GDB
LEGAL UPDATE
PROVIDING CURRENT INFORMATION ABOUT LEGAL DEVELOPMENTS FOR OUR CLIENTS AND FRIENDS SUMMER 2014

New York State Estate Tax Changes – Now You Really Need To Do The Math By: David N. Milner, Esq.

In the Summer 2013 issue of this Newsletter I authored an article entitled "Estate Planning — You Still Need to do the Math." Recent changes in New York's Estate Tax Laws have made it even more critical for those subject to the New York estate tax to plan their estates properly to minimize their liability for New York State estate taxes.

Effective April 1, 2014, New York's estate tax laws changed dramatically. The exclusion, previously $1,000,000, has been increased. When the exclusion is fully phased in on January 1, 2019, New York's exclusion will be the same as the Federal exclusion which is currently $5,340,000 after being indexed for inflation. Until the New York exclusion is fully phased in, the exclusion will gradually increase each year as shown on the table on page 8.

However, unlike the Federal exclusion, New York's new law provides that if the amount of the New York taxable estate exceeds 105% of the available exclusion, the New York exclusion is eliminated, making the estate fully taxable for New York State purposes.

Continued on page 8

Highest New York Court Answers Important Question for Banks and Everyone Who Has a Checking Account By: Jay L. Hack, Esq.

On May 8, the highest appellate court in New York decided that (i) our bank clients can force their depositors to review cancelled checks for accuracy within weeks after they are returned and (ii) our other major business clients lose the right to claim that a check shouldn't have been paid if they don't promptly report a forgery or other defect.

Whether the rule applies to personal checking accounts, or checking accounts of family businesses, is still unanswered. But ignoring those envelopes of returned checks, or those internet notices that your checks are available for viewing, can be costly.

If a bank is presented with a forged check for payment, the bank is supposed to return it unpaid. If the bank instead pays the check and deducts it from the depositor's account, the

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Gallet Dreyer & Berkey, LLP
ATTORNEYS AT LAW

Breaking Up is Hard to Do: Terminating a Defaulting Contractor Without Getting in Trouble

By: Randy J. Heller, Esq.

If you are in real estate or construction, or even if you have had a contractor do work in your home or apartment, you may have encountered a situation where you need to terminate a contractor or subcontractor who has not performed properly.

These end-game situations often turn messy: the contractor stops showing up or reduces its workforce; the owner stops or slows payment; complaints are made; new promises are made and broken. It is not a fun time.

Not infrequently, one of the parties has become so totally fed up that he/she acts impulsively, either marching off the job (the contractor), or dashing off a termination letter and/or simply barring further access (the owner).

Sometimes these precipitous actions can backfire, and an ill-timed termination of a defaulting contractor can actually constitute a breach by the owner. It all depends on the terms of the contract.

It is not unusual for a construction contract to contain a "cure period" before termination can be implemented. Sometimes, the termination provision does not explicitly provide a right to cure, but nevertheless requires that there be a notice period before the termination becomes effective, e.g., "Owner may terminate this Contract for cause on five days' written notice to Contractor." If the owner terminates the contractor without affording the five days' written notice is the termination effective? Perhaps not.

In New York, the courts require strict compliance with contractual termination provisions. Where the parties have agreed to a termination procedure, the clause will be enforced as written. Doing so permits the contractor to finish unperformed work and to cure its unsatisfactory performance before being charged with the cost of completion. And where the owner fails to follow the contractually-agreed procedure, the termination can be held invalid, thus excusing even a defaulting contractor from some of the consequences of its actions.

There is one exception to this "strict enforcement" rule, and that is where giving the required notice would be a "futile act." This is a limited exception, which generally applies only where the contractor has unequivocally abandoned the work. Where the contractor refuses to return, or conditions its willingness to return with a high-handed demand for additional payments, this may constitute a "constructive abandonment" such as would permit an owner to be excused from the futile act of giving additional notice of his intention to terminate the contractor.

> If the owner terminates the contractor without affording the five days' written notice is the termination effective? Perhaps not.

It's a messy business and the risks are high. A "wrongful termination" may subject the owner to damages for the contractor's lost profits and deprive it of its right to recover its costs to complete the work. But a good contract and some clear-minded planning may keep a bad situation from getting worse.

