

## BOARD OPERATIONS

New York City

# Attorneys Answer Six More Questions Boards Have About Superstorm Sandy

By Adam Leitman Bailey, Leonard H. Ritz and Dov Treiman

**Jan. 15, 2013** — In this second of two installments, leading real-estate attorneys answer more condo and co-op board members have been asking about what's expected of them and of shareholders / unit-owners in the terrible aftermath of superstorm Sandy.

**Q:** Does the Board have any responsibility for loss of value of the apartment due to the storm damage or due to the apartment's now apparent vulnerability to storms?

**A:** Neither in a condo nor in a co-op will any loss of value of the apartment make any difference in the economic responsibilities of the parties.

**Q:** Does the unit owner have to pay maintenance or common charges for the period the unit owner is sitting in an apartment with no electricity and no heat?

**A: Co-op:** In a co-op, the requirement to pay maintenance in a less than completely functional apartment is on a sliding scale, not an on/off switch. Unless the parties can agree to an appropriate dollar adjustment to the rent while the apartment or building is being repaired or while certain utilities are shut down, it will be up to the Housing Court (principally, but it could be other courts, even including Small Claims) to figure out how much is a reasonable discount.

If the apartment is both unusable and the shareholder actually goes somewhere else during the period of unusability, the courts will likely find that the shareholder is entitled to complete rent forgiveness on a per diem basis for that period the tenant is absent. If the apartment is substantially unusable, but the shareholder is still living there anyhow, the court will have to determine a reasonable percentage downward adjustment to the rent for the affected period. Some outages are fairly predictable from the case precedents: 25% for lack of hot water, 25% for lack of heat, 50% for lack of electricity, 10% for broken windows, 10% for plaster damage from water penetration, and so on. None of these figures are hard and fast.

**Condo:** In a condo, because there is no lease, unit owners have no right to a credit for common charge for any of this. [*Note from Web Editor:* As mentioned in part one, attorney Steven Wagner of Wagner Davis says courts have ruled both ways on the issue, though he believes common charges are due regardless. Another expert notes that a particular condominium's bylaws may require abatement.]

**Q:** Is the Board liable for damage to the occupant's property caused by the storm?

**A:** Generally speaking, the Board is not liable for damage to an occupant's property caused by the storm. However, there is an exception for conditions of which the Board had notice that were defective prior to the storm, conditions that allowed the storm to do damage when a proper apartment would not have. Examples of this are missing window panes and façade brick work damaged to the point that the exterior walls of the apartment were already leaky prior to the storm.

**Q:** Is loss of income due to the storm a valid excuse for not paying maintenance or common charges?

**A:** Loss of income or increased expenses because of the storm are no excuses to paying maintenance or common charges. Prudent Boards will give the unit owners some leeway as the courts are not likely to have much sympathy for Boards who come across as being Sandy Scrooges. Thus, it is wise to waive late fees and legal fees, but subject to the matters we have discussed above, the maintenance and common charges will have to be paid reasonably quickly and close to on time.

**Q:** Is lack of subway service a valid excuse for not paying maintenance or common charges?

**A:** A Board has no responsibility at all for continued neighborhood amenities. Subway and other transportation outages will generally have no legal effect.

**Q:** What should be done about insurance?

**A:** In both condos and co-ops, unit owners have to file their claims with their insurance carriers as soon as possible. It should be noted that Homeowners Policies do not include flood insurance. That had to be purchased separately prior to the storm in order to cover any floor-related losses from the storm, but should be gotten now in any event. Even on the 20th floor of a building, you can suffer a flood from a washing machine hose breaking in your apartment or in the apartment upstairs from you.

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