

Insurance Insights

by Ken Furst and Jason Schiciano
Levitt-Furst Associates



Why Insurance Companies Usually Settle Liability Claims

TARRYTOWN

"I can't believe my insurance company settled that ** claim!!!"**

If I had a dollar for every time I've heard a client make that word-for-word exclamation, I would have been able to retire comfortably long before I got grey hair.

In general, liability insurance protects the insured from the financial burden of a lawsuit, by paying for attorneys' legal expenses (attorneys in New York routinely bill \$500 or more per hour), and legal judgements/settlements.

Claims covered by liability policies usually result in out-of-court settlements, wherein the insurance company pays an agreed-upon sum to the plaintiff to make the claim "go away," rather than defending the claim through a full trial by judge or jury with hope that that adjudicated result will be favorable to the defendant. In fact, more than 90 percent of insurance liability cases are settled, either before trial, or before a final judgement.

Settlements have long been a practice for resolving liability claims, and most people - especially business people - understand the logic: it's better to resolve a claim for a known dollar amount that the defendant's insurance company finds reasonable (and which is agreeable to the plaintiff), rather than spending money on a legal defense where the outcome is uncertain, and could result in costs far in excess of the settlement amount.

A Review

Let's look at some claim scenarios which an insurance company might settle, even though their insured is mostly, or not at all, at-fault:

- A tenant in your apartment building slips while exiting the shower. As she falls, she grabs the sink, which pulls away from the wall and falls on top of her, causing severe injuries. She files a lawsuit, claiming the sink was not properly maintained, which led to its dislodging, and her injuries.

- You have a rear-end collision with a car in front of you that stops short in traffic. The driver of the car you hit was sending a text message at the time he stopped short. He claims severe back/neck injuries as a result of the accident (though he has a history of medically treated back problems). He sues, claiming the accident was the cause of new, more severe back/neck pain, loss of work, and depression.

- A poor-performing employee (who is well-liked by her co-workers) is verbally warned several times before she is fired. She files a wrongful termination lawsuit, claiming she was not properly trained, was verbally abused, and humiliated in front of fellow employees, before being terminated. She further claims that her status as a minority was a factor in her termination. The employer/defendant is concerned that many co-workers of the well-liked former employee will back-up the allegations (despite the fact that they are untrue).

In all of the above cases, the defendant (landlord of a unit with an adequately maintained sink; driver of a following vehicle who hit a texting driver; employer who fired a poor-performing employee), might win in court (i.e. be found "Not Guilty"), or be judged to be largely not responsible for the plaintiffs' claims.

The key word is "might." The element of doubt is usually not worth the risk to an insurance carrier. The risk of absorbing the costs for a carefully-prepared legal defense, and well-executed trial presentation, only to suffer a total loss, due to a sympathetic judge or jury, is a risk insurance carriers are usually unwilling to take.

An Unnecessary Action

Importantly, it's a risk insurance companies don't have to take! Insureds who are defendants in a liability lawsuit are often surprised to learn that most liability insurance policies do not require that the insurance company obtain the insured's consent, before settling.

In exchange for a premium paid by the insured, the insurance contract (policy) requires that the insurance company resolve lawsuits for covered claims against the insured. The insured benefits from a "fixed" cost (i.e. the cost of the premium) to resolve potential liability lawsuits. Once the premium is paid, all of the risk shifts to the insurance company.

A financially successful insurance company finds a way to pay-out less to resolve lawsuits against its insureds - whether by settling claims or going to trial - than it collects in premiums. You pay a certain premium to transfer to the insurance company an unknown amount of financial risk associated with liability claims.

Since the insurance company is putting-up its money (not yours) to resolve claims, you do not get to choose how your claim is resolved - even if you are certain you are innocent, not at-fault,

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Co-op and Condo Corner



By Diana Virrill, Chair

The Cooperative and Condominium Advisory Council (CCAC)

A Reminder - BRI Members Are Welcome to Attend the Valuable Membership Meetings of the CCAC!

WHITE PLAINS

Members of The Cooperative and Condominium Advisory Council (CCAC) regularly receive notices from our staff regarding our Membership Meetings.

The notices are composed by the staff of the CCAC and The Building and Realty Institute (BRI), our association's affiliate organization. The flyers always issue an important message - "All BRI Members are Welcome to Attend This Program."