About the author: *Randy Heller is a partner at Gallet Dreyer & Berkey LLP. His practice focuses on construction law and litigation, representing contractors and owners in construction related matters. Mr. Heller has been named a Super Lawyer by the* New York Times Magazine *as one of the top attorneys in construction law in the New York metropolitan area, and by* New York *magazine as one of the Best Lawyers of New York. Mr. Heller can be reached at rjh@gdblaw.com.*

Sexual Orientation and Juror Selection

By: Adam M. Felsenstein, Esq.

Criminal defendants have a constitutional right to a fair and impartial jury of their peers, and a key to ensuring that a defendant receives such a jury is to make certain that the adversary is not eliminating an entire class of potential jurors. Currently, there is an important legal battle brewing with regard to the elimination of jurors based on their membership in one such class: sexual orientation.

During jury selection, a party is permitted to eliminate potential jurors either for bias, defined as an inability to judge the case impartially based on answers to questions asked during juror interviews, or through the exercise of a peremptory challenge. Each side gets a limited number of peremptory challenges, which may be exercised to strike a potential juror without having to provide a reason.

In 1984, the Supreme Court, in Batson v. Kentucky, deemed it an unconstitutional violation of a party's right to due process of law guaranteed in the 14th Amendment to the U.S. Constitution to use a peremptory challenge to eliminate a potential juror based on their race. In 1994, in J.E.B. v. Alabama, the Supreme Court extended that doctrine to abrogate the use of peremptory challenges based solely on gender. To date, race and gender are the only classes entitled to such protection.

In January 2014, the federal Court of Appeals for the Ninth Circuit (which governs seven Western States, including California) ruled that it was similarly unconstitutional to strike a potential juror solely based on their sexual orientation. The court wrote, "Strikes exercised on the basis of sexual orientation continue this deplorable tradition of treating gays and lesbians as undeserving of participation in our nation's most cherished rites and rituals." This decision runs in direct conflict with a prior decision of the federal Court of Appeals for the Eighth Circuit (which governs six Midwestern States) which found that it was not a constitutional violation of due process to eliminate potential jurors based solely on their sexual orientation. The Second Circuit Court of Appeals (which governs New York) has not yet ruled on this issue.

It is the job of the Supreme Court of the United States to rule on constitutional questions, and resolve such divisions between federal appellate courts. We expect to see a case raising the issue of sexual orientation and jury selection on the Supreme Court's docket in the very near future.

During jury selection, a party is permitted to eliminate potential jurors either for bias, defined as an inability to judge the case impartially based on answers to questions asked during juror interviews, or through the exercise of a peremptory challenge.

About the author: *Adam M. Felsenstein is an associate at Gallet Dreyer & Berkey, LLP. His practice focuses on civil and criminal litigation matters, including trial work in the state and federal courts. Mr. Felsenstein can be reached at amf@gdblaw.com.*

Bank Checking Account Rules (continued from page 1)

depositor has the right to get the money back. However, New York law also provides that the depositor must report a forgery, alteration or unauthorized endorsement of a check within one year after the bank sends the check and the account statement, or makes it available, to the customer. If the customer throws an unopened envelope of checks into the drawer and never looks at them, or if the customer fails to look at the checks made available on the internet, then the customer may get stuck with the loss caused by the forgery or alteration of the check.

The question that the court answered was whether the bank and the customer can agree to reduce the one year period to as little as 14 days. The answer, at least when the depositor is a sophisticated business customer, is yes. You may say, "But I never agreed to look at my checks that fast!" The response of your bank, if it is on the ball, should be, "Look at your deposit account agreement. It's right there. And once a year we send you a reminder."

Thus, make sure that you promptly look at your checking account statement. Verify that you actually signed all of your checks and that there are no other irregularities, such as an increase in the amount of any check. All of our bank clients should make sure that there is appropriate language limiting the review period in the checking account agreement. When possible, they should have the customer individually initial that limit. Reminders of the obligation to promptly review statements should be included in notices to customers and on their Internet banking websites.

An important additional word to the wise — business customers should always make sure that the person who reviews the paid checks is not the same person as the one who is in charge of the checkbook. In my experience representing banks for 38 years, the most common source of forgeries is the bookkeeper or other finance department staff person who uses ease of access to the checking account to embezzle a few dollars, and sometimes more than just a few.

