

RECENT DEVELOPMENT IN NEW YORK LAW

DESPITE THE RULING IN *PEKELNAYA V. ALLYN*, THE AREA OF LAW REGARDING INDIVIDUAL UNIT OWNERS' LIABILITY STEMMING FROM A DEFECT IN THE CONDOMINIUM'S COMMON ELEMENTS STILL REQUIRES LEGISLATIVE ACTION

BRIAN D. BRENNER[†]

INTRODUCTION

With the recent real estate boom of the early twenty-first century, condominium developments across the country have seen an enormous growth in popularity.¹ This growth has been spurred by a combination of domestic economic policy and demographic changes.² Condominium developments are

[†] J.D. Candidate, June 2008, St. John's University School of Law; B.A., May 2004, Brooklyn College.

¹ See Shannon Behnken, *High-Rises, High-Stakes*, TBO.COM SPECIAL REPORTS, Jul. 31, 2005, <http://reports.tbo.com/reports/condo/condoboom.htm> (detailing the condominium boom experienced on the West Coast of Florida); Melinda Fulmer, *The Great American Condo Glut*, MSN REAL ESTATE, <http://realestate.msn.com/buying/Articlenewhome.aspx?cp-documentid=386136> (explaining the development of condominium growth throughout the U.S. and the current glut of condominiums) (last visited Mar. 10, 2007).

² See Kevin McQuaid, *Quay Plans Point to City's Boom*, HERALDTRIBUNE.COM, Feb. 4, 2004, <http://www.heraldtribune.com/apps/pbcs.dll/article?AID=/20040204/NEWS/402040554/-1/quay> (explaining that real estate growth in Sarasota, Florida during the recent real estate boom was fueled by "economic forces and demographic changes nationwide," such as the low interest rates of the early twenty-first century); see also Deborah Schoeneman, *Eloise, Meet Your New Neighbors: The Plaza and St. Regis Are Going Condo—At Prices That Make the Rack Rates Look Mild*, N.Y. MAG., Dec. 6, 2004, at 73 (noting that even two of the most prestigious hotels in New York City, The Plaza and St. Regis, have converted units into condominiums); Vinnee Tong, *Small Cities Get in on Condo-Hotel Boom*, BOSTON.COM, Aug. 17, 2006, http://www.boston.com/business/articles/2006/08/17/small_cities_get_in_on_condo_hotel_boom/ (indicating that the condominium boom

especially on the rise in New York City as well.³ Economic factors, and the willingness of the Bloomberg administration to rezone areas for residential living, have resulted in a marked increase in the number of condominiums in New York City.⁴

The growth of the condominium form of ownership has raised new legal issues, especially since this form of ownership is a relatively new concept.⁵ Due to the novelty of the condominium form of ownership, there are areas of law that remain uncertain. Particularly unsettled is the law regarding the "allocation of damages for tort liability between unit owners and the owners' association."⁶ Recently, in *Pekelnaya v. Allyn*,⁷ New York's First Department of the Appellate Division held that individual condominium unit owners are not liable for injuries that an individual has sustained as a result of a defect in the common elements of the condominium complex.⁸ In *Pekelnaya*, Aba Taratura and his son, Michael, were walking alongside a condominium complex in New York City when a portion of a chain-linked fence from its roof fell.⁹ The fence was part of the common elements of the condominium complex.¹⁰ Aba Taratura

has also been fueled throughout the country by the willingness of hotel owners to convert units into condominiums).

³ See Braden Keil, *City Apts. Defy U.S. Bubble Trouble*, N.Y. POST, Apr. 4, 2006, at 10 (noting that despite the present "softening" of the real estate market, New York City has still seen substantial growth in the real estate market, particularly a 47 percent increase in condominium sales, as compared to the previous quarter).

⁴ See Janny Scott, *In a Still-Growing City, Some Neighborhoods Say Slow Down*, N.Y. TIMES, Oct. 10, 2005, at B1. Scott notes the difficulty in balancing the City's concern for providing adequate housing at a time when its population is growing, with residents' concern that the recent real estate boom has resulted in overly dense communities. This has often resulted in conflicts over rezoning areas of New York City. *Id.*; see also Hemmy So, *Downtown Homes and Lofts: Hudson Square Boom*, DOWNTOWN EXPRESS, Feb. 11-17, 2005, http://www.downtownexpress.com/de_92/hudsonsquareboom.html (noting that the condominium boom in Hudson Square may be attributed to the rezoning of a manufacturing area to a residential zone by the Department of City Planning).

