

## Q&A: Accessing Complaint Documents When a Co-op Is in Litigation

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**Q.** Litigation has been brought against our co-op, its board of directors, and individual board members, accusing one or several members of the 2015/16 board of directors of malfeasance. If the allegations are substantiated in court, it could cost the shareholders of the co-op millions of dollars in non-recoverable damages and legal fees. The litigation/claims documents have been served to our board via our management office, and the management agent forwarded the claims documents to the co-op's attorney, but no copy of the claims against the co-op is available for review by the shareholders.

The questions I have are:

According to the New York Business Corporation Law, are shareholders entitled to see the claims/complaint document to specify the charges against the co-op board and/or some of its members?

Would the process server leave a receipt or confirmation of the signed receipt or acceptance of the court papers by the management agent (recipient) at the management office?

—What Are Our Rights?

**A.** “While there is no specific provision in the New York Business Corporation Law (BCL), which mandates that shareholders see claims/complaint documents specifying the charges against a cooperative board of directors and/or some of its members, pursuant to the indemnity provisions contained in Article 7 of the BCL,” says Eric M. Goidel, a senior partner at the Manhattan firm Borah Goldstein Altschuler Nahins & Goidel, P.C., “shareholders should be entitled to review such documents.

“Pursuant to the BCL, if the bylaws or certificate of incorporation of a business corporation so provide, directors and officers may be entitled to broad indemnification from the corporation for actions taken in good faith. This indemnification can be over and above any available directors and officers’ (D&O) liability insurance.

Indemnification of directors can be denied by a vote of the shareholders, where it is determined by the shareholders that board members have not acted in good faith. In order to determine whether board members have acted in good faith, shareholders must understand the nature of the transaction or conduct that resulted in the legal action. Review of the court complaint and related discovery documents may be critical in assisting shareholders to make such an evaluation.

“One should be aware that a court filing is a public document, and in the absence of the board of directors furnishing such documents, shareholders do have the ability to obtain those documents from the court. However, if board members are unwilling to furnish shareholders with requested documentation, shareholders and board members should be reminded that shareholders have the ultimate decision as to indemnification. Corporate indemnification of directors is somewhat independent of any directors and officers liability insurance, which has been procured by the corporation. However even in an instance where there may be ample D&O coverage, dependent upon issues of good faith or bad faith, an insurance company may not ultimately pay a claim. While under a D&O policy, an insurance company will almost always provide a legal defense, the duty to defend is often far greater than the duty to indemnify.

“[On your second question], affidavits of service upon all parties served with process in an action must be filed with the court in which the action is being maintained. The process server will not generally leave a receipt at the management office or the office of where process is served. Quite the opposite; the recipient of process may be asked by the process server to acknowledge receipt of process.”