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CLIENT ALERT: NY APPELLATE COURT RULES ON UNCONSTITUTIONAL "TAKING"

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A recent ruling by the New York Appellate Division, Third Department, in *Held v. State of New York Workers' Compensation Board*, 921 N.Y.S.2d 674 (N.Y. App. Div. 2011), upheld the New York State Workers' Compensation Board's authority to assess financially healthy group self-insured trusts to pay for the liabilities of defaulted groups.

BACKGROUND

New York workers' compensation law allows employers to participate in group self-insurance, in lieu of obtaining traditional workers' compensation insurance, to take advantage of savings that can be realized through the pooling of resources by employers that share the same or similar risk profiles. Pursuant to New York Workers' Compensation Law, each employer who joins a New York Group Self-Insured Trust ("GSIT") is "jointly and severally" liable for the workers' compensation obligation of each associated member of the GSIT. GSITs are typically managed by trustees and a third-party administrative company that handles billing and claims.

Beginning in 2006, more than a dozen New York GSITs began defaulting on the payment of claims and assessments and subsequently dissolved. In 2008, the New York Workers' Compensation Board ("WCB") began levying massive assessments against solvent GSITs to cover the cost of the WCB's payment of the compensation liabilities of the defaulted groups. Several members of healthy GSITs subsequently filed suit against the WCB to challenge the constitutionality of the assessments.

THE TRIAL COURT'S RULING

The New York Supreme Court ruled that the assessment of solvent GSITs for the liabilities of unrelated, failed GSITs constitutes an unconstitutional taking without just compensation in violation of the Fifth Amendment. In so ruling, the Court held that trust members could never have anticipated that they would be held liable for the failure of unrelated GSITs, only other members of the same trust. In addition, the Court found that the assessment of healthy GSIT's was inconsistent with the purpose of group self-insurance. The Supreme Court entered a judgment requiring the WCB to repay the assessments collected from the healthy GSITs.

THE APPELLATE DIVISION'S REVERSAL

On April 21, 2011, the Appellate Division reversed the Supreme Court's ruling. The Appellate Division ruled that a fair reading of the applicable New York Workers' Compensation Law leads to the conclusion that group self-insurers were intended to be included among those to be assessed to provide the funds to cover the defaults

of all private self-insurers, including groups. Further, the Appellate Division ruled that the WCB's assessment of solvent GSITs to cover liabilities of a defaulted or insolvent GSIT does not violate the

TAKINGS CLAUSE:

Here, the amounts of the assessments may have been unanticipated, but it cannot be said that their economic effect on plaintiffs rises to the level of a taking. While plaintiffs may be deprived of substantial amounts of money to pay the assessments, their liability "in not made in a vacuum, [and] directly depends on" their proportional role in the self-insurance program and the workers' compensation system.
Id. at 681 (Internal citations omitted). In sum, the Appellate Division ruled that the provisions of the New York Workers' Compensation Law authorizing the WCB to make assessments against all self-insurers, including both individual and group self-insurers, for costs that it incurred due to the insolvency of employers electing to self-insure did not effect an unconstitutional "taking" of property of the employers that elected to band together in GSITs.

WWM COMMENT

We expect the plaintiff GSIT members to appeal the Appellate Division's ruling. However, to the extent the Appellate Division's ruling stands, we anticipate the ruling may generate professional liability claims by self-insured employers against the agents/brokers that placed the employers into GSITs.