The ability to reduce the time period to 14 days may not apply to personal checking accounts and accounts of small family businesses. The reduction in the time period must be reasonable. The court recognizes that "It could well be unreasonable for banks to…impose an exacting 14-day limit on unsophisticated customers, small family businesses, or individual consumers, including, for example, the elderly, people suffering from certain disabilities, or others for whom the 14-day rule could be too unforgiving." However, that will depend on the specific facts, and we recommend that all of our clients should protect themselves by looking at their account statements promptly and not just rely on the ability to claim that they were unsophisticated.

Business customers should always make sure that the person who reviews the paid checks is not the same person as the one who is in charge of the checkbook.

About the author: *Jay L. Hack is a partner at Gallet Dreyer & Berkey, LLP and head of the firm's banking department. Mr. Hack's practice focuses on providing a full range of legal services to banks and other financial institutions. Mr. Hack can be reached at jlh@gdblaw.com.*

Should Cooperatives or Condominiums Permit Apartment Ownership by Trusts or LLC's?

By: David L. Berkey, Esq.

We represent many cooperatives and condominiums and are often asked if their boards should allow apartments to be held by trusts or by limited liability companies (LLC's). For estate planning purposes and to limit personal liability, both existing and prospective apartment owners sometimes seek to have ownership of their apartments held by trusts, limited liability companies or other entities.

Prior to 1987, Section 216(b)(2) of the Internal Revenue Code required cooperative apartments to be owned by individuals in order to qualify for tax benefits incident to home ownership, such as deductions of real estate taxes, mortgage interest and the ability to limit taxes on sales. For this reason, cooperatives did not permit apartment ownership by trusts or entities. The Tax Reform Act of 1986 expanded the definition of "qualified tenant-stockholder" to include trusts, estates, partnerships and corporations. For estate planning and other reasons, tenant-shareholders in cooperatives began asking their boards to permit a transfer of their shares and proprietary lease to a trust or LLC created for their benefit. Similarly, condominium owners have also sought to have their apartments owned by trusts or LLC's.

For estate planning and other reasons, tenant-shareholders in cooperatives began asking their boards to permit a transfer of their shares and proprietary lease to a trust or LLC created for their benefit. Similarly, condominium owners have also sought to have their apartments owned by trusts or LLC's.

Some cooperative boards are receptive to these requests, as it helps their tenant-shareholders. Condominium boards usually do not have the power to prevent such transfers. A review of the cooperative proprietary lease and condominium by-laws will determine if the boards have the power to approve or prevent such transfer.

There are several issues that must be addressed to ensure that such a transfer will not adversely affect the cooperative or condominium and the other tenant-shareholders or owners. These include: (1) ensuring that the trust or LLC is properly created; (2) identifying and limiting the number of persons who may reside in the apartment; (3) ensuring that maintenance will be timely paid; (4) ensuring that potential successor owners upon termination of the trust are subject to review and approval by the board before they may own the shares and lease and occupy the apartment; (5) ensuring that the trustees and occupants will be amenable to service

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Tax Lien Foreclosure Proceedings On The Rise

By: Edward M. ("Mike") Cuddy III, Esq.

The economy and staggering government deficit has stimulated a bumper crop of tax lien foreclosure actions being commenced in the Supreme Courts of the five boroughs.

Tax lien foreclosure actions arise when unit owners do not pay their property taxes, water charges, and other charges. The New York City Department of Finance imposes a tax lien, and if it is not paid, the Department then sells these tax liens to third party lien servicing companies, called a NYCTL trust, which can then bring a foreclosure action against the owner to collect the tax lien. Under the City's tax lien sales program, the Bank of New York holds the tax lien certificate on behalf of the purchasing trust as collateral agent and custodian.

In a typical action, the Bank of New York typically names the Board of Managers of a condominium as a necessary party defendant to foreclose upon the lien. Usually, if the unit owner has not paid their taxes, the unit owner also owes money to the condominium for unpaid common charges and other charges. In order to protect the building's interests, the building may need to file an answer to complaint, file its own lien if not already done, or take other action to protect its interests in the foreclosure proceeding.

Because each situation is different, the recommended strategy may be different in each case. Building managers and unit owners who are served with a tax lien foreclosure proceeding should consult with experienced counsel to decide the appropriate course of action.

If the unit owner has not paid their taxes, the unit owner also owes money to the condominium for unpaid common charges and other charges.

