

Presented to the N.Y. State Assembly Insurance Committee at a hearing on the implications of the September 11, 2001 tragedy on the insurance industry.

**TESTIMONY OF JONATHAN J. WILKOFSKY, ESQ.
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Jonathan J. Wilkofsky, Esq., being duly sworn deposes and says:

I am General Counsel and Executive Director of The New York Public Adjusters Association and have been since 1994. I am also in private practice as managing partner of the firm of Wilkofsky, Friedman, Karel & Cummins located at 299 Broadway, New York City. For over 20 years I have represented victims of insurance company misconduct in and around the State of New York and elsewhere.

The New York Public Adjusters Association is a non-profit organization whose mission is to advance the interests of the public adjusting industry, as well as consumers, on issues arising in the presentation of first-party insurance claims by consumers of all varieties against their insurance companies.

Due to the unimaginable immensity of the tragedy of September 11th and the pain and destruction it caused, many insurance related issues have arisen, the

resolution of which which will ultimately determine the life or death of many businesses and the relative well-being of countless families and individuals and ultimately this City and State.

Public Adjusters are licensed by the State to advocate for the interests of the consumer in the calculation and presentation of first-party insurance claims. By their training and experience, their goal is to protect the rights of the insurance consumer on issues of policy interpretation, valuation, mitigation and claim calculation. During the claims process, the Public Adjuster is on the front lines in the often contentious process that is supposed to conclude in the fair payment of legitimate claims within a reasonable time. In this capacity, they have a central prospective on the problems that are arising with respect to the insurance industry's response to claims.

In the opinion of our membership, the response of the insurance industry generally since September 11 has been mixed and the reality is that the important challenges still lie ahead. The initial response in the immediate aftermath of the incident was strong in that carriers appeared ready to respond with CAT teams and resources to make the initial response to claims generally timely. Many made the effort to communicate with customers via radio and television spots and the assurance that the War Risk exclusion would, quite properly, not be asserted as a

defense, combined to raise hopes that the insurance industry would be a responsible contributor to the team effort in repairing and rebuilding the terrible devastation suffered by the City of New York and its citizens.

The true test of the insurance industry response will have to await the formal response to individual claims presented by the many insureds who suffered losses in this catastrophe.

In the weeks that followed the initial response which sometimes included the issuance of nominal advances, the industry response has often been characterized by the same misadventures as witnessed in numerous prior natural disasters and claims.

The issues have been many. Some carriers are refraining from paying losses after an initial advance until all WTC related claims are in and evaluated. This practice alone will cause months of delay and condemn many to permanent business closings, continued displacement and pain.

Many carriers are refusing to pay for environmental testing and at the same time terminating payments for additional living expenses and relocation costs requiring the insured to return to potentially dangerous conditions unless they can afford the cost of testing which can run into the thousands of dollars. Some carriers are refusing to pay landlords for lost rents from tenants who either moved out or just

stopped paying rent. The theory is that the money is legally collectable from the tenant and they advise the insured to go collect it.

A common cause of damage to thousands of insureds for many blocks around ground zero was the smoke, dust and debris that infiltrated into everything. Much of it contained asbestos and other toxins. A number of carriers are disclaiming property claims asserting this blanketing was not "damage". Certain carriers required landlord-insureds to clean, decontaminate and mitigate their losses too quickly in an effort to minimize the carrier's exposure for "loss of rent" claims. When the air continued to be foul and dust, smoke and soot continued to infiltrate and tenants refused to return, the insured-landlord was left with a vacant and often re-contaminated building with an unresponsive insurance company refusing to pay for further lost rents and remediation.

It was reported to me by a Battery Park City resident that an Allstate adjuster, when driving home the "wisdom" of accepting his offer reminded that "You know we can deny your claim because this was caused by a terrorist attack."

Many insureds were delayed in reporting claims. The reasons were as varied as the stories of pain, loss and destruction that we've all heard. These insurance consumers are among the least protected of any in the country on the issue of late notice of claim. Over the decades in New York, literally billions of dollars in

legitimate claims have been lost to consumers and a huge and unwarranted windfall benefitted the insurance industry. The fate of these claims and claimants would have been different had they resided in almost any other state in the nation. New Yorkers should not have had to withstand this injustice for so long. But in the shadow of the disaster, the Legislature has an opportunity to resolve this issue once and for all.

In almost every state in the country, in order to prevail on a defense of late notice, it must be established that the notice was late and that the insurer was prejudiced by the late notice. There has been almost universal recognition of the fairness and appropriateness of avoiding the forfeiture of important and paid-for contractual rights based upon a technical omission without a showing of prejudice. A state-by-state analysis is annexed and made a part of the record as Exhibit 1. ¹

In New York, insurers have prevailed in countless claims by merely asserting that notice of claim was late with no showing of prejudice required. This has proven disastrous for consumers. New York is one of a minute minority of States with such a draconian rule.

New Yorkers deserve the same treatment and level of service as those insurance consumers in neighboring states and around the country. A Bill should be

¹ This analysis was prepared by the firm of Anderson Kill Olick and Oshinsky, P.C. and is used with appreciation.

passed rectifying this injustice immediately and effective at least to claims going back to September 11. It will avoid needless pain, litigation and injustice.

Ultimately, the insurance industry is profit driven. This reality is part of the fabric that makes America the greatest country in the world. However, as many victims of insurer misconduct will attest, where fiduciary responsibilities exist under circumstances of great stress and loss, practices which service the profit motive often short change the consumer. At times, these practices are both nefarious and company wide. New Yorkers continue to be among the most unprotected when it comes to legislation to motivate the industry to be balanced in servicing the profit incentive. Insurers realize that litigation is often a disappointed customer's only avenue of relief and that it is often long winded and expensive. By unfairly and illegally offering ten or twenty percent less than a claim is worth, or worse, the insured will have no alternative but to accept as legal fees and the passage of time will prevent the insured from realizing a benefit from pursuing their legitimate contractual claim.

A proposal to balance the playing field has been passed by the Assembly many times and it has often seemed as if the support existed in the Senate as well. Nevertheless, it has annually been "In Committee" at crunch time. I refer to the proposal to amend Section 2601 of the Insurance Law to create a fair and balanced

private right of action on behalf of consumers under very limited circumstances of proven bad faith. The consumer who successfully established such bad faith would have the potential to recover their attorney's fees and up to one time the amount of physical damage as punitive damages. So for example, if the insurer refuses to pay a claim for \$12,000 in bad faith as defined by the statute, the insured may recover his attorneys's fees back plus an additional \$12,000. By the strict demands of the statute, this relief will not be awarded frivolously and will be reasonably capped to avoid windfalls or financial damage to the industry. The statute will finally provide the incentive to the industry to routinely approach claims in good faith. Many insurers have long recognized the value of good service and fair dealing as a company philosophy. Many, sadly, have not.

A 1995 draft of the Bill (2639-A February 23, 1995) is annexed and made a part of the Record as Exhibit 2.

The Bill's passage would be a revolution for consumers. Citizens around the country have long enjoyed this protection. New Yorkers deserve no less.

JONATHAN WILKOFSKY