For Board Members and Property Managers of Co-ops and Condos™
HABITAT

BOARD OPERATIONS

New York City

Directors and Officers Insurance Does Not Cover Intentional Discrimination

By **Adam Leitman Bailey & Colin E. Kaufman**

In a recent decision that sent shivers of concern across New York co-op and condo boards, the state's highest court held that the Business Judgment Rule does not protect individual condominium and cooperative board members against some personal liability. In response, real estate and insurance attorneys are reviewing directors and officers (D&O) policies and the law to try determine whether you're protected in the event of a claim of discrimination. Here, two veteran attorneys explain the background and what some of your options may be.

April 26, 2013 — In New York, public policy is that you cannot be insured against intentional acts that bring about intended results, such punching someone, causing injury or purposely discriminating against a member of a protected class. One cannot profit from one's own wrongdoing and thus, for example, the well-known prohibition against killing one's spouse and collecting the life-insurance proceeds. Insurance companies cannot pay a judgment against an insured for punitive damages.

The fact that punitive damages are sought in a lawsuit will not prevent an insured board member from receiving a legal defense paid by the insurer. However, if both actual and punitive damages are awarded, indemnification applies only to the actual damages awarded and not to the punitive damages.

The Circular File

One area in which the public policy is clear is that of discrimination liability. Circular Letter No. 6 (1994) of the state Insurance Department (now the Department of Financial Services), which is binding on carriers for policies written in New York, states that liability insurance coverage for intentional wrongs is prohibited. And discrimination based upon disparate treatment is an intentional wrong whose resultant harm flows directly from the acts committed, so liability coverage for it is impermissible.

If a claim is made against an insured under a liability policy, there are two issues to consider: whether the insured has a right to indemnification from the carrier and whether the insured has a right to a defense paid for by the carrier.

As a practical matter, plaintiffs, including discrimination plaintiffs, nearly always allege (or seek to allege) facts or legal theories which bring the suit within coverage. If one of the claims is

arguably within coverage, the carrier is obliged to defend. Once the carrier is "at the table," settlement is much more likely; carriers have cash with which to settle and little interest in vindicating the acts or procedures of their insureds.

Definitions and Exclusions

Every policy contains definitions which may limit coverage for certain events or persons and exclusions which except certain events from coverage. In a typical policy, the policy defines "Loss" in a manner which includes judgment and penalties only "if such violation is not knowing or willful," and goes on to say that Loss does not include "matters uninsurable under the law pursuant to which this policy is issued."

In the Exclusions section of a typical policy, the policy excludes from coverage at an act "based upon, arising out of or attributable to … any willful violation of any statute or regulation committed by such Insured."

Insurance is governed by contract. Even if the insured thought he, she or it was covered, if the loss is outside the definition of coverage in the policy, there is no coverage. If the loss is one which has been excluded, again there is no coverage.

There is no good news in this article as far as coverage for board members who commit intentional torts and lose at trial as coverage will not be provided. Intentional discrimination cannot be covered as a matter of public policy, state law and departmental regulation.

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