JUDICIAL ACTIVISM IN THE SERVICE OF PRIVILEGE: NEW YORK'S FIRST DEPARTMENT MAKES SPECIAL RULES FOR SPECIAL DEFENDANTS

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Cooperatives and condominiums comprise a prominent feature of New York City's housing marketplace; there are more than 350,000 housing units in co-op and condo buildings, slightly more than half of which are located outside of Manhattan.[1] Federal and local law prohibit these housing providers, like all others, from engaging in discriminatory practices, including those based on a person's disability.[2] New York City's Human Rights Law is particularly distinctive on the disability front, with a variety of provisions more protective than those of the Fair Housing Act.[3] Among these are provisions that eliminate collateral litigation on the question of whether a person "qualifies" as having a disability, that more broadly cover discrimination on the basis of perceived disability, and that impose a sweeping requirement to make—and in most cases, pay for—reasonable accommodations to enable a person with a disability to enjoy the use of the premises sought or lived in.[4]

As difficult as it has been to police co-op compliance with the proscriptions against status-based discrimination,[5] reasonable

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[1] U.S. CENSUS BUREAU, N.Y. CITY HOUSING AND VACANCY SURVEY, Series IB, Table 14 (2005), *available at* http://www.census.gov/hhes/www/housing/nychvs/2005/s1bt14.html.

[2] *See* 42 U.S.C. § 3604 (2000); N.Y. CITY, N.Y., ADMIN. CODE §§ 8-102(5), 8-107(15) (1996).

[3] *Compare* 42 U.S.C. §§ 3602(h), 3604(f), *with* N.Y. CITY, N.Y., ADMIN. CODE §§ 8-102(16), 8-102(18), 8-107(5)(a), 8-107(15).

[4] N.Y. CITY, N.Y., ADMIN. CODE §§ 8-102(18), 8-107(15); *see also* Craig Gurian, *A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law*, 33 FORDHAM URB. L.J. 255, 284–86, 303–07, 311 (2006) (discussing the breadth of disability protection).

[5] Almost all co-ops insulate themselves from responsibility for their discriminatory actions by refusing to provide a family who a board has rejected with reasons for the rejection. The tactic is doubly effective: it makes it difficult for a person rejected to assess (or get an attorney to assess) whether the rejection had a legitimate basis, and, in those cases where a person does proceed to bring a fair housing action, it opens the doors for the co-op to present at trial *post hoc* rationalizations shaped by a discrimination defense lawyer's strategic sense of how the case has proceeded (as opposed to the co-op board's actual, contemporaneous reasons for

accommodation cases have proceeded more straightforwardly. The traditional discrimination inquiry is obliged to try to determine what factor or factors motivated a covered entity. The reasonable accommodation inquiry deals with facts that are externally verifiable. What need arose from the disability? What physical modification or rule change was plausible for the covered entity to perform? Did the covered entity make the accommodation? Though this author believes that lack of serious enforcement by institutional prosecutors has resulted in many covered entities not feeling the need to comply proactively, the law has meant that people with disabilities do have a real tool to achieve needed accommodations, even in co-ops and condos.

Late in 2006, a panel of New York's Appellate Division, First Department decided to change that legal landscape. *Pelton v. 77 Park Avenue Condominium*[6] is in some measure a classic instance of bad facts making bad law: it appears that, over time, the defendant had taken significant steps to meet the needs created by the plaintiff's disability, and even someone in sympathy with the struggle for disability rights could easily question why the plaintiff was suing for $23.5 million.[7] But *Pelton* is more. It is the story of a panel that had one thing on its mind—protecting co-ops, condos, and their boards from being exposed to the obligations of New York City's Human Rights Law. The panel was prepared to ignore the provisions of that law, ignore a recently given legislative caution from New York's City Council against judicial overreaching, and ignore clear precedent from the Court of Appeals, New York's highest court.[8]

Specifically, the panel decided to stretch the "business judgment" rule to ensure deferential review of the potentially discriminatory

its actions). Proposed legislation to require co-ops to promptly disclose the specific reasons for rejecting applicants, denominated "Intro 119 of 2006," has won strong support in New York's City Council, but has been stalled by ferocious opposition from co-op boards and their lobbyists who seek to preserve the current system of unaccountability. *See* FED'N OF N.Y. HOUS. COOPS. & CONDOS., http://www.fnyhc.org (last visited Jan. 1, 2008) (asking for the support of co-op boards to defeat Intro. 119). One prominent co-op attorney, for example, asserted that the transparency of disclosure would "destroy the very fabric of co-op life." Jay Romano, *If a Co-op Kills a Sale, Should It Say Why?*, N.Y. TIMES, Mar. 19, 2006, § 11, at 14 (quoting Manhattan Attorney Arthur I. Weinstein, Vice President of the Council of New York Cooperatives and Condominiums). A co-op board president has said that mandating disclosure is "at least as immoral and unethical" as housing discrimination itself. David Wineberg, Letter to the Editor, *Truth in Co-ops: Just Tell Me Why I'm Not In*, N.Y. TIMES, Apr. 30, 2007, at A20.

[6] 825 N.Y.S.2d 28 (App. Div. 2006).

[7] *Id.* at 29, 35 n.3.

[8] *Id.* at 30–35.

conduct of the co-op or condo board members.[9] It decided to write in special pleading and proof requirements to make it difficult to sue members of co-op and condo boards for participating in discriminatory torts against members of the public.[10] And, it invented a complete "good faith" defense to any liability for failure to make reasonable accommodation.[11] Though written in the context of a motion to dismiss brought only by board members and the building's managing agent (and not the condo itself), the reasoning of the ruling is clearly intended to provide shelter from the consequences of violating the Human Rights Law to co-op and condo corporations as well.[12]

Those privileged few for whom the panel legislated were delighted with the gift. Indeed, the beneficiaries were so tickled that they freely acknowledged that *Pelton* had set a precedent, rather than pretending, as the First Department panel had done, that the decision was foreordained by existing law:

> Prior to the Pelton case, once a claimant satisfied the above minimum requirements to make a claim for reasonable accommodation, known as the prima facie case, a housing association could not simply rely on the business judgment rule to defend against the claim. . . .
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> It was generally presumed, however, that the business judgment rule did not apply in these types of cases. Rather, conventional belief—and practice—was that once a claimant stated a prima facie discrimination case, the respondent, (i.e. the board), would then have the burden of proving the legitimacy and non-discriminatory bases of their decisions in order to avoid monetary damages, fines, and injunctive remedies.[13]

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[9] *Id.* at 33–34.

[10] *Id.* at 34–35.

[11] *Id.*

[12] *Id.* at 33 (asserting that there is not "a single fact giving rise to liability on the part of any of the defendants"). The panel was so overeager in the defense of co-ops and condos, it initially dismissed the complaint as against all defendants (including the corporate defendant), even though only individual defendants had actually made a motion for summary judgment. *Id.* at 29, 36–37. Upon further motion from the plaintiff, the panel belatedly had to issue a modified decision only dismissing against the individual defendants who had actually moved for summary judgment. Pelton v. 77 Park Ave. Condo., Motion M-6925, 2007 WL 1854595 (N.Y. App. Div. Mar. 8, 2007) (order granting "[m]odification and/or leave to appeal to the Court of Appeals . . . to the extent of issuing a corrected Opinion and Order"). The full text of the corrected Opinion and Order is on file at the Appellate Division and in the author's possession.

[13] Ian J. Brandt, Esq. & Robert J. Braverman, Esq., *Defending Against Discrimination Claims: The Business Judgment Rule May Apply*, COOPERATOR, Jan. 2007, *available at*

Counsel from the firm that represents the Real Estate Board of New York, writing in the New York Law Journal, concurred that *Pelton* was a "precedent-setting decision."[14]

This Article demonstrates that *Pelton's* application of the business judgment rule was unwarranted and unsupportable. It then shows that *Pelton* ignored the plain language of the City Human Rights Law, and explains how *Pelton* confused director liability arising from contract with that arising from tort. The Article continues by establishing that *Pelton's* introduction of a heightened pleading standard was without basis in law. Finally, the Article makes clear that *Pelton* defied the legislative mandate set forth by New York City's recent Local Civil Rights Restoration Act.[15] That mandate insists that judges not substitute their own public policy choices for those the City has made; in other words, that they allow the City Human Rights Law to achieve its "uniquely broad and remedial purposes."[16] Instead, the *Pelton* panel encouraged noncompliance with the law. *Pelton*, the Article concludes, represents exactly what the Restoration Act is designed to prevent: judicial activism in the service of privilege.

I. THE PROPER CONFINES OF THE "BUSINESS JUDGMENT" RULE

The contemporary application of the "business judgment" rule in the context of *some types* of co-op action flows from *Levandusky v. One Fifth Avenue Apartment Corp.*, decided by New York's Court of Appeals in 1990.[17] At its most protective, the rule requires courts to give deference to board actions "taken in good faith and in the

http://cooperator.com/articles/1381/1/Defending-Against-Discrimination-Claims/Page1.html. The pre-*Pelton* "minimum requirements" or *prima facie* case referred to, was described by these co-op defense lawyers as a plaintiff having to show:

1. He or she suffers from a disability as defined by law
2. Officers or representatives of the association knew or reasonably should have known of his or her disability
3. The requested disability accommodation may be necessary to afford him or her equal opportunity to use and enjoy the dwelling, and
4. The board for the housing association refused the accommodation.

Id.

[14] Richard Siegler & Eva Talel, *Reasonable Accommodations for Disabled Residents*, N.Y. L.J., Mar. 7, 2007, at 3.

