

NYPAA Newsletter

NEW YORK PUBLIC ADJUSTERS ASSOCIATION

Fall 2023



Conference Attracts Public Adjusters From New York And Nearby States

NYPAA ANNUAL CONFERENCE

The two-day event took place September 12-13, 2023 at the charming and fun TWA Hotel at JFK International Airport. Day one included an immersive five-hour exploration of the appraisal process offered by Robert Norton, CPCU, AIC, President of the Insurance Appraisal and Umpires Association (IAUA), and our own Jonathan Wilkofsky, Esq., IAUA and NYPAA General Counsel, and author of the treatise *The Law and Procedure of Insurance Appraisal*. IAUA then offered its examination for certification as an umpire, appraiser, or both. After the exam all retired to TWA's retro sunken lounge for an open bar and tasty appetizers. It was a terrific opportunity to network with fellow public adjusters and vendors as well as spouses who were lucky enough to attend.

Day two started early with break-

fast in the exhibit hall sponsored by Total Restoration Industries, a long-time supporter of NYPAA. This was followed by a symposium entitled "Proven Strategies in the Appraisal Process" offered by one of the foremost practitioners in the country, Jeffrey Major of Skyline Adjusters.

Next was a session delivered by Schellie Percudani of Contango IT, who shared her knowledge regarding the perils of cyber-attacks on small businesses and the need, methods, and DFS's requirements for enhancing protections.

Following a short break, Randy Goodman, SPPA, principal of the firm Goodman-Gable-Gould/AI gave an exceptional seminar focused on several claim studies that were a demonstration of the benefits of hiring a top-notch, professional public adjuster.

CONFERENCE *continued on page 3*

INSURANCE DEPARTMENT OFFICIAL SPEAKS THE PLAIN TRUTH TO NYPAA

John Finston, Esq., Executive Deputy Superintendent for the Insurance Division at the New York State Department of Financial Services addressed an overflowing room of public adjusters and their supporters at an intimate, frank, and groundbreaking discussion of the current state of the insurance claims process and most importantly, what can be done about it. The audience appreciated his honest and open acknowledgment of the challenges at DFS, the difficulties, hurdles and



*NYDFS Executive Deputy
Superintendent John Finston*

impediments that currently exist in protecting consumers from the peeling away of coverage by the insurance industry and the sharp claims practices experienced by public

OFFICIAL *continued on page 6*

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SCENES FROM THE 2023 NYPAA ANNUAL CONFERENCE



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CONFERENCE from page 1

Goodman illustrated that powerful and insightful policy and coverage analysis, the use of other resources like a library of historic policy forms and endorsements, and a relentless effort to find and establish coverage can win the claims battle. It was both inspirational and aspirational as it encouraged the attentive audience to think outside of the box next time they confront a challenging coverage question, and it gave them tools to succeed.

After a relaxing luncheon sponsored by Association friend and supporter Anderson Contracting of Long Island, Conference sponsors and exhibitors were given a chance to introduce themselves and their companies.

Brian Evans of [Archer Inventory](#) spoke of his company's inventory preparation process, using certified technicians to prepare an exact, well supported and priced inventory with links for replacement. Just the type of professional service and hourly pricing approach the public adjusting industry needs.

Robert Norton, CPCU, AIC, spoke on behalf of [IAUA](#) and shared the benefits, responsibilities, and requirements for certification by the only organization focused entirely on the appraisal process. For certification, applicants must take the class, pass a test, and become members. The cost

is nominal and the professional benefits enormous. Norton is an appraisal road warrior and has shared his knowledge and experience, dedication, and moral compass in appraisal throughout the country to the benefit of all stakeholders.

Robert Anderson of [Anderson Contracting](#) explained his decades-long experience in high end residential and light commercial construction and dedicated work as an appraiser. His job takes him throughout the five boroughs, and Nassau and Suffolk Counties. His work history reflects his long-standing commitment to insurance consumers and the property owners who hire him.

Jonathan Wilkofsky spoke on behalf of his firm, Wilkofsky Friedman Karel & Cummins, who have specialized in representing victims of insurance industry misconduct since 1987. The 17 attorneys in the firm's nine offices around the country have over 450 years of experience representing insurance company victims with the highest ethical standards.

