From the Editor's Desk

Hanley's Highlights

by Jeff Hanley
Associate Executive Director, Building and Realty Institute (BRI), *Impact* Editor

Offering a Series of Reading Options on Important Industry Issues

ARMONK

Where should I start?

Readers of this issue of IMPACT may ask that question while browsing through the edition. There are many choices of reports that cover important issues affecting the building, realty and construction industries. Here are some of those options:

- A page one report on the release by the Building and Realty Institute (BRI) on Feb. 16th of a new study, The Housing Stability and Tenant Protection Act: An Analysis of Early Impacts in Westchester County. The study, BRI officials said, reviews the preliminary impacts of the HSTPA on the real estate market within Westchester County since its inception in 2019. The report was released during a press conference at the BRI offices in Armonk. Commissioned by the BRI, the study was conducted by the non-profit group Hudson Valley Pattern for Progress. The BRI requested an objective and data-driven analysis of how the real estate market has changed since 2019, association officials said. The study was completed last year.
- A page one analysis by the BRI on key legislative developments affecting the building, realty and construction sectors at the end of 2022.
- A page one story from the National Association of Home Builders (NAHB) citing that builders across the U.S. expressed "a cautious optimism" in February regarding market conditions improving.
- A report on page one on the BRI and Local 32-BJ Service Employees International Union (SEIU) recently agreeing to a new, four-year agreement that will affect 1,400 residential building service workers in more than 400 co-ops, condos, and rental apartment buildings across the Westchester and Mid-Hudson region. The agreement takes the place of the previous four-year contract that expired at midnight on Sep. 30, 2022. The contract will run to Sep. 30, 2026.
- A page one study from the National Association of Home Builders (NAHB) citing that remodeling market sentiment across the U.S. weakened in the fourth quarter, but remains positive.
- An analysis in Co-op and Condo Corner on the importance of co-ops. Jane Curtis, chair of the Cooperative and Condominium Advisory Council (CCAC) of the BRI, wrote the report. The analysis is on page two.
- The return of the Presidential Perspectives column to our publication. BRI President Lisa DeRosa will now be writing the column. This issue's Presidential Perspectives commentary, which is on page one, stresses the need for building, realty and construction industry members to come together to "change what needs to be changed" in our region so that our area can move forward.
- A report in Counsels Corner on a series of important cases affecting co-ops and condos. The article was written by officials from Finger

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Insurance Insights

By Ken Fuirst and Jason Schiciano
Levitt-Fuirst Insurance

Insurance Claim Declinations Are Not Always Correct – Is Your Insurance Broker Advocating On Your Behalf?

TARRYTOWN

If you are fortunate, during the course of your lifetime, neither you, your business, nor any organization with which you are affiliated (e.g. condo association, cooperative, non-profit, etc.) will experience an incident that results in an insurance claim. The reality is that many of us will be involved in an insurance claim at some point.

After a claim is filed with an insurance company, the carrier renders a decision on whether or not the claim is covered, or denied. The carrier looks at the information presented in the claim, including the cause of the claim, and the result.

The claim information is assessed relative to the policy language concerning what is covered, and in particular, what is excluded (every insurance policy has exclusions), to determine if the carrier should provide "coverage" for a claim. For a Property claim, "coverage" could include repair of the damaged property, and reimbursement for net income lost, due to inability to use the property. For a Liability claim, "coverage" could include payments to an attorney to provide a defense against a lawsuit, and payment of a legal judgement against an insured individual or business.

Usually, the correct claim decision is clear and obvious: repairs from a fire or water pipe break are typically covered; a lawsuit relating to a slip-and-fall injury or an auto accident is typically covered. Most claim coverage decisions are simple and indisputable. Occasionally, the circumstances and/or details of a claim are not clear, or subject to interpretation, relative to the language in the insurance policy. Sometimes a carrier incorrectly overlooks certain information. These cases can lead to a carrier's coverage denial.

A claim denial can result in direct responsibility by the policyholder (individual or business) for all of the expenses related to a claim. In the wake of a claim denial, out-of-pocket expenses could include home or building repair costs, or expenses for legal defense and/or judgement/settlement. These costs can reach tens-of-thousands of dollars, hundreds-of-thousands of dollars, or even more than a million dollars!