[15] N.Y. City, N.Y., Local Law 85 (Oct. 3, 2005). The Local Civil Rights Restoration Act of 2005 is codified in the 2005 N.Y. CITY LEGIS. ANN. 528–35, which is available at http://www.antibiaslaw.com/RestorationAct.pdf. The intent and intended consequences of the Restoration Act are the subject of Gurian, *supra* note 4.

[16] Local Civil Rights Restoration Act § 7, 2005 N.Y. CITY LEGIS. ANN. at 534 (amending N.Y. CITY, N.Y., ADMIN. CODE § 8-130 (1996)).

[17] 553 N.E.2d 1317 (N.Y. 1990).

exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes."[18] *Levandusky*, which was not a discrimination case, involved a shareholder who had made an unauthorized structural alteration (moving a kitchen steam riser), and who had, contrary to the co-op's rules, installed air conditioning equipment.[19] The Court was confronted with what it saw as a quintessentially *internal* building matter.[20] No particular public interest was implicated; the question—correctly perceived to be one that would recur—was how to handle disputes that arose within the confines of the day-to-day governance of a self-contained residential community.[21]

To reach its decision in *Levandusky,* the Court invoked a series of analogies, all of which underline the fact that the court was crafting a rule akin to the business judgment rule in the context of private, voluntary association.[22] In the Court's view, for example, the "purchase of a cooperative apartment represents a voluntary choice to cede certain of the privileges of single ownership to a governing body . . . . The board, in return, takes on the burden of managing the property for the benefit of the proprietary lessees."[23] The Court saw a cooperative or condominium as being "by nature a myriad of often competing views *regarding personal living space*," a place where many board decisions would invariably generate dissatisfaction among some shareholders.[24]

The Court explicitly envisioned co-ops and condos as little self-contained societies that had, "[l]ike a municipal government . . . broad powers [in day-to-day affairs] in areas that range from financial decisionmaking to promulgating regulations regarding pets and parking spaces."[25] A court would not be well-equipped to oversee these kind of internal decisions because the court would not share the experience of board members to "the peculiar needs of their building and its residents."[26] It was in these circumstances that the Court in *Levandusky* decided that the judiciary should not substitute its judgment for a board's.[27]

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[18] *Id.* at 1321 (quoting Auerbach v. Bennett, 393 N.E.2d 994, 1000 (N.Y. 1979)).

[19] *Id.* at 1319.

[20] *Id.* at 1322.

[21] *Id.*

[22] *Id.* at 1321. The court was explicit in saying, "We emphasize that reference to the business judgment rule is for the purpose of analogy only." *Id.*

[23] *Id.* at 1320–21.

[24] *Id.* at 1322 (emphasis added).

[25] *Id.* at 1320.

[26] *Id.* at 1322.

[27] *Id.* at 1323–24.

It is immediately apparent that the rationale for according deference to boards disappears entirely when the matter is not one of community self-government but rather one of enforcing adherence to fundamental public policy embodied in law.[28] *Levandusky,* while analogizing co-ops to municipal governments, did not, after all, set forth a rule that co-ops and condos are *actually* sovereign entities. They, like other corporations, are ultimately part of a larger society, and obliged to follow the laws that are applicable to them.[29] Regardless of how much experience their board members have of "the peculiar needs of their building and its residents,"[30] that fact does not make those board members better than a court at determining whether the law has been followed, or mean that their form of corporate organization exempts them from the law.[31] Thus, it would be most fair to say that the business judgment rule simply has no application in the discrimination context. The judicial task involved remains the same as it would be in respect of any covered entity charged with violating the City Human Rights Law (or any other law): was the law violated?

The same result is commanded even if one operates *within* the confines of the business judgment rule as adapted by the Court of Appeals. Though the phrase "business judgment rule" is used colloquially to connote deference to a decision of a co-op or condo board, in fact the Court of Appeals has made clear that there are real limits as to where and how the rule operates. In *40 West 67th Street v. Pullman*,[32] another business judgment case that arose in what the court clearly saw as a private, internal dispute, the subject of the lawsuit was the eviction of a shareholder found by a supermajority vote of all shareholders to have engaged in continuing, objectionable conduct.[33] The shareholder being evicted had *voluntarily* entered into a proprietary lease that had authorized

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[28] *See* N.Y. CITY, N.Y., ADMIN. CODE § 8-101 (1996) (finding that "there is no greater danger to the health, morals, safety and welfare of the city and its inhabitants than the existence of . . . [bias, and that] prejudice, intolerance, bigotry, and discrimination . . . and disorder occasioned thereby threaten the rights and proper privileges of its inhabitants and menace the institutions and foundation of a free democratic state"); *see also* COMM. ON GEN. WELFARE, REPORT ON "LOCAL CIVIL RIGHTS RESTORATION ACT OF 2005", *reprinted in* 2005 N.Y. CITY LEGIS. ANN. 536, 537 [hereinafter 2005 COMM. REPORT] (stating that acts of discrimination "cause serious injury, to both the persons directly involved and the social fabric of the City as a whole, [and such acts] will not be tolerated").

[29] *See* 18 AM. JUR. 2D *Cooperative Associations* § 3 (2004).

[30] *Levandusky*, 553 N.E.2d at 1322.

[31] 18 AM. JUR. 2D *Cooperative Associations* § 3.

[32] 790 N.E.2d 1174, 1176 (N.Y. 2003).

[33] *Id.*

just such termination proceedings.[34] Nevertheless, *Pullman* warned that, "[w]hile deferential, the *Levandusky* standard *should not serve as a rubber stamp* for cooperative board actions, particularly those involving tenancy terminations."[35] *Pullman* was sounding the alarm that even some actions related to the terms of private, voluntary transactions had sufficiently serious consequences to warrant "heightened vigilance."[36] Surely, a sensitivity to context as illustrated by the Court of Appeals in *Pullman's* private circumstances means that action implicating clearly expressed public policy values warrants an even more elevated level of scrutiny.

The Court of Appeals had already explained in *Levandusky* that the broad powers of co-ops carry the potential for abuse, including the possibility of discrimination.[37] In *Pullman,* the Court repeated *Levandusky's* admonition, and stressed that abuses such as unlawful discrimination "are incompatible with [the exercise of] good faith and the exercise of honest judgment."[38] Thus, *Pullman,* the Court of Appeals' most recent word on the subject, treats allegedly discriminatory conduct as outside the protection of a deferential standard, and fully subject to inquiry. The only way to find out if discrimination occurred, of course, is to apply the standards of the discrimination law.

Finally, the Court of Appeals in *Pullman* amplified why *Levandusky* had not treated "good faith and . . . honest judgment" as standalone qualities, the finding of which justified judicial deference, but had rather said "good faith and . . . honest judgment" had to be taken in the "*lawful and legitimate* furtherance of corporate purposes."[39] "[A]ll the shareholders of a cooperative may agree on an objective," *Pullman* explained, "and the board may pursue that objective zealously, *but that does not necessarily mean the objective is lawful or legitimate*."[40] Even if the *Pelton* panel had simply consulted a standard treatise on corporations, it would have learned that inquiry as to lawfulness is essential; regardless of how its powers may have been enumerated, "[a] corporation cannot, any more than an individual, do things [that] violate the law or public

[34] *Id.* at 1176–78.

[35] *Id.* at 1182 (emphasis added).

[36] *Id.*

[37] Levandusky v. One Fifth Ave. Apt. Corp., 553 N.E.2d 1317, 1320 (N.Y. 1990).

[38] *Pullman*, 790 N.E.2d at 1182.

[39] *Levandusky*, 553 N.E.2d at 1321 (emphasis added) (quoting Auerbach v. Bennett, 393 N.E.2d 994, 1000 (N.Y. 1979)).

[40] *Pullman*, 790 N.E.2d at 1181 (emphasis added).

policy."[41]

In sum, since discrimination claims raise issues of public importance, the entire concept of business judgment is best understood as irrelevant, and a court should proceed directly to an examination of the law that has allegedly been violated. Even if one were to operate *within* the confines of the business judgment rule, and to consider whether that rule's deferential standard of review would be applicable in a particular factual circumstance, one could not intuit in advance whether or not a co-op or condo had acted unlawfully. Instead, one would, in any event, have to examine the terms of the law that had allegedly been violated. If the law had indeed been violated, then the co-op or condo board had operated outside the pale of conduct where deference would be applicable. Either within or without the framing device of "business judgment," the proscriptions and standards of the underlying discrimination law itself are paramount.

II. *PELTON* GRAVELY DISTORTED AND FUNDAMENTALLY MISAPPLIED THE "BUSINESS JUDGMENT" RULE

Pelton ignored all of the foregoing. The panel believed its job was done when it concluded that that the condo board had acted in good faith. Whether or not the panel was correct to use the term "good faith" in connection with a board that made a person with a disability suffer without needed accommodations for a two-and-a-half year period,[42] the panel's fundamental legal error was its failure to recognize the inappropriateness of business judgment deference in the context of a duly enacted public policy choice. It was, in any event, impossible for the panel to know whether the good faith purportedly exercised was exercised in the furtherance of a "lawful" purpose *without examining the City's Human Rights Law*.

Yet, from reading the decision, one would literally not know which of the City Human Rights Law's provisions imposes an obligation to make reasonable accommodation. One would also not know those on whom the law places that obligation, what the scope of the obligation is, what the exceptions to the obligations are, or what party bears what burdens of proof.

In fact, the comprehensive 1991 Amendments to the City Human

[41] 6 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2491 (perm. ed., rev. vol. 1996).

[42] *See infra* notes 53–57 and accompanying text.