⁵ See Donald L. Schriefer, *Judicial Action and Condominium Unit Owner Liability: Public Interest Considerations*, 1986 U. ILL. L. REV. 255, 255 (1986) (stating that "[b]ecause of its hybrid character, and also because the condominium is a relatively recent legal development, certain areas of condominium law remain unsettled").

⁶ Jerry C.M. Orten & John H. Zacharia, *Allocation of Damages for Tort Liability in Common Interest Communities*, 31 REAL. PROP. PROB. & TR. J. 647, 648 (1997).

⁷ 25 A.D.3d 111, 808 N.Y.S.2d 590 (1st Dep't 2005).

⁸ *Id.* at 118, 808 N.Y.S.2d at 596.

⁹ *Id.* at 113, 808 N.Y.S.2d at 592.

¹⁰ *Id.* at 114, 808 N.Y.S.2d at 592.

suffered minor injuries. Michael was less fortunate and suffered severe brain injuries, which rendered him permanently disabled.¹¹

The plaintiffs sued the condominium board and the individual condominium unit owners. The unit owners were included in the suit because the plaintiffs felt that the board's two million dollar liability insurance policy would be inadequate to cover the damages.¹² The court, however, refused to impose liability on the unit owners pursuant to New York's Condominium Act.¹³ The court noted that section 339-ee of the Act places control of the maintenance and upkeep of the common elements on the condominium board and is silent as to individual condominium unit owner's liability.¹⁴ The court stated that this silence by the New York State Legislature "precludes the courts from imposing responsibility by implication"¹⁵ on the individual condominium unit owners.

The court then considered whether the individual condominium unit owners might be liable under sections 4(44)¹⁶ and 78¹⁷ of New York's Multiple Dwelling Law. The court held that they were not. The court noted that although section 78 mandates that owners are responsible for the "safe maintenance of the building and its facilities,"¹⁸ the term "owner" in section

¹¹ *Id.* at 113, 808 N.Y.S.2d at 592. Although Aba suffered head trauma and fractures of the vertebral column, Michael's injuries were far more severe. He suffered "skull fractures and multiple intracerebral hemorrhages and contusions, rendering him severely and permanently disabled." *Id.*

¹² *Id.*

¹³ N.Y. REAL PROP. LAW § 339-ee (McKinney 2000).

¹⁴ *Pekelnaya*, 25 A.D.3d at 118–20, 808 N.Y.S.2d at 596–98.

¹⁵ § 339-ee(1) provides in part:

Any provision of the multiple dwelling law, the multiple residence law, or any state building construction code as to multiple residences pursuant to the provisions of article eighteen of the executive law, requiring registration by the owner or other person having control of a multiple dwelling shall be deemed satisfied in the case of a property submitted to the provisions of this article by registration of the board of managers, such registration to include the name of each unit owner and the designation of his or her unit; each unit owner shall be deemed the person in control of the unit owned by him or her, and the board of managers shall be deemed the person in control of the common elements, for purposes of enforcement of any such law or code

N.Y. REAL PROP. LAW § 339-ee (McKinney 2000).

¹⁶ N.Y. MULT. DWELL. LAW § 4(44) (McKinney 2000).

¹⁷ *Id.* § 78.

¹⁸ *Pekelnaya*, 25 A.D.3d at 117, 808 N.Y.S.2d at 595 (quoting *Garcia v.*

78,¹⁹ as defined in section 44²⁰ of New York's Multiple Dwelling Law, did not include the condominium form of ownership.²¹

The *Pekelnaya* decision, while adding more certainty to the law,²² leaves open the question of whether a court may impose liability on individual unit owners in a different situation. In *Pekelnaya*, the individual condominium unit owners all had the same access to the roof from where the chain-link fence fell.²³ Thus, the court noted that unit owners were all in the "same legal position" and refused to impose liability on any of them.²⁴ The question remains, however, whether the court might have imposed liability if access to the roof had been limited to certain unit owners.²⁵ Furthermore, the decision provides for a shocking result where an individual may very well be unable to obtain adequate compensation for his injuries. "New York has not adopted the Uniform Condominium Act . . . or the Uniform Common Interest Ownership Act . . . both of which impose liability on unit owners for unsatisfied judgments against a condominium association, in proportion to the unit owner's

Dormitory Auth., 195 A.D.2d 288, 288, 599 N.Y.S.2d 600, 600 (1st Dep't 1993)).

