To Be Argued By: SETH P. WAXMAN
Time Requested: 20 Minutes

APL-2016-00100
New York County Clerk's Index No. 156923/13

Court of Appeals
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 FOR PLAINTIFFS-RESPONDENTS

CYNTHIA E. NEIDL
GREENBERG TRAURIG, LLP
54 State Street
6th Floor
Albany, NY 12207
Tel.: (518) 689-1400
Fax: (518) 689-1499

SETH P. WAXMAN
DAVID M. LEHN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
Tel.: (202) 663-6000
Fax: (202) 663-6363

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
Tel.: (212) 230-8800
Fax: (212) 230-8888

October 24, 2016

Attorneys for Plaintiffs-Respondents

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f), Plaintiffs-Respondents disclose the following. All Plaintiffs-Respondents are wholly owned indirect subsidiaries of Liberty Mutual Holding Company, Inc. The subsidiaries and affiliates of Liberty Mutual Holding Company, Inc. are:

600 Holladay Limited Partnership

All Set Works, Inc.

Ambco Capital Corporation

America First Insurance Company

America First Lloyd's Insurance Company

American Economy Insurance Company

American Fire and Casualty Company

American States Insurance Company

American States Insurance Company of Texas

American States Lloyds Insurance Company

American States Preferred Insurance Company

Arlington Insurance Company, Ltd

Avomark Insurance Agency, LLC

Barco Assignments Ltd

Barrier Ridge LLC

Berkeley Holding Company Associates, Inc.

Berkeley Management Corporation

Berkeley/Columbus I II LLC

Berkeley/Columbus II LLC

Berkeley/Columbus Real Estate LLC

Berkeley/St. James II LLC

Berkeley/St. James Real Estate LLC

Brooke Drilling, LLC

Camcoroil Sands Fund 2, L.P.

Capitol Court Corporation

Colorado Casualty Insurance Company

Compana De Seguros Generales Penta Security S.A.

Consolidated Insurance Company

Diversified Settlements, Inc.

Emerald City Insurance Agency, Inc.

Employers Insurance Company of Wausau

Excelsior Insurance Company

F.B. Beattie & Co., Inc.

First Liberty Insurance Corporation

First National Insurance Company of America

First State Agency, Inc.

Fundacion Seguros Caracas

General America Corporation

General America Corporation of Texas

General Insurance Company of America

Georgia Tax Credit Fund-LM L.P.

Golden Eagle Insurance Corporation

Gulf States AIF, Inc.

Hawkeye-Security Insurance Company

Helmsman Insurance Agency, LLC

Helmsman Management Services LLC

Hughes Insurance Services Limited

Indiana Insurance Company Liberty International Underwriting Services Limited

Indiana Se Guros S/A

Insurance Company of Illinois

Inverora Centro Comercial, C.A.

Inversora Segucar Financiadora Deprimas, C.A.

Kellen Holdings, LLC

Kellen-Wildcat Holdings, LLC

Keter Consulting LLC

Kritaya Tun Company Limited

La Libert Ad Compana De Inversiones Y Servicios S.A.S.

Lexco Limited

Li (Columbia) Holdings Ltd.

Liberty Assignment Corporation

Liberty Brasil Investiments Os E Participaçöes Ltda.

Liberty China LLC

Liberty City State Holdings PTE Ltd

Liberty Compana DE Se Guros Generales S.A.

Liberty Contractor S Retro Group

Liberty Corporate Capital Limited

Liberty Corporate Services LLC

Liberty County Mutual Insurance Company

Liberty Data Analytics Private Limited

Liberty Energy Canada, Inc.

Liberty Energy Holdings, LLC

Liberty Energy, LLC

Liberty Financial Services, Inc.

Liberty Hospitality Group, Inc.

Liberty Information Technology Limited

Liberty Insurance (JSC)

Liberty Insurance Berhad

Liberty Insurance Corporation

Liberty Insurance Holdings, Inc.

Liberty Insurance Limited

Liberty Insurance Limited

Liberty Insurance Pt Eltd

Liberty International Amsterdam Holdings C.V.

Liberty International Asia IT PT E. Ltd.

Liberty International Asia Pacific Holdings LLC

Liberty International Brasil LTDA.

Liberty International Chle S.A.

Liberty International Europe Inc.

Liberty International Europe IT Spolka Zograniczona, Odpowiedzialnds CIA

Liberty International European Holdings B.V.

Liberty International European Holdings Cooperatieve U.A.

Liberty International European Holdings, S.L.

Liberty International Insurance Limited

Liberty International Latin America Holdings, LLC

Liberty International Latin America IT LLC

Liberty International Netherlands Holdings C.V.

Liberty International Netherlands V.O.F.

Liberty International Underwriters PTE Ltd.

Liberty International US Dutcheen LLC

Liberty International Us European Holdings LLC

Liberty International US Netherlands LLC

Liberty Life Assurance Company of Boston

Liberty Life Holdings Inc.

Liberty Lloyds of Texas Insurance Company

Liberty Management Services, Inc.

Liberty Managing Agency Limited

Liberty Metals & Mining Canadian Coal Royalties Ltd.

Liberty Metals & Mining Canadian Genesee Royalties Ltd.

Liberty Metals & Mining Canadian Royalties Ltd.

Liberty Metals & Mining GPC Canadian Royalty Holdings Ltd.

Liberty Metals & Mining Holdings, LLC

Liberty Mexico Holdings Inc.

Liberty Mexico Holdings S.A. Dec. V.

Liberty Mutual Agency Corporation

Liberty Mutual Auto and Home Services LLC

Liberty Mutual Captive Holdings LLC

Liberty Mutual Equity LLC

Liberty Mutual Fire Insurance Company

Liberty Mutual Foundation Inc.

Liberty Mutual Group Asset Management Inc.

Liberty Mutual Group Inc.

Liberty Mutual Holdings (Bermuda) Ltd.

Liberty Mutual Insurance Company

Liberty Mutual Insurance Company – PAC

Liberty Mutual Insurance Europe Limited

Liberty Mutual Investment Advisors LLC

Liberty Mutual Investment Holdings LLC

Liberty Mutual Ireland Investment Holdings Limited

Liberty Mutual Managed Care LLC

Liberty Mutual Management (Bermuda) Ltd.

Liberty Mutual Management (South Carolina) LLC

Liberty Mutual Management (Vermont) LLC

Liberty Mutual Mid-Atlantic Insurance Company

Liberty Mutual Opportunistic Investments LLC

Liberty Mutual Personal Insurance Company

Liberty Mutual Personal Insurance Ventures LLC

Liberty Mutual Retirement Plan Master Trust

Liberty Mutual Scholarship Foundation

Liberty Northwest Insurance Corporation

Liberty Parkwood Crossing LLC

Liberty Personal Insurance Company

Liberty Re (Bermuda) Ltd

Liberty Real Estate Holdings LLC

Liberty Risk Services De Venezuela, S.A.

Liberty Seguros De Vi Da S.A.

Liberty Seguros S.A.

Liberty Seguros S.A.

Liberty Seguros S/A

Liberty Seguros, Compana De Seguros Y Rea Seguros, S.A.

Liberty Seguros, S.A.

Liberty SI Gorta Anonim Sirketi

Liberty Spain Holdings LLC

Liberty Specialty Market SMENA Limited

Liberty Specialty Markets Limited

Liberty Sponsored Insurance (Vermont) Inc.

Liberty Structured Holdings LLC

Liberty Syndicate Services Limited

Liberty UK and Europe Holdings Limited

Liberty Videocon General Insurance Company Limited

Liberty/Hoffman Estates LLC

Liberty/Kent LLC

Liberty/Milwaukee LLC

Liberty/Warrenville LLC

Liberty-USA Corporation

Lila (Colombia) Holdings Ltd.

LIU Specialty Insurance Agency Inc.

LLIC S.a.r.l.

LM General Insurance Company

LM Insurance Corporation

LM Property and Casualty Insurance Company

LMG Chiles PA

LMG Film Productions. LLC

LMG Holland C.V. (Netherlands) Bermuda Reg # 48083

LMG Holland LLC (DE) Bermuda Reg # 48082

LMG Insurance Public Company Limited

LMHC Massachusetts Holdings Inc.

LSH Real Estate Holdings LLC

Mid-American Fire & Casualty Company

Midwestern Indemnity Company

Montgomery Mutual Insurance Company

National Corporation LIH-RE of America Corporation

National Insurance Association

Netherlands Insurance Company

North Pacific Insurance Company

Ocasco Budget, Inc.

OCI Printing, Inc.

Ohio Casualty Corporation

Ohio Casualty Insurance Company

Ohio Security Insurance Company

Open Seas Solutions, Inc.

Oregon Automobile Insurance Company

Peerless Indemnity Insurance Company

Peerless Insurance Company

Pilot Insurance Services, Inc.

Raymond James LM Georgia Tax Credit Fund L.L.C.

Raymond James LM Massachusetts Tax Credit Fund L.L.C.

RBC State Credit Fund LLC

Rianoc Research Corporation

RJTCF-37 Georgia Tax Credit Fund L.L.C.

RJTCF-38 Georgia Tax Credit Fund L.L.C.

S.C. Bellevue, Inc.

Safecare Company, Inc.

Safeco Corporation

Safeco General Agency, Inc.

Safeco Insurance Company of America

Safeco Insurance Company of Illinois

Safeco Insurance Company of Indiana

Safeco Insurance Company of Oregon

Safeco Lloyds Insurance Company

Safeco National Insurance Company

Safeco Properties, Inc.

Safeco Surplus Lines Insurance Company

San Diego Insurance Company

Scit, Inc.

Seguros Caracasde Liberty Mutual C.A.

Servihogar Gestion 24 Horas, S.L.

Solaria Labs, LLC

St. James Insurance Company Ltd.

St. James/Arlington LLC

St. James/Arlington Management LLC

St. James/Arlington Real Estate Limited Partnership

Stuart Insurance Group, Ltd.

Tara Energy Investments, LLC

Tun Ka Oklai Co., Ltd.

Twee US Dutch LLC

Vermilion Cliffs Partners, LLC

W.E. McCluskey (Insurance Brokers) Limited

Wausau Business Insurance Company

Wausau General Insurance Company

Wausau Insurance Company (U.K.) Limited

Wausau Underwriters Insurance Company

West American Insurance Company

Wildcat Midstream Holdings II LLC

Wildcatfield Services, LLC

Winmar Company, Inc.

Winmar of the Desert, Inc.

Winmar Oregon, Inc.

Winmar-Metro, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page(s)

CONSTITUTIONAL AND STATUTORY PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

New York's Workers' Compensation Law ("WCL") requires employers to compensate their employees for work-related injuries. Many employers satisfy that obligation by obtaining workers' compensation insurance from private carriers. Because injuries can have long-delayed consequences, workers' compensation insurance covers all claims arising out of injuries suffered during the policy period, even if the claim arises years or decades after the injury was suffered. In fact, workers' compensation cases can "reopen" after being closed for years, where the employee suffers additional harm—perhaps a worsened condition—long after it had appeared that the injury had been fully compensated.