Rights Law[43] added a provision, title 8, section 107(15)(a) of the New York City Administrative Code, providing that *any person* proscribed by the law "from discriminating on the basis of disability" had a specific, affirmative statutory obligation to "make reasonable accommodation to enable a person with a disability to . . . enjoy the right or rights in question."[44] Were co-ops and condos among the persons proscribed from discriminating on the basis of disability? The City Council specifically decided to end any doubt. The Council amended the law to clarify that it applied to both co-ops and condos "by prohibiting discrimination in the 'approval of the sale' of housing accommodations 'or an interest therein.'"[45]

In requiring co-ops and condos to make reasonable accommodation, the Human Rights Law was not simply asking those entities to act reasonably, and leaving it to a court to decide just what was reasonable. The law *provides a statutory definition* of what constitutes "reasonable" accommodation (another thing the panel failed to examine). Title 8, section 102(18) of the New York City Administrative Code provides that reasonable accommodation is "such accommodation [as] can be made that shall not cause undue hardship in the conduct of the covered entity's business."[46] This section then places the burden of proving any undue hardship squarely on the covered entity.[47] The question being posed by the law, therefore, is clearly not one of *generic* "good faith" or "reasonableness." As the word "reasonable" is being used as a defined term, the co-op board can only be in compliance with the law (and, thus, can only be furthering a lawful and legitimate corporate purpose) if it does what is required by the defined term.

The panel had no warrant to import a good faith exemption on its own motion, especially since the panel was doing its legislating in contradiction to decisions that had already been made by the City

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[43] N.Y. City, N.Y., Local Law 39 (June 18, 1991), *reprinted in* 1991 N.Y. CITY LEGIS. ANN. 145, 145–81. For a detailed discussion of the provisions and purpose of the 1991 Amendments, see Gurian, *supra* note 4, at 283–88.

[44] N.Y. CITY, N.Y., ADMIN. CODE § 8-107(15)(a) (1996); *see also* 1991 N.Y. CITY LEGIS. ANN. at 162–63.

[45] COMM. ON GEN. WELFARE, REPORT OF THE LEGAL DIVISION ON PROP. INT. NO. 465-A AND PROP. INT. NO. 536-A, at 13–14 (1991) [hereinafter 1991 COMM. REPORT] (on file with Committee), *available at* http://www.antibiaslaw.com/LL39CommitteeReport.pdf (containing a section-by-section analysis of the proposed amendments to the New York City Human Rights Law); *see also* 1991 N.Y. CITY LEGIS. ANN. at 155–56 (amending, *inter alia*, what had been N.Y. CITY, N.Y., ADMIN. CODE § 8-107(5)(a) and (5)(a)(1)).

[46] N.Y. CITY, N.Y., ADMIN. CODE § 8-102(18).

[47] *Id.*

Council. If the panel had bothered to examine the statute, it would have seen that the Council had already decided in 1991 to provide only *one* defense to a failure to make reasonable accommodation: that, even with such accommodation, the covered entity proves that the aggrieved person could not "satisfy the essential requisites of [the] job or enjoy the right or rights in question."[48] Moreover, it is not as though the City Council did not tackle the issue of "good faith" as part of the 1991 Amendments.[49] The Council selected two areas in which "good faith" would be relevant. One area is related to the imposition of civil penalties (in the administrative context) and punitive damages (in the judicial context). A covered entity's good faith attempts to comply with the law are deemed relevant to mitigate the scope of such penalties or damages.[50] The second area is related to liability: good faith can be demonstrated to negate an employer's vicarious liability in the context of co-worker harassment.[51] Despite a number of revisions to the city law since 1991, these provisions were not changed.[52]

III. THE *PELTON* PANEL REWRITES THE LAW (AND IMPERSONATES A JURY IN THE PROCESS)

There was, therefore, a straightforward question for the *Pelton* panel. The panel ought to have begun with: "could any reasonable jury, drawing all inferences in favor of the non-moving party, find that the condo had failed, in the period from January 2002 to June 2004, to provide such accommodation as was plausible to enable the plaintiff to enjoy full rights of access to the building and its services?" January 2002 (the start of the period) represented the time that the evidence in the record shows that plaintiff had advised

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[48] N.Y. CITY, N.Y., ADMIN. CODE § 8-107(15)(a) (setting forth the obligation to make reasonable accommodation "[e]xcept as provided in paragraph (b)"). Title 8, section 107(15)(b) of the New York City Administrative Code sets forth the affirmative defense set out in text, above, and provides for no other exceptions.

[49] The Council was codifying the reasonable accommodation requirement just three years after the Federal Fair Housing Act had been amended to proscribe discrimination against persons with disabilities, and to require covered entities to make reasonable accommodations and allow reasonable modifications. 42 U.S.C. § 3604(f)(3)(A)–(B) (2000). The Federal Fair Housing Amendments Act of 1988 contained no "good faith" exemption to liability.

[50] N.Y. CITY, N.Y., ADMIN. CODE § 8-107(13)(d)–(e).

[51] *Id.*

[52] The Federal Civil Rights Restoration Act of 1991 created a good faith exemption to all *damages* in cases arising in the employment context under the reasonable accommodation provisions of the Americans with Disabilities Act, codified at 42 U.S.C. § 1981(a)(3) (2000). New York's City Council has had sixteen years to decide that this approach was a good idea, but has not done so.

his condo that he suffered from muscular dystrophy and had asked to be accommodated by having barriers to accessibility removed.[53] Over the next six months, plaintiff repeatedly pursued his request *with the president of the condo's board of managers.*[54] July 2002 represented the condo's flat rejection of plaintiff's request: the board president said "he had been advised that the condominium had no legal obligation" to plaintiff.[55] June 2004 (the end of the period) represented the moment that the condo appeared ready, at least provisionally, to "pursue a plan" for accessibility.[56]

Midway through the period in question, the condo's lawyers had conveyed the condo's position, based on findings of architects retained by the condo's board, that the ramping solution was a "physical impracticality," and that it was, in any event, cost-prohibitive.[57] In view of the absence of any dispute over the fact that plaintiff had not received the accommodations necessary to accommodate the needs created by his disability in the period outlined, the only questions for a court on consideration of a motion for summary judgment related to the plausibility of making accommodations.

Remembering that the condo made *no* accommodation even after it was on actual notice of plaintiff's need,[58] the first sub-question to consider was whether a reasonable jury could have found that there was in fact *some accommodation* that plausibly could have been made to meet plaintiff's needs. Clearly, a reasonable jury could have. After all, the first thing a reasonable jury would have thought

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[53] The First Department decision in *Pelton* has a typo, in which it refers to the beginning of the period as "June 2002." Pelton v. 77 Park Ave. Condo., 825 N.Y.S.2d 28, 30 (App. Div. 2006). That the start of the period was actually *January* 2002 is made clear by the decision's reference to July 2002, which represented the culmination of a six-month period of time during which plaintiff had checked on the progress of his complaint (there was none). *Id.* This is confirmed by the lower court's reference to the initial request having been made in January 2002. Pelton v. 77 Park Ave. Condo., No. 113614/2004 (N.Y. Sup. Ct. Jan. 18, 2006), *available at* http://decisions.courts.state.ny.us/fcas/FCAS_docs/2006JAN/30011361420041SCIV.pdf.

[54] *Pelton*, 825 N.Y.S.2d at 30.

[55] *Id.*

[56] *Id.* at 31. It is true that "willingness to accommodate" is not the same as actually effectuating accommodation, and the "lift" it suggested it would install was not ultimately placed in operation until November 2004. *Id.* at 32. For the purposes of assessing the court's handling of the motion for summary judgment, it is simpler, however, to focus on what the record shows was a two-and-a-half year period during which the condo was not even prepared to represent that it would pursue a specific plan. *Id.* at 31.

[57] *Id.* at 30. This communication was made in November 2003. *Id.*

[58] *Id.* Constructive notice would have been sufficient pursuant to the City Human Rights Law: the obligation to make accommodation arises when a person's disability "is known or should have been known by the covered entity." N.Y. CITY, N.Y., ADMIN. CODE § 8-107(15)(a) (1996).

of was this: "even if the condo's architects were correct with respect to the impracticality of building a ramp, the condo itself concedes by the alternative actions it took in 2004, that *there were in fact some plausible accommodations to be made*. Why did the condo refuse to do anything when plaintiff asked it to in 2002?"[59]

As for the sub-question of cost, that is a question of undue hardship, a question on which a defendant bears the burden of persuasion.[60] A reasonable jury could easily have found that the condo had not proved that accommodating plaintiff would have caused an undue burden, both in light of the availability of the accommodations it did ultimately make, and in light of the fact that neither the appellate division panel in *Pelton* nor the court below cited any evidence of undue hardship.[61]

The *Pelton* panel failed to ask these questions and sub-questions, another reflection of the fact that it was not interested in performing its mandated role. Interestingly, the closest the panel came to approaching a discrimination analysis was a passing reference to *Hitter v. Rubin*,[62] a case where the plaintiff had claimed that a co-op had rejected her for admission because of her "age, sex and marital status."[63] *Hitter* was a telling choice for the panel to deploy for the proposition that a plaintiff must offer "proof of unlawful discrimination sufficient to raise a triable issue of material fact" in order to resist a motion for summary judgment successfully.[64] From one point of view, it demonstrated how unselfconscious the *Pelton* panel was as it went about its task of creating special rules for the benefit of co-ops and condos and their directors; *Hitter*, by contrast, had examined the question of co-op liability strictly through the lens of a discrimination law analysis that would apply to any defendant, co-op or not.[65]

From another point of view, the choice demonstrated the *Pelton* panel's inability, or refusal, to understand that status discrimination cases are different from reasonable accommodation

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[59] Apparently the condo was perfectly comfortable doing nothing so long as it was merely a person with a disability asking for assistance on his own. It was only after the City's Human Rights Commission intervened, and a lawsuit was threatened, that action was ultimately taken. *Pelton*, 825 N.Y.S.2d at 30–31.

[60] N.Y. CITY, N.Y., ADMIN. CODE § 8-102(18) (Supp. 2006).