¹⁹ N.Y. MULT. DWELL. LAW § 78(1) (McKinney 2000). Section 78(1) provides: Every multiple dwelling, including its roof or roofs, and every part thereof and the lot upon which it is situated, shall be kept in good repair. The owner shall be responsible for compliance with the provisions of this section; but the tenant also shall be liable if a violation is caused by his own willful act, assistance or negligence or that of any member of his family or household or his guest.

Id. (emphasis added).

²⁰ *Id.* § 4(44). This provides the following definition:

The term "owner" shall mean and include the owner or owners of the freehold of the premises or lesser estate therein, a mortgagee or vendee in possession, assignee of rents, receiver, executor, trustee, lessee, agent, or any other person, firm or corporation, directly or indirectly in control of a dwelling.

Id.

²¹ *Pekelnaya*, 25 A.D.3d at 117–18, 808 N.Y.S.2d at 595–96 (noting that since the Multiple Dwelling Law was enacted in 1929, it was inconceivable that the Legislature intended their definition of the term "owner" to encompass an "owner" pursuant to the Condominium Act which was enacted in 1964).

²² See Richard Siegler & Eva Talel, *Personal Liability of Condominium Unit Owners*, N.Y. L.J., Jan. 4, 2006, at 3 (noting that while the recent Appellate decision in *Pekelnaya* added more certainty than the previous trial court decision, some uncertainty still remains in the law).

²³ *Id.*

²⁴ *Pekelnaya*, 25 A.D.3d at 114, 808 N.Y.S.2d at 592.

²⁵ Siegler & Talel, *supra* note 22, at 3.

interest in the common elements.”²⁶ Additionally, New York has not adopted any form of statute, as have other states, either mandating that a condominium board obtain adequate liability insurance or imposing liability on individual condominium unit owners.²⁷

As the court noted in *Pekelnaya*, the Legislature needs to address the issue regarding condominium unit owners’ potential liability stemming from the common elements of the condominium complex.²⁸ Part I of this article will analyze how states, such as Florida and California, have dealt with the issues raised by the *Pekelnaya* court. Part II will analyze the Assembly Bill,²⁹ proposed by the New York State Legislature, which is geared at addressing the concerns that the *Pekelnaya* decision has raised. Part III recommends a course of action that the Legislature should take in addressing the issue.

I. HOW OTHER JURISDICTIONS HAVE DEALT WITH INDIVIDUAL CONDOMINIUM UNIT OWNERS’ LIABILITY STEMMING FROM THE COMMON ELEMENTS

A. *The California Approach*

California is one of the few jurisdictions that has case law regarding individual condominium unit owners’ liability arising from the common elements. In *White v. Cox*,³⁰ the California Court of Appeals held that where an individual who is a member of the condominium unit is injured from the common elements of the condominium complex, he is able to seek relief against the condominium association.³¹ The concurring opinion noted that the majority failed to address what the result would be if a third party sustained an injury as a result of a defect in the common

²⁶ *Id.*

²⁷ See generally Orten & Zacharia, *supra* note 6, at 665–66 (noting that some states, including Texas, California, Florida, Alabama, Wisconsin, Washington, Illinois, Massachusetts, Michigan, Mississippi, and New Jersey, address issues of liability arising out of a defect in a common element of a condominium complex, either by mandating that the condominium board maintain adequate liability insurance or by imposing liability on individual unit owners in some fashion).

²⁸ *Pekelnaya*, 25 A.D.3d at 122, 808 N.Y.S.2d at 599.

²⁹ N.Y.A. 4325, 228th Sess. (2005).

³⁰ 95 Cal. Rptr. 259 (Cal. Ct. App. 1971).

³¹ *Id.* at 263.

element.³² The concurrence expressed the same concern that many commentators have noted over the present state of New York law regarding the same issue of condominium liability,³³ namely that “[t]he absence of an express statutory scheme for the re-distribution of tort liability . . . is ample warning that the problem of protecting the individual unit owner from tort liability which, it should be noted, may exceed the value of his unit . . . is yet an open question in California.”³⁴ The concurrence, while raising a novel issue at the time, proposed a fairly simple solution. Specifically, it suggested that the condominium association obtain adequate insurance to cover any liability that might stem from the common elements.³⁵

With the area of individual condominium unit owner liability law still uncertain in California, another case was decided that appeared to spur California to enact legislation dealing with the issue. In *Ruoff v. Harbor Creek Community Ass’n*,³⁶ the plaintiff sued the individual unit owners of a condominium complex for her injuries resulting from a fall in the common area of the condominium.³⁷ Reversing the Superior Court’s determination, the California Court of Appeals held that individual condominium unit owners may be held liable for injuries caused to a third person.³⁸

³² *Id.* at 264 (Roth, J., concurring).