In 1933, the Legislature enacted Section 25-a of the WCL, establishing a fund to cover workers' compensation cases that had been closed for a statutorily defined period but were reopened upon the occurrence of some new or additional harm arising out of the original injury (the "Fund"). Liability in such reopened cases was, by statute, the exclusive responsibility of the Fund, not the carrier. The Fund was financed through assessments charged to carriers but passed through to employers, separate from their premiums.

All participants in the workers' compensation system structured their conduct accordingly. Carriers adopted policy language that defined their coverage by reference to the law in effect during the policy period, which (as noted)

assigned liability for Section 25-a claims to the Fund, not carriers. Premium rates—which are designed to support all expected liability under the policy—were computed by a State-designated entity (the New York Compensation Insurance Rating Board, or "NYCIRB") based on the Fund's (not the carriers') responsibility for Section 25-a claims. Both the policies and the premium rates were approved by the New York State Department of Financial Services ("DFS"). And employers paid carriers those premiums in exchange for the defined coverage.

That scheme remained undisturbed in relevant part until 2013, when the Legislature amended the WCL to close the Fund to cases that are reopened after 2013—regardless of whether the policy under which the reopened case arose was issued before or after the amendment's enactment. At the time, the Governor explained that closing the Fund would "save" employers hundreds of millions of dollars in assessments per year while eliminating a "windfall" for carriers. His premise was that the premiums historically charged by carriers had covered Section 25-a liability even though that liability was the Fund's responsibility .

That premise was completely and totally wrong. As explained, the State-approved premiums that carriers had been charging before the amendment were specifically set based on the assumption that carriers had no liability for Section 25-a claims because such claims were, by law, the Fund's exclusive responsibility.

The financial consequences of the State's inexplicable error have been staggering for workers' compensation insurance carriers. As a result of the amendment, carriers became liable for Section 25-a claims not only under future policies, but also past policies—those whose State-approved premiums were already paid and could not be supplemented, whose State-approved terms were already fixed and agreed to by carriers and employers, and which could not be terminated. NYCIRB thus determined that the amendment imposed a new, "unfunded liability" under preexisting policies that would cost carriers $1.1 to $1.6 billion. To cover their share of this unfunded liability, Plaintiffs—State-approved workers' compensation insurance carriers—had to increase their loss reserves by $62 million.

Plaintiffs challenged the amendment in Supreme Court on the ground that its retroactive application to policies already written between carriers and their employer-insureds violates the United States and New York constitutions. Specifically, Plaintiffs contended that the imposition of a new, unanticipated, substantial, and unfunded liability, which the State sought to justify only by a patently erroneous claim that the amendment prevented a windfall to carriers, violated the Contracts, Takings, and Due Process Clauses of the U.S. Constitution, as well as analogous provisions of the New York constitution. The Appellate

Division agreed, holding in a unanimous opinion that the statute was unconstitutional as retroactively applied.

The State reprises its arguments here, defending the amendment as a lawful exercise of its power to adjust *prospectively* the allocation of benefits and burdens within the highly regulated field of workers' compensation insurance. But the State's contention that the amendment's effect is solely prospective because it applies only to cases reopened in the future is, as the Supreme Court of the United States said recently of a similar argument advanced by the federal government, "disingenuous." The amendment imposed a new liability—responsibility for Section 25-a claims—on carriers under preexisting policies. That is the epitome of a *retroactive* law.

Retroactivity demands special attention under the U.S. and State constitutions. Unlike other retroactive amendments to the WCL that have been upheld by New York courts, the amendment here does not impose new liability on carriers to expand coverage and protection for injured workers; workers will continue to be compensated to the same extent they were before the amendment. Rather, the amendment's only real effect is to transfer the cost of coverage for Section 25-a claims from employers to carriers. There is no legitimate justification for that transfer. The only explanation the State has ever offered—to save employers their assessments and eliminate the windfall obtained by carriers—was

based on the unreasonably mistaken belief that the premiums carriers charged already covered Section 25-a liability. The State has never explained, much less defended, the Legislature's foundational error, nor could it. Indeed, DFS has approved rate increases for future policies specifically to account for carriers' new liability for Section 25-a claims under the amendment.

The State's insistent refrain is that the Legislature must have discretion to adjust the benefits and burdens of the workers' compensation scheme. That is true so far as it goes, but there are important constitutional limitations on the Legislature's exercise of its policy-making judgment, and those limitations were transgressed here. This Court has long been cautious about retroactive legislation, and has carefully policed the line between permissible and impermissible adjustments. *See, e.g.*, *Health Ins. Ass'n v. Harnett*, 44 N.Y.2d 302, 306, 312-313 (1978) (holding that the Legislature "may not constitutionally require the addition of [maternity care] coverage" where carriers did not have the choice of increasing premiums or terminating the policy). The amendment closing the Fund to new cases—a wholly unexpected development after the Fund spent 80 years as a central element of the workers' compensation scheme—countermanded express provisions of State-approved insurance contracts, derogated the economic bargain at the heart of State-approved workers' compensation policies, and was justified exclusively

by a manifestly incorrect statement of purpose and effect. It thus clearly falls on the wrong side of that line. The judgment should be affirmed.

QUESTION PRESENTED

Whether the Legislature's closure of the Fund to future reopened workers' compensation cases under preexisting insurance policies violates (a) the Contracts Clause of the U.S. Constitution, (b) the Takings Clauses of the U.S. and New York constitutions, or (c) the Due Process Clauses of the U.S. and New York constitutions, where the law in effect at the time the policies were issued mandated that the Fund would have exclusive responsibility for such cases, where the policies defined the scope of coverage by reference to that law, and where the premium rates calculated by a State-designated entity, approved by DFS, charged by carriers, and paid by insureds were premised on the Fund having continuing exclusive responsibility for such cases.

STATEMENT OF THE CASE

A. Workers' Compensation Insurance

The WCL requires employers to "secure compensation to [their] employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment," WCL § 10(1), including "pay[ing] for medical treatment, procedures, devices, tests and services … 'for such period as the nature of the injury or the process of recovery may require,'" *Matter of Kigin v.*

State of N.Y. Workers' Compensation Bd., 109 A.D.3d 299, 306 (3d Dep't 2013) (quoting WCL § 13(a)), *aff'd*, 24 N.Y.3d 459 (2014). "Except in the limited circumstances where an employer can become self-insured, employers generally purchase workers' compensation insurance policies to guarantee performance of this obligation." *Commissioners of State Ins. Fund v. Photocircuits Corp.*, 20 A.D.3d 173, 176 (1st Dep't 2005); *see* WCL § 50. Employers can purchase workers' compensation insurance policies from a State-approved private carrier or obtain coverage from the New York State Insurance Fund. *See Photocircuits*, 20 A.D.3d at 176; WCL § 50(1), (2); *see also* Record on Appeal ("R.") 53.

Where an employer elects to purchase private insurnace, it enters a contract with the insurance carrier providing that in exchange for a premium, the carrier assumes the employer's risk of liability for paying the benefits required by the WCL to workers injured during the policy term (typically one year). R.53, 55, 253. Whereas some types of insurance provide claims-made coverage, which obligates the carrier to pay only claims made during the policy term, workers' compensation insurance is occurrence-based, "meaning that [the policies] provide coverage for accidents that occur during the policy term regardless of when the claim is made." R.534; *see also St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 534 n.3 (1978) (explaining difference between occurrence-based and claims-based insurance policies). This occurrence-based structure means that

carriers' "liability may extend over the entire remaining life of the insured employee," *N.Y. Workers' Compensation Handbook* § 1.08(1) (Matthew Bender 2016), with claims often arising "years after the original injury," R.67—colloquially referred to as a "long tail" of liability, *id.*; *see also* R.351.

Because a workers' compensation insurance carrier has occurrence-based obligations but collects premiums from its employer-insureds only during the policy term, workers' compensation premiums must account for the entire long tail of liability—that is, they must cover all projected claim costs associated with any accidents and injuries that occur during the policy period, regardless of when claims are filed and ultimately resolved. R.253, 517. For example, if a worker is injured in 2007, the premium collected from her employer for its 2007 workers' compensation policy must be sufficient to cover resulting medical expenses arising not only in 2007 but also in, say, 2010 or 2016. R.253. If it turns out that liability under the policy exceeds the premium collected, the carrier will have no mechanism to recoup the shortfall and so will bear the cost of the additional unanticipated liability. R.212, 253, 256, 517, 522-524.

The State plays an active role in superintending the rate-making process for workers' compensation insurance to ensure that premiums charged by carriers are sufficient to cover all projected liabilities under the policies (while affording carriers a reasonable profit). Premiums are a function of two factors: loss costs

(*i.e.*, medical expenses and lost wages carriers pay through the policies they have written), and a loss-cost multiplier, representing an individual carrier's expenses and profits. R.251, 254-255, 517. Loss costs are calculated by NYCIRB—the State-designated entity responsible for developing workers' compensation premium rates—and approved by DFS. R.55, 251, 254-255, 517. DFS also approves each individual carrier's loss-cost multiplier. R.517. Carriers may charge their employer-insureds only DFS-approved premium rates. R.254, 519.

Loss cost levels are calculated annually in advance of the upcoming policy period in which the premium will be charged, by reference to the WCL as it is then and as it will be during that upcoming period. R.254. NYCIRB annually determines whether to adjust the loss cost level "by comparing actuarially projected losses for the upcoming policy period to the current loss cost level." R.518. The calculation of actuarially projected losses is based on data reported by insurance carriers reflecting all their paid losses and estimated reserves for future payments on open claims. R.255, 518-519. As a result, any unanticipated future changes to the carriers' liability for past injuries may cause a shortfall (or surplus) in premiums. R.55-56, 254. The New York Legislature is no doubt mindful of that fact: For example, in conjunction with its 1996 enactment of a law to reduce employer liability for past injuries, which would cause a surplus in reserves, the Legislature imposed a "special assessment" on carriers to be deposited in the

general fund of the State. *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 587-588 (1998).

The State likewise superintends the terms of the insurance contracts written between workers' compensation carriers and their employer-insureds. The contracts are filed with and approved by DFS. R.253, 257. They also explicitly define the scope of coverage by reference to the WCL in force during the policy period: carriers "will pay … the benefits required of [the employer] by the workers compensation law," which is defined to mean the workers' compensation law and "any amendments to that law which are in effect during the policy period." R.504.

B. The Section 25-a Fund

A workers' compensation case is closed when "no further proceedings [are] foreseen" for a given injury. *Casey v. Hinkle Iron Works*, 299 N.Y. 382, 385 (1949). Sometimes, however, an employee may require unforeseen additional medical treatment or compensation related to the original injury in a closed case—for example, there may be "a recurrence of malady, a progress in disease not anticipated, or a pathological development not previously prognosticated, arising out of the injury"—and so the case must be reopened for determination of new benefits. *Riley v. Aircraft Prods. Mfg. Corp.*, 40 N.Y.2d 366, 369 (1976); *see* R.37. Recognizing that employers and carriers would have difficulty ascertaining their future liability and establishing reserves for cases that reopen after being

closed for "extended periods," the New York Legislature in 1933 established the Fund to "save … insurance carriers from liability" for such reopened cases. *Riley*, 40 N.Y.2d at 369; R.105-106.