[61] *Pelton*, 825 N.Y.S.2d at 32–34; Pelton v. 77 Park Ave. Condo., No. 113614/2004 (N.Y. Sup. Ct. Jan. 18, 2006), *available at* http://decisions.courts.state.ny.us/fcas/fcas_docs/2006JAN/30011361420041SCIV.pdf.

[62] 617 N.Y.S.2d 730 (App. Div. 1994).

[63] *Id.* at 732.

[64] *Pelton*, 825 N.Y.S.2d at 34.

[65] *See Hitter*, 617 N.Y.S.2d at 731.

cases. Status discrimination cases implicate hidden motivation. In such cases, it is common for a plaintiff to be able to create a rebuttable inference of discrimination with the familiar elements of a *prima facie* case.[66] In the context of a summary judgment motion, a defendant articulates (in proper evidentiary form) a non-discriminatory reason for its conduct. In *Hitter,* the non-discriminatory reasons included undisputed evidence that the plaintiff had overstated her financial worth and had altered a letter submitted to the board.[67] One way for a plaintiff to overcome a motion for summary judgment in the face of the presentation of non-discriminatory reasons is to create a genuine issue of material fact that the stated reasons were pretextual.[68] In *Hitter,* however, plaintiff failed to do so.[69] She neither provided an affidavit from the real estate broker who had allegedly said that the co-op had a policy that discriminated against single elderly people, nor even made allegations regarding the number of elderly people in the building.[70] In the absence of any evidence of pretext (or, indeed, of any additional evidence), it was unremarkable for the court to grant the motion for summary judgment.

Whereas liability in status discrimination cases *flows from* a defendant's state of mind, liability in reasonable accommodation cases is established *independent of* a defendant's state of mind.[71] Though a defendant who comes up with an untruthful excuse for not having made an accommodation may be described as having put forth a "pretext" for its failure to act, that defendant's liability actually depends only on whether reasonable accommodation—as defined in the statute—has or has not been made by the defendant.[72] It was impossible for the *Pelton* panel to have made an appropriate assessment of the motion for summary judgment because the panel failed to look at the issues pertinent to that

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[66] *See id.* As applied to the *Hitter* case, the necessary elements were proven sufficiently for a reasonable jury to conclude that the plaintiff was an older, single woman who had applied, had been qualified, and had been rejected. *Id.*

[67] *Id.*

[68] *See id.* ("Even assuming that, as the . . . court asserted, '[p]laintiff's allegations set forth a prima facie case' of housing discrimination, plaintiff has not shown that "'the legitimate reasons offered by the defendant[s] were not [their] true reasons, but were a *pretext* for discrimination.'"") (alteration in original) (emphasis added) (quoting Miller Brewing Co. v. State Div. of Human Rights, 489 N.E.2d 745, 747 (N.Y. 1985) (quoting Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981))).

[69] *Id.*

[70] *Id.* at 732.

[71] It is true, of course, that a defendant's state of mind will be relevant to a determination of punitive damages.

[72] *See* N.Y. CITY, N.Y., ADMIN. CODE §§ 8-102(18), 8-107(15)(a) (1996).

inquiry. [73]

IV. *PELTON* CONFUSES DIRECTOR LIABILITY ARISING FROM CONTRACT WITH THAT ARISING FROM TORT

The *Pelton* panel seized on the fact that plaintiff had not alleged that board members had engaged in "acts of discrimination *separate and apart* from the actions taken by the board members collectively on behalf of the condominium."[74] In the panel's view, this meant that there was no showing that any board member had engaged in "individual wrongdoing."[75] In so holding, the panel ignored the applicable legal principle that a corporate director is individually liable for participation in the corporation's tortious conduct (even when acting purely on behalf of the corporation). The panel instead mistakenly applied the principle that individual liability cannot generally be imposed when a director participates in the corporation's violation of a *contractual* duty.[76] Having ignored the appropriate principle of corporate law, the panel went on to ignore the fact that the City Human Rights Law contradicts the panel's "individual wrongdoing" requirement.

It is black letter law that "a corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced."[77] The principle is not new; in a 1953 lower court case

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[73] The *Hitter* case, though not a reasonable accommodation case, was at least a statutory discrimination case. Two other cases used by the *Pelton* panel to justify the supremacy of business judgment deference in the face of "[c]onclusory or speculative allegations of discrimination," were not. *Pelton*, 825 N.Y.S.2d at 34. One involved only allegations of the breach of fiduciary duty, not violations of the City Human Rights Law, and raised only the question of whether the co-op was "selective and arbitrary in determining which of the departing tenants should be paid market, as opposed to book, value." Jones v. Surrey Coop. Apts., Inc., 700 N.Y.S.2d 118, 120 (App. Div. 1999). The court found that plaintiff had not presented "a shred of evidence of bad faith or discriminatory practice." *Id.* at 122. The other case dug up by the *Pelton* panel for its no "[c]onclusory or speculative allegations of discrimination" point was a case that only involved the question of whether a homeowners association had selectively enforced its architectural guidelines when it sought to compel a homeowner "to restore the original color of [the] walkway on her property after she painted it pink without the approval of the Board of Directors." Captain's Walk Homeowners Ass'n v. Penney, 794 N.Y.S.2d 82, 83 (App. Div. 2005). The *Penney* court concluded that plaintiff only had conclusory allegations, not evidence, to support the charge of selective enforcement. *Id.* at 84.

[74] *Pelton*, 825 N.Y.S.2d at 35 (emphasis added).

[75] *Id.*

[76] *Id.* at 34–35.

[77] Am. Express Travel Related Servs. Co. v. N. Atl. Res., Inc., 691 N.Y.S.2d 403, 404 (App. Div. 1999); *accord* Espinosa v. Rand, 806 N.Y.S.2d 186, 187 (App. Div. 2005); People v. Apple

still cited decades later by the Court of Appeals, a New York court wrote:

> In a long list of cases it has definitely been held that the officers, directors and agents of a corporation are jointly and severally liable for torts committed on behalf of a corporation and the fact that they also acted on behalf of the corporation does not relieve them from personal liability.[78]

The Second Circuit has had no problem understanding this principle, overruling a district court's dismissal of a claim against a corporate officer "because '[i]t has long been established, . . . , that a corporate officer who commits *or participates in* a tort, even if it is in the course of his duties on behalf of the corporation, may be held individually liable.'"[79] The First Department itself has pointed out that where liability is predicated on the commission of a tort, "[t]he particular tort committed is of little significance."[80]

In discussing the issue of the liability of directors and officers to third persons for torts, a leading treatise describes two similar bases for liability: (1) a showing of "some form of participation . . . in the tort"; or (2) showing that the director or "officer directed, controlled, approved, or ratified the decision which led to the plaintiff's injury."[81] The treatise concludes: "[t]he true basis of liability is *the officer's violation of some duty owed to the third person which injures such third person.*"[82]

Anti-discrimination statutes create new legal duties, the violation of which constitute torts. As the Supreme Court held in *Curtis v. Loether*, "[a] damages action under the [Federal Fair Housing Act] sounds basically in tort—the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach."[83]

Health & Sports Clubs, Ltd., 613 N.Y.S.2d 868, 870 (App. Div. 1994).

[78] Lippman Packing Corp. v. Rose, 120 N.Y.S.2d 461, 464 (Mun. Ct. 1953). *Rose* is subsequently cited in Marine Midland Bank v. John E. Russo Produce Co., 405 N.E.2d 205, 212 (N.Y. 1980).

[79] LoPresti v. Terwilliger, 126 F.3d 34, 42 (2d Cir. 1997) (alteration in original) (emphasis added).

[80] Sergeants Benev. Ass'n Annuity Fund v. Renck, 796 N.Y.S.2d 77, 80 (App. Div. 2005).

[81] 3A FLETCHER ET AL., *supra* note 41, § 1135 (perm. ed., rev. vol. 2002) (footnote omitted).

[82] *Id.* (emphasis added).

[83] 415 U.S. 189, 195 (1974). As explained by section 1 of the Restoration Act, *see supra* note 15, federal case law may act as an aid in interpretation to the local law to the extent that the federal interpretation is viewed as "as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise." 2005 N.Y. CITY LEGIS. ANN. 528, 528. The City Council was reacting to its sense that the "City's Human Rights Law has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law." *Id.*

The specific legal duty defined by the City Human Rights Law and at issue in *Pelton* was the duty to "make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job or enjoy the right or rights in question."[84] Either a covered entity complies with its obligation and makes reasonable accommodation, or it fails to make reasonable accommodation and violates its obligation. Where reasonable accommodation is not made by a co-op or condo, and a person with a disability is injured thereby, the decision leading to injury is, *inter alia*, the corporation's decision not to take the action required by statute. Unlike some tortious activity (like fraud) that may or may not be directed, controlled, approved, or ratified by a director, *a decision of a corporation is, by definition, something that is directed, controlled, approved, ratified, and participated in by the directors (other than those who vote against the illegal decision).*[85]

The City Human Rights Law leaves no room to argue that somehow it is only the corporation that has a duty, and not the individual director. Title 8, section 107(15)(a) of the law imposes the obligation on "any person" prohibited by title 8, section 107(5)(a) from discriminating on the basis of disability.[86] Administrative Code section 8-107(5)(a) makes clear that the proscription against all forms of housing discrimination applies, *inter alia*, to any person "having the right to . . . approve the sale, rental or lease . . . [of] a housing accommodation or an interest therein," and to "any agent or employee thereof."[87] For those inclined to think "that can't really

[84] N.Y. CITY, N.Y., ADMIN. CODE § 8-107(15)(a) (1996).

