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**MEMORANDUM**

TO: NYSCOPBA Executive Board

FROM: Hinman Straub, P.C. *CH/C*

RE: *Matter of Henry v NYS*  
Interest on mandatory retirement arrears litigation

DATE: May 17, 2005

We write to inform you that unfortunately the New York State Court of Appeals denied our motion for leave to appeal in regards to the above-referenced matter on May 10, 2005.

As you are aware, we commenced this litigation in an Article 78 proceeding (on or about August 11, 2003) in the nature of mandamus to review the decision of Respondent New York State Retirement System ("Retirement System" or "System") to require payment of interest in addition to mandatory retirement arrears owed by Petitioner Henry. Specifically, Petitioners sought judgment declaring that the Retirement System acted in violation of the *Executive Law* and the *New York State Constitution* and requiring that the Retirement System refund all interest paid by Petitioner; we argued that the System acted without express statutory or regulatory authority. Judge Bradley determined that while there is no express authority for the System to charge and take interest on mandatory retirement arrears, the Comptroller possesses implicit authority to do so through his fiduciary responsibilities as the sole trustee of the Retirement System.

Thereafter, we appealed the order and judgment of Judge Bradley to the Third Department on or about January 9, 2004, arguing that the lower court erred when it determined that the Comptroller is implicitly authorized to charge and take interest on mandatory retirement arrears. The court unanimously affirmed Judge Bradley's decision, finding that while no express statutory or regulatory authority authorizes the charging and taking of interest on mandatory retirement arrears, as sole trustee of the System, the Comptroller may do so.

Although the Third Department issued a unanimous decision, we were directed to move for permission to appeal to the Court of Appeals. It was our opinion that this would be an uphill battle because it is very difficult to demonstrate that a matter is worthy of being heard by the Court of

Appeals. Specifically, we had to show one of the following: (a) the issue is novel or of public importance; (b) the issue presents a conflict with prior decisions of the Court; or (c) the issue involves a conflict among the appellate departments. While we advised you of the case's difficulty, we agreed to proceed and argued that the Comptroller's taking of interest was a novel issue with statewide importance.

Enclosed please find a copy of the Court of Appeals' decision for your review. If you have any questions, please do not hesitate to call.

Thank you.