Between its enactment in 1933 and its amendment in 2013, WCL § 25-a(1) provided that, when a new application for benefits is made in a closed case "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," any resulting award "shall be against the special fund provided by this section." By statute, the Fund has been financed by assessments charged to insurance carriers (and self-insured employers), which the carriers passed through to their employer-insureds as a charge separate from the premiums. R.56, 517.

As this Court has observed, the "statutory scheme contemplates that the … Fund will step into the shoes of the insurance carrier and succeed to its rights and responsibilities." *Matter of De Mayo v. Rensselaer Polytech Inst.*, 74 N.Y.2d 459, 462-463 (1989). If a new claim in a closed case meets the timing requirements of Section 25-a, the "Fund's liability [is] triggered, as a matter of law," *Matter of Goutremout v. Advance Auto Parts*, 134 A.D.3d 1194, 1194-1195 (3d Dep't 2015) (quotation marks omitted), and the Workers' Compensation Board ("WCB")—which oversees the State workers' compensation scheme and adjudicates coverage disputes—may "not as a matter of law impose liability on the employer or its

insurance carrier," *Berlinski v. Congregation Emanuel of New York*, 29 A.D.2d 1036, 1037 (3d Dep't 1968). Rather, liability rests exclusively with the Fund; "the insurance carrier has no further interest in payment of the claim." *De Mayo*, 74 N.Y.2d at 462.

For eight decades, the Fund was a persistent feature of the State's workers' compensation system, and all participants in the system predicated their conduct on the Fund's continuing responsibility for Section 25-a claims. Accordingly, the State-approved workers' compensation insurance contracts between carriers and employer-insureds not only specified that carriers would pay all benefits required by the WCL—which did not include Section 25-a claims—but also expressly provided that the "insurance conforms to the parts of the [WCL] that apply to … payments into … special funds, and assessments payable by [the carrier] under" the WCL, affirming that liability for Section 25-a claims would be borne by the Fund rather than the carriers. *Supra* pp.10; R.505. Similarly, as NYCIRB explained, the premiums calculated by NYCIRB, approved by DFS, charged by carriers, and paid by their employer-insureds under policies written before the Fund's closure "did not incorporate th[e] possibility" that claims "subject to the provisions of Section 25-A … would remain the responsibility of the carrier," but

rather "assumed such costs would be borne by the Fund." R.220.[1] Moreover, carriers were "required" by applicable actuarial principles to account for the Fund's responsibility for Section 25-a claims when establishing "loss reserves"—money set aside to pay for claims related to accidents and injuries that have already occurred. R.209-212.

C. The Closure Of The Fund

In 2012, the Governor proposed to amend the WCL to close the Fund to cases reopened on or after January 1, 2014 ("Amendment"). R.401. On March 29, 2013, the Legislature enacted the Amendment as proposed. *See* WCL § 25-a(1-a) (codifying 2013 McKinney's Session Law News of N.Y. Ch. 57, S. 2607-D, part GG).[2] Thus, the Legislature provided a nine-month "grace period" (between March 2013 and January 2014) in which the Fund would remain open to pay benefits and manage newly reopened cases that satisfied Section 25-a's

---

[1] In the rate-making process described above, loss cost data reported by carriers did not include liability for Section 25-a claims because they had no such liability, and NYCIRB calculated future loss cost levels based on that data and on the assumption that the Fund would be responsible for future Section 25-a claims, consistent with the statutory scheme at the time. R.55-56, 255-256, 258, 306, 520-521.

[2] The Amendment provides: "No application by a self-insured employer or an insurance carrier for transfer of liability of a claim to the fund for reopened cases shall be accepted by the [WCB] on or after the first day of January, two thousand fourteen except that the [WCB] may make a finding after such date pursuant to section twenty-three of this article upon a timely application for review." WCL § 25-a(1-a).

requirements. R.259. But because of the Amendment, liability for Section 25-a claims reopened after 2013—regardless of when the injury occurred—would be borne by insurance carriers, and not the Fund. *Id*.

The rationale for the Amendment was laid out in the Governor's memorandum supporting his proposal: to "save" employers "hundreds of millions of dollars in assessments per year" while "prevent[ing] a windfall for … carriers." R.401. The memorandum stated that, whereas "[t]he original intent of the Fund was to provide carriers relief in a small number of cases where liability unexpectedly arises after a case has been closed for many years[,] … carriers do not need this relief because the premiums they have charged already cover this liability." *Id*.

That statement—the only contemporaneous one offered by the State in support of the Amendment—was demonstrably false. As detailed above, the workers' compensation premiums charged in New York State, as calculated by NYCIRB and approved by DFS, did not in any way compensate carriers for Section 25-a claims. Instead, premium rates were determined explicitly on the premise that the Fund bore exclusive liability for such reopened claims. Consequently, the effect of the Amendment was not to recover a windfall from workers' compensation carriers, but rather to impose substantial uncompensated liability and risk on them, as evidenced by two undisputed record facts.

First, for policies effective on or after October 1, 2013, DFS approved NYCIRB's proposal to increase loss cost levels by 4.5% explicitly to account for the closure of the Fund. R.255-256, 353-356, 463, 520-521, 523. That increase, which covers only the projected liabilities arising under policies issued on or after October 1, 2013, not liabilities arising under prior policies, demonstrates that the loss costs—and thus the premium rates approved by the State, charged by the insurance carriers, and paid by their employer-insureds—before that date did not cover liability for claims within the Fund's responsibility and assumed the Fund's continued responsibility for such claims. R.256, 521-523. If prior premiums had been computed to cover Section 25-a liability, there would have been no reason for DFS to increase future premiums to account for the Fund's closure.[3]

Second, once the Fund was scheduled to close to reopened cases as of January 1, 2014, carriers had to increase their loss reserves to account for claims under pre-Amendment policies that would reopen after that date and would otherwise have been paid by the Fund. R.211-212. Plaintiffs calculated and booked a $62 million increase in their loss reserves attributable to the elimination of the Fund. R.213-216, 512. In substance, that reserve increase means that, had

---

[3] In 2016, DFS approved another 9.3% increase in loss cost, of which 6.2% was attributed to the closure of the Fund. *See* Opinion & Decision, *In the Matter of Workers' Compensation Insurance Rate Application of the NYCIRB* 1-2, 8, 12, *at* http://www.dfs.ny.gov/insurance/wc/wc_od_loss_cost_2016.pdf.

responsibility for Section 25-a claims that were to reopen after 2013 been assigned to carriers all along, the premiums charged and paid under policies issued before the Amendment's enactment should have been set at least $62 million higher than they actually were. R.523. That figure was corroborated by NYCIRB's own analysis of the "unfunded liability" occasioned by the elimination of the Fund for the entire market, of which Plaintiffs share is roughly 7.1% to 10.0%. R.215, 220-221. NYCIRB determined that the Amendment's "[r]etrospective impact" on carriers statewide for "claims on current and past policies which were closed, may be reopened in the future, and would have been subject to the provisions of Section 25-[a]" but for the Amendment would be between $1.1 billion and $1.6 billion. R.220-221.

D. Procedural History

1. Proceedings in Supreme Court, New York County

Plaintiffs, insurance carriers authorized to provide workers' compensation insurance to New York employers, filed suit in July 2013 to declare the Amendment unconstitutional as applied to claims arising under policies issued before 2014, and to permanently enjoin the State from enforcing the Amendment with respect to such claims. R.29. Plaintiffs argued that the Amendment violated the Contracts Clause of the U.S. Constitution, as well as the Due Process and Takings Clauses of the U.S. and New York constitutions. R.42-47.

The State moved to dismiss the complaint.[4] The State's motion sought a judgment declaring the Amendment constitutional, and submitted the Affidavit of Michael Papa, an attorney in the WCB general counsel's office, in support. R.51-67. Plaintiffs opposed the State's motion and cross-moved for summary judgment, submitting five affidavits in support. R.68-69. Although the State opposed the cross-motion, it neither sought leave to conduct any discovery nor so much as suggested the existence of triable issues of fact precluding summary judgment.

The Honorable Donna M. Mills, J.S.C, granted the State's motion, denied Plaintiffs' cross-motion, and ordered the Clerk to enter judgment dismissing the complaint. R.5-18. The court first rejected Plaintiffs' contention that the Amendment applied retroactively to the extent that it altered their liability under insurance contracts issued before October 1, 2013. Citing this Court's decision in *Matter of Raynor v. Landmark Chrysler*, 18 N.Y.3d 48 (2011), the court stressed that a "statute is not retroactive when made to apply to future transactions merely because such transactions relate to or are founded upon antecedent events." R.14; *see* R.13 (same, also citing *Raynor*). The court's retroactivity analysis stopped there, however; while the court concluded that the Amendment "neither altered

---

[4] The complaint named as defendants 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 the State of New York Workers' Compensation Board (collectively, the "State").

plaintiffs' preexisting liability, nor imposed new legal consequences," it never explained how that was so. R.14. Yet from that premise, the court concluded that the Amendment did not violate any of the constitutional provisions identified in the complaint. R.15-18.

2. Proceedings in the Appellate Division, First Department

A unanimous panel of the Appellate Division, First Department (Mazzarelli, Renwick, Saxe, Moskowitz, JJ.), reversed and ordered entry of judgment in Plaintiffs' favor, declaring the Amendment unconstitutional as applied to policies issued before October 1, 2013. R.529-544.

The Appellate Division first rejected the central premise of Supreme Court's order—that the Amendment "neither altered plaintiffs' preexisting liability, nor imposed new legal consequences"—finding it "essentially undisputed" that the premiums Plaintiffs charged for pre-October 1, 2013 policies "did not account for potential future liability relating to [reopened] claims," and that, as a result, the Amendment imposed "unfunded liability … on plaintiffs for reopened cases arising from accidents occurring before October 1, 2013 that would have otherwise qualified for transfer under Workers' Compensation Law § 25-a." R.537. The Appellate Division found Supreme Court's reliance on *Raynor* "misplaced," as the amendment to the WCL at issue in that case "'neither altered the carrier's preexisting liability nor imposed a wholly unexpected new procedure. It merely

changed the time and manner of payments.'" R.538-539 (quoting *Raynor*, 18 N.Y.3d at 57).

The Appellate Division next dispatched the State's argument that the Amendment was "a mere "allocation of economic benefits and burdens" relating to the workers' compensation scheme. R.539 (quotation marks omitted). The court observed that unlike in *Becker v. Huss Co.*, 43 N.Y.2d 527 (1978), where the new law "simply made [the carrier] cover costs incurred in obtaining [a statutorily provided] benefit," the Amendment's "closure of the Fund … deprived [carriers] of the entirety of the benefit of [the Fund] and created a new class of unfunded liability." R.540. Further, the court stated that whereas prior retroactive amendments to the workers' compensation scheme were justified by the Legislature's considered determination to impose retroactive liability that served some important public function, the Amendment "reflect[ed] the incorrect belief that the increased costs to carriers for pre-October 1, 2013 claims were already taken into account in the calculation of [carriers'] premiums." R.541.