The afternoon included an intimate and frank conversation with the New York Department of Financial Services Executive Deputy Superintendent John Finston, Esq., who leads the insurance division (*see article on page 1*).

At the close of the Conference, NYPAA held its formal annual

membership meeting with a discussion of proposed bad faith legislation, which will be pending in the upcoming legislative session in Albany starting in January and running through early June 2024 (*see article on page 8*).



ANNUAL CONFERENCE ATTENDEES ENJOY VENUE

It was unanimous! When polled late on day two of the Conference, attendees overwhelmingly praised the meeting venue and wished to return to the well-appointed TWA Hotel at JFK International Airport for future meetings. This gem of a property was built around the 1962 historic Eero Saarinen's iconic and futuristic TWA terminal building behind which two modern hotel wings were constructed.

Amenities include a year-round rooftop infinity pool overlooking JFK's main runway, the largest hotel gym in America, and a cocktail lounge set in a 1962 Lockheed Constellation that sits on the tarmac. The hotel is a 1960s themed airport experience that

VENUE continued on page 4

VENUE *from page 3*

includes modern, but period decorated rooms, great food at the Paris restaurant, a museum, and fabulous public spaces.



A Runway View Of The TWA Hotel Terminal Lounge

In light of the sell-out at the October event, next year we will be in the ballroom with a bigger room block to make sure that no member or spouse will miss out. Details will be posted in the near future on www.nypaa.com.

UPDATE YOUR COMPLIANCE DOCUMENTS

Have you updated your compensation agreement, direction to pay letter, and disclosure statement to comply with the new Regulation 10?

In June 2021, the New York Department of Financial Services adopted amendments to Regulation 10 to give structure to a legislative amendment in 2014, which recognized the public adjusting industry with the distinction, honor, and great responsibility of having a fiduciary duty to their insureds. That is the duty to put the insured's interest over your own.

The change in law also included conflicts of interest avoidance

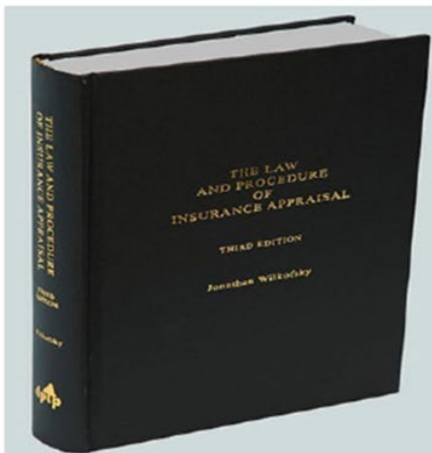
provisions as to contractors with specific limitations and disclosure requirements. Public adjusters are now accepted as professionals in New York and must perform accordingly.

Included in the new regulation (click [here](#) to view) with changes to pages 6 to 10 are the new mandated forms as published by the Department of Insurance. The terms may not be altered.

Third-generation public adjuster and longtime NYPAA board member, Howard Guttman, has offered his printed form as a sample for members to use. If you choose to adopt it, be sure to personalize it with your own information.

Click [here](#) to view/print the form.

THE LAW AND PROCEDURE OF INSURANCE APPRAISAL



Jonathan J. Wilkofsky, Esq., Author

Jonathan Wilkofsky is known as *the* authority on Insurance Appraisal. As the Nation's top expert on the Appraisal process, this book reflects his commitment to tirelessly keep up to date with matters of Insurance Appraisal, providing invaluable guidance to his readers which include Judges, Lawyers, Public Adjusters and Insurance Carriers as well as the industry as a whole.

The legal treatise, "**The Law and Procedure of Insurance Appraisal**" currently in its third edition, was written with the idea in mind to present a text "as accurate, balanced and complete as possible." This goal has been far exceeded, and has literally changed the landscape by allowing policyholder advocates the confidence and knowledge to utilize this unique ADR process to its full potential.

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adjusters and insureds in New York. Such openness and frankness instilled a sense of hope that there may finally be a reckoning with the absence of meaningful oversight, which has allowed for the current state of abuses.

It was a welcome development as community members present offered to work closely together with information sharing and consideration of a number of our proposals going forward.

