

THE SAGA OF GRACIE TERRACE

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In *Superman I*, when Superman gripped Lois Lane's arm from behind and leaped with her from the terrace of her penthouse apartment into the night sky on their first date, a flight over Manhattan and the Statue of Liberty, he took off from the roof-terrace of an apartment that was the object of bitter litigation that consumed our lives for three and one-half years and posed challenging issues of landlord-tenant and insurance law.

The case, *Gracie Terrace Apartment Corp. v. Goldstone*,¹ was at the center of a protracted dispute that eventually gave rise to seven lawsuits, dozens of motions, several appeals, and reams of acrimonious correspondence. It divided a residential community into two warring camps, trapping the non-combatant tenants in the middle and compelling them to share in the Apartment Corporation's hefty litigation expenses.

The nature of the action appears in a judicial decision, written early in the course of the litigation, where the court observed that the parties were "embroiled in a bitter and continuing feud since Mrs. Goldstone was ousted, in 1983, from her position as a director of the cooperative corporation," and that "the present administration of the cooperative corporation would like to force the [Goldstones] out of their occupancy of Penthouse B."²

On one side was the Apartment Corporation, as owner of a luxury cooperative apartment building, led by its then president Walter Albrecht.³ Gracie Terrace is located at the end of 82nd Street at the East River, just south of Carl Schurz Park and Gracie Mansion. On the other side were Dr. Jonas Goldstone, the tenant under a Proprietary Lease of the duplex apartment Penthouse B (PH-B), and his wife Maro, a real estate lawyer.⁴

Maro played an instrumental role in the conversion process, chairing the negotiations on behalf of the tenants with the then owner-Sponsor, Norman K. Winston, a prominent New York real estate developer and owner. For much of

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¹ 477 N.Y.S.2d 647 (App. Div. 1984).

² *Gracie Terrace Apartment Corp. v. Jonas Goldstone*, No. 3941/84, slip op. at 1-2 (N.Y. Sup. Ct. Apr. 2, 1984).

³ "[Walter] has [a] BA and MBA from Harvard College and the Harvard Business School and studied at the London School of Economics." He was a Lt. Colonel in the USAFR. See Letter from Maro Arrathoon Goldstone, President, Gracie Terrace Apartment Corporation, to the Tenant-Shareholders of Gracie Terrace Apartment Corporation (May 24, 1982) (on file with the *Nevada Law Journal*).

⁴ Maro received her BA from Vassar College and an LLB from Columbia Law School. *Id.*

the cooperative's first decade of existence, Maro was repeatedly re-elected as its president. She had a hands-on management style and took an active role in overseeing the maintenance of the building's physical plant, and the high level of performance of its staff and outside Managing Agent.

In her May 1982 President's Report to the Tenant-Shareholders, Maro was able to proudly announce that Gracie Terrace held "the City-wide record from the lowest maintenance cost per room in a large luxury building operation without deficit financing"⁵ and that the appreciation in market prices per room in the ten years since conversion to cooperative ownership far exceeded that in comparable buildings.

I. THE APARTMENT AND ITS HISTORICAL USE

Gracie Terrace contains nineteen stories plus two penthouse levels. The lower penthouse level is shared by PH-A and PH-B, while the only rooms on the upper penthouse level are part of the upper duplex portion of PH-B. Adjoining the upper level of PH-B on its eastern, southern, and western sides, are portions of the building's 2200 square foot continuous wrap-around tar and gravel terrace/roof.

The eastern portion of the roof (about 1200 sq. ft), onto which the Goldstone's master bedroom⁶ opened, had been completely landscaped and improved by the former rental tenants, with the permission of the building's then owner, Norman K. Winston.

A redwood walkway in the form of a cross led from a concrete paved roof/terrace outside the bedroom and bath to the parapet walls. It divided this part of the eastern roof into four sections, each covered with white stones. Ivy, climbing Robin Hood roses, and grape vines adorned the building and parapet walls. A profusion of other flowers, berries, and fruit-bearing apple, pear, peach, nectarine, apricot, and cherry trees grew out of redwood planter boxes. Photographs of the fully planted and landscaped rooftop garden had been featured in *The Terrace Gardner's Handbook*⁷ and *The Garden Journal*.⁸

PH-B was offered for sale by the Sponsor on the basis of a thorough physical inspection of both levels of the duplex apartment and the adjacent terraces, roof areas, hallways, and stairs. The apartment was not sold to Dr. Goldstone on the basis of any diagram, sketch, or floor plan.

The Sponsor's Selling Agent, who accompanied the Goldstones on their inspection tours,⁹ told them that all the exterior and interior areas adjoining PH-

⁵ *Id.*

⁶ Recreated as Lois Lane's entrance foyer-living room in the *Superman I* and *II* movies.

⁷ LINDA YANG, *THE TERRACE GARDNER'S HANDBOOK* (Doubleday & Co. 1995).

⁸ *New York Botanical Garden*, *THE GARDEN JOURNAL* (Feb. 1973).

⁹ The apartment was sold on the basis of a visual inspection. The Subscription Agreement stated that the prospective purchaser has "inspected or been given the opportunity to inspect the Apartment and have satisfied [him/herself] as to the condition thereof . . . and [the Subscription Agreement] shall also constitute [an] agreement to accept the Apartment in the condition in which it shall be on the date of closing of title under the Plan. . . ." Paragraph 8 of the Subscription Agreement.

The Proprietary Lease allocated "the rooms in the building as partitioned on the date of execution of the lease . . . together with their appurtenances . . . and any . . . terraces,

B had always been, and were to continue to be, exclusively used by the occupants of PH-B.¹⁰ He showed them physical evidence of this exclusive use: a fence which prevented anyone on the southern portion of the roof (onto which the fire stairs exited) from gaining access to the eastern portion, signs affixed to the inside of the fire exit doors state “[n]o one permitted on roof at any time,” cosmos blooming and corn growing in planter boxes on the western portion of the roof, alarmed panic bolts on the interior of the doors leading from the fire exit hallway on the southern end of the upper level of PH-B onto the fire stairs’ landing,¹¹ abandoned gardening materials, suitcases with tags labeled “Cohen,” and terrace furniture in the fire exit hallways.¹²

The improved and completely landscaped eastern roof/terrace which the Goldstones saw on their inspection tours in April 1972, together with the apartment’s great views of the City¹³ and the privacy that came from being the only persons allowed access to the entire wrap-around roof/terrace on the upper level of PH-B, were what led the Goldstones to purchase PH-B and move out of the large riverview apartment on the third floor of Gracie Terrace that they had occupied for eight years.¹⁴

About one year after the building was converted to cooperative ownership, the Goldstone’s exclusive use of the roof areas outside their apartment was challenged when certain new residents of the building proposed that the Apartment Corporation install a deck for sun bathing purposes on the southern and western portions of the building’s roof, which were directly above the master bedroom of PH-A and the entire lower level of PH-B. The Board appointed a committee to look into the matter and report to the shareholders at the Annual Meeting. Dr. Goldstone and the then occupant of PH-A, Arthur Godfrey, threatened legal action against the corporation if the sun deck proposal was approved.¹⁵

balconies, roof, or portion thereof outside of said partitioned rooms . . . exclusively to the occupant of the apartment.” See Record on Appeal at 270, *Gracie Terrace Apartment Corp. v. Goldstone*, 477 N.Y.S.2d 647 (App. Div. 1984) (No. 01153/83). It stated “[t]he Lessee shall take possession of the apartment and its appurtenances and fixtures “as is” as of the commencement of the term hereof.” *Id.* at 284 ¶ 18(a).

¹⁰ Letter from Maro Arrathoon Goldstone, President, Gracie Terrace Apartment Corporation, to the Tenant-Shareholders of Gracie Terrace Apartment Corporation (May 24, 1982) (on file with the *Nevada Law Journal*).

¹¹ These panic bolts gave the occupants of PH-B one-way egress to the fire stairs from the fire exit hall, while preventing anyone on the fire stairs from gaining access to this hall and, from it, into the upper level of PH-B. *Id.*

¹² *Id.*

¹³ To the northeast, one sees the Triborough Bridge and, in the distance, the Whitestone and Throgs Neck Bridges. To the east lies Roosevelt Island and Queens. To the south, the midtown skyline, the 59th Street Bridge, the East River, and FDR Drive. When it is dark and there is a traffic jam on the Drive, as frequently happens, from the apartment, the northbound cars’ headlights look like a shimmering diamond necklace, while southbound taillights shine like rubies.

¹⁴ The Appellate Division noted that this “was unquestionably a major inducing factor in Dr. Goldstone’s decision to purchase the apartment.” See *Gracie Terrace*, 447 N.Y.S.2d at 649.

¹⁵ Letter from Maro A. Goldstone to *Nevada Law Journal* (Feb. 26, 2002) (on file with the *Nevada Law Journal*).

At its May 6, 1974 meeting, the Board (with Maro abstaining) voted to accept its committee's recommendation that the sun deck not be built. Among other things, the committee's report noted that the building's counsel had advised that "stock has been purchased and proprietary leases issued in connection therewith on the basis of the existing structure"; construction of a sun deck was sure to embroil the corporation in costly litigation; substantial expenditures would have to be made to protect the roof's surface and probably to increase the loading of the roof for public assembly usage; an increase in liability insurance premiums could be expected; the roof was not constructed for heavy traffic and had no insulating soundproofing layer; the waterproofing membrane was likely to be damaged, resulting in leaks and damage to the two penthouse apartments directly underneath with the potential for other lawsuits; and finally, the security of the penthouse apartments on both levels would be seriously compromised.¹⁶

For nearly ten years after their purchase of PH-B in January 1973, the Goldstones enjoyed undisturbed, exclusive use of the eastern, southern, and western roof areas and the upper level fire exit hallways adjoining their apartment without challenge or incident.

II. THE SEEDS OF THE LITIGATION

After the conversion to cooperative ownership, when the initial Board of Directors was elected to office, Walter Albrecht became treasurer of Gracie Terrace. He was an officer of Citibank and surely understood the earning power of money. Yet, on the instructions of the then outside Managing Agent, who had prepared the operating budget for the co-op's first year of operation, Walter permitted the building's \$150,000 capital fund to lie fallow; supposedly because the Managing Agent "was not sure" the co-op's income would be adequate to operate the building.¹⁷

Maro, then vice-president, said that, at the very least, the building's capital fund should be put into an interest bearing money market account, from which money could be drawn down if needed. Walter refused to go against the wishes of the Managing Agent. Maro told him that he had a choice, invest the money or reimburse the Apartment Corporation for its lost interest. When the

¹⁶ PH-A, located on the lower penthouse level was burglarized two times prior to the installation of alarmed gates on the fire stairs, as recommended by the New York City Police Department. In both burglaries, the intruder was reported to have gained entry by going up the fire stairs to the upper level penthouse landing and from there out to the southern portion of the roof, from which he dropped onto the lower terrace-roof outside the master bedroom of the Godfrey apartment.