The Appellate Division then turned to Plaintiffs' constitutional claims. The Amendment violated the Contracts Clause, the court held, because it significantly impaired the carriers' contracts with their employer-insureds and was not "reasonable and necessary to serve a significant and legitimate public purpose." R.542 (quotation marks omitted). To the contrary, the court reiterated, "the

legislation's stated purpose of preventing a windfall to insurance carriers was based upon the erroneous premise that premiums already cover this new liability." *Id*. The court likewise concluded that the Amendment violated the Takings Clauses of the U.S. and New York constitutions, insofar as it imposed "severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." *Id*. (quotation marks omitted).

Finally, the Appellate Division rejected the State's claim that certain purported fact issues precluded the court from ordering the entry of judgment in Plaintiffs' favor. As the court explained, the State failed to "establish[] the existence of triable issues of fact precluding summary judgment." R.542-543. The State's eleventh-hour suggestion that such issues existed was "purely speculative, unsupported by reference to the record, and improperly raised for the first time on appeal." R.543. Specifically, the court concluded that the State failed to "submit any evidence to contradict plaintiffs' evidence as to the economic impact of the Fund's closure on plaintiffs, or to support their claim that issues exist as to 'the extent to which plaintiffs benefitted from other changes in the 2013 legislation,' or the nature and value of such benefit." *Id*.

The Appellate Division directed the Clerk of Supreme Court to enter an amended judgment in favor of Appellants "declaring that Workers' Compensation

Law § 25-a(1-a) as retroactively applied to policies issued before October 1, 2013 is unconstitutional." R.544. This appeal followed. R.545.

SUMMARY OF ARGUMENT

I. The Amendment is "retroactive." Legislation is retroactive in the constitutionally relevant sense if it "creates a new obligation [or] imposes a new duty … in respect to transactions or considerations already past." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994). The Amendment plainly qualifies, as it imposes on carriers liability for Section 25-a claims under preexisting policies. Since 1933, the WCL had vested responsibility for Section 25-a claims solely in the Fund. That allocation of responsibility was incorporated into Plaintiffs' insurance policies and formed the basis for the premium rates approved by the State, charged by Plaintiffs, and paid by their employer-insureds. Closing the Fund imposed an "unfunded liability" on Plaintiffs under their preexisting policies because they cannot charge supplemental premiums to cover the newfound shortfall.

Contrary to the State's principal argument, it is hardly dispositive that the Amendment acts only on cases reopened in the future. The Amendment is retroactive because, through such future cases, it imposes a new class of liability on Plaintiffs, namely, for Section 25-a claims under preexisting policies. *See Becker v. Huss Co.*, 43 N.Y.2d 527, 540-542 (1978). The State's contention that

the Amendment merely requires carriers to "retain" a liability they have always had is belied by undisputed facts demonstrating that the law and the terms of carriers' policies excluded such liability from the scope of carriers' obligations. That the Amendment altered carriers' obligations is confirmed by DFS's subsequent approval of a rate increase for future policies explicitly to reflect the Amendment's transfer of Section 25-a liability to carriers. *Cf. Matter of Raynor v. Landmark Chrysler*, 18 N.Y.3d 48, 57 (2011) (amendment was not retroactive where it mandated present-value payment of insurance awards that would be owed anyway).

The State's remaining arguments are both misplaced and without merit. Plaintiffs did not have a mere "hope" that the Fund would remain available to pay benefits in reopened cases. That expectation was based on the clear law at the time policies were issued, and was a basic assumption of the premium rates approved by the State, charged by carriers, and paid by employer-insureds as consideration for coverage. Moreover, the State's argument in this connection is truly directed at whether the Amendment's retroactivity was permissible (addressed below), not at whether the Amendment had retroactive effects in the first place.

Finally, the State erroneously depicts Plaintiffs' complaint as a grievance that the premiums they charged turned out not to be sufficient to cover their liabilities, which, the State says, is simply an inherent risk in writing insurance.

But while premium rates do not guarantee sufficient funds to cover a carrier's liabilities, they are nonetheless based on the expected cost of future liabilities. Whatever uncertainty that entails is fundamentally different from the uncertainty that would arise if the State could impose new categories of coverage under preexisting insurance agreements.

II. The Amendment's retroactivity is unconstitutional. "[R]etroactive statutes raise particular concerns," *Landgraf*, 511 U.S. at 266, and even though the field of workers' compensation is highly regulated, the Amendment exceeds permissible limits.

First, the Amendment violates the Contracts Clause of the U.S. Constitution. The Amendment substantially impairs preexisting policy agreements between Plaintiffs and their employer-insureds by newly imposing on Plaintiffs multi-million dollar liability for Section 25-a claims, which Plaintiffs and insureds had agreed were outside the scope of coverage. *Health Ins. Ass'n v. Harnett*, 44 N.Y.2d 302, 306 (1978).

Such imposition of liability is not reasonable or necessary to an important public purpose. The Legislature's intent was to save employers costs and eliminate a windfall to carriers, but that was premised on the plainly false notion that carriers were charging premiums that supported Section 25-a liability. The State now argues that the Legislature sought to promote the vitality of the State's economy,

but a hypothesized justification does not suffice under the heightened scrutiny of the Contracts Clause. *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002). In any event, such a purpose would not qualify as a mere adjustment of the benefits and burdens of the workers' compensation system, but rather would be an unprecedented and illegitimate wealth transfer from carriers to employers, since that aim has nothing to do with ensuring compensation for injured workers—their Section 25-a claims will be covered either way.

Second, the Amendment violates the U.S. and New York Takings Clauses. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-539 (2005). The Amendment's effect is not merely to require Plaintiffs to pay more, but also to diminish the value of their policy agreements, which is a constitutionally recognized property interest. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984). The economic impact is significant—$62 million for Plaintiffs alone, and more than $1 billion for all carriers—and reflects the Amendment's interference with Plaintiffs' investment-backed expectations, *i.e.*, collecting premiums for coverage and establishing loss reserves based on the shared understanding among carriers, employers, and the State that carriers had no Section 25-a liability.

Third, the Amendment violates the U.S. and New York Due Process Clauses. Given the fundamental and unreasonable error that motivated the Amendment, it lacks even a rational basis. *Armour v. City of Indianapolis*, 132 S.

Ct. 2073, 2080 (2012). Moreover, for reasons already noted, the Amendment is unfair to carriers, disturbs carriers' well-justified reliance on prior law, and alters a basic term of the policy agreements (the definition of the scope of liability). *Alliance of Am. Insurers v. Chu*, 77 N.Y.2d 573, 586 (1991).

III. There are no genuine disputes of material fact that would warrant a remand. The State asserts that there are several such issues remaining, but, as the Appellate Division explained, the State forfeited its opportunity to pursue that argument by failing to raise it in response to Plaintiffs' cross-motion for summary judgment and by failing to identify additional evidence it would need. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Moreover, most of the fact issues the State now points to would not affect the disposition of the case.

ARGUMENT

I. THE AMENDMENT OPERATES RETROACTIVELY BY SUBSTANTIALLY INCREASING PLAINTIFFS' FINANCIAL OBLIGATIONS TO THEIR EMPLOYER-INSUREDS UNDER PREEXISTING POLICIES

For the 80 years before the Amendment took effect, the Fund, not private insurance carriers, was responsible for paying claims made in reopened cases under WCL § 25-a. Plaintiffs' policies and the State-approved premiums paid by employer-insureds have long reflected that allocation of responsibility. The Amendment, however, imposed on insurance carriers the risks, costs, and liability for future Section 25-a claims not only under policies issued after the Amendment,

but also under policies issued before it. That is the very definition of retroactivity. The State resists that straightforward conclusion, but none of its arguments obscures the basic fact that the Amendment substantially increases Plaintiffs' financial obligations to their employer-insureds under policies negotiated and entered in the past.

A. The Amendment Is Retroactive Because It Shifts Section 25-a Liability Under Preexisting Policies From The Fund To Plaintiffs

Legislation operates "retroactively" in the constitutionally significant sense if it "attaches new legal consequences to events completed before its enactment," such as by "creat[ing] a new obligation, impos[ing] a new duty, or attach[ing] a new disability, in respect to 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) (same). The Appellate Division found the Amendment "retroactive" because it attaches a new (and substantial) legal consequence—liability for Section 25-a claims reopened in the future—to Plaintiffs' past workers' compensation policies. R.537. That conclusion was correct.

For decades, Plaintiffs' workers' compensation policies have categorically excluded coverage of claims that qualify for the Fund under Section 25-a. Those policies—as approved by DFS—stated that Plaintiffs "will pay … the benefits required of [the employer-insured] by the workers compensation law," which

meant the WCL "in effect during the policy period." R.504; *see supra* p.10. The policies also provided that the "insurance conforms to the parts of the [WCL] that apply to … payments into … special funds, and assessments payable by [the carrier] under" the WCL. R.505.

The law in effect during the relevant policy periods—indeed, in effect continuously from 1933 until the Amendment's enactment in 2013—provided that all Section 25-a claims "shall be" paid by the Fund. WCL § 25-a(1). That statutory command left carriers with no liability for Section 25-a claims whatsoever. Before the Amendment, if a case was reopened within the timeframe specified by Section 25-a:

- the "Fund's liability was triggered, as a matter of law," *Matter of Goutremout v. Advance Auto Parts*, 134 A.D.3d 1194, 1194-1195 (3d Dep't 2015) (quotation marks and brackets omitted);
- the WCB could "not as a matter of law impose liability on the employer or its insurance carrier," *Berlinski v. Congregation Emanuel of N.Y.*, 29 A.D.2d 1036, 1037 (3d Dep't 1968);
- "the insurance carrier ha[d] no further interest in payment of the claim," *Matter of De Mayo v. Rensselaer Polytech Inst.*, 74 N.Y.2d 459, 462 (1989); and

- the carrier could not even contractually agree to assume liability for the Section 25-a claim, *Matter of Martin v. New York Tel.*, 46 A.D.3d 1136, 1137 (3d Dep't 2007) (rejecting "Fund's assertion that the employer should remain liable for medical expenses [qualifying under Section 25-a] based upon the settlement agreement's express terms to that effect"); *see also* R.59 (State's expert testifying carrier was "required to timely notify the [WCB] if it believe[d] that a workers' compensation claim[] for which it ha[d] been paying compensation benefits[] [wa]s one that qualifie[d] for reimbursement from the Fund").

Correspondingly, the premium rates calculated by NYCIRB, approved by the New York State DFS, charged by carriers, and paid by their employer-insureds under preexisting workers' compensation policies were premised on the Fund being responsible for Section 25-a claims, as were the loss reserves set aside by carriers. *Supra* pp.8-9, 12-13. Because premium rates are set to be "sufficient to fund the benefits required to be paid to injured workers" for injuries occurring during the policy period regardless of when those benefits are due, R.253, the computation and State approval of premium rates establish conclusively that Plaintiffs were not liable for Section 25-a claims under their preexisting policies.