Deputy Commissioner Finston, a former insurance regulator in California, but a New York native, with great insurance industry regulation experience, was a breath of fresh air, reminding some in the audience of the plain speaking and empathic former New York Insurance Commissioner and General Counsel Greg Serio.

The Commissioner emphasized the critical importance of consumer complaints in the regulatory

Mr. Finston spoke of the operational challenges confronting the department upon his arrival nine months ago, many of which were due to the hiring and promotional freeze imposed during Covid. Out of approximately 450 permanent positions at the department, 170 are unfilled

with another 70 to be lost to retirement in the near future. Those departures and soon to be retirements often drain the department of its most experienced and senior employees to the detriment of the department's effectiveness. Without the possibility for advancement through promotion, and with the loss of senior personnel, morale has suffered as well.

Additionally, the civil service system in New York State caused further complications.

The good news is that full funding was received this year. Hiring and refilling the ranks has begun. They are also looking to bring recent retirees out of retirement to help in the battle. Internal promotions have restarted.

The Commissioner emphasized the critical importance of consumer complaints in the regulatory process and encourages adjusters, public adjusters, attorneys, and anyone impacted by unfair claims practices to file a formal complaint through the department website (https://www.dfs.ny.gov/comp_laint). While he acknowledged that the department lacked the mandate and authority to resolve questions of law or fact, and that the workforce did not exist fully to manage all complaints, they would be carefully watching for trends,

reflecting a regular business practice as to the matter and carriers complained of. Once a trend is spotted, and a sampling of claims files is audited, a market conduct survey is begun. Should nefarious conduct be determined to exist with regularity, fines often exceed \$100,000 have been imposed.

Without consumer complaints the department is flying blind. We encourage all members and their insureds to file a formal complaint with DFS and to copy the Association at info@nypaa.com so we can follow the trend and guide the department as necessary.

Two other major challenges that helped to explain the historic lack of effectiveness at the department were pointed out by Deputy Superintendent Finston.

He has become more aware of the existence and strong impact of differing mission statements and philosophies between the New York department, and its more effective California equivalent agency.

The California department is focused on consumer protection and is thus rightly perceived as the more consumer friendly, whereas the New York departments focus is the financial integrity of the insurance industry that is less correctly perceived as more business friendly.

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BE ON THE LOOKOUT

We are watching. NYPAA and its General Counsel monitor the marketplace for bad faith claim activities and seek to proactively confront them to the best of our ability. We look for developing trends and seek to verify whether each has become a regular business practice by that carrier.

John Finston, Esq., the current leader of the Insurance Division at the New York Department of Financial Services told NYPAA at its Annual Conference on September 13 that despite workforce shortages and limited authority, the Department would vigorously pursue a market conduct investigation of any insurer routinely engaging in unfair claims practices such that they reoccur in at least 20% of similar claims. It falls to all of us to identify these nefarious practices and share them with both the Association and the Department.

They can also be raised during our “problem carrier and adjuster” segment at future meetings. Don’t wait! Report these things as soon as possible. We are currently investigating the following:

State Farm – the improper use of new construction pricing in Xactimate on partial losses.

Guard/Amgad – the failure to respond timely or at all to a claim, claim correspondence, calls and substantial delays in processing.

Contact NYPAA immediately if you know of any victims.

INTRODUCING JENNIFER AND DAVID BARRACK

by Jonathan Wilkofsky, Esq.

To many, Jennifer and David Barrack need no introduction to the public insurance adjusting profession. David and his firm administered the National Association of Public Insurance Adjusters, and for nearly four decades ran the administrative aspect of the group business and its meetings in a manner that was warm, thoughtful, kind, efficient, and highly successful.

Jennifer, David’s daughter, began attending events at the age of seven, started to work meetings with him at age 29, and was increasingly instrumental in all operations. In early 2023, they became available to take NYPAA to the next level of success in pursuing the missions of the group. Our Board of Directors seized the moment and made it happen. Now, with Jennifer leading the way and David assisting her, our members and mission have benefited through an enhanced website, better communication, and a five-star Annual Conference at a premier venue that included relevant speakers and education that was approved for CE credits.

I’ve known David for 40 years and Jennifer for most of her life. They are true professionals who have had the entire public insurance adjusting community in their hearts and minds. We welcome them and wish them the greatest success in helping us achieve our important goals.