³³ See Siegler & Talel, *supra* note 22, at 3 (expressing concern over the recent *Pekelnaya* decision by focusing on the absence of any statutory provisions regarding the issue). It was also noted as a possibility that the New York Court of Appeals may review the *Pekelnaya* decision and determine, as a matter of policy, that individual unit owners must be held liable where there is no statute mandating that the condominium board maintain liability insurance. *Id.*

³⁴ *White*, 95 Cal. Rptr. at 264 (Roth, J., concurring).

³⁵ *Id.*

³⁶ 13 Cal. Rptr. 2d 755 (Cal. Ct. App. 1992).

³⁷ *Id.*

³⁸ *Id.* at 760. The court asserted that condominium unit owners are “tenants in common who delegate control and management of the [common elements and] remain jointly and severally liable for tortious acts or omissions causing injury to third persons.” *Id.*

The *Ruoff* decision raised many eyebrows.³⁹ The possibility of exposing individual unit owners to liability served as the impetus for legislation dealing with the issue.⁴⁰ In 1995, the California State Legislature passed section 1365.9 of the California Civil Code. Specifically germane to our analysis is section 1365.9(b) which states:

Any cause of action in tort against any owner of a separate interest arising solely by reason of an ownership interest as a tenant in common in the common area of a common interest development shall be brought only against the association and not against the individual owners of the separate interests, as defined in subdivision (l) of Section 1351, if both of the insurance requirements in paragraphs (1) and (2) are met: (1) The association maintained and has in effect for this cause of action, one or more policies of insurance that include coverage for general liability of the association. (2) The coverage described in paragraph (1) is in the following minimum amounts: (A) At least two million dollars (\$2,000,000) if the common interest development consists of 100 or fewer separate interests. (B) At least three million dollars (\$3,000,000) if the common interest development consists of more than 100 separate interests.⁴¹

The California State Legislature devised a fairly simple statute to address individual unit owner's liability stemming from the common elements of a condominium. The statute is straightforward in requiring a board to maintain a minimum of two million dollars in liability insurance if the condominium complex has one hundred or fewer "separate interests,"⁴² and at

³⁹ See Karren E. Klein, *Condo Owners Liable for Common Area Mishaps; Lawsuit: Court Ruling Clears Way for Victims to Sue Individual Owners for Common Area Accidents*, L.A. TIMES, Mar. 14, 1993, at K1 (noting that the *Ruoff* decision had the possibility to affect hundreds of thousands of people and that the ruling was "unfortunate for condo owners"); see also Sharon Bush, *Beware the Association: Associations Control You and Infringe Upon Your Inalienable Rights!*, AM. HOME RESOURCE CENTER, Feb. 16, 2006, <http://www.ahrc.com/new/index.php/src/news/sub/article/action/ShowMedia/id/2672> (noting that the *Ruoff* decision is one that "could make any association member nervous").

⁴⁰ See Bradley Inman, *New Year Will Bring Challenges to Some Home-Related Laws*, SAN DIEGO UNION-TRIB., Dec. 19, 1993, at H3 (noting that due to concern over *Ruoff's* decision that unit owners may be held liable to a third party, there would be proposed legislation in the upcoming year, 1994, specifically dealing with this apprehension).

⁴¹ CAL. CIV. CODE § 1365.9(b) (West 2006).

⁴² *Id.* § 1365.9(b)(2)(A).

least three million dollars if there are over one hundred "separate interests."⁴³ The statute, however, fails to address the issue of what occurs if there is a judgment that exceeds the association's insurance policy. This leaves the possibility that individual unit owners might bear the loss that has been uninsured.⁴⁴

B. *The Florida Approach*

Florida was arguably the first state to recognize the condominium form of ownership,⁴⁵ as well as the first state to enact a condominium statute.⁴⁶ Florida took a pre-emptive approach regarding individual condominium unit owner liability by addressing the issue in its initial Condominium Act of 1963.⁴⁷ Due to this pre-emptive approach, Florida's case law is not rich with history, as is that of California.⁴⁸

Florida's statute provides that:

(1) The liability of the owner of a unit for common expenses is limited to the amounts for which he or she is assessed for common expenses from time to time in accordance with this chapter, the declaration, and bylaws.