__About the author:__ Edward M. ("Mike") Cuddy III is an associate at Gallet Dreyer & Berkey LLP. His practice focuses on complex commercial litigation. He has represented developers, corporations, cooperatives, insurance companies and individuals in construction law disputes, contract actions, architectural and structural engineering malpractice claims, and casualty related property damage subrogation claims. He regularly advises co-op and condominium boards and managing agents on governance issues and disputes with shareholders or unit owners. He is a lecturer for Lorman Educational Services and the author of "Basic AIA Contracts – Dos and Don'ts of Negotiation." Mr. Cuddy can be reached at emc@gdblaw.com.

Gallet Dreyer & Berkey, LLP
845 Third Avenue
New York, NY 10022-6601
Tel: 212-935-3131 ■ Fax: 212-935-4514
Website: www.gdblaw.com ■ Email: info@gdblaw.com

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Tips and Reminders for Employers

By: David T. Azrin, Esq.

As the number of employment-related lawsuits continues to increase each year, employers must constantly review their policies. Here are five issues that most commonly generate lawsuits, with tips and reminders to help avoid problems.

AVOID IMPROPERLY TREATING WORKERS AS INDEPENDENT CONTRACTORS.

Employers often get into trouble by treating workers as independent contractors, when they should be treated as employees. The courts look at many factors to decide whether a worker should be treated as an independent contractor versus an employee. Two of the most important factors are usually whether the worker sets his or her own schedule and brings his or her own equipment or supplies. When in doubt, it is best to err on the side of treating a worker as an employee, because penalties for improper classification can be significant.

KEEP TIME RECORDS AND PAY OVERTIME.

Employers create big problems for themselves if they fail to keep track of workers' time, because they leave themselves open to exaggerated claims regarding hours actually worked. Also, employers must remember that, when determining whether an hourly non-exempt employee is entitled to overtime in one week, employers cannot carry forward hours from one week to the next week. In addition, if the employer does not want to pay overtime, an employer should not let workers stay at work more than 40 hours each week.

TREAT EMPLOYEES RESPECTFULLY.

One of the biggest reasons terminated employees decide to seek legal counsel is that they feel they were humiliated and not treated with respect in the termination process. Employers should conduct the termination process in a manner that does not humiliate the employee. Also, to the extent practical, policies should be applied equally and uniformly to all employees.

HAVE WRITTEN PROCEDURES FOR DEALING WITH CO-WORKER HARASSMENT.

Employers should have written procedures in their employee handbooks for employees to report co-worker discriminatory behavior. Where appropriate and necessary, employers should consider giving all managers and employees formal sensitivity training regarding discrimination issues.

KEEP PROPER WORK RECORDS.

When a new employee starts, employers should obtain proper documentation, including obtaining a completed I-9 form confirming work authorization. Also, when a new employee starts, and each year in January, New York employers must provide a written notice to each employee, confirming their pay rate, and obtain written acknowledgement from each employee.

About the author: *David T. Azrin is a partner at Gallet Dreyer & Berkey LLP. Mr. Azrin represents a range of business clients and individuals on employment, trademark, and franchise law matters. Mr. Azrin is the sponsor of the International Franchise Association's franchise business network educational program in the New York City area. Mr. Azrin has been repeatedly named one of the top 125 franchise attorneys ("Legal Eagle") by the editorial board of* Franchise Times *magazine. Mr. Azrin can be reached at dta@gdblaw.com.*

NY State Estate Tax Changes (continued from page 1)

Date of Death	NY State Exclusion
4/1/14 - 3/31/15	$2,062,500
4/1/15 - 3/31/16	$3,125,000
4/1/16 - 3/31/17	$4,187,500
4/1/17 - 3/31/18	$5,250,000
After 1/1/19	Federal Exclusion

Since New York does not currently impose a gift tax one would think that they could simply make a gift to their children of an amount that is calculated to keep their New York taxable estate below the threshold.

Without proper planning this can result in a substantial New York estate tax, even if there is little or no federal estate tax payable. For example, if someone that dies in 2019 has a New York taxable estate that is exactly $5,512,500, there would be no New York estate tax payable. However, if the decedent's New York taxable estate were $5,512,501 ($1 more than 105% of the $5,250,000 exclusion), the New York estate tax would be $452,300.