Why is this message important? The reason is one of need. The member buildings and complexes of the CCAC need the expertise and advice of the Supplier and Professional Services Members of the BRI.

Accordingly, the attendance of those BRI Supplier and Professional Services Members at our CCAC Membership Meetings produces many opportunities for valuable interaction between representatives of co-ops and condos and the companies that service and advise those complexes.

The staff of the CCAC/BRI often tells the Board of Directors of the CCAC of the many requests it receives from the Supplier and Professional Services Members of the BRI regarding ways to best reach the representatives of the CCAC's co-op and condo members.

So, in turn, on behalf of our Board of Directors and our staff, I will issue the following advice to the Supplier and Professional Services Members of the BRI - attend as many Membership Meetings of the CCAC as you possibly can!

It is, without doubt, the best possible way to reach the representatives of our member co-op and condo buildings and complexes. I cannot emphasize the large amounts of positive feedback the CCAC/BRI staff receives from the BRI Supplier and Professional Services Members who attend the CCAC Membership Meetings.

Those members often rave about the opportunities they have to network with CCAC members. They are thrilled over the many ways they can deliver messages on how their respective services and materials can help the co-op and condo buildings and complexes that compose the membership of the CCAC.

Simply put, it is "a win-for-win" for all involved parties! So, in turn, please, please remember that, as a BRI Supplier and Professional Services Member, you are most definitely welcome to attend our CCAC Membership Meetings!

Additional Thoughts

Just a few more thoughts:

- ◆ Please notify the CCAC/BRI staff of any changes in your contact information. Those notifications will help CCAC members receive the many valuable notices, bulletins and materials that our staff sends to our membership on a regular basis.
- ◆ Any ideas on topics for Membership Meetings of the CCAC are most definitely welcome. Please send your thoughts to Jeff Hanley, associate executive director of the CCAC/BRI, at jeff@buildersinstitute.org.



From the Editor's Desk

Hanley's Highlights

by Jeff Hanley

Associate Director, Building and Realty Institute (BRI), *Impact* Editor

Another Busy Stretch Ahead for the Industry as Spring Gets Closer

ARMONK

The approach of spring usually produces a busy agenda for members of the local building, realty and construction industry.

A glance at this issue of *IMPACT* illustrates that the trend can most definitely be applied to the advent of this spring. Our latest edition offers a series of reports on key topics affecting our industry - from the building, remodeling and construction sectors, to the realty and services arenas. And, those articles all cite "busy trends."

The reports include:

- ◆ A Page One Summary on the plans of the BRI to offer "a thorough review and critique" of the first proposed changes in a generation to the State Environmental Quality Review Act (SEQRA) recently announced by The New York State Department of Environmental Conservation (DEC). The report also summarizes how the BRI intends to coordinate its analysis efforts with other affected groups in the Westchester and Mid-Hudson Region. A related commentary on the issue by Denise J. D'Ambrosio, Esq., the principal of The Law Office of Denise J. D'Ambrosio, is also in this edition.
- ◆ A Page One Report on The Cooperative and Condominium Advisory Council (CCAC) of the BRI joining a metropolitan area coalition to oppose proposed legislation calling for co-op boards to issue their respective decisions on accepting proposed shareholders within a 45-day time frame. The article highlights the efforts of the alliance - known as The New York Metropolitan Coalition for Cooperatives - in opposing S.2540, a proposal that was recently introduced by State Sen. Kemp Hannon (R-6th LD).
- ◆ A report in Presidential Perspectives on how the incentives, services and events offered by the BRI are continuing to be well-received. The study, written by Carmelo Milio, BRI president, adds that, accordingly, membership in the organization and attendance at its meetings is continuing to increase, as is the satisfaction and pride of BRI members.

- ◆ A analysis of a recent report from The National Association of Home Builders (NAHB) citing that, although employment and home-price levels have returned to, or exceeded, normal levels of activity, new-home construction during the fourth quarter of 2016 remained tepid in many markets due to regulatory and supply-side constraints. The study highlights that the building and realty industry is continuing the hectic and time-consuming routines of dealing with regulatory hurdles, as well as the consistent shortages of lots.

- ◆ A summary of a report from NAHB showing that optimism in the remodeling market is remaining positive. Accordingly, the study added, that sector of the building and realty industry has a busy and bright outlook in the months ahead.

