



Comments Received by the Department of
Consumer and Worker Protection on

Proposed Rules related to the Home Improvement Business Trust
Fund

IMPORTANT: The information in this document is made available solely to inform the public about comments submitted to the agency during a rulemaking proceeding and is not intended to be used for any other purpose

Online comments: 1

- **Susan M Kassapian**

I commend DCWP for trying to add to their ability to invade the HIC TF for consumers. However, until DCWP resumes bringing hearings on behalf of consumers to the Office of Administrative Trials and Hearings (OATH), there will be few additional settlements that will be capable of a TF invasion. DCWP and OATH are aware of my strenuous entreaties to make this happen as outlined in my letter to Mayor Adams and Comptroller Lander, dated June 9, 2022. See attached. I hope the two agencies can expedite the resumption of these HIC consumer hearings, as well as consumer hearings in all DCWP license categories, as soon as possible. If the suggestions in my letter are accepted, this proposed rule will certainly bear fruit.

I do have some wording concerns regarding the proposed rule:

- Use of the word "award" and all references to the "Department" conducting hearings, issuing decisions or imposing amounts to consumers or fines should be changed.

In 6 RCNY 2-224(b)(5) the rule maintains language about paying "awards" and refers to such awards as "being imposed by the Department." Since it is OATH, not DCWP, that conducts the administrative hearings and imposes restitution amounts and fines, any reference to the word "award," either alone or in conjunction with the word "Department" and all references to the Department conducting hearings and issuing decisions or imposing awards, amounts to consumers, or fines should be removed throughout the proposed rule changes and in the Statement of Basis and Purpose. I would note that the proposed changes to 6 RCNY 2-224(c)(1) already deletes the word "awards" and substitutes "amounts to consumers." Perhaps it would be better to describe these amounts throughout as "restitution amounts."

- "Decisions" (meaning OATH decisions) and "Departmental suspensions for failure to pay" should be added to 6 RCNY 2-224(c)(1)(i)(d). As proposed, the only written notices listed are judgments, arbitration awards or settlement agreements.

- 6 RCNY 2-224(c)(1)(iv) should be changed but not eliminated. The proposed changes eliminate the requirement about invading the TF only after an HIC's license has been revoked, surrendered, or the HIC has failed to renew the license. I think this is inconsistent with 6 RCNY 2-224(5) which retains references to license revocation, license surrender and failure to renew the license, while also adding license suspension. I also think that an HIC's license should, at the very least, be suspended (either by an OATH decision or a suspension notice by the Department for failure to pay) before the TF is invaded.

Thank you for considering my comments.

Sincerely,

Susan Kassapian, former Deputy Commissioner at OATH and former General Counsel at DCA

[Comment attachment](#)

Letter-to-Mayor-and-Comptroller-June-9-2022.pdf

SUSAN KASSAPIAN
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June 9, 2022

Dear Mayor Eric Adams and Comptroller Brad Lander:

To quote Mayor Adams, "In order for our city to operate effectively and carry out its core functions, we need fair, expeditious, and just administrative trials and hearings."¹ I am writing to make you both aware of a critical instance where this is not happening. The problem can be easily fixed and the city would even see increased revenues as a result.

The Department of Consumer and Worker Protection (DCWP) Is Not Filing Individual Consumer Restitution Cases For Hearings At The Office of Administrative Trials and Hearings (OATH), Without Requiring Consumers To First Obtain A Judgment In Regular Court

In 2017 DCWP ended its decades-long practice of filing consumer restitution cases for hearings and has required consumers to first go to court to obtain a judgment. As a result, there are tremendous delays and unnecessary roadblocks for consumers seeking restitution. Millions of dollars in trust funds are not being distributed in a timely fashion to pay consumers their restitution or to pay fines owed to the city.

My 35 Years of Experience And Expertise In This Area

I worked for 28+ years at what was formerly known as the Department of Consumer Affairs (DCA), as General Counsel and Assistant Commissioner, Special Counsel, and Principal Administrative Law Judge (ALI). I then worked at OATH for the past six years as Deputy Commissioner. I retired in February 2022.

