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To: ALL DEPARTMENT AND AGENCY HEADS

From: Patrick J. Bulgaro

Subject: Judgments Against State Departments and Agencies

This Bulletin provides guidelines for payment of court judgments or settlements against State departments and agencies or against non-State entities which the State is obliged to indemnify, which are not payable from the Court of Claims or Public Officers Law Sections 17 and 19 appropriations.

Background

Currently, there are only two specific appropriations available for the payment of judgments or settlements. The miscellaneous appropriation for General State Charges includes two line items which are used to pay judgments, attorneys' fees and other litigation-related expenses. Both these appropriations are included in the sub-schedule for fixed costs. However, the language of the Court of Claims appropriation limits its use to payments of judgments rendered against the State in the Court of Claims. The other source of funds limits the State's expenses for defense and indemnification of its officers and employees under sections 17 and 19 of the Public Officers Law.

The Court of Claims appropriation was established when it was generally understood that monetary judgments directly against the State could be awarded only by the Court of Claims. The Public Officers Law appropriation for defense and indemnification was created when the State agreed, in statute, to protect State officers and employees sued *individually* in certain circumstances.

Expansion of State Liability

Historically, State agencies have had the responsibility for payment of backpay awards for current and former employees. In recent years, developments in case law and statutory law have led to the imposition of additional monetary awards against the State for which there are no specific budgetary provisions. For example:

- Federal courts have issued monetary awards directly against the State and its agencies.
- The State's Equal Access to Justice Act, enacted in 1989 (Chapter 770), created a mechanism authorizing plaintiffs to recover counsel fees and other reasonable expenses in certain actions against the State unless the Court finds that the agency's position was "substantially justified."
- The State indemnifies municipalities and public authorities for certain claims. (Public Authorities Law §2614, Chapter 899 of the Laws of 1984 and Highway Law §12 and §349-c).
- Sections 89 (4)(c) and 97 (2) of the Public Officers Law established a State liability for attorneys' fees in certain Freedom of Information Privacy Law cases.

In addition, the State has opted to contractually indemnify non-State entities, such as landlords or others who perform services on behalf of the State. In these cases, as well as those cited previously, there exists no miscellaneous appropriation to pay these costs. Agencies must be prepared to cover these costs should indemnification of a contractor become necessary. Issues which incorporate other prelitigation concerns should be discussed with the Attorney General's Office before action. These issues include indemnification and waiver of contractor liability.

Payment of Judgments, Settlements or Other Claims

In all cases of litigation either against the State or against a non-State entity which the State is obliged to indemnify where payment of a judgment, settlement, attorney fee, or other related litigation costs, is not payable from either the Court of Claims appropriation or the Public Officers Law appropriation, such payment is the responsibility of the State department or agency involved. Agencies should be aware that these payments represent a legal obligation of the State and our agreement to pay a specified amount may have been the basis for the withdrawal of a suit by an injured party. Furthermore, State Court judgments accrue interest of 9 percent from the date the judgment is entered with the court clerk. Federal court judgments similarly accrue interest but at a variable rate set by Federal guidelines.

Agencies should examine these costs to ascertain if non-General Fund appropriations can be charged. Similarly, capital appropriations should be charged for construction related judgments and bond monies if funds are available for land acquisition. If other monies are not available contact your budget examiner immediately.

All agencies should follow these procedures when they are involved directly or derivatively (e.g., through contractual indemnification) in any litigation that has a reasonable likelihood of resulting in a charge against the agency:

1. The Counsel to the agency (or other person who has been designated to oversee litigation) should alert the agency head and agency's chief fiscal officer of any

administrative or court case that has a reasonable likelihood of resulting in a monetary award or settlement which may become a charge against the agency or the State. An assessment of whether the Court of Claims or Public Officers Law funds would cover any liability should be made as early as possible by discussing the case with the Office of Deputy First Assistant Attorney General.

It is desirable for an attorney to participate in all discussions regarding potential litigation liability to preclude the admissibility of these discussions or memos as evidence in court.

Whenever a case has potential for significant agency liability, possibly affecting the agency's ability to keep spending within available appropriations or cash disbursement limits, the agency should alert its budget examiner. This applies as well to situations affecting future appropriations or programs.

2. Internal, confidential discussions with the attorneys and others involved in the case concerning the relative risks and dollar amounts any litigation could cause should be conducted as necessary.
3. The agency counsel (or other designated person) should keep the agency head and the chief fiscal officer apprised of significant developments in any case.
4. For actions resulting in a judicial or administrative judgment, decision or determination, agencies should submit to the Comptroller's Office a standard voucher signed by the plaintiff or the plaintiff's attorney.

The plaintiff's attorney will submit to the Comptroller's Office a certificate of no appeal from the Department of Law, or the equivalent, and a copy of the judgment, decision or determination.

5. If settlement is discussed, it should be treated in the same way as cases that implicate the Court of Claims or Public Officers Law appropriations. Therefore, agreement on the proper settlement must be reached between the Attorney General's office and the client agency and then agreed upon with the opposing party; when signed, the agreement is subject to the audit of the Comptroller. In instances where an apportionment among agencies is required, all parties must concur with the agreement. Also, the agency must confirm that necessary monies are available before providing approval to settle to avoid the filing of disciplinary charges against State attorneys for misinforming plaintiffs or claimants.

Any questions regarding the calculation of interest payments should be discussed with the Bureau of Contracts in the Office of the State Comptroller prior to submission for payment.

Where actions have culminated in a settlement, the same procedures should be followed, with the exception that the signed agreement (typically in the form of a stipulation of settlement which may also be approved by the court) will replace the court judgment or administrative determination.

By following these procedures, agencies will be able to plan for the fiscal impacts of a court judgment or an administrative determination, settlement or claim. In addition, this process will ensure the timely payment of all legal obligations of the State. Your cooperation in this process is appreciated.