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For membership details visit:
<https://nypaa.com/membership>

JOIN THE 1% CLUB!

Contribute one percent of your net fees between now and the end of the New York State Legislative Session on June 6, 2024.

Be a part of the solution!

Passage of our Bad-Faith Legislation will change the claims process in New York once and for all --- but we need your help.

Join your peers in this worthy cause.

Contact NYPAA at 212-285-0510 or info@nypaa.com to discuss how you can contribute.



LEGAL NEWS

WAS IT A THEFT OR FIRE

It was with these words that federal judge Renee Marie Bumb, chief of the United States District Court for the District of New Jersey began her analysis of this fascinating coverage issue

Background of the Case:

The Insured had an insurance policy with Westchester Surplus Lines Insurance Company. Thieves attempted to steal copper electrical components from the property. As a result of the theft, arcing occurred and caused a fire that resulted in severe damage to the premises. The insurance policy had provisions covering damage from fire but had exclusions for damages stemming from theft, or specifically, the theft or vandalism of copper. Westchester denied the Insured's claim for the damages caused by the fire, citing the theft and copper loss exclusions in the policy.

The Court's Analysis:

First, the applicability of the Copper Loss Exclusion: The

Court determined that the more specific Copper Loss Exclusion where reads as follows: [Ferland Cert., Ex. A at 48.] The Theft Exclusion states that Westchester “will not pay for loss or damage caused by or resulting from theft.” [Id.] In such cases, Westchester will only pay for premises loss or damage occurring due to (i) “looting at the time and place of a riot or civil commotion;” or (ii) “the breaking in or exiting of burglars.” [Id.] Additionally, the Theft Exclusion provides that if a theft results in a Covered Cause of Loss, Westchester will pay for the loss or damage caused by that Covered Cause of Loss. [Id.]

The Copper Loss Exclusion excludes coverage for “Loss or damage to copper, including but not limited to wiring, piping, air-conditioner coils or roofs, and loss or damage to the described premises caused by or resulting from the theft, attempted theft or vandalism of copper.” [Ferland Cert., Ex. A at 52.] In such cases—just like the Theft Exclusion—Westchester will only pay for loss or damage occurring due

to (i) “looting at the time and place of a riot or civil commotion;” or (ii) “the breaking in or exiting of burglars.” [Id.]

Unlike the Theft Exclusion, however, the Copper Loss Exclusion does not provide that if the theft of copper results in a Covered Cause of Loss, Westchester will pay for the loss or damage caused by that Covered Cause of Loss.

It would apply over the general Theft Exclusion (another exclusion relied upon in the denial of the claim but not really focused on during motion practice). Roman Rabinovich argued that under the Appleman Rule it applies and would extend coverage to fire damage as a proximate cause of the loss. The Court, in considering the Appleman Rule, noted that it is a principle of insurance law in New Jersey. This rule states that if an exclusion bars coverage for losses caused by a specific event (e.g., theft), the exclusion only applies if that specific event was the primary cause of the loss. If another event (e.g., fire) that is covered by the policy is the

THEFT continued on page 12

WANTED

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WESTGUARD, AZGUARD



FASTGUARD AND/OR NORGUARD



Berkshire Hathaway
GUARD Insurance
Companies

VICTIM DESCRIPTION:

LOSS WITHIN THE LAST THREE YEARS,
WHERE GUARD FAILED TO TIMELY
COMMUNICATE OR PROPERLY RESPOND TO
CLAIM SUBMISSIONS BY THE INSURED OR
THEIR PUBLIC ADJUSTER

REWARD

HOLDING THEM TO ACCOUNT

primary cause of the loss, then the exclusion might not apply. The Court found that while the theft of copper was the initial cause, the fire (which was a covered event under the policy) was the direct cause of the damage. Hence, the Appleman Rule was applied.

The Court further noted, that in order for the Copper Loss Exclusion to apply to all ensuing losses, the policy needed to include anti-concurrent or anti-sequential language, which, if included, would have circumvented the outcome due to the Appleman Rule.

Decision:

Given the above analysis, the Court concluded that the Insured could state a claim for the damages caused by the fire, even if the fire was a result of the theft of copper. Consequently, the Court denied Westchester's Motion to Dismiss, allowing the case to proceed after ruling in favor of South Millville on the issue of the Insured.