- ◆ An article on the preparations of The Apartment Owners Advisory Council (AOAC) of the BRI for the upcoming "Guidelines Season" involving the AOAC and The Westchester County Rent Guidelines Board. The report summarizes the importance of the preparations - and "Guidelines Season" - to Owner/Manager members of the AOAC and the local building and realty industry.

- ◆ A report on the Benefits of Membership in the BRI from Maggie Collins, director of membership for our association. The story summarizes how the BRI is consistently enhancing its Membership Benefits and Membership Programs through its many initiatives, including the organization's new Incentives Program.

Also featured in this edition are:

- ◆ A summary in Insurance Insights covering why insurance companies usually settle liability claims. The report was written by Ken Furst and Jason Schiciano of Levitt-Furst Associates. Levitt-Furst Associates is the insurance manager for the BRI and all of its affiliate organizations.

- ◆ A commentary on the appearance of Steven Cucchiari, chief executive officer (CEO) of 3Edge Asset Management, at the Jan. 12

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Presidential Perspectives: Pride of Membership at the BRI!

By Carmelo Milio, President, Builders Institute (BI)/Building and Realty Institute (BRI)

ARMONK

Pride of Membership. From its establishment over seven decades ago, The Building and Realty Institute (BRI) has come a long way.

I would just like to mention how honored I feel to be one in a long line of presidents in the history of the association. The year of 2016 was a great year for the BRI, as well as for me, personally. I'm thrilled to have been involved with a variety of ventures so far. And, above all, I'm ecstatic that I've been given one more opportunity to lead the association for 2017.

With that being said, I'd like to point out that there is a reason why our association keeps growing better and stronger. When I first joined the BRI, I was unsure of the potential value that it would have on my career and networking efforts.

I then attended several Membership Meetings and quickly understood that the value was not only in the organization's staff and lobbying efforts, but also the value was in the actual members that collectively have made the BRI what it is today - and has for over 70 years.

I met some members that were new, and many that have been around for more than 50 years. The group is solid, the members are professional and it afforded me a network of real players in the industry that I am able to use as a reference for tradesmen, professional services and advice.



Carmelo Milio

There is an increasing number of people who join us, align with our goals, and stay with us for the long haul.

It is important to remember that all members are able to profit - as I have - from the wealth of knowledge and experience that the BRI, its membership and its staff and consultants - have to offer.

Time and again, the BRI's main motivation has been to support the members of our industry through Advocacy, Education, and Networking Opportunities. Our members not only benefit from one another, but they now have the opportunity to tap into our Incentive Program offered by BRI members, for BRI members, and our Health Insurance Program. That program can help members - and their businesses - save on the ever-increasing Health Care Costs.

It gives me great pleasure that our incentives and events are being well-received, as I can see that membership is increasing and the Pride of Membership at the BRI is at an all-time high!

Editor's Note: Carmelo Milio is in his second term as President of The Builders Institute (BI)/Building and Realty Institute (BRI) of Westchester and The Mid-Hudson Region. He is also President and Director of Trion Real Estate Management.

Why Insurance Companies Usually Settle Liability Claims, Continued from p. 2

etc. (note: certain types of policies may allow you to veto the insurance company's settlement deal, but if the final adjudication ends-up costing the insurance company more than the settlement option you vetoed, then you will have to share in a portion of the additional cost, which will make you think twice, before calling the settlement deal "crazy").

Our clients are regularly shocked and appalled at the settlements their insurance carriers make. Their reaction goes something like this: "They gave that guy \$100,000?!?!? He shouldn't have gotten a dime!!!! Well, maybe \$5,000 or \$10,000, but certainly not \$100,000. Are they crazy?!?!? That's ridiculous! What are they, stupid? Find me an insurance company that's willing to fight, especially when I did nothing wrong. This is a totally bogus, fraudulent claim! No wonder insurance premiums are so high!"

The Response

Our response includes the following points:

- Insurance companies are not spending your money to settle claims; it's their money, so if they didn't feel it was in their best interest to settle a claim at a certain amount, they would not do so.
- If insurance companies were so foolish and ignorant in settling claims, they would not have survived for decades, or (in some cases) more than a century, employing hundreds or thousands, and generating profits.
- If you were faced with the prospect of settling for \$100,000 of your money, in order to avoid potentially paying \$500,000 of your money, you'd settle.