So how do you plan to avoid this? Since New York does not currently impose a gift tax one would think that they could simply make a gift to their children of an amount that is calculated to keep their New York taxable estate below the threshold. However, included in the legislation that increased the exclusion was a provision that adds back to the computation of the New York taxable estate the amount of any gifts made within three years of death if made between April 1, 2014 and December 31, 2018. Furthermore, since these gifts are not part of the New York taxable estate the New York estate attributable to these gifts is not deductible for Federal estate tax purposes. What can one do? Provide a provision in your will that makes a contribution to a charity of the amount necessary to keep the New York taxable estate below the threshold. Essentially by giving something away to someone that is not part of your family, you will be increasing the amount your family receives.

It is also important to remember that New York has not adopted the Federal concept of "portability" which permits the unused exclusion of the estate of the first to die to be available for use by the estate of their spouse. Accordingly, while for Federal purposes it often does not matter which spouse is the legal owner of the asset, for New York purposes it becomes very important. For example, assuming a married individual dies in 2015 when the New York exclusion is $2,062,500 and their spouse dies in 2016 when the exclusion is $3,125,000. Further, assume that the combined value of their assets will be $4,000,000 upon their respective deaths

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and that the assets are held in the couple's joint names with the right of survivorship. Since upon the first death the assets will automatically pass to the survivor, the marital deduction will shelter the assets from estate taxation. However, upon the second death the entire $4,000,000 will be subject to New York estate tax since the value of the survivor's New York taxable estate is greater than 105% of the $3,125,000 exclusion. (There would be no Federal estate tax payable at either death.) Had the couple separated the ownership of their assets (i.e., if they owned the assets as tenants-in-common), there would be no New York estate tax payable.

The firm's estate planning attorneys stand ready to help you understand the new law and help you plan your estates to avoid the payment of estate taxes unnecessarily.

About the author: *David N. Milner is a partner at Gallet Dreyer & Berkey LLP. Mr. Milner's practice focuses on tax law, estate planning, corporate law, and real estate. Mr. Milner, who is also a certified public accountant, helps clients to structure transactions in a manner calculated to reduce adverse tax consequences, and helps families develop estate planning strategies. He is a frequent speaker before community groups and trade organizations on matters relating to estate planning. Mr. Milner can be reached at dnm@gdblaw.com.*

GDB Partners

David T. Azrin
dta@gdblaw.com
Franchise, Trademark, Employment, Litigation

David L. Berkey
dlb@gdblaw.com
Real Estate, Cooperative/Condo Law, Litigation

Morrell I. Berkowitz
mib@gdblaw.com
Litigation, Real Estate

Mark B. Brenner
mbb@gdblaw.com
Corporate, Bankruptcy, Real Estate

David S. Douglas
dsd@gdblaw.com
Litigation

Jay L. Hack
jlh@gdblaw.com
Banking, Securities, Corporate

Randy J. Heller
rjh@gdblaw.com
Construction, Suretyship and Litigation

Beatrice Lesser
bl@gdblaw.com
Real Estate, Litigation Co-op/Condo, Commercial and Residential Landlord/Tenant

Marc J. Luxemburg
mjl@gdblaw.com
Real Estate, Corporate, Litigation

David N. Milner
dnm@gdblaw.com
Taxation, Trust and Estates, Corporate, Real Estate

Perry L. Mintz
plm@gdblaw.com
Real Estate, Corporate

Seymour D. Reich
sdr@gdblaw.com
Trusts and Estates, Real Estate

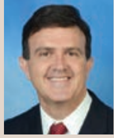
Scott M. Smiler
sms@gdblaw.com
Real Estate, Corporate

Roger L. Stavis
rls@gdblaw.com
White Collar Criminal Defense, Investigations

Jerry A. Weiss
jaw@gdblaw.com
Litigation

Firm News and Honors

DAVID T. AZRIN



In February 2014, partner David T. Azrin was again honored to be named as a Franchise Times Legal Eagle, a designation given to the best attorneys in franchising as judged by his peers in conjunction with the Franchise Times' editorial board.

DAVID L. BERKEY

On June 1, 2014, partner David L. Berkey was honored to become the Chairperson of the New York State Bar Association's Real Property Law Section.

BEATRICE LESSER

On June 10, 2014, partner Beatrice Lesser was a panelist in a continuing legal education program. She spoke on the topic of Fiduciary Obligations of Board Members in Co-ops, Condos and Homeowners Associations, at the Association of the Bar of the City of New York.

