



**STATE OF NEW YORK
INSURANCE DEPARTMENT
160 WEST BROADWAY
NEW YORK, NEW YORK 10013**

Circular Letter No. 6 (1994)
May 31, 1994

TO: All Licensed Property/Casualty Insurers and Insurance Producer Organizations

RE: Insurance Coverage for Discrimination Claims Based upon Disparate Impact and Vicarious

The Property & Casualty Insurance Bureau, in conjunction with the Office of General Counsel, has conducted a comprehensive analysis concerning the permissibility of coverage for acts of discrimination under liability insurance policies. Based on this analysis, the Department has concluded that liability coverage for acts of discrimination, when based solely on either disparate impact (as opposed to disparate treatment) or vicarious liability, would not be against public policy and therefore should be permitted.

Liability insurance coverage for intentional wrongs is, and has always been, prohibited on two related grounds: first, purposeful misconduct lacks the element of "fortuity" generally required of insurance contracts; and, second, indemnification of wrongful conduct that is intentional (and hence in theory may be deterred) is against public policy. In fact, court decisions suggest that the question of whether coverage is permissible or not turns most centrally upon the relationship between the wrongdoer's act and the resultant harm: if that relationship may be said to be sufficiently fortuitous, rather than intended, coverage is permitted. In other cases -- such as sexual battery against children -- where harm is so direct and inescapable a result of the act that no fortuity can reasonably or objectively be said to exist, coverage is impermissible.

Discrimination based upon disparate treatment is an intentional wrong whose resultant harm flows directly from the acts committed, and liability coverage for it is impermissible. The Department's longstanding prohibition against coverage for discrimination claims generally originated at a time, some thirty years ago, when virtually all discrimination claims were of this type.

In recent years, however, actions and recoveries under the various and evolving civil rights laws have increasingly been rooted in discrimination claims based upon disparate impact, rather than disparate treatment. In such cases, the discriminatory result does not directly proceed from specific discriminatory acts against individuals; in fact, such acts are not an element of the wrong and need play no part in the facts alleged. Rather, such suits are normally grounded upon statistical or other numerical profiles that reflect disparities between or among groups sufficient to support a finding of discrimination.

The basis for allowing employers coverage in actions alleging vicarious liability arising from the discriminatory acts of their employees is identical -- i.e., the lack of intentional conduct on the employer's part. An employer may be held vicariously liable for the discriminatory act of an employee even though it: (1) played no active role in the commission of the act; (2) did nothing whatever to aid or encourage its commission; and (3) may have done all that it possibly could to prevent it. In all situations except those involving discrimination, the Department permits coverage for claims of vicarious liability regardless of whether the underlying wrong is intentional or not. Therefore, this determination merely conforms the Department's treatment of discrimination with its treatment of all other kinds of vicarious liability claims.

Moreover, the Insurance Department concludes that the strong public policy against discrimination of any kind is, in fact, furthered by permitting coverage of the kinds described. By bringing to employers' attention practices that can potentially result in unlawful discrimination, insurers' loss prevention programs and underwriting standards should discourage such practices. Any employer who does not diligently attempt to modify employment procedures accordingly may well be denied insurance coverage. When unlawful acts of discrimination occur nonetheless, coverage will help ensure just compensation for victims.

Finally, it should be noted that, in conformity with court decisions on the subject, it remains against public policy to provide insurance coverage for punitive damages.

In light of this Circular Letter, insurers may make appropriate form filings.

Very truly yours,

SALVATORE R. CURIALE
SUPERINTENDENT OF INSURANCE