There Are Millions of Dollars In Trust Funds From Which Unpaid Restitution and Fines Can Be Paid, But Only After There Is A Hearing And Order By OATH

There are two Trust Funds established to provide restitution and fines when a DCWP licensee fails to pay -the Home Improvement Contractor (HIC) Trust Fund and the Tow Truck Trust Fund. **The more important of these is the HIC Trust Fund which as of late last year had amassed \$12M.** The Comptroller may not invade these Trust Funds, for either restitution or fines, until OATH holds a hearing, finds the licensee in violation of the relevant license laws, and orders restitution and fines.

Consumers Left in the Lurch/Many Unable to Pursue Their Claims

There is no question that many, if not most, of the consumers turned away by DCWP since 2017 have not pursued their cases in court. The reasons include claims being above the Small Claims Court monetary cap and the difficulty in initiating and pursuing a case in Civil Court or State Supreme Court without an attorney to help.² In fact, as of the end of last year, only about two dozen HIC consumer

¹ The Record of Law & Commerce, March 23-30, 2022.

² In many cases the cost of an attorney is prohibitive because discovery and motions takes years in court. This is why DCWP is supposed to facilitate the bringing of expeditious administrative hearings in the city's tribunal.

restitution hearings had been filed with OATH after the consumer obtained a judgment.³ Of those, all had had many years of lag time. In the last few years DCWP has curiously filed one or two cases with OATH without the consumer first obtaining a court judgment, raising serious questions of special access and a lack of fairness.

Failure To Ensure That Licensees Comply With The Relevant Licensing Laws

DCWP's long delays in bringing charges against licensees, and then only on a sliver of cases where a consumer returns after obtaining a court judgment, fails to ensure that licensees will comply with the relevant laws and rules. Moreover, after so many years of not filing these cases for hearings, licensees must be aware that DCWP will not likely ever bring such cases against them. It makes a mockery of the license laws meant to protect consumers. It also makes for an uneven playing field for the licensees who comply with the laws!

The Need To Resume Hearings At OATH Is Most Critical In The Home Improvement Area

Home Improvement issues have always been one of the most frequent consumer complaints and they involve the greatest amounts of restitution sought. They are, also, the most difficult to resolve by DCWP's Consumer Services Division, and most often had to be referred to the General Counsel's Office to draft the papers for hearings. It is only when faced with a hearing and the possible imposition of both restitution and fines that there is a strong enough incentive for licensees to settle the cases.

Failure To Protect the Most Vulnerable; Many Forced To Live In Unsafe Conditions

Abandoning expeditious hearings for those consumers who have come to DCWP for help and who are often elderly, minority, or immigrants, and without the financial means to fend for themselves, too often leaves them with no timely refunds and no justice. Consumers risk living in a house or apartment in disrepair or being unable to rent a part of their house, losing income that may be critical to keeping their homes. Many of the cases I worked on over the years in this area were heart-breaking and involved serious unsafe living conditions. Consumers who had taken out home equity loans were often unable to repay them until monies came from the Trust Fund, helping avoid foreclosures.

OATH's Past Outreach to DCWP To Help Mediate These Cases Inexplicably Refused

OATH reached out to DCWP in the Spring of 2020 about the HIC cases not coming to OATH. Then Commissioner Joni Kletter offered the mediation services of OATH's Center for Creative Conflict Resolution (CCCR) to reduce the number of cases that would have to go to a hearing since DCWP's main objection to filing these cases was it had to assign an attorney to prosecute cases in OATH's Hearings Division. DCWP inexplicably rejected the offer even though with effective mediation very few of these cases would ever go to hearing so there would be little need for DCWP attorneys to have to prosecute these cases.

If Calendared At OATH, Fewer Than 10% Of Filed HIC Cases Should Require A Contested Hearing

Based on my experience, most cases will not require contested hearings. I always had an excellent record of settling HIC restitution cases as an ALJ at DCA. Then, in 2012, I requested a re-assignment from my ALJ

³ Most of these cases were drafted by law interns and are no simpler to draft than the pre-court judgment cases.

