

May 5, 1988

SUBJECT: INSURANCE

Circular Letter No. 12  
May 5, 1988

TO: ALL INSURERS DOMICILED IN NEW YORK:

RE: DIRECTOR'S LIABILITY

Chapter 367 of the Laws of 1987 amended Section 402 of the Business Corporation Law to authorize domestic corporations to amend, subject to certain conditions, their Certificates of Incorporation to limit or eliminate the personal liability of directors to the corporation or its shareholders for damages for any breach of duty in such capacity. Section 108 of the Insurance Law provides that the Business Corporation Law shall be applicable to domestic insurers unless it is in conflict with a provision in the Insurance Law.

It is the position of the Insurance Department that the provisions of Section 402 of the Business Corporation Law, as amended in 1987, are not inherently in conflict with the provisions of the Insurance Law. However, directors of insurance corporations have always been held to a higher standard of conduct, because of the additional provisions and requirements of the Insurance Law, (such as Section 1219) than are directors of other business corporations. The responsibility of directors for investments, as in the "prudent person" rule established in Section 1405(c), is another concern. It would therefore be inappropriate to allow insurance company directors to totally absolve themselves of their fiduciary responsibility.

Accordingly, amendments to corporate Charters that include the following language, with appropriate modifications for mutual insurers, are unobjectionable to this Department:

No director shall be personally liable to the Corporation or any of its shareholders for damages for any breach of duty as a director; provided, however, that the foregoing provision shall not eliminate or limit (i) the liability of a director if a judgment or other final adjudication adverse to him or her establishes that his or her acts or omissions were in bad faith or involved intentional misconduct or any violation of the Insurance Law or a knowing violation of any other law or that he or she personally gained in fact a financial profit or other advantage to which he or she was not legally entitled; or (ii) the liability of a director for any act or omission prior to the adoption of this amendment by the shareholders of the Corporation.

Corporations wishing to utilize other language should submit such proposed amendments to both our Corporate Affairs Bureau in Albany and the Bureau with primary regulatory authority over the insurer for our review.

All charter amendments must be in conformity with the provisions of Sections 1206 and 1208 of the Insurance Law and all board resolutions to implement an amendment to limit or eliminate directors' liability should include a statement that the directors acknowledge their understanding that the limitation on their liability is restricted by the Insurance Law.

Very truly yours,

[SIGNATURE]

JAMES P. CORCORAN

Superintendent of Insurance