new applications did not … impose any new contractual terms on the parties to insurance contracts." (Br. at 61.) In fact, before the 2013 Amendment, those contracts did not include any obligation to pay awards

on Reopened Claims that were based on accidents that occurred in the years the policies were issued. Section 25-a "save[d] employers and insurance carriers from liability" for such claims, *Matter of Riley*, 40 N.Y.2d at 369, by "impos[ing]" that liability on the Fund. *Matter of Jansch*, 302 A.D.2d at 852. (*See* Points I.A. and I.B., *supra*.) Because the 2013 Amendment would retroactively impose that obligation on insurers, it violates the Contract Clause.[8]

Cases interpreting the Takings Clause consider whether a challenged regulation interferes with the plaintiff's "reasonable investment backed expectations." *E.g. Eastern Enters. v. Apfel*, 524 U.S. 498, 522 (1998). Appellants deny that the 2013 Amendment interferes with the "reasonable investment backed expectations" of insurers, because, they say, insurers "could have foreseen that the Fund's skyrocketing costs would compel the Legislature to alter the terms of the Fund, particularly in light of the Legislature's similar closure of the Special Disability Fund only six years earlier." (Br. at 67.)

As noted above, this is the same Takings Clause argument the defendants made in *McKeithen*, and it fails for the same reason: it is not "reasonable" to expect the government to impose new obligations on existing contracts (226 F.3d at 418):

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[8] Appellants purport to distinguish *Health Ins. Assoc. of America v. Harnett*, 44 N.Y.2d 302 (1978), but solely on the basis of their assertion that the 2013 Amendment imposes no new contractual obligations. (*See* Br. at 61.) Because that assertion is incorrect, the reasoning of *Harnett* applies with equal force in this case.

> [It is not] objectively reasonable to expect that Louisiana would decide to shift the cost of funding the [Louisiana Second Injury Fund] … to insurers … . There was no evidence that the cost of financing the SIF was ever intended to be borne by insurers … .

The reasoning applies with especial force here, in light of the fact that New York's Special Disability Fund was closed in 2007, in a manner that carefully *avoided* shifting costs to insurers.

For these reasons, Appellants' Constitutional arguments are in error.

CONCLUSION

For all of the foregoing reasons, *amici* American Insurance Association, Property Casualty Insurers Association of America, National Association of Mutual Insurance Companies and New York Insurance Association, Inc., respectfully submit that the Decision and Order of the Appellate Division should be affirmed.

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Dated: October 21, 2016

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