The alarmed gates on the fire stairs were installed by the Board of Directors and inspected and approved by the New York City Building Department at a time when Maro was not on the Board. See Affidavit, Thomas Day Thacher II, in *Gracie Terrace Apartment Corp. v. Goldstone* (N.Y. Sup. Ct. 1983) (No. 01153/83).

¹⁷ The building was protected against cost-overruns on ordinary maintenance and capital expenditures by a unique five-year sponsor's guarantee. Therefore, even if the contingency cushion built into the initial budget proved insufficient, the Sponsor would have to reimburse the corporation for such overruns. Thus, there was no sensible reason to leave the entire capital fund uninvested at a time when interest rates were high. Letter from Maro A. Goldstone to *Nevada Law Journal* (Feb. 26, 2002) (on file with the *Nevada Law Journal*).

other directors supported Maro's position, Walter resigned as an officer and director. He never forgave Maro.¹⁸ That was in 1973.

It has been said revenge is a dish best eaten cold. Walter was patient. He seems never to have forgotten this incident. He could have reminded elephants.

Ten years later, after a bruising election campaign marked by vicious personal attacks on Maro, Walter and his supporters won control of the Board of Directors. Walter became president of the co-op. He was now in a position to repay Maro, who had been reelected as a minority director. He would go her one better, however. Not only would he force her off the board, but out of the building. Or so he thought.

His tone was an ugly mixture of superiority and hatred when he phoned Maro and boldly announced, "I'm going to railroad your ass out of this building. I court-martialed another guy like you out of the Air Force."¹⁹ At about the same time, in a memorandum to a fellow director, Walter outlined his thoughts "about 'playing hardball.'" "I'm coming to think we should change the by-laws to freeze meathead [Maro] out." "It [is] . . . important that we get her off" the board.²⁰

Maro was not a "guy." Walter was no longer on active duty in the Air Force. But these are quibbles. More to the point, Maro would prove to be a formidable adversary, unlike anyone Walter, or the rest of his coterie, had ever encountered.

Walter would have done well to recall Churchill's stirring admonition during the darkest hours of World War II: "Never give in, never give in, never, never, never, – in nothing, great or small, large or petty – never give in except to convictions of honor and good sense."²¹

This would have given him an accurate measure of Maro. It might even have made him realize the emptiness of his threat. He would never be able to make it good.

By trying, he took the building on the legal equivalent of a jihad lasting three years. When it was over, the Apartment Corporation had spent a small fortune to finance bitter and divisive litigation that resulted in a final judgment of the Supreme Court of the State of New York completely vindicating Maro and establishing the Goldstone's right to the exclusive use and possession of the entire top of the building.²² It also required the Apartment Corporation to

¹⁸ This and other comments about Albrecht's thoughts and feelings are our opinion based on how we interpreted his behavior and the events that subsequently occurred.

¹⁹ Letter from Maro Arrathoon Goldstone, Director, Gracie Terrace Apartment Corporation, to the Tenant-Shareholders of Gracie Terrace Apartment Corporation (May 24, 1983) (verbatim transcript of telephone call from Walter Albrecht to Maro Goldstone at 9:30 p.m. on Feb. 16, 1983) (on file with the *Nevada Law Journal*).

²⁰ *Id.*

²¹ Address at Harrow School (Oct. 29, 1941), *quoted in* BARTLETT'S FAMILIAR QUOTATIONS 745 (15th ed. 1980).

²² The final judgment declared, *inter alia*, that "the eastern portion of the roof adjoining PH-B is a part of the demised premises and is allocated exclusively to the occupants of that apartment," that "any occupant of PH-B shall continue to have exclusive use of the adjoining fire exit hallway on the upper duplex level of apartment PH-B," that Gracie Terrace would advise all tenants that no one other than the Goldstones was "permitted to go up the fire stairs and exit onto . . . the [southern and western portions of the] roof except in case of fire or other emergency." It also proved that Gracie Terrace would pay the Goldstones \$70,000

reimburse the Goldstones for \$70,000 of unreimbursed legal fees incurred in their defense of its baseless claims.²³

The Gracie Terrace litigation brings to mind the advice given by a Berlin lawyer, an uncle of my father (also a lawyer), at the end of the nineteenth century, equally valid today, on how to conduct litigation. His first rule was, "Huete Dich vor Prozessen, Du kennst vielleicht den Anfang, abner nicht das Ende." Guard yourself against lawsuits. You may know how they begin, but not how they will end.

III. THE GRACIE TERRACE ACTION

On January 13, 1983, two days before expiration of the statute of limitations on actions to recover possession of real property,²⁴ the Apartment Corporation commenced an action against the Goldstones in Supreme Court, New York County.²⁵

The Proprietary Lease "allocated exclusively to the occupant of the apartment" the rooms in the building as partitioned on the date of execution of the lease, "together with their appurtenances . . . and any . . . terraces, balconies, roof, or portion thereof outside of said partitioned rooms."²⁶ The Apartment Corporation, however, sought to restrict the Goldstones' exclusive interest to the small concrete portion of the eastern roof outside the glass windows and terrace door of their master bedroom and bath. The rest of the eastern roof (about 1,200 sq. ft.) was to be used in common by all 400 tenants and their guests for sun bathing, star gazing, sightseeing, or such other diversions as might appeal to them, including, presumably, peering into the Goldstones' unshielded bedroom and bath.

Despite the Proprietary Lease's clear grant of exclusive possession, confirmed by decades of usage, both before and after the cooperative conversion, Gracie Terrace's complaint asked for a judgment determining, inter alia, that "the proprietary lease does not give the Goldstones any rights" to the roof, the upper level fire exit hallway and fire stairs;²⁷ that sole and complete possession of the roof, the hall and the stairways be awarded to Gracie Terrace and that it remain in possession thereof;²⁸ and that "the Goldstones be removed and excluded from possession of the roof, the hall and the stairways . . . [and]

toward their defense costs. See *Goldstone v. Gracie Terrace Apartment Corp.*, Index No. 419/86, slip op. at ¶ 6 (N.Y. Sup. Ct. May 8, 1986) (order and judgment); *Gracie Terrace Apartment Corp. v. Goldstone*, No. 01153/83 (N.Y. Sup. Ct. May 8, 1986) (order and judgment).

²³ The rest of the Goldstones' litigation expenses (about \$170,000) were covered by their personal liability insurance carrier and the Apartment Corporation's D & O carrier. Letter from Maro A. Goldstone to *Nevada Law Journal* (Feb. 26, 2002) (on file with the *Nevada Law Journal*).

²⁴ N.Y. C.P.L.R. 212(a) (McKinney 2001).

²⁵ Complaint and Summons, *Gracie Terrace Apartment Corp. v. Goldstone* (N.Y. Sup. Ct. Jan. 12, 1983) (No. 01153/83) (hereinafter "Complaint") (on file with the *Nevada Law Journal*).

²⁶ See Record on Appeal at 270, *Gracie Terrace Apartment Corp. v. Goldstone*, 477 N.Y.S.2d 647 (App. Div. 1984) (No. 01153/83) (Exhibit E).

²⁷ Complaint ¶C.

²⁸ Complaint ¶ D.

forever enjoined and restrained from entering and trespassing upon the roof, the hall and the stairways.”²⁹

The complaint also sought \$20,000, plus interest, for each year of the Goldstones’ allegedly unauthorized use and occupation of the roof, the hall and the stairways, in addition to the \$450,000 damages³⁰ for the “unlawful withholding of possession, trespass and encroachment of the roof, the hall and the stairways”³¹ and for having “inflicted damage to them.”³²

When questioned during his deposition as to the factual basis for this claim of damages, Francis X. (Joe) Maloney, a director who was then a partner in a major New York law firm and had voted in favor of bringing the lawsuit, testified:

A. My understanding is that . . . the corporation, by reason of this wrenching experience, has suffered and has properly alleged that it has suffered damages from the overall penthouse litigation matter in the sum of \$250,000. I think it is a fair damage claim.

Q. What is the basis for that understanding, . . . as to how \$250,000 can be assigned to a wrenching experience?

A. I . . . have deferred to others to assign a figure. They have done so. I understand now why they have done so, and I would support it.

Q. On what factual basis, if you have any?

A. I think one can put a value on the psychic injury, if you will, that the apartment corporation and its tenant-shareholders have undergone by reason of what we consider a misappropriation of corporate property, and I think one can fairly say the value of that psychic injury, if not actual deprivation of possession is \$250,000, and that is the basis.³³

Walter verified the complaint. However, as his deposition showed, he had absolutely no knowledge of any facts to support the allegations made therein. He did not know the condition of PH-B in May 1972 when Dr. Goldstone signed the subscription agreement to purchase it. He did not know, and made no effort to find out, whether the planters, wooden walkway, and other improvements on the eastern and southern roof were in existence when the Goldstones bought their apartment. Nor did he know anything about the upper duplex level fire exit hallway.³⁴

His fellow director, Joe Maloney, also a witness on behalf of the Apartment Corporation, was not better informed on the condition of the roof, hallway, or stairs in 1972.

In the face of the powerful evidence supporting the Goldstones’ claim to exclusive possession of the roof and hallway, all the Apartment Corporation could come up with was a rental floor plan, prepared in 1951 when the building was erected, which was not shown to Dr. Goldstone at the time of his purchase.

²⁹ Complaint ¶ E-F.

³⁰ Complaint ¶ G.

³¹ Complaint ¶ G-H.

³² Complaint ¶ 27.

³³ Deposition, Francis X. Maloney, at 277-277A, Gracie Terrace Apartment Corp. v. Goldstone (N.Y. Sup. Ct. 1983) (No. 01153/83). In our opinion, the claim of “psychic injury” to a corporation was plainly frivolous.

³⁴ Deposition, Walter E. Albrecht, Gracie Terrace Apartment Corp. v. Goldstone (N.Y. Sup. Ct. 1983) (No. 01153/83).