[85] *See* 3A FLETCHER ET AL., *supra* note 41, § 1135. A corporation, of course, "may only act through its agents." JP Morgan Chase Bank v. Winnick, 350 F. Supp. 2d 393, 399 (S.D.N.Y. 2004).

[86] N.Y. CITY, N.Y., ADMIN. CODE § 8-107(15)(a).

[87] *Id.* § 8-107(5)(a)–(a)(1); *see, e.g.*, Andujar v. Hewitt, No. 02 CIV. 2223(SAS), 2002 WL 1792065, at *10–11 (S.D.N.Y. 2002) (holding that, both under the City Human Rights Law and the Fair Housing Act, individual defendants may be held liable). The *Pelton* panel cited this City Human Rights Law provision section in connection with its discussion of the potential liability of the building's managing agent, one of the defendants in the case, but ignored the provision when the panel came to its discussion of directors. *Pelton*, 825 N.Y.S.2d at 34–36. With respect to the managing agent, the *Pelton* panel thankfully (but confusingly) did not overrule *Bartman v. Shenker*, a case which applies the City Human Rights Law to a managing agent's failure to make reasonable accommodation. Bartman v. Shenker, 786 N.Y.S.2d 696 (Sup. Ct. 2004). Instead, the panel attempted to argue that, on the facts, defendant managing agent had made such accommodation to the plaintiff. *Pelton*, 825 N.Y.S.2d at 36. Nevertheless, *Pelton* does include the assertion that the plaintiff failed to "plead[] or show[] circumstances that would demonstrate . . . that the managing agent owed [the plaintiff] a duty." *Id.* at 35–36. This statement is incorrect as a matter of law. The managing agent—a person proscribed "from discriminating on the basis of disability"—had an affirmative statutory duty to make "such accommodation that can be made." N.Y. CITY, N.Y., ADMIN. CODE §§ 8-102(18), 8-107(15)(a). To the extent that the managing agent failed to do

be,"[88] there is always the additional provision of the City Human Rights Law that makes it unlawful "for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter, or to attempt to do so."[89]

Remarkably, *Pelton* does not discuss, address, or acknowledge any of the principles recited thus far. Instead, *Pelton* purports to imagine the case at hand to be one sounding in contract, where "[i]t is the general rule that corporate officers cannot be held personally liable on the contracts of their corporations if they do not purport to bind themselves individually under the contracts."[90] The *Pelton* panel sought to make it appear as though it was following established law by citing four cases in this section of the opinion.[91] First, it cited *Murtha v. Yonkers Child Care Ass'n*[92] for the proposition that, "[i]n bringing an action against the individual members of a cooperative or condominium board based on allegations of discrimination or similar wrongdoing, plaintiffs were required to plead with specificity independent tortious acts by each individual defendant in order to overcome the public policy that

any of the things that it could have done to avoid the delay in providing accommodation (except those which it proved would cause it undue hardship), it violated its obligation under title 8, section 107(15)(a) of the New York City Administrative Code and also violated its obligation under section 107(6) (setting forth the duty of every person to refrain, *inter alia,* from aiding or abetting the commission of an unlawful discriminatory practice, or attempting to do so). *Id.* § 8-107(6).

[88] The First Department has previously taken this posture in connection with trying to narrow the scope of the City Human Rights Law through judicial legislation. *See infra* notes 111–13 and accompanying text (discussing Priore v. N.Y. Yankees, 761 N.Y.S.2d 608 (App. Div. 2003)).

[89] N.Y. CITY, N.Y., ADMIN. CODE § 8-107(6); *see also* Balt. Neighborhoods, Inc. v. Rommel Bldrs., Inc., 3 F. Supp. 2d 661, 665 (D. Md. 1998) (construing the Fair Housing Act's "design and construct" requirements). In *Rommel*, the court held that the provision

> should be read broadly. When a group of entities enters into the design and construction of a covered dwelling, all participants in *the process as a whole* are bound to follow the FHAA. To hold otherwise would defeat the purpose of the FHAA to create available housing for handicapped individuals and allow wrongful participants in the design and construction process to remain unaccountable. In essence, any entity who contributes to a violation of the FHAA would be liable. By this, the Court does not suggest that all participants are jointly and severally liable for the wrongful actions of others regardless of their participation in the wrongdoing, but rather, that those who are wrongful participants are subject to liability for violating the FHAA.

Rommel, Builders, Inc., 3 F. Supp. 2d at 665; *see also* Robert G. Schwemm, *Barriers to Accessible Housing: Enforcement Issues in "Design and Construction" Cases Under the Fair Housing Act,* 40 U. RICH. L. REV. 753, 778 (2006) (pointing out that "the general view has emerged that a wide range of participants in the 'design-and-construct' process may be named as proper defendants," and noting that "HUD and the Department of Justice have agreed with this approach" (citing *Rommel*, 3 F. Supp. 2d. at 665)).

[90] Key Bank v. Grossi, 642 N.Y.S.2d 403, 404 (App. Div. 1996).

[91] *Pelton*, 825 N.Y.S.2d at 34–36.

[92] 383 N.E.2d 865, 866 (N.Y. 1978).

supports the business judgment rule."[93]

In fact, *Murtha* does not discuss pleading requirements, and was not a case involving allegations of discrimination or similar wrongdoing; it was a breach of contract case.[94] The Court held only that there is no individual liability for a director who takes steps and makes decisions that leads to a breach of contract *if* that director "act[ed] in good faith . . . [*and* did not commit] independent tort[ious] . . . acts."[95] The "independent tort[ious] acts" were not contemplated as acts independent of the corporation's tortious action, but action independent of the corporation's breach of contract and the director's participation in the contract violation.[96]

That this is the meaning of "independent" is made clear in *Brasseur v. Speranza*,[97] another case not involving discrimination law that the *Pelton* panel misused. In *Brasseur*, the court was faced with a breach of fiduciary duty claim (some condo owners had complained that the condominium association was improperly requiring unit owners to enter into alteration agreements).[98] The court, citing the contract-based *Murtha*, dismissed the claims against individual directors for lack of independent tortious conduct.[99] If the *Pelton* panel had read the next paragraph of *Brasseur,* however, it would have understood more clearly what the term "independent" is designed to mean. In *Brasseur,* there was no cognizable claim against the individual board members "since there is no allegation that they breached a duty *other than, and independent of, those contractually imposed upon the board."*[100]

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[93] *Pelton*, 825 N.Y.S.2d at 34.

[94] *Murtha*, 383 N.E.2d at 865.

[95] *Id.* at 866 (emphasis added) (some alteration in original).

[96] *Id.*

[97] 800 N.Y.S.2d 669 (App. Div. 2005).

[98] *Id.* at 670.

[99] *Id.*

[100] *Id.* at 671 (emphasis added). Similarly, *Konrad v. 136 E. 64th St. Corp.*, 667 N.Y.S.2d 354 (App. Div. 1998), was yet another case in which there was no discrimination claim. *Konrad*, like *Brasseur*, also involved alleged breaches of fiduciary duty (relating to the failure to make repairs, mismanagement, and similar conduct). *Id.* at 355. Plaintiff, without adequate excuse for her delay, belatedly sought to add a claim that the individual directors had a fiduciary duty *to her* that they breached by treating her differently from other shareholders in a manner unexplained by the decision. *Id. Konrad* disallowed the proposed amendment in the context of stating that the *fiduciary* duty owed by a director is a duty to the corporation and "to its shareholders, collectively." *Id.* In other words, *Konrad*, like *Brasseur*, saw a breach of fiduciary duty—even a deliberate one involving an alleged singling out of an individual shareholder—as a violation of the *corporation's* contractually-based duty to that shareholder. *Id.* at 356. To hold individual directors liable, the plaintiff would have had to "ascribe[] . . . independent tortious conduct" (i.e., tortious conduct independent of the contract violation) to the directors charged, but had not done so. *Id.*

This situation, of course, is entirely different from that in *Pelton* itself, where board members participated in the tortious decisions and had (along with the corporation) an independently-imposed statutory duty to persons with a disability like the plaintiff.

The *Pelton* panel's misuse of *Pekelnaya v. Allyn*[101] is perhaps most brazen. In that case, the third-party victims of personal injuries (sustained when a piece of fence fell from the roof of a condominium) sought to hold the individual unit owners liable.[102] *Pekelnaya* rejected the claim, stating: "[s]ince the unit owners have no control over, or direct responsibility for, the common elements and neither statutory nor common law renders an individual condominium unit owner liable for injuries sustained as the result of defects in the common elements, the unit owners are not liable for plaintiffs' damages."[103] *Pelton* claimed that "[t]he same reasoning applies here to the individual members of the board of managers, since control of the board's policies lies in the hands of the board collectively, not in the hands of any individual member."[104] The analogy is nakedly dishonest. Unlike unit owners, board members can participate in board decisions, are responsible when those decisions involve tortious behavior, and have a statutory duty imposed on them as individuals.[105]

In view of the foregoing, it is apparent that case law citation was only window dressing for what the *Pelton* panel was actually doing—giving directors special privileges as compared with any defendant by inventing a theory mandating allegations of a tort independent of the corporation's tort before a director could face liability.[106] The theory was not only legally deficient, but contrary to public policy. As the New York Court of Appeals has noted, "antidiscrimination edicts all too commonly are circumvented unless

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[101] 808 N.Y.S.2d 590 (App. Div. 2005).

[102] *Id.* at 592.

[103] *Id.* at 598. In *Pekelnaya*, the court had not yet lost its awareness of the need for checks on the power of a co-op or condo board:

> If a condominium or cooperative board were the mere instrumentality of its constituent unit owners, as plaintiffs suggest, the Court of Appeals would not have been moved to note that "some check on its potential powers to regulate residents' conduct, life-style and property rights is necessary to protect individual residents from abusive exercise, notwithstanding that the residents have, to an extent, consented to be regulated and even selected their representatives."