The Amendment's closure of the Fund to all new Section 25-a claims reopened after 2013 is a sea change. As a result, carriers undisputedly are now

liable for those claims, regardless of whether the workers' compensation policy under which they are made was issued in the future or the past. The ratemaking process—including DFS's approval—again confirms the point: In response to the Amendment, NYCIRB computed a 4.5% increase in future loss cost levels specifically to account for carriers' new Section 25-a liability in the future, and DFS approved that increase, effective October 1, 2013. *Supra* p.15.

That rate increase, however, covers only those claims made under future policies; it does not mitigate Plaintiffs' new Section 25-a liability under policies issued before October 1, 2013, because premiums are determined and paid only during the policy period and there is no mechanism by which Plaintiffs could charge their employer-insureds to make up any premium shortfall under past policies. *Supra* pp.8, 15. Thus, as NYCIRB put it, the Amendment leaves statewide carriers collectively with an "unfunded liability" of $1.1 to $1.6 billion under their preexisting policies. *Supra* pp.15-16. To account for just their portion of this unfunded liability, Plaintiffs have had to increase their reserves by $62 million. *Id*.[5]

[5] Although the Amendment was enacted and became effective in March 2013, its retroactive effect encompasses all workers' compensation insurance policies issued before October 2013, when the DFS-approved rate increase took effect, because (again) carriers had no ability to avoid or offset liability for Section 25-a claims under policies issued between March and October 2013.

B. The State's Arguments That The Amendment Is Only Prospective Are Wrong

The State agrees that the Amendment applies to all future Section 25-a claims arising under preexisting policies; it nonetheless improbably maintains that the Amendment's effect is entirely prospective. The State's position reflects a basic misunderstanding about the meaning of "retroactive" and about the pre-Amendment allocation of responsibility for Section 25-a claims. Further, the State's refrain—that the Amendment is not retroactive because workers' compensation insurance policies have a "long tail" of liability (covering claims made many years after the policy period), and the Legislature has a recognized power to adjust that liability from time to time—mistakes the question of retroactivity for the separate question of whether a particular retroactive enactment is constitutionally permissible. Nothing about the structure of the workers' compensation system renders ordinary retroactivity principles inapplicable here; under those principles, the Amendment is unmistakably retroactive.

1. Confusing future operation with an absence of retroactivity, the State repeatedly argues (Br. 29-33, 36-38) that the Amendment is only prospective because it affects only future payments, which "in many instances" will be "triggered by" future conditions. *See also* N.Y. Br. 45-47 (making same argument to deny that Amendment's retroactive effect is shown by carriers' obligation to increase reserves for future Section 25-a claims under preexisting policies). As the

Supreme Court of the United States recently recognized in rejecting the federal government's similar account of a plainly retroactive statute, that argument is "disingenuous": A future condition or reopening might "occasion[]" the carriers' new liability, "but the reason for [the] new" liability was the "past" workers' compensation policy. *Vartelas v. Holder*, 132 S. Ct. 1479, 1488-1489 (2012) (quotation mark omitted). Before the Amendment, insurance carriers were not liable for Section 25-a claims made under policies they had previously issued; now they undisputedly are. "This is the very definition of retroactivity." *U.S. Fid. & Guar. Co. v. McKeithen*, 226 F.3d 412, 418 n.10 (5th Cir. 2000).

Indeed, this Court, the Supreme Court of the United States, and other courts have routinely deemed a law "retroactive" where it increased preexisting obligations triggered by future transactions or other events. For example, in *Becker v. Huss Co.*, this Court determined that a new law—which made workers' compensation insurance carriers partly liable under preexisting policies for employees' future costs incurred in recovering from third parties, thereby "saddling [carriers] with financial obligations not contemplated when prior insurance premiums had been computed"—was "retroactive." 43 N.Y.2d 527, 537, 540-542 (1978); *see also, e.g., Eastern Enters. v. Apfel*, 524 U.S. 498, 532 (1998) (plurality) ("[E]ven though the Act mandates only the payment of future health benefits, it nonetheless attaches new legal consequences to [a contractual]

relationship completed before its enactment." (quotation marks and brackets omitted)); *U.S. Fid. & Guar. Co.*, 226 F.3d at 415, 418 n.10 (statute was "retroactive" because, by changing state insurance fund assessment formula for carriers paying future benefits under workers' compensation policies "written before [statute's] effective date, [statute] attache[d] new legal consequences to past acts").

Drawing on this Court's decision in *Matter of Raynor v. Landmark Chrysler*, the State objects (Br. 32) that the Amendment is not retroactive "merely because" the future "transactions" to which it applies "relate to an injury that occurred prior to the enactment of the statute." 18 N.Y.3d 48, 57 (2011). No one says it is. Although a Section 25-a claim under a preexisting policy will of course relate to a preexisting injury, the Amendment is retroactive because it "altered the carrier[s'] preexisting liability" for that injury as defined by insurance policies entered into before the Amendment. *Id.*

Nor does *Polone v. Commissioner of Internal Revenue*, 505 F.3d 966 (9th Cir. 2007), support the State's position (Br. 32-33) that the Amendment is only prospective. The Ninth Circuit held that applying a new tax law to certain future payments made pursuant to a preexisting settlement agreement was not retroactive. 505 F.3d at 972. The new law did "attach[] new legal consequences" to payments received pursuant to that agreement (by subjecting them to taxation), but at the

time the new law took effect, those payments had not yet been made. *Id*. The formation of the settlement agreement may have been a completed, past action, but the new tax law did not increase anyone's liability under that agreement or otherwise attach any new obligations to it—unlike the Amendment here with respect to past policies. *Id*. at 972-973.[6]

2. The State also misstates the scope of Plaintiffs' pre-Amendment liability. The State argues (Br. 33-34) that the Amendment did not "alter" carriers' liability under preexisting policies because they were already liable for Section 25-a claims before the Amendment. In the State's view (Br. 33), the Amendment merely "required carriers to *retain*" their preexisting obligations. That view is at odds with the law and the undisputed facts.

As detailed above, Plaintiffs' preexisting policies explicitly defined the scope of liability by reference to the law in effect at the time, which assigned liability for Section 25-a claims exclusively to the Fund; and the DFS-approved premiums paid to Plaintiffs by their insureds did not, by design, cover Section 25-a

---

[6] The State suggests (Br. 31) that the nine-month "grace period" between the Amendment's enactment and the closure of the Fund somehow disproves that the Amendment was retroactive. That is meritless. While the grace period did "ensure that carriers would have sufficient time to apply to transfer any of their *existing* liabilities to the Fund," as the State says (*id*. (emphasis added)), that is true only with respect to those claims that were eligible for transfer during the grace period. Claims that would become eligible after January 1, 2014, for which carriers were now equally liable, could not be transferred. R.259.

claims. Plaintiffs' liability for Section 25-a claims under preexisting policies is entirely a function of the Amendment. And if the Amendment had not increased carriers' liability, then there would have been no need or cause for DFS to approve premium increases going forward or for NYCIRB's determination that the Amendment created a statewide "unfunded liability" for carriers in excess of $1 billion, or for Plaintiffs to increase their loss reserves for claims under past policies by $62 million. *See supra* pp.15-16.

The State provides literally no support for its contention that liability for Section 25-a claims rests initially with the carrier, and thus that the Amendment simply requires carriers' to "retain" that liability. *Cf.* N.Y. Br. 51-53. While the State labors mightily to argue that the Fund was restrictive, and that carriers could only "transfer their payment obligations in reopened cases to the Fund in carefully defined circumstances," the sole case the State cites for that proposition betrays it. *See* N.Y. Br. 9 (citing *De Mayo*, 74 N.Y.2d at 462-463). As this Court explained in *De Mayo*, the Fund's liability for a reopened case was triggered "simply by virtue of the passage of the requisite period of time." 74 N.Y.2d at 462; *see* WCL § 25-a(1). The "adversarial administrative proceedings" to which the State refers (Br. 52) are merely to determine whether the case was closed and whether the requisite period of time had indeed passed. And as discussed above, once a claim was found to satisfy those objective conditions, the *Fund* was *required* to pay it.

Although the State is right (Br. 34) that the amendment at issue in *Raynor* "modified" in some sense "the future payments" carriers were required to make under preexisting policies, *Raynor* again does not support the State's position, as the Appellate Division cogently explained (R.538-539). The law at issue there previously permitted the WCB to order a carrier to deposit into a fund "the present value of a non-schedule permanent partial disability indemnity award." 18 N.Y.3d at 54. The amendment eliminated the WCB's discretion and made such payments mandatory. *Id*. Thus, this Court concluded, the amendment "merely changed the time and manner of payments of non-schedule permanent partial disability awards"—formerly, either a lump-sum present-value payment *or* an annuity, as determined by the WCB; subsequently, only a lump-sum present-value payment. *Id*. at 57. The amendment there did "not increase the amount the carrier owes" by altering the economic value of the carrier's obligations. *Id*. at 59. The Amendment at issue here, in contrast, changes not *when* or *how* payments for certain reopened claims under preexisting policies must be made, but *by whom*—previously, the Fund; now, the carriers. The Amendment thus unquestionably "altered the carrier's preexisting liability." *Id*. at 57.

3. The State disparages Plaintiffs' expectations about the scope of their pre-Amendment liability while overstating the Legislature's history of regulating workers' compensation—which bears, if at all, on the question of whether the

Amendment is constitutionally permissible, not whether it is retroactive. Specifically, the State argues across various parts of its brief (Br. 39-45, 50-52) that the Amendment is not retroactive because it "merely unsettl[ed] carriers' expectation"—or "hope," the State sometimes says—"that the Fund would be indefinitely available." The Fund's ongoing availability, the State says (Br. 52), was a "benefit" the Legislature was free to withdraw "going forward" because (Br. 40-42) the field of workers' compensation is highly regulated, and the legislature must not "be disabled from effectively regulating workers' compensation" by adjusting "economic benefits and burdens."

The Legislature is surely free to close the Fund in a truly prospective way, *i.e.*, only with respect to claims made under future policies. But it does not follow that the Legislature may also close the Fund for claims made under past policies. On the contrary, Plaintiffs' expectation that Section 25-a claims would be transferred to the Fund was neither gratuitous nor undermined by the background uncertainty of occupying a highly regulated field. The expectation was embedded in binding State-approved contracts between carriers and employer-insureds, and was the basis for the consideration provided by employer-insureds for coverage, *i.e.*, the premiums. Thus, the Amendment did not merely disrupt Plaintiffs' expectations; it overrode their prior binding agreements. *Cf. Landgraf*, 511 U.S. at

269 n.24 (discussing hypothetical kinds of laws that would merely unsettle expectations and therefore not be retroactive in the relevant sense).

Moreover, as discussed further below, Plaintiffs' expectation that the Fund would continue to be responsible for future Section 25-a claims under preexisting policies was well justified. *Infra* pp.43-45, 53-54. The law had assigned Section 25-a liability exclusively to the Fund since 1933, the State had approved the premium rates based on non-liability for Section 25-a claims, and the closure of the Fund to claims under preexisting policies had not been "presaged for some years" (or at all) before the Amendment. *Becker*, 43 N.Y.2d at 542.