Again, the correct claim decision is usually clear and obvious. But what about those claim decisions that fall into a "grey area," where the decision is subject to interpretation of the events involved, and/or how the policy terms apply to those events? Often times, a carrier will deny coverage for those "grey area" claims. Now what?

A professional insurance broker, with a claims team capable of recognizing "grey area" claims denials, and willing to take the time to craft a carefully-worded appeal, can be the difference between an uninsured, and a claim that is fully paid by the insurance carrier (less deductible, if applicable.)

Examples

For example, recent real claim denials that were reversed upon appeal by our office include:

*A unit-owner lawsuit against a condo association alleged that a noisy garage door made the unit uninhabitable, causing loss in rental income. The General Liability carrier denied legal defense to the association, arguing that no property damage (a requirement for coverage) had occurred. Our office argued that the alleged negative effects of the noisy garage did constitute "property damage" (as defined by the policy). The carrier reversed its position, and agreed to defend the association in the lawsuit.

*A Directors and Officers carrier denied to defend a condo Board, asserting that the issue at hand "arose out of prior litigation," which was excluded by the policy. Our office argued that while the parties were common in the two matters, the subject proceeding was unrelated to the prior litigation and sought different relief, so the exclusion should not apply. The D&O insurance carrier then reversed its decision, and assigned defense counsel to defend the insured.

*A Professional Liability carrier denied defense of a lawsuit alleging that a company had discriminated against sight-impaired people, because its website did not include features that would allow for viewing by the plaintiffs. The carrier's declination asserted that the claim did not relate to the performance of the insured's professional services. Our office argued that the claim was covered under the third-party discrimination provisions of the policy, and that the website was part of the insured's professional services. Upon review, the insurance company withdrew its denial.

*A manufacturer, whose product was damaged during shipping, submitted a claim for the replacement cost of the product under its Property policy. The carrier denied coverage, citing an exclusion relating to "insufficiency or unsuitability of packaging." Our office reminded

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Co-op and Condo Corner

Why Co-ops Matter – A Review of the Important Reasons

Jane Curtis

By Jane Curtis,
Chair, Cooperative and Condominium Advisory Council (CCAC) of the Building and Realty Institute (BRI)

ARMONK

Co-ops have been a part of New York's housing mix for over a century, historically coming to the fore in times of crisis and opportunity.

In the 1920's, labor unions sponsored co-op developments to fill the need for worker housing. Mitchell-Lamas flourished in the 1950's post-war housing boom to close the gap between income and the cost of market rate housing. Rental buildings bankrupted or abandoned during the 1970's New York City fiscal collapse were converted into financially stable market rate co-ops. Today, co-ops are enjoying a resurgence in popularity and government support as one important answer to our housing shortage.

Co-ops have survived and thrived because of their unique characteristics as a form of homeownership. Unlike condo owners, co-op shareholders are legally bound together in a corporate structure of joint ownership of their entire property. This mutual dependence creates both responsibilities and opportunities. While many choose co-op living to free themselves of the usual homeowner's burden of repairs and snow shoveling, they nevertheless have a responsibility to participate in governance.

Cooperators cast their lot with each other to jointly manage both the financial and operational affairs of the building as a nonprofit business. Success arises when shareholders can meet their individual financial obligations to pay their share of the operating costs, be good neighbors by abiding by the house rules, and choose their Boards of Directors wisely.

Co-op boards are much like municipal governments, charged with providing the best possible service at the lowest possible cost. Co-ops do not seek profit, but operational efficiency that minimizes monthly maintenance costs to shareholder owners. Studies have shown that cooperators pay less than tenants in comparable rental buildings.

Co-op boards that fairly apply reasonable rules and actively foster community also reap the rewards of cohesion, common purpose, and neighborly consideration among shareholder residents, a possibility of community that is typically not present in other multifamily developments.

In short, co-ops can be both economical and pleasant places to live.

Facts

Co-ops on average are significantly more affordable than either single family houses or condominiums. In the current environment of dramatically escalating housing prices, co-ops have become especially attractive. The 2022 median cost for a single-family home was $885,000, $450,000 for a condo, and $203,000 for a co-op.

The affordability of co-ops is enhanced by historically favorable tax treatment, recently threatened by proposed state legislation that would dramatically increase property taxes and price many cooperators out of their homes.