Id. (quoting Levandusky v. One Fifth Ave. Apt. Corp., 553 N.E.2d 1317, 1321 (N.Y. 1990)).

[104] Pelton v. 77 Park Ave. Condo., 825 N.Y.S.2d 28, 35 (App. Div. 2006).

[105] *See supra* notes 77–89 and accompanying text.

[106] The panel was horrified that, otherwise, the exposure to litigation was "hardly a fitting reward" for board members. *Pelton*, 825 N.Y.S.2d at 35.

they are comprehensive in their application."[107] Yet, in the world the *Pelton* panel wanted to create, a director of a co-op or condo *could never as a practical matter be sued* either in the context of a failure to make reasonable accommodation to a building's policies or practices, or even in the context of a discriminatory refusal to approve an application to purchase.[108]

If the co-op or condo does what it is supposed to do (over the objection, say, of one or two individual board members), there is no injury, and hence no suit against any individual director. If the co-op or condo decides through its board to do or refrain from doing that which is required by statutorily-imposed anti-discrimination duties, thereby injuring a person intended to be protected by the City Human Rights Law, the directors could not be sued, per *Pelton*, because their torts were not "independent" of the corporation's torts.[109] Finally, even if the *Pelton* panel were to backtrack and acknowledge that individual liability can attach for participation in the corporation's discriminatory tort, the secrecy of board deliberations means that no one would ever meet *Pelton's* newly-legislated special pleading requirements,[110] and, once more, there would be no suits against directors.

What is particularly ironic about the *Pelton* panel's assertion of the need for there to be "independent" conduct is that, in a notorious case that helped spur the passage of the Local Civil Rights Restoration Act of 2005, the First Department had rejected individual liability in an employment discrimination case because the conduct *was* independent of the existence of discriminatory conduct on the part of the entity itself.[111] In *Priore*, the First Department chose to ignore both a textual change that New York City had made to its Human Rights Law and abundant legislative history, and held that "[t]here is no indication in the local ordinance, explicit or implicit, that it was intended to afford a separate right of action against any and all fellow employees based on their independent and unsanctioned contribution to a hostile environment."[112] The Local Civil Rights Restoration Act was

[107] Sanders v. Winship, 442 N.E.2d 1231, 1233 (N.Y. 1982).

[108] *See infra* notes 109–10 and accompanying text.

[109] *Pelton*, 825 N.Y.S.2d at 34.

[110] *See* discussion *infra* Part V (discussing pleading requirements).

[111] *See* Priore v. N.Y. Yankees, 761 N.Y.S.2d 608, 614 (App. Div. 2003).

[112] *Id. Priore* was decided in the face of the 1991 change in the statutory prohibition from one proscribing discrimination by an "employer *or licensing agen[t]*" to one proscribing discrimination by "an employer *or an employee or agent thereof*." *Id.* It ignored, *inter alia*, then-Mayor Dinkins' statement in connection with the passage of that legislation that, "[t]he

intended to undo what *Priore* had done,[113] but *Pelton* makes clear that the First Department is not ready to obey those legislative commands with which it disagrees.

V. PELTON'S INTRODUCTION OF A HEIGHTENED PLEADING STANDARD IS WITHOUT BASIS IN LAW

Pelton involved the review of a lower court's denial of a motion for summary judgment.[114] As such, the panel had no need to address pleading standards in order to reach a decision. But the panel was determined to use the occasion of its review to try to protect co-op and condo directors as broadly as possible: "[c]ourts must hold those who would challenge the decisions of condominium and cooperative boards to the requirement of pleading with specificity claims of discriminatory conduct or wrongdoing."[115] The panel offered no

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new law takes the fundamental step of making all people legally responsible for their own discriminatory conduct." David N. Dinkins, Mayor, N.Y. City, Remarks at Public Hearing on Local Laws (June 18, 1991) (transcript on file with the New York City Council's Committee on General Welfare), *available at* www.antibiaslaw.com/MayorsRemarks061891.pdf; *see also* 1991 COMM. REPORT, *supra* note 45, at 9–10 (showing that the 1991 Amendments would make explicit the individual liability of employees and agents of employers); 1991 N.Y. CITY LEGIS. ANN. 145, 187 (setting forth contemporaneous memorandum summarizing changes made by the 1991 Amendments, which stated that the law shifted to a regime where "[e]mployees and agents are responsible for their own discriminatory acts"). In the course of hearings on the proposed Restoration Act, *Priore* had been cited by multiple advocates as an egregious example of a court failing to interpret the City Human Rights Law as intended. *See, e.g.*, Brennan Ctr. for Justice, N.Y. Univ. Sch. of Law, Statement of the Brennan Center for Justice at New York University School of Law in Support of the Local Civil Rights Restoration Act (Intro 22), at 6 (July 8, 2005) (on file with the New York City Council's Committee on General Welfare), *available at* www.antibiaslaw.com/BrennanStatement070805.pdf; Letter from Bettina B. Plevan, President, Ass'n of the Bar of the City of N.Y., to Hon. Gifford A. Miller, Speaker, N.Y. City Council (Aug. 1, 2005) (on file with the New York City Council's Committee on General Welfare), *available at* www.antibiaslaw.com/BarAssociationLetter080105.pdf; *see also* Gurian, *supra* note 4, at 272–75 (analyzing *Priore* and "the court's insertion of itself as a replacement for the legislative branch of local government").

[113] As stated by New York City Council Member Annabel Palma at the Council meeting at which the Restoration Act was passed,

> There are many illustrations of cases, like *Levin* on marital status, *Priore*[,] *McGrath* and *Forrest* that have either failed to interpret the City Human Rights Law to fulfill its uniquely broad purposes, ignore the text of specific provisions of the law, or both. With [the Restoration Act], these cases and others like them, will no longer hinder the vindication of our civil rights.

Annabel Palma, N.Y. City Council Member, Statement at the Meeting of the New York City Council 41–42 (Sept. 15, 2005) (transcript on file with the Office of the New York City Clerk) (some alteration in original); *see also* N.Y. CITY, N.Y., ADMIN. CODE § 8-130 (1996); Gurian, *supra* note 4, at 260–61, 297 nn.188–90.

[114] *Pelton*, 825 N.Y.S.2d at 29.

[115] *Id.* at 35.

statutory or case law support for this proposition.[116] Its sole justification for this brand-new rule was that, in its absence, "the threat of baseless litigation, with its attendant serious financial and personal burdens, would pose a formidable obstacle to those willing to volunteer their talent, experience and knowledge for the common good of their homeowner communities by serving on such a board."[117] There could not be a more shameless illustration of judicial legislating.

Whether one agrees that co-op and condo board members were suddenly going to stop volunteering after having lived for decades without the benefit of the court's heightened pleading requirement (the panel offered no evidence in support of its dire assessment), there are a series of more fundamental considerations, none of which the court considered.

First among these is that *this kind of policy decision lies within the province of the appropriate legislative bodies*, and neither the City's Human Rights Law nor New York's Civil Practice Law and Rules require specificity in pleading either with respect to discrimination claims as a class, or with respect to claims against co-op and condo directors as a sub-class.[118] Judicial dissatisfaction with liberal pleading requirements as applied to discrimination claims does not mean that judges are actually licensed to rewrite the rules.

This very problem was squarely dealt with by the United States Supreme Court in *Swierkiewicz v. Sorema N.A.*[119] The Second Circuit had dismissed a claim of age and national origin discrimination in employment because the plaintiff had not alleged facts in the complaint that would constitute a prima facie case pursuant to the framework of *McDonnell Douglas Corp. v. Green*.[120]

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[116] *See id.*

[117] *Id.* (footnote omitted).

[118] *See* N.Y. C.P.L.R. 3016 (McKinney 1991) (outlining specific actions, which do not include discrimination claims, that require a heightened specificity in pleading requirements). The City Human Rights Law does not specify any heightened pleading requirements whether a complaint is made in the administrative context or brought in court. *See* N.Y. CITY, N.Y., ADMIN. CODE §§ 8-109(a)(ii), 8-502 (1996).

[119] 534 U.S. 506 (2002).

[120] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); *Swierkiewicz*, 534 U.S. at 510. The showing by a plaintiff that (1) he is a member of a protected class (2) who performed his job satisfactorily (3) but suffered an adverse employment action (4) under circumstances giving rise to an inference of discrimination is required to make out a prima facie case of discrimination. *McDonnell Douglas Corp.*, 411 U.S. at 802 & n.13 (noting that elements of a prima facie case vary depending on factual circumstances). The rote application of *McDonnell Douglas* has been the subject of extensive criticism. *See, e.g.*, Lapsley v. Columbia Univ.-Coll. of Physicians & Surgeons, 999 F. Supp. 506, 515–16 (S.D.N.Y. 1998) (urging courts deciding

The Supreme Court unanimously reversed, holding that the Circuit's heightened pleading standard "conflicts with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'"[121] The statement, the Court continued, "must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'"[122]

The Supreme Court specifically invoked the principle of *expressio unius est exclusio alterius*[123] in reaching its decision.[124] Because the Federal Rules do address circumstances in which greater particularity is needed (fraud and mistake), normal principles of statutory construction preclude the judicial imposition of such requirements on other categories of claims, such as discrimination claims.[125] As the Supreme Court stated bluntly: "[a] requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'"[126]

Just as the Federal Rules identify a limited number of issues requiring specificity in pleading, so too does New York's Civil Practice Law and Rules.[127] New York's list, set out in CPLR 3016, is longer than its federal counterpart, but makes no mention of requiring specificity in any or all discrimination lawsuits.[128] The principles of *expressio unius* and legislative supremacy should apply in New York as well.[129]

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summary judgment motions to focus on "the ultimate issue by examining whether the plaintiff has presented sufficient evidence to permit a reasonable jury to conclude that a defendant's decisions were motivated at least in part by an impermissible reason," an examination that must be performed after "resolving all conflicts in the proof and drawing all reasonable inferences in favor of the plaintiff").