(2) The owner of a unit may be personally liable for the acts or omissions of the association in relation to the use of the common elements, but only to the extent of his or her pro rata share of that liability in the same percentage as his or her interest in the common elements, and then in no case shall that liability exceed the value of his or her unit.

(3) In any legal action in which the association may be exposed to liability in excess of insurance coverage protecting it and the unit owners, the association shall give notice of the exposure

⁴³ *Id.* § 1365.9(b)(2)(B).

⁴⁴ See Bush, *supra* note 39.

⁴⁵ Condominium, <http://en.wikipedia.org/wiki/Condominium> (last visited Mar. 11, 2007).

⁴⁶ Joe Adams, *Florida Condo Act Enacted in 1963*, NEWS-PRESS, Aug. 10, 2006, <http://www.news-press.com/apps/pbcs.dll/article?AID=/20060810/COLUMNISTS16/608100352/1032/COLUMNISTS>.

⁴⁷ Florida initially addressed the issue of individual unit owners' liability stemming from the common elements in section 711.18 of its initial Condominium Act of 1963. See FLA. STAT. § 711.18 (1963), *repealed by* 1976 Fla. Laws ch. 76-222, § 3. Section 711.18 has since been codified in § 718.119 in 1976. FLA. STAT. ANN. § 718.119 (West 2006).

⁴⁸ See *supra* text accompanying notes 30–44.

within a reasonable time to all unit owners, and they shall have the right to intervene and defend.⁴⁹

Unlike California's statute,⁵⁰ which insulates condominium unit owners from liability,⁵¹ Florida's statute imposes liability on individual unit owners on a pro rata basis,⁵² i.e., liability proportional to their interest in the common elements. Under Florida's statute, an individual seeking recourse against the unit owners as a result of a controversy arising from the common elements or common interest, may only sue the condominium association as representatives of the individuals.⁵³ One may not directly sue an individual unit owner for a common element or interest issue. Once the association, which represents the individual unit owners, is found liable, the unit owners may be held liable via an assessment based on a pro rata basis.⁵⁴

II. THE NEW YORK APPROACH

On February 9, 2005, the New York Assembly proposed the adoption of Assembly Bill 4325.⁵⁵ The bill, as proposed, states:

⁴⁹ FLA. STAT. ANN. § 718.119 (West 2006).

⁵⁰ CAL. CIV. CODE § 1365.9(b) (West 2006).

⁵¹ See *supra* notes 41–43.

⁵² FLA. STAT. ANN. § 718.119 (West 2006).

⁵³ *Four Jay's Constr., Inc. v. Marina at Bluffs Condo. Ass'n, Inc.*, 846 So. 2d 555, 556 (Fla. Dist. Ct. App. 2003). In *Four Jay's* a contractor built balconies for the condominium unit owners. The contractor brought suit for breach of contract against the condominium unit owners as a class and named the condominium association as their representative. The contractor did not seek relief by requesting individual payments from each condominium owner, but rather requested one lump sum from the association. The court determined that since the balconies were considered a common interest to all units, thus, an "association may sue and be sued as the representative of condominium unit owners in an action to resolve a controversy of common interest to all units." *Id.* at 557.

⁵⁴ *Cooley v. Pheasant Run at Rosemont Condo. Ass'n.*, 781 So. 2d 1182, 1184 (Fla. Dist. Ct. App. 1998). The plaintiff in *Cooley*, a guest, was injured while on the common elements of Pheasant Run. The plaintiff sued the association as well as the individual unit owners. The court held that a plaintiff may not sue an individual condominium unit owner, rather, he may sue the association as a representative of the unit owners. *Id.* at 1185. The court noted that the correct interpretation of section 718.119(2) of the Florida Statutes was that the only liability that individual unit owners could be exposed to is an increase in their assessment. *Id.* at 1184. An increase in assessment would result from a finding against the condominium association, which, if properly filed, would be sued as a representative of the individual unit owners; the increase would be proportional to their interest in the common elements. *Id.*

⁵⁵ N.Y.A. 4325, 228th Sess. (2005).