That plan showed a small concrete surfaced portion of the roof outside the master bedroom of PH-B, which bears no separate description and is indistinguishable from the remainder of the eastern portion of the roof. Moreover, and most importantly, that plan was not filed as part of the plan of cooperative organization, as required by New York law if it was to be used in connection with the offer or sale of any cooperative apartment.³⁵

In their answer, the Goldstones asserted a number of affirmative defenses, including: estoppel, waiver, laches, and unclean hands. As to the latter, it was alleged that:

Since June 1982, Gracie Terrace has been and presently is subject to the domination and control of individuals comprising a majority of its Board of Directors who have expressed and exhibited open hostility toward the Goldstones and have caused Gracie Terrace to institute this action solely to harass the Goldstones and cause them great and irreparable personal and economic hardship by . . . threatening to destroy the security, privacy, marketability and habitability of their apartment, PH-B, thereby impairing and sharply diminishing the value of the Goldstones' investment in their apartment.³⁶

After considerable discovery, motion practice, and depositions, the Goldstones moved for summary judgment to dismiss the complaint. The Supreme Court found questions of fact and denied the motion.³⁷ The Goldstones then appealed to the Appellate Division, First Department, which modified the order entered below and granted the Goldstones' partial summary judgment, declaring their right to exclusive use of the entire eastern portion of the roof, the principal area in dispute.³⁸

The Appellate Division reached its result as a matter of the proper construction of the Proprietary Lease.³⁹ However, in confirmation of its declaration, it noted that the eastern portion of the roof had been improved by the installation of planter boxes, wooden walkways, and white gravel (which was seen by the Goldstones during their pre-purchase inspection tours), and that the prior rental tenants had for at least ten years been permitted exclusive use of this improved portion of the roof (which was made known to the Goldstones by the sponsor's selling agent). The court found this "was unquestionably a major inducing factor in Dr. Goldstone's decision to purchase the apartment."⁴⁰

The Appellate Division also dismissed all of the Apartment Corporation's claims for damages.⁴¹

³⁵ 13 N.Y.C.R.R., Part 17, § 17.4(e) provides: "No room plan, chart or diagram may be used in connection with the offer or sale of any cooperative unit unless such document has been filed as part of the plan of cooperative organization." *Gracie Terrace Apartment Corp. v. Goldstone*, 477 N.Y.S.2d 647, 649 (App. Div. 1984). It was the intention of Mr. Winston and the Sponsor, One Gracie Terrace Company, that all apartments in the building would be sold on the basis of a physical inspection, not on the basis of the floor plans or diagrams. *Id.*

³⁶ Answer, *Gracie Terrace Apartment Corp. v. Goldstone* (N.Y. Sup. Ct. 1983) (No. 01153/83).

³⁷ *Gracie Terrace Apartment Corp. v. Goldstone*, 477 N.Y.S.2d 647 (App. Div. 1984)

³⁸ *Id.* at 699.

³⁹ *Id.* at 700.

⁴⁰ *Id.*

⁴¹ *Id.*

Regardless of whether the Goldstones were conveyed the right to exclusively use the other portions of the roof or the hallway and stairways leading to the roof, the Apartment Corporation's action "in permitting that use without objection for a period of almost ten years constituted, at the very least, a revocable license to defendants for the use of those areas."⁴²

The court stressed the fact that the Goldstones had been advised by the Selling Agent at the time they considered purchasing the shares of PH-B that the prior tenants had used these areas to the exclusion of the other tenants in the building, and there was visible, tangible evidence supporting such prior use⁴³ (alarmed panic bolts on the interior of the hallway doors and alarmed gates on the stairs leading to the roof installed at the recommendation of the Police Department by the Board of Directors at a time when Maro was not a Board Member).

The only issue left open (found to present a triable question of fact) was whether the Goldstones were also entitled to a judgment declaring their right to exclusive possession of the improved western and southern portions of the roof, which were directly above PH-A, and the lower level of PH-B.⁴⁴ These areas were accessible by the fire stairways, but none of the rooms of PH-B or the disputed hallways opened directly onto them. This issue was, nevertheless, an important one for the Goldstones and for the occupant for PH-A because of privacy and security considerations.

The Appellate Division's decision established an important principle of New York landlord-tenant law – that the rights of cooperative tenant-shareholders who purchased their shares in reliance on a physical inspection of the premises and the terms of the Sponsor's Offering Plan and Proprietary Lease, could not be altered or restricted by the Apartment Corporation in reliance on any floor plan or other document that was not filed as part of the cooperative conversion plan.

IV. UNANSWERED QUESTIONS AND OUR OPINIONS

The reported decision sheds no light on why the Apartment Corporation's directors voted to commence what they must have known would be extremely acrimonious, burdensome, costly, and divisive litigation. The Goldstones had their share of staunch supporters in the Gracie Terrace community⁴⁵ and, with their home and reputations at stake, could not afford to capitulate.

Why would fiduciaries, charged with acting on behalf of and in the interest of their fellow tenant-shareholders, commit the Apartment Corporation to such a perilous course? Why try to force such a radical change in the decades long manner in which the occupants of PH-B and the rest of the tenant body had peacefully coexisted? Why did they continue to litigate for two more years after the Appellate Division's decision? That decision surely must have told them they were on a fool's errand.

⁴² *Id.* at 701.

⁴³ *Id.*

⁴⁴ *Id.* at 699.

⁴⁵ Year after year, the vast majority of the tenants in the building re-elected Maro to the Board. Despite her detractors' charges, they obviously believed she was doing a good job.

The telling of that story, with the characters fully developed and the many dramatic episodes chronicled, must await another day. Here, we will only briefly sketch the highlights insofar as they set the stage for the issues of insurance law and practice.⁴⁶

We believe the explanation lies in the confluence of several factors. The tenant body was ready for a change. Maro had been a dominant, visible and vocal personality and force in operating Gracie Terrace for almost ten years. Throughout that period of firm hands-on management, her positive achievements on behalf of the community were many.⁴⁷ However, no one can please all of the people all of the time. It was inevitable that her style or actions, or both, would appear autocratic to some tenants and lead to resentment and real or fancied grievances against her. Some may have been envious of the Goldstones for living in a penthouse apartment. Others may never have been in a penthouse apartment and simply did not understand that the premium paid for a penthouse apartment confers on the owners thereof certain rights not granted to or shared by the other tenants in the building.⁴⁸

Cliques formed, as they will in any community. In 1982, enough of the anti-Maroids banded together to gain control of the Board of Directors. Walter became their spokesman and the Apartment Corporation's new president.

This long festering feeling of ill-will was skillfully harnessed, aimed at Maro and ignited by Bruce Heafitz, a newly elected Board member who, we have always felt, had his own agenda. We believe that, in his grandiosity, Bruce coveted the Goldstones' apartment and, if possible, wanted to buy it and the adjoining PH-A at a substantially below market price.

In those days, Bruce's star appeared to be ascending. A profile in the business section of *The New York Times*⁴⁹ described him as a young "new energy entrepreneur" who hit it big in the oil industry. In seven years' time,

⁴⁶ Since we are not privy to or advised of the private discussions of the hostile Board members and their advisors, our reference in this article to particular individuals and what may have motivated them is necessarily just our own opinion and belief, based on the facts as we experienced and how we understood them as they developed in the litigation.

⁴⁷ For example, in the field of energy conservation, Maro was the first to introduce Danfoss non-electric, thermostatic radiator valves into existing apartment buildings in the United States. She also invented a new form of plastic weather-stripping, costing only three cents a foot, for the then metal casement windows. For this innovation, she was awarded the Golden Apple from the City of New York. She and her family were invited to Denmark as guests of Danfoss and the Danish Government.

⁴⁸ This is exemplified by the following testimony of Francis X. Maloney, at p. 351 of his deposition in the Gracie Terrace action on May 6, 1983, as the explanation for why he felt that the allocation of shares of PH-B did not include the exclusive use of the roof:

I have a strong personal conviction it would be bizarre for one to purchase an apartment in this town and be in some way deprived of the normal everyday use of the roof of that building.

I can think of a situation where you have a guest who says, "What does the East River look like from the top of your building? Let's go up and take a look."

I think that your guest would be shocked if you were to respond to him that "This corporation can't use the roof of the building."

What is shocking is that anyone living at One Gracie Terrace could have thought that the area outside an expensive penthouse apartment was to be equated with the roof of a tenement, which is accessible to and may be used by tenants on a hot summer night to gain some relief from the heat in their apartments.

⁴⁹ NEW YORK TIMES, Jan. 11, 1982, at D1.

Bruce is said to have gone from living in a third-floor walk-up with "his bank account overdrawn and his net worth nil" to extreme wealth "in the mid-eight figures." Along the way, "the walk-up was exchanged for the requisite East Side cooperative."

Unfortunately, he selected Gracie Terrace rather than the Dakota or something on Park or Fifth Avenues.

Bruce realized that the other members of the Board, as fiduciaries, would be extremely reluctant to commit the Apartment Corporation to paying the substantial and open-ended cost of litigating with the Goldstones. They would not have been able to justify to the shareholders the expenditure of several hundred thousand dollars simply to regain possession of the roof and fire exit hallway which served only the upper level of PH-B.⁵⁰

To allay their concerns, and as a condition to their voting to commence the action to recover possession of the roof, hallway and fire stairs, Bruce entered into an agreement with the Apartment Corporation to pay "all expenses incurred by it . . . in excess of \$25,000."⁵¹

The first \$25,000 was covered by contributions of \$10,000 from Walter and \$15,000 from Peter Duffy. In a letter to the shareholders, Walter described this gift as "an extraordinary act of selflessness."⁵² What he did not say was that Duffy had a run-in with Maro a few years earlier. She had been called by the building employees because Duffy had been drunk and disorderly in the lobby of Gracie Terrace on Rosh Hashanah and was making anti-Semitic comments. She called the police, who came and advised him to leave the lobby.⁵³ Given this history, altruism does not appear to have been his prime motivation in joining the effort to bring Maro down.

Flush with confidence in Bruce's supposed gilt-edged financial guarantee (which turned out to be worthless⁵⁴), and with nothing to lose but their honor, the controlling directors of the Board set off on their quixotic mission to rid the building of Maro.

⁵⁰ As he put it in his deposition, "we took a straw poll as to . . . our feelings about the matter and a number of my colleagues were cowed by the threat and the potential cost to the corporation in what might entail from filing this litigation." Deposition, Bruce Heafitz, Heafitz v. Goldstone (N.Y. Sup. Ct. 1983) (No. 8080/1983).

⁵¹ In *The New York Times* article, Bruce was quoted as saying he was "willing to take risks." Underwriting the litigation costs must have seemed like a good gamble in his quest for the penthouse apartments. *Supra* note 48.

⁵² Letter from Walter E. Albrecht to Peter Duffy (Feb. 4, 1983) (on file with the *Nevada Law Journal*).

⁵³ See Letter from Maro A. Goldstone, Director, to Tenant-Shareholders of Gracie Terrace Apartment Corporation (May 24, 1983) (on file with the *Nevada Law Journal*).

⁵⁴ Maro had a premonition about Bruce's ability to stand behind his guarantee. At the January 12, 1983 Board meeting, she made a motion requiring him to create a \$250,000 escrow fund to cover the corporation's anticipated legal fees and expenses. It was voted down 4 to 2, with Bruce abstaining. Although the Board appears not to have known of it, in November 1982, Bruce was questioned about rumors that he had filed bankruptcy. Paraphrasing Mark Twain, he was quoted as saying: "Reports of my financial demise are greatly exaggerated . . . I have not gone bankrupt. I'm not about to go bankrupt. And no one has asked me to go bankrupt." He termed his financial difficulties as "cash flow bind." See PENSIONS & INVESTMENT AGE, Nov. 8, 1982, at 53.

Bruce's only contribution toward Gracie Terrace's litigation costs was a single payment of \$10,000. He subsequently was unable and unwilling to honor his commitment.