Co-ops provide a first rung on the homeownership ladder for young adults, a refuge for the widowed and divorced, and a downsizing option for retirees. Limited equity co-ops provide an even more attainable goal for those who could not otherwise aspire to homeownership, and help to close the racial disparity in building generational wealth.

So, while many have attempted to characterize co-ops as exclusionary and elitist, the facts reveal that co-ops are empowering and progressive, places where it is possible to build both financial and social capital.

Co-ops need and deserve the support of everyone in the housing industry, to push back on the very real legislative threats to our financial and operational integrity. We ask all to support the BRI's 2023 five-point legislative agenda with regard to co-ops. The agenda can soon be found at buildersinstitute.org.

Our goal: "Keep non-profit housing cooperatives and condominiums affordable for first-time homeowners, downsizing seniors and others by avoiding layering on additional costs."

***Editor's Note:** The Cooperative and Condominium Advisory Council (CCAC) represents more than 400 co-ops and condos. The organization, a component association of the Building and Realty Institute (BRI), was formed in 1979.*

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Building & Realty Industry Report:

Builder Confidence Across the U.S. Continues to Decline As Housing Weakness Continues

WASHINGTON, D.C.

Elevated interest rates, stubbornly high building material costs and declining affordability conditions that are pushing more buyers to the sidelines continue to drag down builder sentiment, according to a recent building and realty industry report.

Builder confidence across the U.S. in the market for newly-built, single-family homes posted its 11th straight monthly decline in November, dropping five points to 33, according to the National Association of Home Builders (NAHB)/Wells Fargo Housing Market Index (HMI) released on Nov. 16th. The figure is the lowest confidence reading since June of 2012, with the exception of the onset of the pandemic in the spring of 2020, the report said.

"Higher interest rates have significantly weakened demand for new homes as buyer traffic is becoming increasingly scarce," said NAHB Chairman Jerry Konter, a home builder and developer from Savannah, Ga. "With the housing sector in a recession, the Biden administration and new Congress must turn their focus to policies that lower the cost of building and allow the nation's home builders to expand housing production."

The report said that to bring more buyers into the marketplace, 59 percent of builders report using incentives, with a big increase in usage from September to November. For example, in November, 25 percent of builders say they are paying points for buyers, up from 13 percent in September. Mortgage rate buy-downs rose from 19 percent to 27 percent over the same time frame. And 37 percent of builders cut prices in November, up from 26 percent in September, with an average price of reduction of six percent. This is still far below the 10 percent to 12 percent price cuts seen during the Great Recession in 2008, the report said.

"Even as home prices moderate, building costs, labor and materials – particularly for concrete – have yet to follow," said NAHB Chief Economist Robert Dietz. "To ease the worsening housing affordability crisis, policymakers must seek solutions that create more affordable and attainable housing. With inflation showing signs of moderating, this includes a reduction in the pace of the Federal Reserve's rate hikes and reducing regulatory costs associated with land development and home construction."

Key Data

Derived from a monthly survey that NAHB has been conducting for more than 35 years, the NAHB/Wells Fargo HMI, NAHB officials said, gauges builder perceptions of current single-family home sales and sales expectations for the next six months as "good," "fair" or "poor." The survey also asks builders to rate the traffic of prospective buyers as "high to very high," "average" or "low to very low." Scores for each component are then used to calculate a seasonally adjusted index where any number over 50 indicates that more builders view conditions as good than poor.

The report said that all three HMI components posted declines in November. Current sales conditions fell six points to 39, sales expectations in the next six months declined four points to 31 and the traffic of prospective buyers fell five points to 20.

Looking at the three-month moving averages for regional HMI scores, the Northeast fell six points to 41, the Midwest dropped two points to 38, the South fell seven points to 42 and the West posted a five-point decline to 29. HMI tables can be found at nahb.org/hmi. More information on housing statistics is also available at Housing Economics PLUS (formerly housingeconomics.com), NAHB officials said.