position, back to being Special Counsel in the General Counsel's Office, to dedicate myself to clearing a backlog of cases that needed to be drafted. **Between Sept. 2012 and Sept. 2014, there were 437 cases sent for hearings. Of those, 235 cases were settled either by me or one of the ALJs. In total, \$1.6M in restitution was achieved via these settlements.** (See attached report submitted at the time; relevant totals are from the sums listed on pages 1 and 3.) **There were 31 contested hearings and 115 cases where the HIC defaulted resulting in inquests. Of the combined 146 inquests and hearings, \$2.3M was awarded in restitution and \$2.3M in fines.** Of the 437 calendared cases, 20 were withdrawn. That leaves a remainder of 36 cases which would not yet have come up for their hearing dates. **Bottom line: During that two-year period, of the 437 cases calendared, 401 had come up for their hearing dates and only 31 cases (8 %) led to contested hearings. Plus, excellent settlement results were achieved through mediation!**

Leverage To Settle These Cases Does Not Exist in Court

HIC cases are particularly amenable to a settlement because the licensee typically faces \$7K to \$10K in fines, which DCWP has always offered to waive if the HIC settles the restitution claim. This leverage is lost when a consumer is forced to go to court. It also means that when a consumer obtains a court judgment and DCWP refers the case for a hearing at OATH, the HIC will have onerous fines imposed which could have been avoided. Many will needlessly have to close their businesses once their licenses are revoked for failing to pay these fines. We should do what we can to avoid more businesses closing.

Suggested Way to Go Forward

The non-HIC cases can be filed with OATH's Hearing Division as there are few such cases and they are generally simple, involving less than \$1K. The HIC cases, which typically come in at about 15 to 20 per month, are better filed with OATH's Trials Division, which unlike the Hearings Division, conducts settlement conferences. If a respondent defaults, the case could be transferred to the Hearings Division for a computer-generated default decision; no inquest required. The contested HIC cases involving under \$10,000 can also be transferred to the Hearings Division and should be allowed to proceed to a hearing without a DCWP attorney —just like in Small Claims Court.⁴ The contested HIC cases involving more than \$10,000 can be heard at the Trials Division. As most should settle with effective mediation efforts, a DCWP lawyer will not often have to prosecute the case.⁵

I Will Volunteer My Time Two Days a Week

I am willing to volunteer at least two days a week to help fix this problem. I am willing to train the Trials Division ALJs, as I previously trained OATH's Hearing Officers⁶ to handle these cases. I would also mediate as many cases as possible either under the auspices of the CCCR or the Trials Division.

WIN-WIN For Consumers, Licensees Who Are Complying With The Laws, The City

The return to traditional practice will afford consumers the assistance they always received prior to 2017, provide a level-playing field for businesses who do right by consumers, and generate revenue

⁴ OATH may need to promulgate a simple rule to allow this, which would match an existing Trials Division rule.

⁵ OATH could also possibly expand this area for the appointment of pro bono attorneys.

⁶ Working with Ray Kramer at OATH's CCCR, I was responsible for organizing the Continuing Legal Education classes for the Hearing Officers from 2018 until I retired in 2022, and I was always an instructor for the DCWP classes.

from more timely fines being paid by licensees or from the two existing Trust Funds. The City is in the enviable position of being able to right a long-time wrong committed by the prior administration by once again providing an expeditious forum for the consumers it is meant to serve. I know that you are both dedicated to affordable housing and achieving equity for vulnerable New Yorkers. This would help in both of these regards.

Sincerely,

A handwritten signature in blue ink that reads "Susan Kassapian". The signature is written in a cursive, flowing style.

Susan Kassapian

cc: DCWP Commissioner Vilda Vera Mayuga; OATH Commissioner Asim Rehman; Deputy Mayor Maria Torres-Springer; Chief Counsel to the Mayor, Brendan McGuire; Corporation Counsel

This letter is dedicated to Robert Martin, former General Counsel at DCA, who was helping me to right this wrong, until he died of a 9/11 cancer in March of this year.