[121] *Swierkiewicz*, 534 U.S. at 512.

[122] *Id.* (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

[123] *Id.* at 513; *see also* BLACK'S LAW DICTIONARY 620 (8th ed. 2004) (translating *expressio unius est exclusio alterius* as "to express or include one thing implies the exclusion of the other").

[124] *Swierkiewicz*, 534 U.S. at 513.

[125] *See id.*

[126] *Id.* at 515 (quoting Leatherman v. Tarrant County Narcotics Intell. & Coordination Unit, 5070 U.S. 163, 168 (1993)).

[127] N.Y. C.P.L.R. 3016 (McKinney 1991).

[128] *See id.*

[129] Moreover, adoption of the *Swierkiewicz* rule is suggested by the "floor not ceiling" command of the Restoration Act. *See* N.Y. City, N.Y., Local Law 85 (Oct. 3, 2005), *reprinted in* 2005 N.Y. CITY LEGIS. ANN. 528, 528; *see also* 2005 COMM. REPORT, *supra* note 28, at 537 ("[P]rovisions of the human rights law may not be construed less liberally than interpretations of comparably worded federal and state laws."). To the extent that the Supreme Court's post-Restoration Act decision in the antitrust case of *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007), can be said to have increased pleading federal pleading requirements at all, the Restoration Act was specifically designed to protect against

The rationale underlying liberal pleading requirements applies with special force in connection with discrimination cases. Because modern discrimination almost never announces itself, the process of proving these cases most often involves a painstaking search for circumstantial and inferential evidence. Prior to the opportunity to engage in discovery, a discrimination plaintiff often has little, if any, information about the inside workings of the discriminatory process. As the Supreme Court has noted: "[b]efore discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case."[130]

Nowhere is this difficulty more challenging than in the co-op and condo context. At the urging of industry trade associations, co-op and condo boards universally cloak their actions in secrecy. As such, the *Pelton* panel was being singularly disingenuous when it commented that the plaintiff did not "even allege contact with each of the board members, much less acts of discrimination separate and apart from the" allegedly discriminatory conduct of the corporation.[131] After all, absent crudely discriminatory treatment by a board member in the course of an admissions interview, it is unlikely that a plaintiff, prior to discovery, would have *any* means by which to delineate the particular roles that different board members played in rejecting an application or otherwise proceeding on a discriminatory course (like voting not to make reasonable accommodations). It is apparent that the *Pelton* panel's new standard is actually a means to insulate all co-op and condo board

having the City Human Rights Law narrowed by operation of increasingly conservative state and federal rulings. As the 2005 Committee Report makes clear, the Council was "again underscoring that protections afforded by New York City's human rights law are not to be limited by restrictive interpretations of similarly worded state and federal statutes." 2005 COMM. REPORT, *supra* note 28, at 536. As it happens, the *Twombly* Court required a federal court plaintiff to allege "only enough facts to state a claim to relief that is plausible on its face," explicitly disclaimed the intention of imposing a heightened pleading requirement, and specifically reaffirmed *Swierkiewicz*. *Twombly*, 127 S. Ct. at 1973–74. As the Second Circuit has explained, *Twombly* does not require a universally heightened standard of fact pleading under Rule 8, but "instead requir[es] a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations *in those contexts where such amplification is needed to render the claim plausible*." Iqbal v. Hasty, 490 F.3d 143, 157–58 (2d Cir. 2007) (first emphasis added). In *Pelton,* there was no question that the alleged failure to make reasonable accommodation was an act of the corporation performed, controlled, and participated in by its directors. As such, the nature of the claim against individuals was clear. *See, e.g.*, Barkley v. Olympia Mortgage Co., Nos. 04 CV 875(RJD)(KAM), 05 CV 187(RJD)(KAM), 05 CV 4386(RJD)(KAM), 05 CV 5302(RJD)(KAM), 05 CV 5362(RJD)(KAM), 05 CV 5679(RJD)(KAM), 2007 WL 2437810 (E.D.N.Y. Aug. 22, 2007) (rejecting *Twombly*-based challenges to Fair Housing Act and other civil rights claims).

[130] *Swierkiewicz*, 534 U.S. at 512.

[131] Pelton v. 77 Park Ave. Condo., 825 N.Y.S.2d 28, 35 (App. Div. 2006).

members who do not go out of their way to admit liability from being held accountable for their actions.

Pelton has traveled a very long way from the Second Circuit's seminal housing discrimination decision, *Robinson v. 12 Lofts Realty, Inc.*[132] In that racial discrimination case against a co-op, decided almost thirty years ago, the focus of the court was on the importance of not allowing fair housing laws to be evaded.[133] The *Robinson* court issued four solemn warnings:

(1) that discriminatory motivation must play no role in co-op admissions (or other housing) decisions;

(2) that a fact-finder must remember that "clever men may easily conceal their motivations"; [134]

(3) that, "[a]s overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find. But this does not mean that racial discrimination has disappeared"; [135] and

(4) that "courts must be alert to recognize means that are subtle and explanations that are synthetic."[136]

The concerns of *Robinson* were of no moment to the *Pelton* panel, and hence *Pelton* devised a regime which rewards secrecy and evasion.

The *Pelton* panel was so caught up in strengthening the ability of co-op and condo board members to resist accountability for their actions that it completely misinterpreted the lessons offered by New York's Court of Appeals in *Biondi v. Beekman Hill House Apartment Corp.*,[137] and ignored the guidance provided by the New York City Council. In *Biondi,* a board member who, as a defendant in a federal fair housing case had been found guilty by a jury, sought to have the co-op corporation indemnify him with respect to the punitive damages that had been awarded against him.[138] The Court of Appeals said no; discrimination and retaliation, held the Court, "is precisely the type of conduct for which public policy should preclude indemnification."[139] "Indemnification [would] 'defeat[] the

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[132] 610 F.2d 1032 (2d Cir. 1979).

[133] *See id.* at 1040.

[134] *Id.* at 1043 (quoting United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974)).

[135] *Id.* (quoting Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977)).

[136] *Id.*

[137] 731 N.E.2d 577 (N.Y. 2000).

[138] *Id.* at 578.

[139] *Id.* at 579.

purpose of punitive damages, which is to punish and deter others from acting similarly.'"[140] In other words, the Court of Appeals wanted board members to be held accountable for their discriminatory acts.

In 2005, the City Council underlined *Biondi's* recognition that discrimination is a *public* injury, and one to be firmly deterred.[141] As part of the Restoration Act, the Council increased the civil penalties available under the City Human Rights Law.[142] The Council set forth its belief that all acts of discrimination cause serious injury *to the City itself*, and that the availability of higher penalties would demonstrate that discrimination "will not be tolerated."[143] The City's insistence on deterrence was reflected in its command that, when construing the City Human Rights Law, courts must remember that "traditional methods and principles of law enforcement ought to be applied in the civil rights context."[144]

The City was very clearly saying that there is a strong public interest in deterring and ferreting out discrimination wherever it may be hiding. That goal can only be achieved if people who perceive themselves to be aggrieved by discrimination have a full and fair opportunity to bring allegations of discrimination to court. But *Pelton,* ignoring both the commands of the Restoration Act and the intent of the Court of Appeals' decision in *Biondi*, took away that full and fair opportunity by imposing the heightened pleading requirement.[145]

The panel's means to that end were as dishonest as its other rationales. It set up the specter of enormous damages awards by citing the undeniably large sum the plaintiff in *Pelton* had demanded in his complaint, and by then pretending that *Biondi's* doctrine of no indemnification somehow meant that a punitive damages demand of a scope that the *Pelton* panel was characterizing as "outrageous" would ever either be awarded in the first place or upheld upon review.[146] Despite the lack of any

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[140] *Id.* (quoting Hartford Accident & Indem. Co. v. Village of Hempstead, 397 N.E.2d 737, 743 (N.Y. 1979)).

[141] 2005 COMM. REPORT, *supra* note 28, at 537.

[142] N.Y. City, N.Y., Local Law 85 (Oct. 3, 2005), *reprinted in* 2005 N.Y. CITY LEGIS. ANN. 528, 534; *see also* N.Y. CITY, N.Y., ADMIN. CODE § 8-126 (1996).

[143] 2005 COMM. REPORT, *supra* note 28, at 537.

[144] *Id.*

[145] Pelton v. 77 Park Ave. Condo., 825 N.Y.S.2d 28, 33 (App. Div. 2006).

[146] *Id.* at 35 n.3. The likelihood of an individual defendant ever having to pay an *unfairly* large sum is vanishingly small. The board member defendant (just like any other defendant) is able to count on: (1) the availability of summary judgment in those cases that go through discovery without the development of evidence that could justify a jury in finding for a

empirical evidence cited in *Pelton* for the proposition that there had been, or threatened to be, an explosion of fair housing litigation against co-op and condo directors, the panel passionately believed that it would be a serious injustice for any volunteer board members to face even theoretical exposure to large liability.[147] Given that one of the principal concerns of the panel was that board members would not serve if there was the risk that damages claimed in a pending complaint might "surface as a contingent liability on the individual board members' personal financial reports,"[148] the panel was clearly not imagining board members in the same socioeconomic category as the bulk of the population.