In any event, the State's discussion of Plaintiffs' expectations (Br. 42-45) reveals that the import of the State's argument here is *not* that the Amendment lacks retroactive effect—it clearly is retroactive—but rather that the Amendment's retroactive effect is *permissible*. *See, e.g.*, N.Y. Br. 42 ("the Legislature has the power"); *id.* at 43 ("the Legislature may permissibly"); *id.* at 44 ("the Legislature's authority"). As discussed in Part II, however, there are serious constitutional constraints on the State even when it is operating in a highly regulated field, and the Amendment runs afoul of them. If the State were right that new legislation expanding liability under a preexisting policy is not "retroactive" in the constitutionally relevant sense as long as the legislation governs a highly regulated

field, those constitutional constraints would be largely meaningless, not just in the field of workers' compensation but in the many other highly regulated industries.[7]

4. The State also erroneously tries (Br. 51-53) to undermine the certainty of the scope of Plaintiffs' preexisting liability on the ground that "there was no guarantee that a carrier could transfer any particular payment obligation to the Fund," because, in the State's view, "the statute previously afforded carriers only the *opportunity* to apply to transfer a case." This argument is both irrelevant and wrong.

The State's contention is irrelevant because the Amendment's effect is not to impose new liability for any particular claim, but rather to shift liability to carriers for a category of claims, *i.e.*, those that satisfy the requirements of WCL § 25-a. Whether any particular claim would in fact be paid by the Fund is irrelevant to the question whether imposing categorical liability on carriers for previously covered

---

[7] The State argues (Br. 45 n.10) that invalidating the Amendment insofar as it would apply retroactively would "produce inequitable results for employers" entering the State after the Amendment became effective. Even if that were correct, it would not matter. The State cannot violate the U.S. or New York constitution to avoid inequitable results; it has ample room to do that without imposing substantial retroactive liability on New York insurance carriers. In any event, there is no reason to believe that new employers would pay anything that did not support coverage of their liabilities, like any other employer. For cases arising under future policies, the State is correct (*id.*) that a new employer would "pay increased premiums" to cover what would have been Section 25-a claims. But so would existing employers; such payments would simply cover the employer's own liability.

Section 25-a claims is retroactive. More to the point, the State's contention is wrong because the Fund's liability for Section 25-a claims was not in any way discretionary, but rather, as noted above, attached "as a matter of law" based on the passage of time since the claim was closed.

5. Finally, the State misunderstands the nature of insurance premiums. It argues (Br. 47-49) that the risk of an unexpected financial obligation being legislatively imposed in the future is inherent in insurance policies because "previously calculated premiums [do not] represent a guarantee of adequate coverage for all future costs." The ratemaking process certainly does not guarantee that premiums will adequately fund all future liabilities; ratemaking is an exercise in probabilistic judgment about the likelihood, timing, and cost of potential employee workers' compensation claims based on the defined scope of coverage. *Supra* pp.7-9; R.271, 351-357, 439-444. The Amendment unexpectedly imposes a new category of coverage on Plaintiffs long after they had any ability to predict, and thus be compensated through premiums for, the expected cost of that coverage under the workers' compensation system as it existed when the policies issued. The State's argument—that legislative imposition of an entirely new class of liability on prior premiums does not render a statute retroactive—is belied by the very passage the State quotes from *Becker*, which, as discussed above, determined that by "saddling [carriers] with financial obligations not contemplated when prior

insurance premiums had been computed," the new law had "retroactive" effects. 43 N.Y.2d at 540-542.

The State nonetheless insists (Br. 49-51) that carriers did assume the risk of legislative change because "[i]t is the nature of [their] business as insurers to bear the risk" and because the legislature "frequent[ly] … changes … the workers'-compensation system" to adjust economic benefits and burdens. The same points could have been made of the new law in *Becker*, but as just noted, the Court determined that the law at issue there had retroactive effect insofar as it imposed liability for future costs under preexisting policies. Yet again, the State conflates the question of retroactivity with the question of validity. *See, e.g.*, N.Y. Br. 49 ("precluded the Legislature"). Indeed, the Appellate Division's remark in *Matter of Hogan v. Lawlor & Cavanaugh Co.* that the State quotes (Br. 49)—"the insurance company must be deemed to have assumed the risk of such changes in the law, in its dealings with its insured"—came in response to the argument that imposing liability under preexisting policies was "illegal and unjust," not whether it was retroactive. 286 A.D. 600, 604 (3d Dep't 1955).[8]

---

[8] The State quotes another passage from *Becker* but misunderstands its import. When this Court said, "[t]he carrier's financial burden is rarely fixed in amount and fluctuates because of a number of contingencies," it was *not* saying that the new law was such a contingency or that carriers assume the risk of legislative change. It was saying that the substantive change effected by the new law—exposing carriers to the unpredictable liability of "equitable apportionment" rather than liability based on more predictable "rigid formulas"—was consistent with the

II. THE AMENDMENT VIOLATES THE U.S. AND NEW YORK CONSTITUTIONS

Although legislation is not invalid merely because it has retroactive effect, "retroactive statutes raise particular concerns." *Landgraf*, 511 U.S. at 266. Courts have recognized "the antiretroactivity principle," which "finds expression in several provisions of [the] Constitution." *Id*. Thus, on multiple occasions this Court has held that legislation "may not constitutionally require the addition of … coverage to policies in existence before" the legislation "'[w]here … the insurer does not have the right to terminate the policy or change the premium rate without consent'" of the insured. *Health Ins. Ass'n v. Harnett*, 44 N.Y.2d 302, 306, 313 (1978) (quoting *Moore v Metropolitan Life Ins. Co.*, 33 N.Y.2d 304, 312 (1973)).

As in *Health Insurance*, that principle "is dispositive of this cause of action." 44 N.Y.2d at 313. The Amendment retroactively undid an eighty-year-old regime and thereby subjected insurance carriers to more than $1 billion in new liabilities (more than $60 million for Plaintiffs) under policies that had already been entered into and paid for before the Amendment. That went too far, violating the U.S.

---

kinds of liability carriers ordinarily bear. 43 N.Y.2d at 537. That aspect of *Becker* is irrelevant here, as Plaintiffs do not contend that Section 25-a liability is not the kind of liability they, as carriers, ordinarily bear; rather, they object to the Legislature's imposition of Section 25-a liability for claims made under preexisting policies because that creates an entirely new financial obligation for a class of claims that had always been the Fund's responsibility.

Contracts Clause, the U.S. and State Due Process Clauses, and the U.S. and State Takings Clauses.[9]

A. The Amendment Violates The Contracts Clause

Under the Contracts Clause of the U.S. Constitution, a State may "substantial[ly] impair[]" a contract "by subsequent legislation" only if "it is reasonably necessary to further an important public purpose and the measures taken that impair the contract are reasonable and appropriate to effectuate that purpose." *Crane Neck Ass'n v. N.Y.C./Long Island Cty. Servs. Grp.*, 61 N.Y.2d 154, 167 (1984) (citing U.S. Const. art. I, § 10); *accord 19th St. Assocs. v. State*, 79 N.Y.2d 434, 441, 443 (1992) (same). This standard reflects a more demanding level of scrutiny than rational-basis review. *See Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984) ("[W]e have contrasted the limitations

---

[9] In a footnote, the State half-heartedly suggests (Br. 53 n.13) that article I, § 18, of the New York constitution "arguably" bars Plaintiffs' claims under the State due process and takings clauses. The State's diffidence is telling. No decision of this Court interprets § 18 so broadly as to foreclose a challenge to the State's wholesale reallocation of the burdens of the workers' compensation scheme in a manner that has no effect on injured workers. *Compare Crosby v. State Workers' Comp. Bd.*, 57 N.Y.2d 305, 310 (1982) (§ 18 barred challenge to law requiring WCB approval of claims for attorneys' fees sought in connection with a claim), *with Szold v. Outlet Embroidery Supply Co.*, 274 N.Y. 271, 276, 278-279 (1937) (law requiring administrative authorization of physicians before rendering treatment and care to employees "in the administration of" the WCL was not "obnoxious to" the federal *or State* due process clause). Indeed, where, as here, there is no rational relationship between the law at issue and "the protection of the lives, health, or safety of employees," article I, § 18, has no application. *See infra* pp.48-49; *see also infra* pp.45-47, 56-57.

imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses."); *see also Society Ins. v. Labor & Indus. Review Comm'n*, 786 N.W.2d 385, 389, 405 (Wis. 2010) (legislation that substantially impairs contract "is subject to heightened scrutiny"). The Amendment does not survive such review.

1. By assigning to Plaintiffs liability for Section 25-a claims under preexisting policies, without providing them any opportunity to terminate those policies, collect supplemental premiums, or otherwise avoid the new liability, the Amendment substantially impairs Plaintiffs' contracts. Workers' compensation policies are contracts between carriers and employer-insureds, and the scope of coverage is a basic contract term. Although, as the State points out (Br. 59-61), the policies do not mention the Fund by name, liability for Section 25-a claims was clearly excluded from the scope of the policies' coverage: The policies explicitly defined the scope of Plaintiffs' liability by reference to State law at the time the policies were entered into, and that law assigned liability for Section 25-a claims exclusively to the Fund (as it had for decades). Correspondingly, the premiums paid by employer-insureds—and approved by the New York State DFS—as consideration for Plaintiffs' coverage were calculated on the assumption that the policies did not cover Section 25-a claims. In other words, Plaintiffs and their

insureds had a meeting of the minds that Plaintiffs were not responsible for Section 25-a claims.

For decades then, carriers have relied on their policy terms, including the exclusion of Section 25-a claims, in setting premium rates to fund their coverage, and that reliance was reasonable—State law had assigned Section 25-a liability to the Fund since 1933, DFS had approved those rates, and the Fund's closure to future claims under preexisting policies had not in any way been "presaged" before the Amendment's enactment. *Becker*, 43 N.Y.2d at 542. And, finally, the Amendment's override of the contract terms has been costly to Plaintiffs: Drawing from their own assets, they have had to increase their reserves by $62 million to account for their new liability under preexisting policies (and the industry overall faces new unfunded liability of $1.1-1.6 billion). *Supra* p.15-16.

This Court, the Supreme Court, and other courts have recognized substantial impairment in similar circumstances. *See, e.g.*, *Health Ins.*, 44 N.Y.2d at 306 (legislation "may not constitutionally require the addition of [maternity care] coverage"—typically about $2,000—"to [insurance] policies in existence before [enactment] but thereafter renewed, if the renewal is at the option of the insured alone without the consent of the insurer"); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 246-247 (1978) (retroactive pension vesting was "severe" impairment since vesting schedule was "a basic term of the pension contract,"

"company … had no reason to anticipate" the change, and impairment affected "an area where the element of reliance was vital—the funding of a pension plan … determined by a painstaking assessment of the insurer's likely liability"); *Society Ins.*, 786 N.W.2d at 404 (retroactive extension of coverage for certain category of injury substantially impaired contract because definition of liability was a "basic term of an insurance contract" and was "reasonably relied upon by the parties," and new law "expose[d] [carrier] to potentially significant losses" ($5,500-$11,400)).