■ "A bird in hand is worth two in the bush."

For another perspective, consider: a well-known personal injury law firm, which regularly advertises on TV, started a new ad campaign just recently. The ads tout the law firm's success in obtaining far better financial outcomes for their clients by going to trial, rather than taking the insurance company's settlement offer. It features the law firm's clients making statements such as: "They got me forty times more than what the insurance company said my case was worth!"

Ask yourself: if insurance companies were so "stupid" in constantly settling claims for more than they're worth, would this major law firm be spending huge advertising dollars to tell everyone how effective insurance companies are at settling claims for less than they're worth?

We hope you're never involved in a liability lawsuit, especially one where you feel most or all of the responsibility is not yours. If you are, we hope you have the right liability insurance to protect you. If you do, and if your insurance company wants to settle, there's probably a good reason.

For more information on liability insurance for your personal and business insurance, contact your broker, or Levitt-Fuirst, at (914) 457-4200.

Editor's Note: Levitt-Fuirst Associates is the Insurance Manager for The Builders Institute (BI)/Building and Realty Institute (BRI) of Westchester and the Mid-Hudson Region. The firm can be reached at (914) 457-4200.

Another Busy Stretch Ahead for the Industry as Spring Gets Closer, Continued from p. 2

General Membership Meeting of the BRI. The story summarizes the economic outlook that Cucchiaro issued at the meeting.

❖ A reminder in Co-op and Condo Corner from Diana Virrill, chair of the CCAC. Virrill delivers a message that all BRI members are welcome to attend the Membership Meetings of the CCAC and utilize the many networking opportunities of those events.

❖ An analysis in Counsels' Corner on the important duties of board members of co-ops and condos. The piece was written by Finger and Finger, A Professional Corporation, chief counsel to the BRI and all of its affiliate associations.

❖ A review of how smart policies are leading

important development efforts in the Grand Central Terminal-Midtown New York City area. Daniel R. Garodnick, a New York City councilman, wrote the summary. Annunziata, in a Publisher's Note accompanying the story, cites that the strategies of the development efforts may also serve as an example of how rezoning and other progressive Land Use Practices can benefit Westchester County's communities.

❖ An analysis in Tech Talk of the Technology Trends affecting the business sector in 2017. Andrea Wagner, president of Wagner Web Designs, authored the report.

A happy (and busy) spring to all. Enjoy the issue.

Counsels' Corner

So, You Want to be a Board Member?

By Kenneth J. Finger, Esq., Carl L. Finger, Esq. and Daniel S. Finger, Esq., Finger and Finger, A Professional Corporation, Chief Counsel, Builders Institute (BI)/Building and Realty Institute (BRI)

WHITE PLAINS

Every year, when I attend an Annual Meeting, I watch with awe as shareholders, or unit owners, vie to be elected to the Board, whether it be to the Board of Directors (in a cooperative) or the Board of Managers (in a condominium). I wonder whether they recognize the awesome responsibility that they are undertaking as a Board member and, when elected, I congratulate them as "gluttons for punishment."

Shortly thereafter, at the first Board meeting, I give my usual speech which sets forth their duties and responsibilities as a Board member, including, among other things, that they each have to set aside their own personal proclivities, desires, agendas, etc. and act in a fiduciary capacity for the benefit of the entity as a whole.

The example I usually give is a building that has terraces that are in need of repair and yet the particular Board member is in a unit without a terrace and will have to share in the funding of repairs and remediation, so as to keep the building in "tip-top" shape.

While there are always the exceptions to the rule, and some people run for the Board to advance their own person agendas, such as fostering a change in a house rule and regulation, for example, to have dogs, or allow more subleasing, that is generally the exception rather than the rule.

Cooperative and condominium housing was developed and organized to provide community-based housing predicated on the principle that moderate-priced housing with an ownership interest can better be obtained in such a fashion than the purchase of a single-family home - difficult at best in an urban or even suburban area.

A Responsibility

It is the responsibility of the Board to assure that the basic purposes of the housing entity, as reflected in its Offering Plan or organization documents, are carried out faithfully and in a fiduciary or trust capacity. The Board will generally act to assure that the housing provided is accomplished at the lowest and most efficient cost.