Indeed, *Pelton* very clearly decided to place board members in a privileged position in comparison to all other persons involved in the provision of housing accommodations, persons who do not have the benefit of a heightened pleading standard.[149] It was doing so even though the City Human Rights Law—which had in 1991 created or modified a number of exemptions to the law's housing discrimination coverage[150]—treated board members exactly the same as others who were subject to the law. Moreover, *as pointed out by the very Biondi case cited by Pelton,* the State Legislature had, in 1986, expanded the scope of board member indemnification "in an attempt to 'attract' capable officers and directors."[151] If the

plaintiff; (2) access to a vigorous discrimination defense bar; (3) a jury (the entity clearly least trusted by the *Pelton* panel) being instructed not to award the sums feared unless the plaintiff actually proves both the fact of discrimination and the appropriate punitive level of punitive damages; and (4) the readiness of both trial judges and appellate courts to reduce damage awards.

147 *Id.* at 35 & n.3.

148 *Id.* at 35 n.3.

149 *Cf.* BOB DYLAN, *The Lonesome Death of Hattie Carroll*, *on* THE TIMES THEY ARE A-CHANGIN' (Columbia Records 1964) ("In the courtroom of honor, the judge pounded his gavel/To show that all's equal and that the courts are on the level/And that the strings in the books ain't pulled and persuaded/And that even the nobles get properly handled/Once that the cops have chased after and caught 'em/And that the ladder of law has no top and no bottom/Stared at the person who killed for no reason/Who just happened to be feelin' that way without warnin'/And he spoke through his cloak, most deep and distinguished/And handed out strongly, for penalty and repentance/William Zanzinger with a six-month sentence.").

150 *See, e.g.*, N.Y. City, N.Y., Local Law 39 (June 18, 1991), *reprinted in* 1991 N.Y. CITY LEGIS. ANN. 145, 156, 159. These provisions relate, *inter alia,* to the scope of the exemption for rentals in two-family, owner-occupied buildings, the scope of the exemption for rental of rooms within a housing accommodation, the applicability of the law to senior citizen housing, applicability to dormitory residences operated by educational institutions, applicability to dormitory-type housing accommodations, age-based exemptions to coverage, and permissible criteria in connection with publicly-assisted housing accommodations. *Id.* The provisions cited were codified as N.Y. CITY, N.Y., ADMIN. CODE § 8-107(5)(a)(4)(1), (5)(a)(4)(2), (5)(i)–(m) (1996).

151 Biondi v. Beekman Hill House Apt. Corp., 731 N.E.2d 577, 580 (N.Y. 2000).

State Legislature had wanted to do more to "protect" board members, it could have. But it did not. Nevertheless, the *Pelton* panel decided that it knew better than the legislature exactly how much protection board members need.

VI. *PELTON* DEFIED A RECENT LEGISLATIVE MANDATE AND ENCOURAGED NON-COMPLIANCE WITH THE CITY HUMAN RIGHTS LAW

Even if the *Pelton* panel had rendered its decision prior to the October 2005 passage of the Local Civil Rights Restoration Act, the decision would have represented a shocking failure to consider and comprehend the proper application of law. But, as alluded to throughout this Article, the decision was rendered after that legislative enactment. If there had been any doubt as to the impropriety of the *Pelton* panel's approach, any reasonable observer would conclude that the Restoration Act removed any and all such questions.

The City Council, concerned that the City Human Rights Law was being construed too narrowly, and unwilling to accept the practice whereby judges treated the local law as a mere carbon copy of its state and local counterparts (even where the local law was textually distinct), insisted that the City Human Rights Law be construed "in line with the purposes of fundamental amendments to the law enacted in 1991."[152] With those amendments, the City Human Rights Law had

> shifted decisively away from the "let's see if we can conciliate and become friends" philosophy that animated the first generation of modern civil rights statutes. The City Human Rights Law became instead a statute that had at its core traditional law enforcement values. These included the belief that deterrence was necessary to maximize compliance, and that deterrence could only be achieved: (a) under a regime that maximized responsibility for discriminatory acts and concurrently minimized the leeway accorded covered entities to evade such responsibility; and (b) where non-compliance was seen to have serious consequences.
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> . . . Joined to this core belief in civil rights enforcement as law enforcement, and, in some respects, a function of it, was

[152] 2005 COMM. REPORT, *supra* note 28, at 536.

> the view that the needs of victims of discrimination are sufficiently important that they trump—in all but the most limited circumstances—concerns about any burdens to be placed on covered entities.[153]

The *Pelton* panel had a very different set of values, neither recognizing that belated compliance with the law does not retroactively make a failure to make accommodation reasonable or lawful, nor recognizing that the excuses the panel itself would have voted for did not reflect the statutory scheme passed by the City Council.

It was undisputed that plaintiff had asked for accommodation in January 2002 and had been flatly refused (by the condo board's president) six months later. But neither this fact nor the fact that the condo began to move away from a completely obstructionist posture *only after it was contacted by the City's Human Rights Commission more than a year after the initial rejection* registered with the *Pelton* panel as a consummated violation of the law. The dismissive treatment of the initial rejection[154] creates a perverse incentive for co-ops and condos to resist compliance with the law. In some cases, resistance will cause the person with a disability will give up on achieving his or her rights. For those co-ops and condos faced with a person who just will not abandon the protections of the City Human Rights Law (and seeks administrative or judicial relief), *Pelton* assures them that, as a last resort, they can do what they were supposed to do in the first place, and all will be forgiven.[155] In other words, the panel ruled as though the Restoration Act had commanded judges to minimize responsibility and consequences for non-compliance, and maximize the leeway given for evasion, exactly the opposite of what the City Council had actually directed.

Pelton arrived at this point precisely because the panel would have made different legislative choices. It notes, for example, that the access-denying steps "were in place long before [the] passage of the Human Rights Law."[156] This fact would have been relevant if,

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[153] Gurian, *supra* note 4, at 283–84.

[154] "Distilled to its essence, the alleged wrongdoing is the board's delay in reconstructing the building to eliminate the steps that were in place long before passage of the Human Rights Law." Pelton v. 77 Park Ave. Condo., 825 N.Y.S.2d. 28, 33–34 (App. Div. 2006). It is, of course, a vast overstatement to refer to the provision of any accommodation as "reconstructing the building" when the first accommodation made was the installation of a portable stair climber. *Id.*

[155] *Id.* at 34.

[156] *Id.* at 33–34.

in 1991, the City Council had made the reasonable accommodation provision only apply prospectively to new construction, but, in fact, the Council did not.[157] *Pelton* also notes that the defendant board members had shown that they had acted "in reliance upon the professional advice of its architects and counsel."[158] As discussed previously, however, the City Human Rights Law does not have a good faith exception to liability.[159]

Pelton also tried to excuse the defendants' delay by inventing notice requirements that do not exist for City Human Rights Law purposes. The panel thought it noteworthy that "[t]he condominium's bylaws require written notice of any desired board action,"[160] but that private provision could in no way supersede the fact that the City Human Rights Law says that the obligation to make accommodation arises when a person's disability "is known or should have been known by the covered entity."[161] The panel relegated the fact that plaintiff had engaged in repeated conversations with the condo board president in the second half of 2002 to a subordinate clause in a sentence trying to suggest that potential liability may only have accrued after the Human Rights Commission wrote defendants a letter in September of 2003.[162] It decided not to mention the fact that the reasonable accommodation requirement as codified had existed for more than ten years at the

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[157] It is not as though the Council had been unaware of the device of prospective application. The design and construction requirements set forth in the 1988 Fair Housing Amendments Act only applied to dwellings constructed on and after March 1991. 42 U.S.C. § 3604(f)(3)(C) (2000). The Council itself had previously passed Building Code legislation relating to accessibility that limited the requirements to new construction and to buildings undergoing substantial alteration. COMM. ON HOUS. & BLDGS., REPORT ON PHYSICALLY DISABLED PEOPLE/ACCESSIBILITY OF FACILITIES (1987), *reprinted in* 1987 N.Y. CITY LEGIS. ANN. 64, 64–66.

[158] *Pelton*, 825 N.Y.S.2d at 34.

[159] *See* Weissman v. Dawn Joy Fashions, Inc., 214 F.3d 224, 234 n.4 (2d Cir. 2000). In that City Human Rights Law case, the defendant had

> assert[ed] that it should be immune from a charge of retaliation because it declined to look for a new position for [plaintiff] on the advice of counsel. However, while [defendant's] consultation with counsel might show that the defendant lacked the subjective intent to retaliate against [plaintiff]—a fact which may be relevant to the determination of whether punitive damages are warranted for any retaliatory acts—it is not a defense to retaliation. To show retaliation, [plaintiff] need only prove that [defendant] undertook an adverse employment action against him because he filed a charge with the [City Commission on Human Rights].

Id.

[160] *Pelton*, 825 N.Y.S.2d at 30 n.1.

[161] N.Y. CITY, N.Y., ADMIN. CODE § 8-107(15)(a) (1996).

[162] *Pelton*, 825 N.Y.S.2d at 30 (stating that "[o]ther than Pelton's conversations with [the Board President], this letter was the Board's first notice regarding plaintiffs' Human Rights Law claim").

time plaintiff began to seek accommodation.[163] Finally, it decided to ignore the fundamental proposition that ignorance of the law is no excuse.

In sum, the *Pelton* panel failed to engage in the process the Restoration Act had commanded "thoughtful, independent consideration of whether [a] proposed interpretation would fulfill the uniquely broad and remedial purposes of the City's Human Rights Law."[164]

VI. CONCLUSION

Pelton leaves one with the powerful sense that the panel respects neither the authority, history, nor text of the City's Human Rights Law, let alone the public policy choices that law embodies. The decision leaves an equally strong sense that the panel so identified with co-op board members that it acted not as an independent judicial body, but as a medium through which those board members could impose their private interests. Such judicial activism in the service of privilege is neither conservative nor progressive—simply lawless.

[163] A fact surely known by all the architects and counsel from whom defendants got professional advice.

[164] 2005 COMM. REPORT, *supra* note 28, at 537 n.8.