MARC J. LUXEMBURG

In February, 2014, partner Marc Luxemburg submitted a brief amicus curiae on behalf of the Council of New York Cooperatives and Condominiums to the Appellate Division First Department in the appeal of the matter entitled Razzano v. Woodstock Owners Corp. in support of the Motion for Leave to Appeal to the Court of Appeals by the cooperative. The appeal involves the issue of whether a cooperative board can prohibit subletting of apartments by all purchasers of apartments, while allowing existing shareholders to continue to sublet until they sold their apartments, a procedure sometimes called "grandfathering". The Appellate Division ruled that the business judgment rule was superseded by Section 501 of the Business Corporation Law, which the court stated did not allow some shareholders to have rights that were not granted to all shareholders. The brief argued that the decision of the Appellate Division was in conflict with decisions of the Court of Appeals, and that leave should be granted so the Court of Appeals could resolve the conflict.

In March, 2014, partner Marc Luxemburg presented a seminar at the Association of Riverdale Cooperatives for members of cooperative boards on The New Form of Proprietary Lease. The seminar explored the deficiencies in existing forms of proprietary leases and how the new form (which has been promulgated by the Council of New York Cooperatives) clarifies the authority of a board to manage the cooperative.

In June 2014, partner Marc Luxemburg co-presented a seminar with Gregory Carlson, president of the National Association of Housing Cooperatives, entitled Introduction to Co-op Board Responsibilities. The seminar was designed to provide board members, particularly those who are recently elected to their boards, with an overview of the legal and operational responsibilities of board members and how to deal with common situations.

DAVID N. MILNER

On May 21, 2014 partner David N. Milner presented a seminar for the Small Property Owners of New York at the East Republican Club entitled Estate Planning Basic for Small Property Owners.

MICHELLE P. QUINN

On March 19, 2014, associate Michelle P. Quinn gave a continuing legal education presentation for other attorneys on residential and commercial landlord/tenant Law in New York, organized by the Lorman Education Services.

TOBIAS ZIEGLER

On May 10, 2014, counsel Tobias Ziegler gave a presentation at the annual meeting of the International Business Group of Eurojuris International in Milan, Italy, on legal issues facing foreign companies doing business in the United States, including consignment of stock arrangements and expatriation of employees.

Apartment Ownerships by Trusts and LLC's (continued from page 5)

of process should a dispute arise, and (6) ensuring in an LLC that management and ownership changes are approved by the board.

Other important issues to be considered include the extent to which trustees or managers should be permitted to vote the shares or common interest allocated to apartment , whether to obtain a proxy from trustees or managers to assure a quorum or passage of important votes at meetings, and whether ownership of apartments by non-resident trustees or managers will affect the ability of a cooperative and its tenant-shareholders or a condominium and its unit owners to obtain bank loans when financing or refinancing the building or apartments.

We protect our cooperative and condominium clients by preparing a three-party agreement, where the trustee or LLC manager and occupants guarantee all financial obligations to the cooperative or condominium and where an escrow fund may be required to cover such obligations. The agreement generally limits occupancy to the trust beneficiary and members of the immediate family and provides for board review and approval of successor owners and occupants of the apartment during the existence or upon termination of the trust or LLC. Provisions are made for service of process upon the managing agent should a dispute arise and we require an opinion from counsel to the trustees or LLC representing to the cooperative or condominium that the trust or LLC has been properly formed and that the agreement signed by the trustees or managing member of the LLC will be binding upon them. Finally, we assure that any current lender to the tenant-shareholder or unit owner also approves the transfer. There is normally no financial hardship to the cooperative or condominium, as the cost to prepare the agreement and review the trust or LLC documents is paid for by the tenant-shareholder or unit owner seeking the board's consent to the transfer.

With these types of protections, boards can be comfortable approving such transfers.

About the author: *David L. Berkey is managing partner of Gallet Dreyer & Berkey LLP, where he practices real estate law and litigation, concentrating on issues affecting cooperative corporations and condominium associations. He is the Chairperson of the New York State Bar Association's 4000 member Real Property Law Section. Mr. Berkey is counsel to numerous cooperative and condominium boards, companies and individuals. He is a regular speaker at bar association seminars on matters involving co-op and condo law, and he is a faculty member at Cardozo Law School's trial advocacy program. Mr. Berkey has been named by Super Lawyers magazine as one of the top attorneys in real estate law in the New York metropolitan area. Mr. Berkey can be reached at dlb@gdblaw.com.*

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Gallet Dreyer & Berkey, LLP
ATTORNEYS AT LAW

845 Third Avenue
New York, NY 10022-6601