2. Imposing liability on carriers for Section 25-a claims under preexisting policies is not reasonable, appropriate, or necessary to effectuate an important public purpose. The State's principal defense of the Amendment, which it repeats throughout its brief (at 40-45, 49-51, 56-57, 62), is that the Amendment merely re-allocates economic benefits and burdens, which the State says it must have the power to do, even retroactively, if it is to "effectively regulat[e] workers' compensation." Whatever the State's authority to regulate workers' compensation, it violated the applicable constitutional limitations here.

According to the Governor's memorandum supporting the Amendment, the purpose of closing the Fund was to "save [employers] hundreds of millions of dollars in assessments per year" while "prevent[ing] a windfall for … carriers," who "do not need [the Fund] because the premiums they have charged already

cover [Section 25-a] liability." R.401. Even if eliminating one group's windfall to save another group's costs is a justifiable example of adjusting the allocation of benefits and burdens, that is not what happened here because *there was no windfall*. As the State now acknowledges, premiums charged under preexisting policies *did not* cover Section 25-a liability—NYCIRB excluded loss for Section 25-a claims when computing loss costs, and DFS approved both NYCIRB's loss costs and the carriers' rates premised on those costs. *Supra* p.8-9, 12-13. That is why, in light of the Amendment, NYCIRB proposed and DFS approved a rate increase for future policies to account for Section 25-a liability and why Plaintiffs have substantially increased their reserves for preexisting policies. *Supra* p.15-16. The State insists (Br. 62) that courts "*must* defer" to "legislative judgments regarding 'the reasonableness or necessity of a particular measure'" (quoting *19th Street Assocs.*, 79 N.Y.2d at 443 (emphasis added)), but in fact deference is merely the "ordinar[y]" practice, *19th Street Assocs.*, 79 N.Y.2d at 443, and no deference is warranted here given that the factual premise of the State's legislative judgments was indisputably false—obviously so even at the time. The State cannot identify a single case upholding a statute subject to heightened scrutiny on the basis of a demonstrably false factual premise about the enactment's purpose and justification.[10]

[10] This is not a question of whether the Amendment is fair or wise. *See* N.Y.

The Amendment was actually nothing more than a transfer of wealth from carriers to employers. Presumably recognizing that this alone is not an important public purpose, the State tries to salvage the Amendment by asserting (Br. 62) that "the Legislature reasonably determined that the Fund's prospective closure would serve the important state interest in promoting the vitality of the State's economy by lifting a substantial and unnecessary burden on employers." The Legislature in fact made no such connection between eliminating employers' assessments for future Section 25-a claims and the vitality of the State's economy, and no such connection is obvious; the State has fabricated this story for purposes of this litigation. That is fatal to the Amendment because statutes may be sustained "on the basis of hypothesized justifications" *only* under rational-basis review, not under the heightened scrutiny required by the Contracts Clause. *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002); *accord United States v. Virginia*, 518 U.S. 515, 535-536 (1996); *Edenfield v. Fane*, 507 U.S. 761, 768 (1993); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481-482 (9th Cir. 2014); *Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011).

In any event, the State's hypothesized justification would not save the Amendment. "The broad scheme of compensation for work-related injuries or

---

Br. 30 n.6. The mistake on which the Amendment is founded renders the Amendment itself unreasonable.

death contained in the Workers' Compensation Law has as its purpose the provision of a swift and sure source of benefits to injured employees or the dependents of deceased employees." *Crosby v. State Workers' Comp. Bd.*, 57 N.Y.2d 305, 313 (1982). True, to further that purpose courts have afforded the Legislature substantial "flexibility" to "adjust[]" the "allocation of economic benefits and burdens" under the workers' compensation system. *Becker*, 43 N.Y.2d at 541. But that has nothing to do with promoting the vitality of the State's economy. Moreover, the Amendment does not actually serve the purpose of providing swift and sure benefits to employees. To the contrary, when it comes to Section 25-a liability, workers would remain covered with or without the Amendment; the Amendment just reassigns responsibility for that coverage from the Fund to insurance carriers.

The State has not identified a single case in which this Court or the Appellate Division upheld the retroactive imposition of liability on workers' compensation carriers when it did not increase coverage or benefits for workers or their dependents. *See Matter of Lusardi v. Eugene Lusardi, M.D., P.C.*, 167 A.D.2d 3, 4 (3d Dep't 1991) (holding amendments that "restricted" employee's workers' compensation rights were prospective only, and distinguishing cases involving "retroactive application of [WCL] amendments" because those "extended the rights of injured claimants, thereby furthering the legislative

objective of compensating injured employees").[11] Indeed, retroactive expansion of an employer's liability to its workers is unlikely to "violate the contract clause" because such liability "has its origin not in contract but in legislative fiat." *Schmidt v. Wolf Contracting Co.*, 269 A.D. 201, 207 (3d Dep't 1945), *aff'd*, 295 N.Y. 748 (1996). A carrier's liability to its employer-insured, by contrast, is defined by their contractual relationship and therefore raises more serious concerns under the Contracts Clause.

This is not the case to cross the line this Court has long solicitously policed. Although the Contracts Clause tolerates some leeway to adjust economic benefits and burdens, "the mantra that insurance is a regulated industry will not cover all sins of retroactivity." *U.S. Fid. & Guar. Co.*, 226 F.3d at 418. Legislation still "must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 22-23 (1977); *see also id.* at 21 ("[T]he Contract Clause limits

---

[11] *See also, e.g.*, *Becker*, 43 N.Y.2d at 537 (legislation required carriers to contribute to employee's costs in obtaining third-party recovery); *Matter of Busch v. Austin Co.*, 37 A.D.2d 648 (3d Dep't 1971) (legislation extended period of death benefits for certain children of employees); *Matter of De Concilus v. Juney Juniors, Inc.*, 9 A.D.2d 17 (3d Dep't 1959) (legislation increased maximum payable benefits); *Hogan*, 286 A.D. at 603-604 (legislation expanded coverage to include custodial care); *Matter of Kirchner v. Park Edge Supermarkets, Inc.*, 75 A.D.2d 916 (3d Dep't 1980) (legislation allowed wage expectancy consideration for children); *Schmidt v. Wolf Contracting Co.*, 269 A.D. 201, 207 (3d Dep't 1945), *aff'd*, 295 N.Y. 748 (1996) (legislation increased rate of payments to employees).

otherwise legitimate exercises of state legislative authority."). The Amendment does not meet that standard.

For example, as the Appellate Division said, "[u]nlike … in *Becker*," where the carrier "was simply made to cover costs incurred in obtaining [a] benefit [it was already receiving], the closure of the Fund here … retroactively deprived [carriers] of the entirety of the benefit of [the Fund] and created a new class of unfunded liability." R.540; *see Becker*, 43 N.Y.2d at 542 ("The carrier always benefited from the third-party action; the amendment simply requires it to bear the cost of that benefit.").[12] Nor did the carriers cause the specific hypothesized harm—"skyrocket[ing]" assessments for the Fund, N.Y. Br. 56—that the State claims the Amendment would address, or the injuries underlying the claims driving those costs. *Cf. Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18 (1976) ("[T]he [retroactive] imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor—the operators

[12] The State argues (Br. 20, 50-51) that the "effect" of other provisions in the legislation that closed the fund was to benefit carriers by "guarantee[ing] that carriers could recoup from employers the full amount of the assessments levied for the operation of the Fund." The State, however, submitted no evidence showing that this supposed benefit actually results from the Amendment or showing the magnitude of the benefit to carriers.

and the coal consumers.").[13] And whatever cost savings could be achieved by closing the Fund could have been achieved by closing it only prospectively, i.e., only to future claims under *future* workers' compensation policies, as the Legislature did when it closed the Special Disability Fund to address what the State says (Br. 13) were its "balloon[ing]" costs. WCL § 15(8)(h)(2)(A).

Finally, the State's claimed purpose is not sufficiently "important" to justify the Amendment's impairment of Plaintiffs' preexisting policies. If the "average" family's inability to save enough money "to meet the expenses of childbirth" did not present one of the "rare occasions and … extreme circumstances" that rises "to the magnitude of a crisis which warrant[s] overriding the terms of the agreements entered into by the parties," then certainly neither does employers' increasing costs for the Fund. *Health Ins.*, 44 N.Y.2d at 309 n.2, 313-314 (retroactive imposition of coverage for maternity care violated Contracts Clause); *cf. 19th Street Assocs.*, 79

[13] The State speculates (Br. 15-16) that there has been a drain on the Fund in recent years (and a commensurate increase in assessments), which "may" be attributable to "carriers' growing practice of reaching 'indemnity-only settlements' under WCL § 32." But there is no evidence that the Legislature considered that purported practice in enacting the Amendment, and the Amendment cannot be justified by reference to this hypothetical problem. Indeed, if the Legislature was aware of and sought to address the issue, it could have chosen narrower, less constitutionally problematic means, *e.g.*, eliminating or restricting indemnity-only settlements. The State's *post hoc* litigation position cannot justify the Legislature's purported (and overblown) response to it.

N.Y.2d at 443 ("alleviat[ing] New York City's housing crisis and … protect[ing] tenants from its effects … is an important public purpose").

B. The Amendment Violates The Takings Clauses

Whether a regulatory law interferes with private property sufficiently to constitute a taking under the federal and State Takings Clauses depends on the evaluation of several "[p]rimary … factors": "the economic impact of the regulation on the claimant, and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," as well as "the character of the governmental action." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-539 (2005) (quotation marks omitted). Consideration of these factors shows that the Amendment effects a constitutionally impermissible taking.

The State's principal response (Br. 63) to Plaintiffs' takings claim is that it fails at the "threshold" because "hav[ing] to pay more money in the future than … expected" is "insufficient to establish a taking." That is manifestly not Plaintiffs' claim here; indeed, the State's only citation for this straw man is to the portion of the complaint concerning the retroactive impact of the Amendment. *See* Br. 63 (citing R.40 ¶ 83). As the *relevant* portion of their complaint indicates, Plaintiffs claimed that they "have a constitutionally protected interest in their insurance contracts," the diminution in whose value, like the diminution in the value of any other type of property, can constitute a taking. R.45; *see Ruckelshaus v. Monsanto*

Co., 467 U.S. 986, 1003 (1984) ("valid contracts are property within meaning of the Taking Clause"); *United States Trust Co*., 431 U.S. at 19 n.16 ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid.").

The Amendment has a significant economic impact on Plaintiffs' preexisting policies because it expands their coverage to include Section 25-a claims. As shown by their subsequent reserve increases, the Amendment reduced the value of Plaintiffs' preexisting policies by at least $62 million; the impact is confirmed by the future rate increases approved by DFS. *See Eastern Enters*., 524 U.S. at 529 (plurality) (amendment's economic impact "on the order of $50 to $100 million"). Citing *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 225-226 (1986), the State argues (Br. 66-67) that the added economic burden is immaterial because each carrier's liability increased "proportionate to the extent of [its] underwriting of workers' compensation policies." But in *Connolly* the new liability on employers for withdrawing from the pension fund was proportional to the employer's *use* of the fund, *i.e*., to the benefit it had received. 475 U.S. at 216-217. The Amendment's retroactive costs, in contrast, do not correspond to any benefits provided to carriers under the WCL. *Supra* pp.50-51.