Maro was vilified as an unfaithful steward who had usurped community property. Her many and remarkable accomplishments on behalf of the Gracie Terrace community over years of unpaid service were ignored or denigrated.

Bruce and his cohorts and advisors may have believed that the Goldstones would never stay the course of a sustained litigation that was sure to exact a very high toll in terms of money and emotional strain. If so, they badly miscalculated.

Surrender was never an option. Not while Maro's integrity was being questioned.

When it became clear that the Goldstones would vigorously defend themselves and their home, Bruce apparently decided it was time to attack on another front.

V. THE HEAFITZ ACTION

On March 21, 1983, Bruce resigned as a director and treasurer of Gracie Terrace. His letter of resignation outlined his many grievances against Maro and described her as the "bane of our building" who "has made our life as well as others rather intolerable." He said his position as an officer and director of the corporation "have impeded my responding appropriately."⁵⁵

At 4:30 p.m. on Good Friday (appropriately enough it was also April Fools Day), the start of the Easter weekend, Bruce's counsel served Maro, a fellow director, with (i) an order to show cause seeking injunctive relief to prevent her from interfering with alteration and construction work in his and his wife's apartment and (ii) the summons and complaint in the \$26 million lawsuit that they commenced against Maro.⁵⁶

The action asserted claims for trespass into the Heafitz apartment on three separate occasions,⁵⁷ defamation, property damage to their apartment, interfer-

In May and July of 1983, two judgments were entered against Bruce in excess of \$11.8 million. On September 29, 1983, his creditors put him into involuntary bankruptcy. *See In re Bruce Heafitz*, No. 83 B 11407 (JJG) (Bankr. S.D.N.Y. 1983).

Maro became a contingent creditor of the bankrupt estate by reason of a treble damage lawsuit she filed against Bruce for violation of N.Y. Judiciary Law section 487. *See Goldstone v. Heafitz*, No. 14164/83 (N.Y. Sup. Ct. 1983).

⁵⁵ One can only marvel at what his conception of responding appropriately must be.

The previous month, Bruce was seen in the lobby of the building with a glass in one hand and a sledge hammer in the other, threatening to break down a door leading to the Goldstones' apartment. While that did not happen, on the afternoon of March 15, 1983, the alarm on the stairs leading to the roof went off. A metal shed that had been erected on the western portion of the roof (based on a permit from the New York City Building Department) belonging to Dr. Goldstone was found to have been vandalized. It was reported to Maro that Bruce was seen leaving the building shortly after that incident, although he was never connected to it. *See Affidavit*, Maro A. Goldstone, *Heafitz v. Goldstone* (N.Y. Sup. Ct. 1983) (No. 08080/83) (in opposition to motion for a preliminary injunction ¶¶ 33-41).

⁵⁶ *Heafitz v. Goldstone*, No. 08080/83 (N.Y. Sup. Ct. 1983).

⁵⁷ Maro had gone to the Heafitz apartment after learning that apparently unauthorized alterations and demolition work was taking place. She rang the bell and identified herself to the workman as a director of the co-op, the only one present in the building that day. She asked for and was granted permission to enter the apartment for a brief inspection tour to see what was being done. What she saw led her to believe there was an emergency. A clothes dryer was vented into the mechanical duct work of the building and it appeared that a structural

ence with and obstruction of the alteration of their apartment, 19-A, negligent infliction of emotional distress, prima facie tort, and mandamus to turn over corporate books and records in her possession that Bruce allegedly required to perform his duties as a director and treasurer of Gracie Terrace. The complaint sought damages in the aggregate amount of more than \$26 million.

In her affidavit in opposition to the motion for a preliminary injunction, Maro stated that the action was brought maliciously and was intended to:

1. harass me and cause me to incur extremely burdensome defense costs as punishment for attempting to carry out in good faith my fiduciary obligations as a director of GTAC, which obligations required me, inter alia, to file a complaint with the Department of Buildings of the City of New York on the grounds that (a) plaintiffs were making unauthorized alterations to their apartment 19-A, and (b) it appears as though a structural steel column and a load-bearing wall had been removed from the apartment which could threaten the integrity of the [upper levels of the] building and the safety of the occupants;
2. to falsely discredit me before my neighbors in the Gracie Terrace community through the spreading of false and malicious statements and the institution and financing of baseless lawsuits against me, apparently in the hope that this will force me to resign or be removed from the board of directors of GTAC;
3. to drive me and my family out of the building after 17 years by making our life there intolerable;
4. to depress the value of the very desirable duplex apartment, PH-B, . . . ; and
5. to ultimately coerce my husband to put our apartment up for sale at a greatly undervalued distress price.⁵⁸

In his reply affidavit, Bruce accused Maro of being an "immoral and callous person" who had "terrorized and abused our community" for years. He likened her "love for Gracie Terrace . . . [to] that of the female spider that kills her mate at the denouement of copulation."⁵⁹ No wonder that in an opinion disposing of one of the many motions in this action the court stated that "this litigation has been characterized by uncommon acrimony between litigants and their counsel."⁶⁰

To make a very long story short, on April 3, 1986, after three years of intense and bitter litigation, with numerous charges and countercharges of impropriety, the *Heafitz* action was finally discontinued with prejudice, without any payment to the plaintiffs. As part of a global settlement of all Gracie Terrace litigation arrived at with a changed Board of Directors, Maro was reimbursed for that portion of her defense costs not covered by insurance.

steel column may have been removed. On her second visit, three days later, she was accompanied by a representative of the Managing Agent and an architect. Her third visit, one month later, was with an inspector of the Department of Buildings who had asked her to point out the location of the missing wall and steel column.

⁵⁸ Affidavit, Maro A. Goldstone, *Heafitz v. Goldstone* (N.Y. Sup. Ct. 1983) (No. 08080/83).

⁵⁹ Reply Affidavit, Bruce Heafitz, *Heafitz v. Goldstone* (N.Y. Sup. Ct. 1983) (No. 08080/83).

⁶⁰ *Heafitz v. Goldstone*, No. 08080/83, slip op. at 2 (N.Y. Sup. Ct. May 26, 1983) (White, J.).

VI. THE GRACIE TERRACE ACCESS ACTION

Since the first two lawsuits had not brought the Goldstones to their knees, on Friday, February 16, 1984, the Apartment Corporation commenced a third lawsuit accompanied by still another order to show cause seeking injunctive relief.⁶¹ The ostensible reason for this emergency relief was said to be the need to gain access to PH-B to rig scaffolding from the eastern roof outside the Goldstones' master bedroom in order to perform certain repairs to the lower level apartments on the eastern face of the building which, it was claimed, were necessary to prevent loose bricks from falling on cars passing the building on the adjoining FDR Drive.⁶²

This turned out to be a colossal blunder by the Apartment Corporation.

We were able to show, with irrefutable photographic evidence, the utter lack of merit to the Apartment Corporation's position. Access to PH-B was not needed to accomplish the repairs to the building's eastern façade. There were a number of alternative ways in which the repairs could be made, and were in fact made, that did not require such access.⁶³

The photographs also showed that in the area of Gracie Terrace, the East River Drive is completely covered by a pedestrian promenade (John Finley Walk) and motorists drive underneath the steel and concrete pedestrian walkway, as though through a covered bridge. The Apartment Corporation's claim that loose bricks posed a hazard to passing cars on the FDR Drive was a complete fabrication. It destroyed the plaintiff's credibility with the court.

Moreover, in anticipation of balcony repair work with the possibility of falling debris, the contractor had erected a covered sidewalk on the promenade adjacent to the east side of Gracie Terrace and barricaded and fenced off the area. Finley Walk was totally safe for pedestrians.

The court denied the Apartment Corporation's motion for access to PH-B, stating:

It is obvious that much more is involved here than the relief actually sought. The defendant and his present wife, and the present officers and directors of plaintiff corporation have been embroiled in a bitter and continuing feud since Mrs. Goldstone was ousted, in 1983, from her position as a director of the cooperative corporation. [There was] no probative proof that an emergency exists, or that access to the apartment is the only way that the repairs can be made to the extension of the building.

The court found that "in balancing the equities, they do not favor plaintiff."⁶⁴ After defeating the access motion, Dr. Goldstone, as the successful ten-

⁶¹ Maro humorously refers to this suit as the intended St. Valentine's Day Massacre.

⁶² We have always believed the real reason for this suit was to gain information for use in the main Gracie Terrace action and to increase the financial pressure on the Goldstones.

⁶³ For example, motorized scaffolding could have been erected from the promenade to the sixteenth floor eastern walls where steel hooks previously had been installed for scaffolding rigging. In this way, the entire job could have been done from outside all of the apartments at Gracie Terrace. Another alternative was to enter the affected apartments and lower the construction debris from the balconies through use of a bucket and well wheel, as in fact was done in some cases.

⁶⁴ *Gracie Terrace Apartment Corp. v. Goldstone*, No. 3941/84, slip op. at 2-3 (N.Y. Sup. Ct. App. 2, 1984) (Blyn, J.).

ant in a litigation with his landlord (co-op), made a successful application for attorney's fees.⁶⁵ He was awarded attorney's fees of \$200.⁶⁶

While this sum might seem not to have been worth the considerable effort of securing it, this was the first time in New York that Real Property Law Section 234 was applied in a litigation involving a co-op. The principle established by the decision, that Section 234 applied to cooperative apartment Proprietary Leases, would be used as the basis for Dr. Goldstone's separate action to recover his considerable legal fees in defending the rest of the *Gracie Terrace* and roof access suits. This potential for a six-figure award of attorney's fees was a significant factor in the ultimate settlement negotiations.

VII. THREE OTHER RELATED ACTIONS

In May 1983, shortly before the Annual Meeting of Shareholders, three additional suits, all outgrowths of the *Gracie Terrace* action, were commenced against the Apartment Corporation and its majority directors.

A. Maro's Action Against Bruce

Maro countered Bruce's action for trespass, defamation, mandamus, etc., with an action against Bruce (who was a member of the New York Bar) and his lawyer under New York Judiciary Law Section 487(1) which authorizes treble damages where an attorney is "guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party." It was alleged, inter alia, that Bruce's claim that he was treasurer and a director of Gracie Terrace when he verified his complaint on March 24, 1983, was knowingly false and misleading, and an act of deceit or fraud on the court, because he had executed a letter of resignation on March 21, 1983.⁶⁷

This suit made Maro a creditor in Bruce's subsequent bankruptcy proceeding where unflattering details of his conduct at Gracie Terrace were exposed.

B. The Harris Action

Jay Harris, a long-time member of the Board of Directors who sided with Maro, brought an action against Walter, the other Board members, and the Apartment Corporation to enforce his right, as a director, to inspect the Corporation's books and records, particularly all documents relating to the authorization of, bringing of, and incurrence of expenses for any lawsuit brought in the name of the Corporation. He also sought, unsuccessfully, to delay the Annual Meeting of the Shareholders.