Consumer Dockets

Charge Drafting and Settlement Report

Date of Report: Sept. 15, 2014 for Week Ending Sept. 12, 2014

I. Status Update — Weekly Snapshot (Short week — Labor Day; week back from vacation)

| | Week Ending 9-5-14 | Week ending 9-12-14 |
|--|-----------------------|------------------------|
| Cases Assigned for Charge Drafting | 4 | 2 |
| Cases Drafted, but Awaiting Final Review | 5 | 10 |
| Cases Filed with the Tribunal | | 1 |
| Cases where DCA is Awaiting info from Consumer | 14 | 17 |
| Cases Settled | 3 | 3 |
| Total Restitution in Settlements | \$3,986.09 | \$22,000.00 |
| Appeals Filed by Respondents | | |
| Appeals or Oppositions Filed by DCA | | |

II. From Project Beginning (Sept. 2012) to Present

| | Week Ending 9-5-14 | Week Ending 9-12-14 |
|---|--------------------|-----------------------------------|
| Cases Assigned for Charge Drafting | 531 | 533 |
| Cases Sent for Filing with the Tribunal | 436 | 437 |
| Cases Withdrawn or Closed without Going to Hearing | 43 | 43 |
| Cases to be drafted | 26 | 18 |
| Cases where DCA is Awaiting info from Consumer | 14 | 17 |
| Cases Awaiting a Final Decision on Whether to Proceed, Withdraw | 7 | 8 |
| Cases in Review or Needs Revision Post Review | 5 | 10 |
| Cases Settled | 201 | 204 |
| Total Restitution in Settled Cases | \$1,302,780.02 | 204 \$1,324,780.02 |

III. Cases on Hold (8)

| Case name | Date Referred | Reason |
|---------------------------------------|---------------|--------------------------|
| C1035614 Ryncarz v. Mike Masonry | 8/18 | nlic. HIC |
| C0948614 Haymando v. Top City | 6/30 | oncrete case |
| C0556114 Maffeo v. Steam-N-Stone | 4/28 | oncrete case |
| C0339614 Fenster v. Cracovia | 4/4 | iquidated damages |
| C0233714 Hasenfeld v. Custom Wreckers | 3/31 | C handling |
| C0108214 Warren v. Bil-ray | 3/4 | xpect to settle |
| C0428313 Jackson v. Trademark | 12/13 | etters of administration |
| CD5-134284 Mullings v. Bil-Ray | 9/13 | Expect to withdraw |
| | | |

IV. Cases Awaiting Info From Consumers (17)

| Case Name | Date Referred | <u>Info Needed</u> Awaiting Est (E) C review (C) Other (O) |
|--|---------------|---|
| C1190214 Horen v. Tipperary | 8/18 | c/E |
| C1079514 Werner v. Bellerose Const. | 8/18 | c/E |
| C1313714 Gheraldi v. World of Stone | 8/11 | C/atty |
| C1163514 Staffa v. Wild Bird Const. | 8/11 | c/E |
| C1237114 Adams v. Driscilla | 8/11 | c/E |
| C1235514 Zhong v. Boscaino/Speedway | 8/11 | C |
| C1029814 Ruboko v. Seaport Parking | 7/28 | O/Info |
| C1158814 Hanan v._Nari/Firestone | 7/28 | |
| C0951114 Toscano v. Bella Home | 7/28 | c/E |
| C1250314 Carter v. Sherman Industry | 7/28 | c/E/o |
| C1060814 Cabrera v. 4 Kings | 7/14 | c/E |
| C0996114 Franklin v. 4 Seasons | 7/14 | c/E |
| C0844314 Sheperd v. BNI | 7/7 | c/E |
| C0892614 Frances v. Allstate | 7/7 | |
| C0820514 Schlenoff v. Classico | 6/16 | C |
| C0619614 Almonte v. NYC Sunrise | 5/19 | c/E |
| C0214314 Brenner v. Heathrow Const. | 3/24 | E/O Work def. |

V. ALJ Report — Inquests, Hearings, Settlements, Withdrawn

| | Yr to Date for Week Ending 9- 5-14 | Yr to Date Week Ending 9-12-14 |
|---|--|---|
| Inquests | 115 | 115 |
| Hearings | 31 | 31 |
| Settlements (plus 2 by SK as ALI) | 40 | 41 |
| Withdrawn or Consumer Defaulted | 20 | 20 |
| Total Restit. on Settlements (plus 2 by SK=\$15.5K) | \$267,680.96 | |
| Total Restitution on Inquests/Hearings | \$2,287,521.79 | \$2,287,521.79 |
| Total Fines (Combined Company and Salesperson) | \$2,293,475.00 | \$2,293,475.00 |