Further, this impact reflects interference with distinct investment-backed expectations. Plaintiffs made substantial economic decisions—collecting

premiums as consideration for their coverage and establishing loss reserves to cover future liabilities—based on their expectation that the Fund would pay Section 25-a claims. Although, as the State notes (Br. 67), workers' compensation is a "highly regulated industry," that expectation, upon which carriers (not to mention the State and the employer-insureds) operated for decades, was reasonable and well-founded given that the WCL had assigned liability for such claims to the Fund since 1933, that DFS had approved those rates, and that there was no indication that the Fund would close to future Section 25-a claims raised under preexisting policies. As noted, the "mantra" of the highly regulated industry only goes so far. *U.S. Fid. & Guar. Co.*, 226 F.3d at 418; *cf. Connolly*, 475 U.S. at 227 (employers had "more than sufficient notice" of change because pension plans had long been "objects of legislative concern"). And contrary to the State's assertion (Br. 67), the closure of the Special Disability Fund would have reinforced rather than undermined that expectation because that fund was closed only with respect to claims made under future policies. *Supra* p.51.

Finally, the Amendment's character weighs against it. The State emphasizes (Br. 67) that the Amendment adjusted the benefits and burdens of the workers' compensation system. Even if correct, that fact merely "may be relevant in discerning whether a taking has occurred," whereas the other factors would preponderate. *Lingle*, 544 U.S. at 539. In any event, as discussed above, the

State's assertion is incorrect. The notion that the Amendment eliminates a "windfall" for carriers is completely false. And the State's hypothesized justification of the Amendment as reducing employers' costs to promote their economic health does not match reality. Ultimately, the Amendment just forces carriers to pick up the tab for future Section 25-a claims raised under preexisting policies, without having received premiums that reflected that risk and liability. *See U.S. Fid. & Guar. Co.*, 226 F.3d at 419.

C. The Amendment Violates The Due Process Clauses

The Amendment also violates the federal and State Due Process Clauses. "[W]here legislation has retroactive effects, judicial review does not end with the inquiry generally applicable to economic regulation, *i.e.*, whether the legislation has a rational basis. Instead, the courts must balance a number of factors, including fairness to the parties, reliance on pre-existing law, the extent of retroactivity and the nature of the public interest to be served by the law to determine whether the rights affected are subject to alteration by the Legislature." *Alliance of Am. Insurers v. Chu*, 77 N.Y.2d 573, 586 (1991) (quotation marks omitted); *see Landgraf*, 511 U.S. at 266 (A "justification sufficient to validate a statute's prospective application under the Clause may not suffice to warrant its retroactive application.") (quotation marks omitted).

The Amendment, however, founders at the threshold because it lacks even a rational basis, regardless of whether its effect is truly "retroactive." As discussed above and as the Appellate Division found, the premise of the Amendment—that carriers were obtaining a "windfall" because the premiums they charged covered Section 25-a claims—is completely false. Even under rational-basis review, "the legislative facts" underlying the legislation must "rationally … have been considered to be true by the governmental decisionmaker." *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012); *see also New York State Club Ass'n v. City of New York*, 487 U.S. 1, 17 (1988) (enactment fails rational-basis review where "the asserted grounds for the legislative classification lack any reasonable support in fact"). Here, the Amendment is "apparently based" on "legislative facts" that "'could not reasonably be conceived to be true by the governmental decisionmaker.'" *Affronti v. Crosson*, 95 N.Y.2d 713, 719 (2001) (per curiam) (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981)) (internal quotation marks omitted). The Legislature could not reasonably have believed that carriers were obtaining such a windfall, given that carriers' policies explicitly defined coverage by reference to the WCL, which assigned Section 25-a liability to the Fund, and given that NYCIRB was proposing—and the New York State DFS was approving—premium rates based on the transparent assumption that carriers were not paying and would not be responsible for Section 25-a claims.

In any event, for all the reasons discussed above in the context of the Contract and Takings Clauses, the balance of factors set out in *Alliance of American Insurers* tips decisively against the Amendment's retroactivity.

III. THE STATE IS NOT ENTITLED TO A REMAND TO ADDRESS ANY PURPORTED FACT ISSUES

The State contends (Br. 68) that if the Court decides to affirm the denial of the State's motion to dismiss, it should reverse the Appellate Division's judgment in Plaintiffs' favor and remand to Supreme Court to resolve "at least four disputed issues of material fact" in the first instance. The Appellate Division's succinct rejection of the comparable request made below applies equally at this stage: "The issues of fact [the State] now allege[s] to exist are purely speculative, unsupported by reference to the record, and improperly raised for the first time on appeal." R.543.

The State does not even attempt to address any of the defects identified by the Appellate Division. It says (Br. 71) only that "Supreme Court had no occasion to consider these factual disputes because it dismissed plaintiffs' complaint as a matter of law." That is irrelevant. In support of their cross-motion for summary judgment, Plaintiffs submitted supporting affidavits and other evidentiary material. R.68-69. At that point, "the burden shift[ed] to the [State] to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320,

324 (1986). But the State never submitted or pointed to any additional evidentiary proof supporting its contention that there are genuine disputes of material fact, despite opportunity to do so. *See* R.543 ("Defendants did not submit any evidence to contradict plaintiffs' evidence as to the economic impact of the Fund's closure on plaintiffs, or to support their claim that issues exist as to 'the extent to which [plaintiffs] benefitted from other changes in the 2013 legislation,' or the nature and value of such benefit."); *see also* Reply Mem. of L. in Further Supp. of Defs.' Mot. to Dismiss and in Opp'n to Pls.' Cross-Mot. for S.J. ("State Sup. Ct. Reply") 35-36, *American Economy Ins. v. State*, Index No. 156923/2013, Doc. No. 30 (Sup. Ct., N.Y. Cnty. Dec. 20, 2013); *cf.* C.P.L.R. § 3212(f). Indeed, the State still has not cited any record evidence to show a genuine dispute on any of its purported fact issues. *See* Resps. Br. ("State App. Div. Br.") 57 n.18, *American Economy Ins. v. State*, Case No. 156923/13 (App. Div. Aug. 5, 2015); N.Y. Br. 68-72. The State cannot meet its burden "by the unsubstantiated assertions or speculations of [its] counsel," but that is all the State has offered. *Alvarez*, 68 N.Y.2d at 327; *accord S. J. Capelin Assocs., Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 (1974) ("A shadowy semblance of an issue is not enough to defeat the motion."). The State therefore has failed to carry its burden in opposition to the cross-motion for summary judgment.

Moreover, the State has forfeited the ability to oppose summary judgment on the ground that there are material disputes of fact because it failed to raise that argument in response to the cross-motion for summary judgment. *See* State Sup. Ct. Reply 35-36; *Tenth St. Holdings, LLC v. McKowen*, 50 Misc. 3d 141(A), 1, 31 N.Y.S.3d 924 (1st Dep't Feb. 22, 2016) (table) ("tenant's newly raised defense of waiver was waived because he failed to raise it as a defense in his answer and in opposition to landlord's motion for summary judgment").

Even if the State had pointed to contrary evidentiary proof and even if it had not forfeited these contentions by failing to raise them in response to the summary-judgment motion, its eleventh-hour arguments would still not preclude affirming the grant of judgment against the State.

1. The State first contends (Br. 68-69) that there is a factual question relating to Plaintiffs' claims under the Contracts and Due Process Clauses about whether the Amendment would achieve its "anticipated cost savings." That is immaterial because none of Plaintiffs' arguments turns on a dispute as to whether the Amendment would actually save employers money. *See People v. Grasso*, 50 A.D.3d 535, 545 (1st Dep't 2008) ("[O]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." (quotation marks and brackets omitted)).

2. The State next says (Br. 69-70) there is a factual question relating to Plaintiffs' claim under the Contracts Clause about whether their preexisting policies "guarantee[d] the availability of the Fund." The State again confuses things. Plaintiffs do not contend that their policies contained such a guarantee—nor could private insurance carriers purport to guarantee to private insureds that a State insurance fund would be available. Rather, as explained above, what matters here is that the policies defined the scope of coverage by reference to State law at the time, which assigned exclusive responsibility for paying Section 25-a claims to the Fund. That contractual language is clear and reinforced by the undisputed fact that the State-approved premiums paid by employer-insureds as consideration for the coverage did not account for coverage of Section 25-a claims by carriers but rather were premised on the Fund having responsibility for such claims.

3. The State next points (Br. 70) to a supposed fact issue relating to Plaintiffs' claims under the Contracts and Takings Clauses, concerning the substantiality of the burden Plaintiffs have incurred by having to increase their reserves by $62 million to account for their new Section 25-a liability under preexisting policies. The State's implicit suggestion that $62 million is insubstantial beggars belief; the point is, in any event, irrelevant. Courts have found the financial burden of legislative retroactivity to be significant at far lower amounts. *See supra* p.44-45. Moreover, the impact is substantial regardless of the

precise economic effect because the definition of the scope of liability, which the Amendment impairs, is a basic term of an insurance contract. *See supra* pp.43-45.

4. Finally, the State points (Br. 70-71) to a supposed factual question relating to Plaintiffs' claim under the Takings Clauses, as to whether Plaintiffs actually took any steps in reliance on their expectation that the Fund "would remain in existence." The State's professed uncertainty on this point is puzzling. Plaintiffs quite obviously took such steps, and those steps are undisputed: They set premium rates and accepted payment of such premiums as consideration for their coverage based on the assumption that the Fund would pay all Section 25-a claims, as it was legally mandated to do; and they set aside corresponding reserves again based on that assumption. That both the premiums accepted and the reserves set aside reflected Plaintiffs' (well-founded) expectation that the Fund would pay Section 25-a claims are confirmed by the undisputed fact that the State has subsequently approved a rate increase to account for carriers' post-Amendment Section 25-a liability under policies issued on or after October 1, 2013, and the undisputed fact that Plaintiffs, pursuant to generally accepted accounting and actuarial principles, have set aside $62 million in additional reserves to cover their that new liability under policies issued before October 2013.

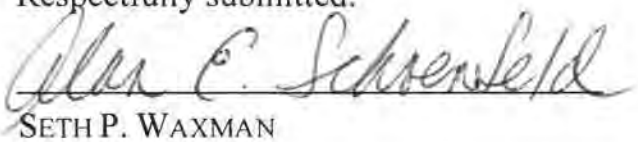
Remand for further development of these fact issues would therefore be pointless.

CONCLUSION

The Appellate Division's decision should be affirmed.

October 24, 2016

Respectfully submitted.



CYNTHIA E. NEIDL
GREENBERG TRAURIG, LLP
54 State Street
6th Floor
Albany, NY 12207
Tel.: (518) 689-1400
Fax: (518) 689-1499

SETH P. WAXMAN
DAVID M. LEHN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
Tel.: (202) 663-6000
Fax: (202) 663-6363

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
Tel.: (212) 230-8800
Fax: (212) 230-8888

Attorneys for Plaintiffs-Respondents