Commentary:

N.Y. State Must Act Now to Help Struggling Landlords

***Editor's Note:** The New York State Homes and Community Renewal Agency (HCR) and the Division of Housing and Community Renewal (DHCR) recently commenced the formal process, required under the New York State Administrative Procedure Act ("SAPA"), to amend various regulations in the Rent Stabilization Code, the Tenant Protection Regulations and the state and New York City Rent Control Regulations. Public Hearings were held on Nov. 15 to give regulated parties and concerned members of the general public an opportunity to express their opinions on DHCR's proposed amendments. Alana Ciuffetelli, chair of the Apartment Owners Advisory Council (AOAC) of the Building and Realty Institute (BRI), testified at one of the Public Hearings on Nov. 15 regarding the proposed amendments. Her testimony is below.*

YONKERS

My name is Alana Ciuffetelli and I am the Chair of the Apartment Owners Advisory Council (AOAC) of the Building and Realty Institute (BRI). I also sit on the Board of Directors of the Westchester Owners Association.

Not only have I been a landlord for basically my entire life, but I am also a real estate broker and a managing agent. I am extremely passionate about what I do and take the responsibilities they bring very seriously. A relationship between a tenant and landlord is important not only to landlords, but also to our tenants who have entrusted myself and my family with a significant asset in their life, their home, their apartment within our buildings.

I live and breathe my buildings. Not only are they a piece of my livelihood, but they also are a part of my family legacy. My management company is called 3C Realty because three generations of Ciuffetellis have owned, managed, and operated our buildings. With a fourth-grade education heavily rooted in his Italian heritage and little to no understanding of the English language, my grandfather risked it all in hopes of providing a better future for his family and generations to come. And our buildings have given back to us as much as we have given to them.

But for the first time in my life, I am afraid. Afraid of what is going to happen to my buildings. My tenants. And my family because of something that is totally beyond our control – I am speaking of the changes made to the Emergency Tenant Protection Act (ETPA) in 2019 which resulted in a new law, the Housing Stability and Tenant Protection Act (HSTPA).

In particular, I would like to address the changes made to Individual Apartment Improvements (IAI's). Let me start by saying I realize this panel cannot change what has been put into law, but my hope is that you take the testimony of myself and my colleagues back to Albany and really listen to what we are saying because circumstances are dire, and immediate changes are needed when dealing with the HSTPA, especially as it relates to IAI's and Major Capital Improvements (MCI's).

Under the new law a landlord is capped at $15,000 for no more than three IAI's over 15 years, no matter the size of the apartment, studio, one-bedroom, two or three. This is impossible to achieve. Everyone here knows the effect inflation has had on our costs of goods. Building and repair costs have skyrocketed. I can't get any apartment renovated, not even a studio and forget about a two-bedroom, for $15,000.00. I want to provide quality and safe housing for our tenants, but under this formula I cannot make the desired renovations to apartments, and provide my tenants with items that they want, like new kitchens, new baths, new appliances. The quality service I think my tenants are entitled to costs resources, time and, most importantly, money. The changes made to the IAI's strips us of the money needed to give my tenants what they deserve.

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Counsels' Corner

An Update on Cooperative and Condominium Cases

Ken Finger

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Carl Finger

Dan Finger

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WHITE PLAINS

Payment of Maintenance

Virtually every landlord faces a claim that rent / maintenance / common charges should not be paid due to failure to maintain the premises, such as in the case of Andrea v. 186 Tenants Corp. – leaks in the apartment. The Court in Andrea found that the tenants were not entitled to withhold maintenance in light of the Proprietary Lease's clauses precluding a setoff, diminution or abatement of rent.

Caveat: Make sure the lease is carefully reviewed when bringing or defending non- payment actions.

Alteration / Renovation Agreement with Board

In the case of 131 Perry St. Apt. Corp. v. Clauser, the shareholder signed an agreement with the Board relative to an alteration, and agreed to be responsible for the new fixtures and also stated that future owners would be responsible.

A new shareholder purchased and was not informed of the Agreement and in fact did not sign anything with either the cooperative or the seller assuming the obligations for the fixtures. A leak ensued and the co-op brought suit claiming the new shareholder was bound by the alteration agreement. The Court held that the agreement could not be enforced as the new shareholder knew nothing about it, was not a party to it and the co-op should have required the new shareholder to sign the agreement.

Alternatively, the Cooperative could have amended all Proprietary Leases to provide that all purchasers are bound by agreements signed by prior shareholders.

Caveat: Cooperatives/Managing Agents should keep copies of all agreements. Perhaps a deposit by the shareholder at the time of the alteration could be considered.