A cause of action arising from a tort claim and relating to common elements, as defined in section three hundred thirty-nine-e of this article, may be maintained only against the condominium association, the board of managers, or the original sponsor. In no event shall individual unit owners be held jointly and severally liable, or individual board members be held personally liable, in a cause of action arising from a tort claim and relating to common elements.⁵⁶

The bill was proposed out of an apparent concern that individual unit owners may be open to an endless amount of liability where an injured individual decides that he has not been "adequately compensated."⁵⁷ Although seemingly well intentioned, the proposed New York Assembly bill actually creates another problem. While insulating the individual unit owners from liability, it remains silent as to mandating that condominium associations obtain some minimum requirement of liability insurance. In an apparent rash response to the *Pekelnaya* decision, the New York Assembly has overlooked a potential plaintiff's possible inability to gain adequate compensation.⁵⁸

III. THE PROPOSED STATUTORY SOLUTION

A. *Insulate Individual Unit Owners from Personal Liability*

The New York Assembly should adopt a legislative solution to individual condominium unit owners' liability that balances the fundamental principles of the condominium form of ownership with a plaintiff's ability to obtain adequate compensation for his or her injuries. This would best be accomplished by adopting a statute that is similar in concept to California's, but with a few tweaks.

Condominium unit owners relinquish control and responsibility of the common elements, and place the duty of upkeep on the board.⁵⁹ Thus, a major tenet of any proposed statute must uphold this fundamental aspect of the condominium

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ This concern has also been expressed by leading attorneys who specialize in the area of co-op and condominium litigation. See Siegler & Talel, *supra* note 22, at 3.

⁵⁹ N.Y. REAL PROP. LAW § 339-ee (McKinney 2007).

form of ownership by insulating individual unit owners from personal liability, even if only specific unit owners have access to the common element. The Legislature, however, must take into account the fact that individual unit owners may not be held personally liable, and therefore require a condominium association to obtain a large amount of liability insurance.

B. Mandate That a Condominium Association Insure for Liability Stemming from the Common Elements in an Amount Equal to Double the Property's Value

The question regarding the amount of insurance sufficient for a board to carry is a difficult one, with perhaps no correct answer.⁶⁰ Merely looking to California's statute⁶¹ and adopting their seemingly arbitrary minimum mandatory level of insurance would be a big mistake. As previously discussed, the California statute requires a board to maintain a minimum of two million dollars if there are one hundred or fewer separate interests, and three million dollars if there are over one hundred separate interests.⁶²

Drawing comparison from cooperative law and other areas of the New York Condominium Act, the New York State Legislature should mandate that a condominium association obtain liability insurance equal to double the value of the condominium complex. In a cooperative form of ownership, a tenant does not actually own their apartment. Rather, the tenant owns stock in the cooperation and has a proprietary lease, which in return entitles the tenant to live in his apartment.⁶³ In exchange for this cooperative arrangement, a tenant would not be held personally liable in a case such as *Pekelnaya*.⁶⁴ The tenant, however, may

⁶⁰ This concern was expressed by Mr. Luxemberg, the president of the Council for New York Cooperatives and Condominiums. See Jay Romano, *Your Home: Liability Concerns for Condos*, N.Y. TIMES, Feb. 29, 2004, at 11–13.

⁶¹ CAL. CIV. CODE § 1365.9(b) (West 2007).

⁶² *Id.*

⁶³ See *State Tax Comm'n v. Shor*, 43 N.Y.2d 151, 154, 371 N.E.2d 523, 524, 400 N.Y.S.2d 805, 806 (1977).

⁶⁴ See generally *Pekelnaya v. Allyn*, 25 A.D.3d 111, 808 N.Y.S.2d 590 (1st Dep't 2005). New York has cooperative law that is only used for farming cooperatives. Historically, all business was performed under stock corporation law, which is now the Business Corporation Law. Presently, housing ventures are incorporated under the Business Corporation Law or the not-for-profit corporation law. See N.Y. BUS. CORP. LAW § 701(a) (McKinney 2003); N.Y. NOT-FOR-PROFIT CORP. LAW § 717(a) (McKinney 2005).

lose his capital investment, i.e., his stock in the cooperative, if a judgment exceeds the liability insurance the cooperative carries.⁶⁵ In a perfect storm scenario, all of a cooperative's tenants would lose their stock—and thereby lose their apartments—if an individual received a judgment in which the cooperative's insurance was inadequate, and the remaining amount was equal to or greater than the value of the cooperative.