In a cooperative, there is the additional advantage (or to some disadvantage) of having every new shareholder subject to the approval of the Board of Directors. While this may or may not be an advantage, it gives the cooperative the advantage of analyzing finances to assure that the prospective resident can afford the unit, and also, without any discriminatory intent or action, assuring that the prospective resident understands the benefits (and obligations) of community living. The Board is charged with the responsibility of carrying out this vital function in an objective, non-discriminatory, consistent manner.

Contrariwise, in a condominium, the Board does not usually have the ability to "select" incoming unit owners, although in most condominium situations the Board can, if the By-Laws and/or Declaration so provide, purchase the unit pursuant to a right of first refusal. While this ability exists, most condominiums will not exercise it because of the cost, unless the price of the unit is so below the norm that the Board believes, in its "business judgment," that the purchase makes economic sense.

The Board acts within its "business judgment" a standard that gives a great deal of discretion to the Board and its actions. Whether those actions are to invest in a new roof, or do an elevator repair rather than replacing the cab and operating mechanism, or install or remove a swimming pool, or convert from oil to gas (which may be a necessity these days in view of the fact that Numbers Four and Six Oil will shortly be illegal), or allowing the use of a recreation room for yoga, canasta or a meeting, the decision is made by the Board in its "business judgment."

A Key Case

A challenge to its decisions will be hard to prove as the business judgment rule was derived from a case in the New York State Court of Appeals, as follows:

The Court of Appeals in *Matter of Levandusky v. One Fifth Ave. Apt. Corp.*, 75 N.Y.2d 530, 544 N.Y.S. 2d 807 held that the business judgment rule was the proper standard of judicial review when evaluating decisions made by residential cooperative corporations.

In short, the Court of Appeals held that "Levandusky established a standard of review analogous to the corporate business judgment rule for a shareholder tenant challenge to a decision of a residential cooperative corporation."

The Court went on to hold that "the business judgment rule is a common law doctrine by which courts exercise restraint and defer to good faith decisions made by Boards of Directors in business settings (citations omitted)."

"Levandusky" involved a situation where a residential cooperative corporation refused to allow one of its shareholders to do an interior renovation. However, the underlying issue was the "legal question of what standard of review should apply when a Board of Directors of a cooperative corporation seeks to enforce a matter of building policy against a tenant-shareholder."

In its decision, the Court of Appeals stated: "As courts and commentators have noted, the cooperative or condominium association is a quasi-government - a little democratic sub society of necessity (citation omitted). The proprietary lessees or condominium owners consent to be governed, in certain respects, by the decisions of a board. Like a municipal government, such governing boards are responsible for running the day-to-day affairs of the cooperative and to that end, often have broad powers in areas that range from financial decision-making to promulgating regulations regarding pets and parking spaces (see generally, Note, Promulgation and Enforcement of House Rules, 48 St. John's L. Rev. 1132 (1974))."

"Through the exercise of this authority, to which would-be apartment owners must generally acquiesce, a governing board may significantly restrict the bundle of rights a property owner normally enjoys."

"We conclude that these goals are best served by a standard of review that is analogous to the business judgment rule applied by courts to determine challenges to decisions made by corporate officers (citation omitted)."

"Developed in the context of commercial enterprises, the business judgment rule prohibits judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. (citation omitted). So long as the corporation's directors have not breached their fiduciary obligation to the corporation, the exercise of (their powers) for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or expedient. (citation omitted)."

Examples

In the case *Genel v. 320-57 Corporation*, the Supreme Court, New York County, held that a challenge to Board action was inappropriate since the decision, in that case to settle litigation, was within the business judgment of the cooperative. Even where a Board took away a previously existing right to park, the Court upheld its right to do so.

In *Gillman v. Pebble Cove Home Owners Association, Inc.*, (citation omitted), the Appellate Division of the Supreme Court held that the corporate association was entitled to eliminate the unit owner's right to park on roadways, a right that had existed at the time they purchased their units. Further, the Court upheld the Board's right to promulgate rules and regulations as to the parking. See also *77 E.12 Owners, Inc. v. Yager*, where the Supreme Court upheld the Board of Directors' right to "adopt rules and make decisions in order to effectuate its proper role."

In what is probably the most significant decision of the New York Court of Appeals regarding the power of a Board of Directors of a cooperative since *Levandusky*, the Court of Appeals in *40 West 67th Street v. Pullman*



Ken Finger



Carl Finger



Dan Finger

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