Statute of Limitations knocks out cooperative from collecting rent

In this case, the Sponsor was required to transfer a unit to the co-op in 2010, but did not do so. The co-op finally brought suit after the Statute of Limitations expired. While the co-op argued, in effect, there was a continuing "wrong" (or obligation to pay the rent monthly), the Court found that the wrong was in 2010 (not transferring the unit to the co-op) and thus there was no "continuing obligation" which would effectuate the continuing wrongs doctrine tolling the Statute of Limitations. 333 East 91st Street Owners Corp. v.165 First Avenue Associates.

Caveat: Always be aware of the Statute of Limitations.

Shareholder Challenge to Proprietary Lease Amendment Defeated

The cooperative in this case, through a shareholder amendment to the Proprietary Lease, changed maintenance responsibilities for terraces from the co-op to the respective shareholders. The shareholders filed suit over a year later. The Court held that this was not a proprietary lease breach but a challenge to Board action, and thus, there was a four-month Statute of Limitations as an Article 78 proceeding.

Dau v. 16 Sutton Place Apartment Corp.

"Where a shareholder engaged in years of objectionable conduct, including threats, false accusations, use of profanity and inappropriate photographing, the Court said that it would not second guess the Board as this is why the co-op is protected by the Business Judgment Rule."

Business Judgment Rule

The basic rule, as applied to Cooperatives / Condominiums / Homeowners' Associations, was set forth in detail in the case of Levandusky v. One Fifth Avenue Apartment Corp. In essence it protects the entity when the governing board acts within the scope of its authority, does not violate the law or its own governing documents and acts in good faith. Among other things a Board is not protected when the Board did not act within the authority granted it in its governing documents or acted in bad faith. It is validly applied when the Board acts in enforcement of its lease and house rules; as to rule making decisions or in management decisions.

Where a Condominium Board relocated a heating system and the unit owner objected, the Court found the action was in good faith and for the benefit of the Condominium. Aydin v. Bd. Of Mgrs. Of the Decora Condominium.

Contrariwise, the Court in Bacharach v. Bd. Of Mgrs. Of the Brooks-Van Horn Condo held that the Board's extensive delay in dealing with a unit owner's complaints as to an unabated noise condition was not justifiable as a legitimate good faith decision.

In Orange Orchestra Properties, LLC v. Gentry UnLtd., Inc. the Court dealt with a shareholder's suit challenging the denial of an alteration (and later termination of the Proprietary Lease). In this case the Board's approval authority provided that it not be "unreasonably withheld." Also, other similar alterations had been approved, thereby calling into question the possibility of "bad faith." Business Judgment did not protect the Board.

Caveat: Board approval authority should not be limited or qualified.

The Cooperative acted after a shareholder vote, to terminate the shareholder's proprietary lease on the grounds of objectionable conduct. A 15-days' notice to cure was required. The Court overturned the ejectment action because the conduct did not continue after the service of the 15-day notice to cure and the Board's claim that it was protected under the business judgment rule since the termination of the lease was in contradiction of the proprietary lease. Tomfol Owners Corp. v. Hernandez

Where a shareholder engaged in years of objectionable conduct, including threats, false accusations, use of profanity and inappropriate photographing, the Court said that it would not second guess the Board as this is why the co-op is protected by the Business Judgment Rule. Haimovici v. Castle Vill. Owners Corp.

Caveat: Note that many of these cases, as set forth in the previous examples, are fact specific.

Miscellaneous

The General Obligations Law, Sec.5-903 requires notification of an automatic renewal provision in a contract between a vendor as to service, maintenance and/or repair and the Board and this section of the law trumps a continuing long term project. See Abstract Management, LLC v. 1701 Albermarle Owners Corp.

Real Property Action and Proceedings Law, Sec.1303(1)(b).

Predicate notice to foreclosure action must be served on tenants occupying units.

U.S. Real Estate Credit Holdings III-B, LP v. BCS 20 West LLC.

Caveat: In foreclosure actions, the notice provisions must be strictly complied with.

***Editor's Note:** The authors are attorneys with Finger and Finger, A Professional Corporation. The firm, based in White Plains, is Chief Counsel to The Building and Realty Institute of Westchester and the Mid-Hudson Region (BRI) and its seven component associations.*