⁶⁵ New York Real Property Law Section 234 provides that whenever a residential lease allows the landlord to recover attorney's fees in the event of a breach by the tenant:

[t]here shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorney's fees and/or expenses incurred by the tenant . . . in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease

⁶⁶ *Gracie Terrace Apartment Corp. v. Goldstone*, No. 3941/84 (N.Y. Sup. Ct. Dec. 21, 1984) (Freedman, J.).

⁶⁷ *Goldstone v. Heafitz & Schiff*, No. 14164/83 (N.Y. Sup. Ct. 1983).

C. Maro's Action for Access to Books and Records

During her last days as a director, Maro brought an action alleging, in essence, that the defendant directors had attempted to freeze her out of participation in the management and review of the affairs of the cooperative and refused to provide her with documents and access to information to which she was absolutely entitled to as a director. She amended her complaint after she was not reelected to the Board, alleging she needed the information to show she was not guilty of any wrongdoing or mismanagement of the Corporation.

D. Dr. Goldstone's Action for Legal Fees and Damages

By 1985, after two years of unremitting litigation, most of the tenants longed for peace and stability to return to Gracie Terrace and an end to the Apartment Corporation's mounting legal fees, which were being passed on to them.

A new Board of Directors was elected and settlement negotiations were underway. A stumbling block was Maro's insistence that the Apartment Corporation reimburse the Goldstones, to the last cent, for all of the legal fees and expenses they had incurred as a result of the Gracie Terrace litigations, and for which they were not being indemnified by an insurance carrier.⁶⁸

When the parties appeared to be at an impasse, Dr. Goldstone commenced an action⁶⁹ seeking legal fees under Real Property Law Section 234 and damages for breach of the express covenant of quiet enjoyment in the Proprietary Lease⁷⁰ and the covenant of good faith and fair dealing which is implied in every contract.⁷¹ The complaint sought compensatory damages of \$755,000 and punitive damages of \$800,000.

We took the position that the Apartment Corporation's attempt to oust Dr. Goldstone from the roof/terrace which had been conveyed to him by the clear terms of the Offering Plan and Proprietary Lease, and to enjoin his return to this area, cast a cloud on his possessory rights and was an action for ejectment proscribed by the express⁷² covenant of quiet enjoyment. The Apartment Corporation sought to dismiss this claim on the ground that the Goldstones had not abandoned their apartment or been ousted from it.

⁶⁸ Maro considered this necessary to completely expunge the stain on her reputation.

⁶⁹ *Goldstone v. Gracie Terrace Apartment Corp.*, No. 0419/86 (N.Y. Sup. Ct. 1986).

⁷⁰ The covenant was to "quietly have, hold and enjoy the apartment without any let, suit, trouble or hindrance from the Lessor . . ." ¶ 10 of the Proprietary Lease.

⁷¹ See RESTATEMENT (SECOND) OF CONTRACTS § 205 ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."); *Van Valkenburgh N. & N., Inc. v. Hayden Publ'g Co.*, 30 N.Y.2d 34, 45 (1972) ("There is implicit in all contracts . . . an implied covenant of fair dealing and good faith.").

We argued that for a landlord to bring a lawsuit seeking ejectment and \$650,000 in damages for acts attributed to a tenant-shareholder, when the most cursory investigation would have proven those allegations to be unfounded, is an act of bad faith and a breach of the implied covenant of good faith and fair dealing.

⁷² Where the alleged breach is of an implied or general covenant, actual or constructive action is required to obviate the tenant's obligation to pay rent or to hold the landlord liable for consequential damages.

Maro's research turned up a then seventy-year old case, *Paddell v. Janes*,⁷³ in which the court had denied a landlord's motion for judgment on the pleadings in an action for breach of the covenant of quiet enjoyment on the ground that the complaint did not allege abandonment of the premises. The opinion in *Paddell v. Janes* could have been written with the facts of Gracie Terrace litigation in mind. After reviewing historical antecedents of this express covenant, the court stated:

To hold that the parties to this covenant intended to make breach of it depend upon an actual expulsion would be importing into the agreement terms absolutely unsuggested by its language.⁷⁴

There is nothing in the terms of the covenant to justify the conclusion that it has not been violated simply because his landlord refrained from aggravating his wrong by ousting the tenant, or was unable to accomplish that purpose because of the tenant's successful opposition. She did her utmost to evict him wrongfully. Contrary to her promise she subjected him to suits, trouble, and hindrances in the enjoyment of the title and possession with which she had invested the lessee. These facts, if proved, in my opinion amount to a breach of a covenant as expressed.⁷⁵

If Dr. Goldstone's action, which could not be dismissed on motion, had to be litigated to conclusion, it would have substantially increased the amount of the Goldstones' legal fees not covered by insurance⁷⁶ that Maro would have demanded as part of any global settlement.

The Apartment Corporation was in a dilemma. It could not cut off its mounting legal fees and expenses by a voluntarily discontinuance of its action. This required Dr. Goldstone's consent,⁷⁷ which he would not give unless he was fully reimbursed for his legal fees. If it sought a court order permitting it to discontinue the action, we would have opposed such an application. We would have pointed out the privacy and security considerations that made it important to obtain a judicial determination with respect to the fire exit hallway and the southern and western portions of the roof, and the compelling force of our evidence on this subject.⁷⁸

⁷³ 152 N.Y. Supp. 948 (Sup. Ct. 1915).

⁷⁴ *Id.* at 953.

⁷⁵ *Id.* at 955.

⁷⁶ In the course of defending claims, insurers are sometimes requested by their insureds to pay the cost of prosecuting cross-claims, counterclaims, or even separate actions. While subrogation provisions in the policy may enable the insurer to benefit from any recovery on affirmative claims, insurers are not required to prosecute such claims. In *Keene Corp. v. Ins. Co. of N. Am.*, No. 78-1011 (D.D.C. May 13, 1983), Keene sought reimbursement of over one million dollars expended "in pursuit of its claims for indemnity and contribution" against certain asbestos suppliers and the United States Government. *Id.* at 6. The court held that "[t]he policies do not require the insurers to prosecute affirmative suits on the insured's behalf." *Id.* at 7. See also *Goldberg v. Am. Home Assur. Co.*, 80 A.D.2d 409, 411 (N.Y. 1981); *Osborne v. Hartford Acc. & Indem. Co.*, 476 S.W.2d 256, 267 (Tenn. Ct. App. 1971).

⁷⁷ N.Y. C.P.L.R. 3217(a) (McKinney 2001).

⁷⁸ Among other things, we had obtained a statement from Joseph E. Browdy, Esq., then a partner at Paul, Weiss, Rifkind, Wharton & Garrison, who had been counsel for Norman K. Winston and the Sponsor, One Gracie Terrace Company, in the conversion of the building to cooperative ownership. Mr. Browdy stated:

Moreover, even if the Apartment Corporation was allowed to discontinue its action, it still had to defend against Dr. Goldstone's action seeking \$1,155,000 in legal fees and damages.

VIII. THE GLOBAL SETTLEMENT AND FINAL JUDGMENT

It took another year of contested motions, court-ordered depositions, and intense negotiating sessions with the new directors before a global settlement of all pending Gracie Terrace litigation was finally achieved.

On May 8, 1986, a judgment was entered in the *Gracie Terrace* action, on consent and pursuant to the parties' stipulation of settlement. It provided that:

1. The parties acknowledge that the eastern portion of the roof adjoining PH-B is a part of the demised premises and is allocated exclusively to the occupants of that apartment.
2. The parties acknowledge that the occupant of PH-B shall continue to have the exclusive use of the adjoining fire exit hallway on the upper duplex level of apartment PH-B. This possession runs with the proprietary lease and any and all renewals thereof and is not personal to the Goldstones
3. The parties acknowledge that GTAC is the owner of the southern and western portions of the roof on the upper level of PH-B. GTAC will advise all tenants of One Gracie Terrace that they are not permitted to go up the fire stairs and exit onto those portions of the roof except in case of fire or other emergency Notwithstanding the foregoing, for as long as [the Goldstones and their children] or anyone of them, are tenant-shareholders of apartment PH-B, they shall have the irrevocable license to use those portions of the roof [subject to certain agreed limitations]
4. The alarmed security gates on the fire stairs at the lower penthouse level of One Gracie Terrace, the metal fence separating the eastern portion of the roof on the upper duplex of PH-B from the southern and western portion of the roof, and the one-way locking mechanisms on the inside of the fire exit doors in the fire exit hallway on the upper level of PH-B will all remain in place during the term of all proprietary leases issued by GTAC, and any and all renewals thereof, and the cost of necessary repairs, maintenance or replacement of these fixtures will be borne by GTAC
5. The Gracie Terrace action, the access suit and Dr. Goldstone's legal fees action are all discontinued with prejudice and general releases exchanged.
6. GTAC will pay to Jonas and Maro Goldstone the sum of \$70,000
7. The parties acknowledge that \$1,358.70 of the payments to be made by GTAC to Maro Goldstone represents indemnification of her as a former director for legal fees incurred in her defense of *Heafitz v. Goldstone* . . . (this amount of the reimbursed retention and coinsurance under GTAC's [D&O policy] and that the sum of \$68,641.83 represents reimbursement for legal fees incurred by Jonas and Maro Goldstone in their defense of the roof suit and the access suit).

After three and a half years of litigation, and the expenditure of hundreds of thousands of dollars, the Apartment Corporation had succeeded in confirm-

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1. It was the intention of Mr. Winston and the Sponsor that all apartments in the building be sold on the basis of a physical inspection. 2. It was the intention of Mr. Winston and the Sponsor that all exterior space and interior physical space which had historically been appurtenant to any apartment in the building prior to the time of presentation of the Plan to convert the building to cooperative ownership be conveyed as part of the demised premises of such apartment to any purchaser thereof at the closing of title.

Record on Appeal at 430, *Gracie Terrace Apartment Corp. v. Goldstone*, 477 N.Y.S.2d 647 (App. Div. 1984).

ing and making iron-clad the Goldstones' entitlement to the exclusive use and possession of the eastern portion of the roof and the upper level fire exit hallway, and in guaranteeing the privacy and security of the occupant of PH-B by keeping in place the security devices and, except in the case of fire or emergency, prohibiting any tenants other than the Goldstones from using the southern and western portions of the roof.

IX. THE INSURANCE ISSUES

The Appellate Division's reported decision gives no hint about the insurance issues that lurked beneath the surface and were of paramount importance to the Goldstones if they were to survive this costly war of attrition.

As the claims multiplied and the Goldstones' costs escalated to extremely burdensome levels, Maro would frequently ask whether there wasn't some way to obtain a defense and coverage under the liability section of Jonas's homeowner's policy and/or Gracie Terrace's D&O policy. After all, while policy coverage is often denominated as "liability insurance," where the insurer has made promises to defend "it is clear that [the coverage] is in fact, "litigation insurance" as well."⁷⁹ Litigation insurance is what was needed here to even up the playing field.⁸⁰

The general rule regarding the insurer's duty to defend, which is separate from and broader than the duty to indemnify, is set out in *Danek v. Hommer*,⁸¹ where the court stated:

[T]he complaint should be laid alongside the policy and a determination made as to whether, if the allegations are sustained, the insurer will be required to pay the resulting judgment, and in reaching a conclusion, doubts should be resolved in favor of the insured.