The New York Condominium Act requires that the board obtain insurance on the condominium building in an amount equal to its value in the event there is a total loss of the building, e.g., in case of a fire.⁶⁶ Borrowing from this concept, the New York State Legislature should likewise require that a condominium association obtain liability insurance in an amount equal to the building's value.⁶⁷ The Legislature, however, should not stop there. Rather, they should further require a condominium association to insure in an amount equal to or greater than double the building's value. This would, in essence, put an individual who is injured in the common elements of a condominium complex on the same footing as one who is injured in a cooperative. The individual injured in a cooperative might ultimately own the building as previously discussed,⁶⁸ while an individual injured in a condominium complex might receive the cash equivalent of the building. This provision directly addresses one of the plaintiffs' contentions in *Pekelnaya*.⁶⁹ Specifically, the plaintiffs in *Pekelnaya* asked the court to impose liability on the individual unit owners by analogizing a cooperative form of ownership with that of a condominium. The plaintiffs noted that in the cooperative form of ownership, since the corporation owns the premises, their ownership provides an alternative means of

⁶⁵ The plaintiffs in *Pekelnaya* asked the court to impose liability on the individual unit owners by analogizing a cooperative form of ownership with that of a condominium. The plaintiffs noted that in the cooperative form of ownership, since the corporation owns the premise, their ownership provides an alternative means of recovery over and above whatever insurance policy the cooperative might have carried. Hence, the plaintiffs felt the court should similarly impose liability on individual unit owners in a condominium setting as they would in a cooperative. See *Pekelnaya*, 25 A.D.3d at 121, 808 N.Y.S.2d at 599.

⁶⁶ N.Y. REAL PROP. LAW § 339-bb (McKinney 2007).

⁶⁷ The value of a condominium complex may be obtained either from the insuring company's assessment of the building's value, or by obtaining three independent appraisals and taking the average value.

⁶⁸ See *supra* note 63 and accompanying text.

⁶⁹ See *supra* note 61.

recovery over and above whatever insurance policy the cooperative might have carried. Hence, the plaintiffs felt the court should similarly impose liability on individual unit owners in a condominium setting as they would in a cooperative.⁷⁰

C. Provide a State Regulated Fund for Condominiums to Pay into in Case of a Judgment Exceeding Double the Condominium's Insurance Policy

Finally, as no two condominium complexes are created equal, under the proposed statute, there will inevitably be condominium complexes that are better insured than others as a result of their higher assessment value. This will pose a problem when an individual is injured at a condominium that is of lesser value than a neighboring condominium. The injured individual may not be able to gain full compensation because of his misfortune. In order to address this problem, the legislature should incorporate a state-managed fund that each condominium complex must pay into every year. This fund, regulated by the state, would provide an additional source of compensation for an injured individual and may be structured similarly to New York State's Workers Compensation fund.⁷¹

CONCLUSION

The condominium form of ownership is here to stay. With the increasing growth of condominiums throughout New York City, it is only a matter of time before another incident such as the *Pekelnaya* case will occur. It is imperative that the legislature implement a statute addressing the issue of individual condominium unit owners' liability stemming from the common elements.

Three main points should be adopted as an integral aspect of any legislative enactment: (1) insulating individual unit owners from liability; (2) requiring a board to insure against liability

⁷⁰ See *Pekelnaya*, 25 A.D.3d at 121, 808 N.Y.S.2d at 599.

⁷¹ N.Y. WORKERS' COMP. LAW § 76 (McKinney 2007). Part of New York State's Workers' Compensation Fund requires most employers to pay into a state managed fund in case their employee is injured on the job. By paying into this common fund, an employer's liability is limited. See generally New York State Workers' Compensation Board, http://www.wcb.state.ny.us/content/main/Small_Business/parties.jsp (last visited Mar. 8, 2007), for a more detailed analysis of New York's Workers Compensation Fund.

stemming from the common elements in an amount equal to double the building's value; and (3) implementing a fund that all condominium complexes must pay into to provide an additional source of compensation for an injured individual. These three points will preserve the fundamental aspects of the condominium form of ownership, while simultaneously allowing an injured individual the ability to obtain just compensation.

Until the issue of individual condominium unit owners' liability stemming from the common elements is addressed by the New York State Legislature, condominium unit owners cannot rest easy. It would be a prudent measure for each individual unit owner to check his homeowner's insurance policy to determine whether he is covered for liability stemming from the common elements.