This Insured was represented by Roman Rabinovich of Wilkofsky, Friedman, Karel & Cummins. The decision was filed Oct. 16, 2022 in the matter of SOUTH MILLVILLE PROPERTIES LLC. v. WESTCHESTER SURPLUS LINES INSURANCE COMPANY

Docket 23-cv1193 RMB

**SUPREME COURT
DETERMINES THAT
SENECA MAY NOT HIRE
THE ESTIMATOR WHO
DID THE ORIGINAL
LOSS CALCULATION
TO BE THEIR
APPRAISER IN
APPRAISAL AS HE CAN-
NOT BE CONSIDERED
IMPARTIAL**

In a recent decision from the New York State Supreme Court, sitting in Queens County, Justice Timothy Dufficy determined that Seneca Insurance Company wrongfully nominated Dominic Casale as its appraiser and wrongfully resisted replacing him upon objection by the insured.

Following a fire, Seneca hired Dominic Casale of Muscianesi-Casale Associates to evaluate the loss to structure, and the repair estimate was presented.

*insurers may not utilize
the original estimator on
the claim to represent
them in the appraisal*

Due to a large disagreement which became apparent between the claim and the offer, appraisal was demanded and the insured nominated Paul Zendler.

Seneca agreed to appraise the loss and nominated Mr. Casale and his firm as its

appraiser, despite the fact that he had rendered the original estimate for Seneca during the adjustment.

The insured challenged Mr. Casale as not "disinterested" but Seneca declined to choose an alternate appraiser, preventing the appraisal from moving forward.

The insured sued to compel Seneca to appoint an impartial and disinterested appraiser, pursuant to the policy and statute.

Seneca answered the lawsuit by claiming Casale was an impartial appraiser and asserted it was not impeding the appraisal process.

The court agreed with Scott Agulnick, counsel for the insured, and determined that Mr. Casale is disqualified as not being impartial, having conducted the initial evaluation of the damage on behalf of Seneca and that doing so would render the process "a mere formality." The court also concluded that by its actions in not replacing Mr. Casale upon demand, Seneca improperly impeded the progress of the appraisal, warranting judicial intervention.

The case confirms a line of similar decisions in Suffolk and Nassau, which make clear

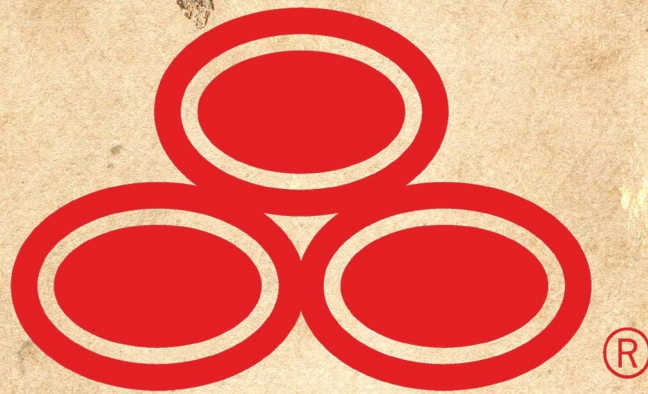
SENECA continued on page 14

WANTED

A CURRENT VICTIM OF STATE FARM'S
"NEW CONSTRUCTION" BUTTON



State Farm



VICTIM SHOULD HAVE PARTIAL LOSS WHERE
STATE FARM NEVERTHELESS PRICED THE
LOSS USING XACTIMATE'S "NEW
CONSTRUCTION PRICING". CLAIMANT MUST
BE A CURRENT STATE FARM INSURED WHO
RECOVERED LESS THAN POLICY LIMITS AND
BE WITHIN TWO YEARS OF THE LOSS

REWARD

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that insurers may not utilize the original estimator on the claim to represent them in the appraisal process.

Please advise the Association promptly at info@nypaa.com if you become aware of any insurance carriers that replicate this type of action as it must be deemed unacceptable and

appropriately addressed.

See, In the Matter of the Application of Gardip S. LLC v. Seneca Insurance Company, Index #709188/23, Queens County, 9/13/23.



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