The rule that the insurer's duty to defend is determined by the allegations contained within the "four corners of the complaint" is widely followed.⁸² New York had embraced this rule. In *Seaboard Surety Co. v. Gillette Co.*,⁸³ the court noted:

The duty to defend arises whenever the allegations in a complaint against the insured fall within the scope of the risks undertaken by the insurer, regardless of how false or groundless those allegations might be [T]he duty of the insurer to defend the insured rests solely on whether the protection [was] purchased [S]o long as the claims [asserted against the insured] may rationally be said to fall within policy cov-

⁷⁹ *Seaboard Sur. Co. v. Gillette Co.*, 476 N.E.2d 272 (N.Y. 1984).

⁸⁰ After collecting and spending the \$35,000 from Walter, Duffy, and Bruce, the Apartment Corporation was able to pass its costs on to the entire tenant body in the form of maintenance increases and special assessments.

⁸¹ 100 A.2d 198, 202 (N.J. App. Div. 1953), *aff'd per curiam*, 105 A.2d 677 (N.J. 1954).

⁸² See generally OSTRAGER & NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 5.02[a][1] (10th ed. 1999). In some jurisdictions it is referred to as the "eight corners" rule because it looks to the wording within the four corners of the complaint and the four corners of the policy. See *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Merch. Fast Motor Lines Inc.*, 939 S.W.2d 139 (Tex. 1997) ("An insurer's duty to defend is determined by the allegations in the pleadings and the language of the insurance policy This is sometimes referred to as the 'eight corners' rule.").

⁸³ 476 N.E.2d at 275 (1984).

erage, whatever may later prove to be the limits of the insurer's responsibility to pay, there is no doubt that it is obligated to defend.

The Goldstones' homeowner's policy issued by USAA offered the best chance because it covered both Jonas and Maro, as his wife, for liability for "property damage," a defined term that included "loss of use of tangible property which has not been physically injured or destroyed."⁸⁴ The Apartment Corporation's complaint in the Gracie Terrace action sought damages from the Goldstones for their allegedly unauthorized use of the disputed roof areas and conversion of a fire exit hallway and the fire stairs. The conduct complained of resulted in the alleged "loss of use" of the disputed areas to the Apartment Corporation and the other tenants during the policy period. Thus, it constituted "property damage" within the meaning of the policy and a potentially covered claim was asserted. This triggered a duty to defend the entire action for it is generally held that if there is any potentially covered claim in a multi-claim complaint, the insurer must defend the entire action.⁸⁵

A. Coverage for the Gracie Terrace Action from USAA

Dr. Goldstone was insured by USAA, under a Comprehensive Personal Insurance Policy (CPI) and a Personal Umbrella Policy. The CPI policy covered the named insured and his spouse for "all sums which the insured shall become legally obligated to pay as damages because of . . . property damage to which this policy applies, caused by an occurrence"⁸⁶ Property damage was defined to include "physical injury to . . . tangible property which occurs during the policy period" and "loss of use of tangible property which has not been physically injured"⁸⁷ The policy excluded coverage for property damage to "property owned by the insured" or "property occupied or used by the insured or rented to or in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control."⁸⁸ The insurer was contractually obligated to defend any suit seeking damages on account of property damage "even if any of the allegations of the suit are groundless, false or fraudulent."⁸⁹

On January 26, 1983, we sent a copy of the suit papers in the *Gracie Terrace* action to USAA and advised them of Dr. Goldstone's choice of counsel. The complaint clearly alleged property damage during the policy period and sought a total of \$450,000 as damages for the "unlawful withholding of possession, trespass and encroachment of the roof, the hall and the stairways" and for having "inflicted damage to them."⁹⁰

⁸⁴ Reciprocal Interinsurance Exchange Policy Coverage, United Services Automobile Association.

⁸⁵ See, e.g., *Ruder & Finn, Inc. v. Seaboard Sur. Co.*, 422 N.E.2d 518, 521 (N.Y. 1981).

⁸⁶ Reciprocal Interinsurance Exchange Policy, United Services Automobile Association.

⁸⁷ *Id.*

⁸⁸ The Personal Umbrella Policy contained a similar definition of "property damage" and property damage exclusions, as well as an exclusion for expected or intended damage. *Id.*

⁸⁹ *Id.*

⁹⁰ Letter to United Services Automobile Association from Thomas R. Newman, attorney for Dr. Jonas Goldstone and Maro A. Goldstone (Jan. 26, 1983).

On February 9, USAA acknowledged receipt of our letter. Although it said it was investigating coverage under a complete reservation of rights, it sought no further information about the suit. We sent status reports to the carrier on February 11 and April 18, 1983. There was no response.

On April 15, 1983, Dr. Goldstone sent our first bill for services rendered in defense of the action to USAA with the request that it be processed and paid. There was no response. On May 9, he sent another letter to USAA asking that the bill be paid. He pointed out that it was bad enough to be sued in a wholly baseless and maliciously motivated suit, which seeks to recover several hundreds of thousands of dollars in alleged damages without having to worry about how to pay for a vigorous and effective defense. That was why he purchased liability insurance.

By letter dated May 11, 1983, USAA denied coverage. The two paragraph letter contained no analysis of the complaint or policy provisions. It did not indicate that any investigation had been done. Nor did it explain why it took three and one-half months to say that coverage was denied because "none of the allegations in the complaint comes within the coverage provided under the policy of insurance issued by USAA to Jonas or Maro Goldstone."⁹¹

We subsequently entered into a dialogue with the insurer's coverage counsel and learned the denial was based on no coverage for expected or intended damage. We brought to their attention a recent Appellate Division case that had rejected another insurer's reliance on "intentional harm" exclusions, holding that it is not "legally impossible to find accidental results flowing from intentional causes, i.e., that the resulting damage was unintended although the original act or acts leading to the damage was intentional."⁹²

In July 1984, we advised USAA of the Appellate Division's decision granting the Goldstones partial summary judgment and noted that dismissal of the damage claims vindicated the insureds and showed the allegations of the complaint were completely groundless.

We asked the insurer to withdraw its disclaimer and to assume its share⁹³ of defense costs, which by that time had amounted to \$164,138.86. "Now that an end to the ill-conceived, groundless and burdensome litigation seems finally to be in sight, Dr. and Mrs. Goldstone should not be forced to engage in a further dispute with their own insurance carrier."⁹⁴

In August 1984, the Apartment Corporation made an unsuccessful motion for leave to appeal to the Court of Appeals from the Appellate Division's order. In a letter responding to a query from the court, counsel described "The Third and Fourth Causes of Action - Physical Damage to the Roof" and stated that

⁹¹ New York Insurance Law Practices Act § 2601 Unfair Claim Settlement. See *Roldan v. Allstate Ins. Co.*, 149 A.D.2d 20, 42-43 (N.Y. App. Div. 1989). There has never been a reported New York case (or any other that we know of) in which punitive damages have been awarded against an insurer for breach of the duty to defend.

⁹² *Atl. Cement Co. v. Fid. & Cas. Co. of N.Y.*, 91 A.D.2d 412 (N.Y. App. Div. 1984).

⁹³ *Liberty Mutual Insurance Company, Gracie Terrace's D&O carrier*, had agreed to reimburse Maro for a portion of these defense costs.

⁹⁴ See Letter from Thomas R. Newman, Attorney for Maro A. Goldstone, to Richard L. Cantrell, Claims Attorney for United Services Automobile Association (July 17, 1984).

they "include claims that the presence of planters and other items on the roof have damaged the building's structure and injured the roof."⁹⁵

We sent a copy of this letter to USAA, pointing out that "the Apartment Corporation's claim permits a finding that physical damage to the roof, if any in fact occurred, was unintentional and the result of negligence. That possibility is sufficient to trigger USAA's defense obligations."⁹⁶

Two months later, the insurer still had not agreed to assume its share of defense costs. We again wrote and directed its attention to the case law rendering its intentional harm exclusion inapplicable. We concluded our letter by saying we would have no alternative but to seek judicial resolution if the insurer did not acknowledge its contractual obligation to pay defense costs within thirty days.

When three months passed with no response to our letter, we sent USAA's coverage counsel a copy of a complaint we had prepared and were ready to serve on the insurer unless the matter was amicably resolved. This finally resulted in the insurer entering into negotiations with us that culminated in a satisfactory settlement of Dr. Goldstone's claim.

B. Coverage for the Heafitz Action from USAA

On April 25, 1983, we gave notice of the *Heafitz* action to USAA under Dr. Goldstone's comprehensive personal insurance policy and personal umbrella policy. We sent the insurer copies of the pleadings and asked for a defense and coverage based on the complaint's allegations of trespass, slander, and prima facie tort, all of which were covered by the policies. We also advised USAA that, late in the afternoon of Good Friday and simultaneously with the service of the summons and complaint, Maro had been served with an order to show cause and moving papers seeking preliminary injunctive relief against her.

On June 3, 1983, USAA agreed to pick up the defense of the *Heafitz* action under a full reservation of rights and it agreed to "pay a reasonable attorney's fees for this defense from this date forward."⁹⁷ The carrier took the position that it was not bound to pay for the considerable legal work and expense that had been performed prior to its receipt of notice of the action and without its consent, as required by the policy.

We agreed to table the issue of pre-tender defense costs for the time being, reserving the right to pursue a claim for those expenses at a later date. The intensity of the litigation and enormous amount of work it required made it more important for us to have an agreement in place that would result in future defense costs being paid.

We explained, however, that, plaintiffs' timing of their action, late on Good Friday, made it impossible for Dr. Goldstone to have notified USAA, and

⁹⁵ See Letter from Phyllis H. Weisberg, Attorney for United Services Automobile Association, to Hon. Kathryn C. Brown (Aug. 27, 1984).

⁹⁶ See Letter from Thomas R. Newman, Attorney for Maro A. Goldstone, to Irwin Haut (Aug. 29, 1984).

⁹⁷ See Letter from Richard L. Cantrell, Claims Attorney for United Services Automobile Association, to Thomas R. Newman, Attorney for Maro A. Goldstone (June 3, 1983).

obtained its consent, prior to engaging counsel to defend Maro.⁹⁸ We were confident that, in these circumstances, the insured's right to an immediate defense meant that the insurer would have to pay pre-tender defense costs.⁹⁹

Moreover, USAA's reservation of rights created a conflict of interest that gave Maro the right to select her own counsel;¹⁰⁰ it made sense to select the firm which was already representing the Goldstones in the related *Gracie Terrace* action and was familiar with the factual background.

Eventually, when the entire litigation was settled and all of the lawsuits discontinued with prejudice, Dr. Goldstone and USAA reached an amicable resolution of this issue as well.

C. Coverage for the Heafitz Action from Liberty Mutual

In July 1982, the newly elected officers and directors asked Maro to turn over to them "the Corporate files which you have built up during the years you served as Director and President and which are now in your apartment." In reply, she pointed out the obvious. She had "personal duplicate copies of many documents relating to Gracie Terrace matters," but the "Corporate files and records are at the offices of the Corporation's Managing Agent, Counsel and Certified Public Accountants." Maro declined the Board's offer to copy her documents at the corporation's expense or to review them in her apartment. She did offer to share her papers with the Board "provided that a secure storage space accessible only to all Directors at all times could be created at Gracie Terrace." Bruce's maid's room was not an acceptable place.

In September, when the Board threatened legal action to obtain her documents, Maro gave notice to Liberty Mutual, Gracie Terrace's D&O carrier, of

⁹⁸ We were compelled to work the entire weekend to prepare opposition papers to submit on April 7, the return date of the order to show cause. By the end of Monday, April 4, we had already devoted thirty-eight and three-fourths hours to this matter; by the end of April 7, we logged another twenty and one-half hours, including the court appearance.

⁹⁹ Pre-tender defense costs have been held not recoverable under an insurance policy, which contains a clause prohibiting voluntary payment made without the consent of the insurer. *See Smart Style Indus. Inc. v. Penn. Gen. Ins. Co.*, 930 F. Supp. 159, 164 (S.D.N.Y. 1996); *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 316-17 (Minn. 1995); *LaFarge Corp. v. Hartford Cas. Ins. Co.*, 61 F.3d 389, 399 (5th Cir. 1995); *Aerojet Gen. Corp. v. Transport Indem. Co.*, 948 P.2d 909 (Cal. 1997); *Cincinnati Cos. v. W. Am. Ins. Co.*, 701 N.E.2d 499, 504 (Ill. 1998). The general rule presupposes sufficient time to notify the insurer and for it to make a coverage determination and engage defense counsel. Where the insured will be prejudiced if an immediate defense is not mounted, reasonable pre-tender defense costs must be recoverable if the duty to defend is to have meaning.

¹⁰⁰ An insurer that contests coverage generally cannot control the insured's defense of the underlying action. Where the insurer either asserts a reservation of rights or disclaims liability as to some ground for recovery alleged in the complaint against its insured, entitling the insured to a "defense by an attorney of his own choosing, whose reasonable fee is to be paid by the insurer." *See Pub. Serv. Mut. Ins. Co. v. Goldfarb*, 425 N.E.2d 810, 815 (N.Y. 1981); *see also Am. Motorists Ins. Co. v. Trane Co.*, 544 F. Supp. 669, 686 (W.D. Wis. 1982), where the court explained:

A conflict of interest between the insurer and the insured does not relieve the insurer of its contractual duty to defend. Where there is a conflict, the insurer must either provide an independent attorney to represent the insured or pay the costs incurred by the insured in hiring counsel of the insured's own choice.

the possibility that a claim might be made against her in her capacity as a director and former president of the Apartment Corporation.¹⁰¹

On April 4, 1983, we sent Liberty Mutual copies of the summons, complaint, and motion for a preliminary injunction in the *Heafitz* action. We pointed to the cause of action for mandamus and the allegations that Maro had in her possession corporate books and records that she refused to turn over to the plaintiff and other members of the board. We included a copy of Maro's affidavit in opposition to the motion, which furnished "the background necessary to put this litigation in its proper factual context and show how it arises out of and related to [her] actions as a director and former president of GTAC."¹⁰²

On July 13, Maro was informed that Liberty Mutual had decided to provide her with a defense to the *Heafitz* action and to extend coverage, subject to a reservation of rights,¹⁰³ for the claims of trespass and prima facie tort.¹⁰⁴

We kept Liberty Mutual closely advised of the intense activity and voluminous papers filed in the *Heafitz* action. There was a continual stream of motions and cross-motions, including one to disqualify my firm as defense counsel. Through a succession of maneuvers in both the trial and appellate courts, plaintiffs sought to delay or forestall entirely the taking of their depositions. They failed. Bruce's deposition took place at the Supreme Court Courthouse, pursuant to a court order and under judicial supervision, on July 26, 1983.

D. Coverage for the Gracie Terrace Action from Liberty Mutual

Bruce's deposition testimony made clear that, in commencing the *Gracie Terrace* action, he and other newly elected directors had voted to bring that suit because they believed Maro had breached her duty to the Apartment Corporation by committing wrongful acts in her capacity as president and a director. For example, he testified that his fellow directors generally agreed with his position that Maro "had used her position as a director and officer for her own interests to the detriment of the apartment corporation," and that she had abused or misused her power as an officer and director.¹⁰⁵

This testimony was consistent with statements by counsel for the Apartment Corporation during the deposition of Walter in the *Gracie Terrace* action that issues raised in the answer "may require proof of Mrs. Goldstone's conduct as an officer and director" and that "upon a trial it may well get us into issues concerning Mrs. Goldstone's tenure as corporate president and her activities during those years."¹⁰⁶

¹⁰¹ See generally Newman & Gioia, *Triggering Coverage Under an "Awareness Clause" of a Claims-Made Liability Policy*, 499 FICC Q. 137 (Winter 1999).

¹⁰² See Letter from Thomas R. Newman, Attorney for Maro A. Goldstone, to Liberty Mutual Insurance Company (Apr. 4, 1983).

¹⁰³ If it was determined that the wrongful acts alleged were not done "solely by reason of your being a director."

¹⁰⁴ There were express exclusions that barred coverage for the claims of defamation and for the mandamus claim, which did not seek damages.

¹⁰⁵ Deposition, Bruce Heafitz at 213-15, *Heafitz v. Goldstone* (N.Y. Sup. Ct. 1983) (No. 08080/83).

¹⁰⁶ Deposition, Walter E. Albrecht at 101-03, *Gracie Terrace Apartment Corp. v. Goldstone* (N.Y. Sup. Ct. 1983) (No. 01153/83).

We now had a basis for asking Liberty Mutual to defend the *Gracie Terrace* action, even though Maro had not been sued therein in her capacity as a corporate officer or director.

We sent Liberty Mutual copies of affidavits and memoranda of law submitted by the Apartment Corporation in opposition to our motion for summary judgment in the *Gracie Terrace* action. These papers continued the attack on Maro, charging her with having breached her fiduciary obligations to the Corporation.

We still had to overcome the hurdle that Maro had not been sued in her capacity as a corporate officer or director. Whenever Maro would say there had to be a way to obtain a defense of the *Gracie Terrace* action under Liberty Mutual's D&O policy, I would repeat, like a broken record, "the law of New York is clear. The 'four corners of the complaint' govern. There are no claims in the complaint that are asserted against you in your capacity as an officer or director of the Apartment Corporation."

Maro would not accept this. She insisted that she and her husband would not have been sued, but for the animosity she aroused among some of her neighbors and fellow Board members because of actions she had authorized and decisions she had properly made in discharging her fiduciary duties during her long tenure as president and a director of the Apartment Corporation.

It was Maro's unshakable belief that a just legal system should not and would not permit a corporate officer or director (especially of a not-for-profit corporation) to be exposed to ruinous defense costs and potential personal liability simply because a clever plaintiff, intent on burdening the defendant, could carefully draft a complaint that would not trigger an insurer's duty to defend the action. She was adamant. Either the law was wrong and ripe for change or I simply had not researched the point sufficiently.

In late August 1983, while we were still debating this issue, Barry Ostrager and I put together and co-chaired a program on insurance law.¹⁰⁷ Maro attended the program and heard Barry say, as part of his lecture on the duty to defend, that in some jurisdictions the four corners of the complaint do not control. In those jurisdictions, if an insurer has knowledge of facts, which potentially bring a claim within the indemnity coverage, provided by the policy it must provide a defense even though the complaint fails to plead all of the requisite facts.¹⁰⁸

Armed with this knowledge, Maro promptly called Morgan Cox, the extremely knowledgeable and experienced claims handler for Liberty Mutual who had responsibility for the *Gracie Terrace* claim. Morgan was fair and open-minded when it came to evaluating an insured's right to coverage. He agreed to listen to her presentation of why she thought herself entitled to a defense under *Gracie Terrace's* D&O policy¹⁰⁹ even though the complaint made no express claim against her in a corporate capacity.

When Maro finished, Morgan said he was sympathetic to her position, but would need some case law to support a recommendation for coverage. He

¹⁰⁷ This was the first of fourteen annual programs on Insurance, Excess & Reinsurance Coverage Disputes that we co-chaired for Practicing Law Institute from 1983-97.

¹⁰⁸ See, e.g., *Previews, Inc. v. Cal. Union Ins. Co.*, 640 F.2d 1026, 1028 (9th Cir. 1981).

¹⁰⁹ Fortunately, the policy did not have an "insured vs. insured" exclusion.

asked whether she knew of any authorities that supported her. Maro told him, "I'm sure Tom can give you the citation." She then called me and conveyed Morgan's request for cases in which extrinsic evidence was relied on as the basis for finding an insurer had a duty to defend. It was my assignment to find such cases.

I told one of the young lawyers in my office, Carol Baisi, that I had been put on the spot and had to come up with cases holding an insurer had a duty to defend on the basis of facts outside the complaint. I asked her to research the point. Three days later, I was given not only a New York case on point, *Sucrest Corp. v. Fisher Governor Co.*,¹¹⁰ but one in which Liberty Mutual was the carrier that had been ordered to provide a defense!

It was an amazing piece of good fortune to be able to cite a New York case, albeit only a trial court decision, that involved Liberty Mutual, the very insurer we were trying to persuade to accept the principle of law established by that case.

In *Sucrest Corp.*, Sucrest sued Fisher Governor Company for breach of warranty and negligence in the manufacture, sale, and distribution of a shut-off valve.¹¹¹ After discovery had been initiated, Fisher commenced a third-party action against Scovill Manufacturing Company, the manufacturer of the forging in which the shut-off valve had been placed by Fisher.¹¹² Scovill was insured by Liberty Mutual under a CGL policy with a vendor's endorsement.

On the basis of the allegations in Fisher's third-party complaint describing its relationship with Scovill, Fisher asserted it was an additional insured under the Scovill policy and asked Liberty Mutual to assume its defense in the main action. Liberty Mutual denied coverage, contending that the allegations of the Sucrest complaint were insufficient to trigger a duty to defend because there was no claim of negligent design or manufacture directed against Scovill. The court rejected Liberty Mutual's position:

Liberty's contention that the court may not consider any matter which is not within the four corners of the Sucrest complaint is without merit under the circumstances of this case [W]here the complaint alleges facts without the coverage of the policy, but the carrier has knowledge of facts indicating coverage, the insurer is to be guided, not exclusively by the allegations of the complaint, but also by the facts known to it.¹¹³

We sent Morgan a lengthy letter discussing the *Sucrest* case. We showed how the *Gracie Terrace* complaint was "artfully drafted" to make it appear as though the action does not involve Maro in her capacity as a corporate officer

¹¹⁰ 371 N.Y.S.2d 927 (Sup. Ct. 1975).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 936-38. See also *Commercial Pipe & Supply Corp. v. Allstate Ins. Co.*, 36 A.D.2d 412 (N.Y. 1971), where the court stated:

The language of the complaint need not state all the facts requisite to establish insurance coverage. "Where a complaint . . . contains ambiguous or incomplete allegations and does not state facts sufficient to bring a case clearly within or without the coverage, the general rule is that the insurer is obligated to defend if there is potentially, a case under the complaint . . . within the coverage of the policy." . . . Where, as here, the insurer has knowledge of facts which potentially bring the claim within the coverage of the policy it has a duty to defend even though the allegations of the complaint fail sufficiently to allege all the facts requisite to do so.

and director, although in fact that is the reason why it was instituted. We noted that, by this stratagem, the hostile faction that had gained control of the board sought to deprive Maro of her coverage under Liberty Mutual's policy and to subject her and her husband to the punitive financial burden of defending the action.

There were still more obstacles to coverage. We had previously taken the seemingly contradictory position in the *Gracie Terrace* action that Maro "is a party to this lawsuit only in her capacity as an occupant of PH-B by virtue of her status as the wife of Dr. Goldstone, the sole tenant-shareholder of PH-B." It was necessary to explain to Liberty Mutual that "solely for the purpose of limiting the issues and increasing our chances of winning a summary judgment motion, we adopted a litigation tactic of urging that this dispute involves merely a question of the proper construction of Dr. Goldstone's Proprietary Lease, a question of law for the court." To have raised the issue of the Apartment Corporation's true reason for commencing the action against Maro "would have destroyed our chances of obtaining summary judgment. It is for that reason that we stated plaintiff's attack on Mrs. Goldstone is wholly irrelevant and creates no triable issue of fact."

Liberty Mutual understood and approved of our litigation decision. It did not seek to deny coverage on the ground that the *Gracie Terrace* action was not directed against Maro for acts as a corporate officer or director.¹¹⁴

In November, Morgan advised us that Liberty Mutual felt Exclusion D of the D&O policy ("personal profit or advantage to which [she] was not legally entitled") might apply and bar coverage for Maro.¹¹⁵ We then presented the following analysis to show Exclusion D did not apply.

"Loss" is defined as "any amount an insured is obligated to pay in respect of his legal liability for a Wrongful Act . . . asserted and includes damages . . . and costs, charges and expenses incurred in the "defense of legal proceedings" ¹¹⁶ The insurer's defense obligation is triggered whenever there is an

¹¹⁴ Some years later, New York law was settled by the New York Court of Appeals in *Fitzpatrick v. American Honda Motor Co.*, 575 N.E.2d 90, 93 (N.Y. 1991) (citing *OSTRAGER & NEWMAN*, *supra* note *, at § 5.02[a]).

The court held that, notwithstanding the allegations of the complaint, an insurer must "provide a defense when it has actual knowledge of facts establishing a reasonable possibility of coverage." The duty to defend derives, in the first instance, not from the complaint drafted by a third party, but rather from the insurer's own contract with the insured. While the allegations in the complaint may provide the significant and usual touchstone for determining whether the insurer is contractually bound to provide a defense, the contract itself must always remain a primary point of reference. Indeed, a contrary rule making the terms of the complaint controlling "would allow the insurer to construct a formal fortress of the third party's pleadings . . . thereby successfully ignoring true but unpleaded facts within its knowledge that require it . . . to conduct the . . . insured's defense." Further, an insured's right to a defense should not depend solely on the allegations a third party chooses to put in the complaint. This is particularly so because the drafter of the pleading may be unaware of the true underlying facts or the nuances that may affect the defendant's coverage and it might not be in the insured's (or the insurer's) interest to reveal them.

Id.

¹¹⁵ "The insurer shall not be liable to make any payment in connection with a claim under insuring clauses 1A and 1B . . . D. Based upon or attributed to [her] gaining in fact any personal profit or advantage to which [she] was not legally entitled."

¹¹⁶ See Liberty D & O Endorsement (on file with the *Nevada Law Journal*).

"assertion" of a claim for a wrongful act, even though it may subsequently be proved to be groundless, false, or fraudulent. A finding of "actual" legal liability for the alleged wrongful act is not necessary.

Any other interpretation would lead to an absurd result: a director who successfully defends against an "asserted" but baseless claim of a wrongful act would not be reimbursed for the cost of defense, while a faithless director who sustains a loss because of the imposition of legal liability for an "actual" wrongful act would recover the defense costs.

The exclusion was meant to apply to such situations as where a corporate officer embezzled corporate funds or in some other manner lined his or her own pocket by "gaining in fact" some personal profit or advantage "to which he or she is not legally entitled." That was not this case.

Dr. Goldstone was, at all relevant times, the sole shareholder and Proprietary Lessee of PH-B. Under the terms of the lease, Maro as his wife, was contractually and "legally entitled" to live in the apartment. By doing so, she did not derive any personal profit or advantage to which she was not "legally entitled."

The Apartment Corporation's asserted claim (which was denied) was that Maro breached her duty and misused and abused her powers as a corporate fiduciary through her neglect, error, or omission to cause the Corporation to take steps to recapture the corporate property that, allegedly, had been converted to the personal use and advantage of a tenant-shareholder. She was not that shareholder. The claim was not, as it could not have been, that she, "in fact," had gained any personal profit or advantage "to which she was not legally entitled." Thus Exclusion D did not apply and the assertion of the claim entitled Maro to a defense of the action.

Five months later, at the end of April 1984, Liberty Mutual agreed to reimburse Maro for costs and expenses incurred in her defense of the *Gracie Terrace* action.

In August 1984, after we advised Liberty Mutual of the Appellate Division's decision granting partial summary judgment to the Goldstones in the *Gracie Terrace* action, Morgan was kind enough to send us a congratulatory letter in which he said that while this was not the largest D&O claim he had worked on, "it was the most complicated from a coverage standpoint."

X. AN ETHICAL PROBLEM DEFTLY HANDLED BY THE INSURER

For many months, counsel for the Apartment Corporation had been pressuring Liberty Mutual for copies of its correspondence with Maro concerning the coverage it was providing to her under the D&O policy for the *Heafitz* action.¹¹⁷ Counsel also asked what its position would be with respect to coverage for the *Gracie Terrace* action.

We considered this to be an unethical attempt to "meddle in, interfere with or disrupt" the separate contractual and fiduciary relationship between Liberty and its insured. The insurer was being asked to divulge to counsel for the

¹¹⁷ The Board and its counsel even considered making a complaint to the New York Insurance Department if Liberty Mutual did not comply with their demands.

plaintiff confidential communications between it and its insured relating to the action in which it was providing a defense.

We pointed out to counsel that “[w]here two or more insureds under the same policy are in an adversarial position, the insurer must respect the integrity of its separate fiduciary relationship with, and obligation toward, each individual insured.” We threatened to sue them if Maro sustained any injury as a result of their conduct.

Liberty Mutual understood perfectly the ethical considerations involved. Morgan wrote a letter to Walter and counsel for both sides saying:

Certainly, our policyholder, the Corporation, has a right to be informed of what business is being conducted as respects this coverage. On the other hand, I feel that I must be concerned about the rights of each Director and/or Officer claiming, or entitled to, coverage under our policy. If you wish to waive any assertion of conflict of interest against the parties involved, perhaps that would allow us to come together and allow me to make disclosure. Kindly advise your wishes.¹¹⁸

Liberty Mutual respected our position that there be no blanket disclosure. It declined to respond to repeated inquiries from the Apartment Corporation’s counsel without our consent or waiver of the conflict.

XI. EPILOGUE

In May 1984, before the Appellate Division’s decision and at a time when the final resolution of the *Gracie Terrace* litigation was still in doubt, the Goldstones’ then fifteen year old son, John, captured the essence of what was happening in the building in the following poem. His prophecy turned out to be amazingly accurate.

ONE GRACIE TERRACE

The bitch on the throne,
Miss Regalia, Queen that Rules
From Above.
10 years her reign,
Chronicles of pain.

So,
The Masses Revolted.
Oh, it was sad to see
– the Queen dethroned,

Exiled now to her penthouse home.
Were the masses jealous, envious,
Hard to control,
Or were they correct in their
Overthrowing poll?

¹¹⁸ Letter from Maro A. Goldstone to *Nevada Law Journal* (Feb. 26, 2002) (on file with the *Nevada Law Journal*).

They worshiped her, and hated her
For doing well.
Thus they sent the Queen to Hell.
She met there Bruce, Archduke of Brimstone,
Who coveted the Queen's penthouse to roam.

The masses didn't care, didn't want to be involved;
They had their own problems to solve.
Her ten years were finished and done.
All good she accomplished over
In a single year of fun.

The bitch had been banished
And in her place,
Rule Five Men Brave and True,
Who had trumped Maro's ace.

Not satisfied, they set at her heels
Loosing Bruce to deprive her of meals.
Not only was the Queen's reign done,
The board-elect wished for Her Highness to run
And leave her penthouse palace
Soon to be occupied by Bruce's malice.

But the Queen had only lost her throne,
Some still supported her – she was not alone –
And though she was hit with several lawsuits,
Daddy saved his darling from the clutches of Bruce.

The people looked in horror as their fairy tale land
Was Raked end to end with a soiled bloody hand.
Civil War erupted, and Maro returned to fight
For a building that betrayed her
– though perhaps they were right.

Suddenly fate intervened
For now Bruce, it seemed
Had been deposed as well.
No longer did he rule in Hell.

Bruce had finally lost his cash
– Perhaps his threat was broken at last.
The Banks moved in for the kill,
And yet Bruce vowed to break the Queen still.

Tom, her knight protector true
Clashed with her enemies (lawyers too);
And however his summary judgment had lost,
He swore a vow to win for her at any cost.

And so the stage was set for battle
With tenants hiding like frightened cattle.
Some cried for peace, some for war
As legal debts doubled in score.

A war of paper, hate and law,
Of staring at the enemy as elevators
Zoomed down into a gaping maw.
Across One Happiness Place there was total strife,
As every man fought with every man's wife.

And then, at last, a peace of sorts
A lawsuit dropped,
A lawsuit won.
A death, divorce – but whose, which one?

This poem unfinished, the prose discontinued,
A vague prophecy had been issued.
For who can tell which side had won.
Before the proper time had come?

The Queen will once again reign from above
(Though not, perhaps, as before).
Bruce shall leave, a strife – torn man,
While Tom must deal with other problems at hand.

Our Five Men Brave and True shall retire,
To spend their time before a brooding fire.

Karen departs from Bruce,
And One Gracie Terrace will resurrect itself
To not quite its former state.
Its saving changes come about a little too late

This poem drifts away
Like dreams,
Knowing all will become not quite as it seems

JOHN T. GOLDSTONE