GDB
Legal Update
PROVIDING CURRENT INFORMATION ABOUT LEGAL DEVELOPMENTS FOR OUR CLIENTS AND FRIENDS SPRING/SUMMER 2012

Hiring a Risk Manager to Administer Your Insurance During Construction

By: Eugene H. Goldberg, Esq.

An owner on a construction project must ensure that the contractor and subcontractors buy and maintain required insurance, and that insurers are notified of incidents. To accomplish this, the owner may need to assign an employee to the dedicated task of administering insurance, sometimes referred to as a risk manager.

The person assigned to the task of administering insurance can ensure that proper insurance is obtained and maintained throughout the construction process, and that proper notice is given to insurers of incidents. The failure to properly administer insurance can sometimes lead to adverse results.

An experienced owner should require its contractor and subcontractors to furnish copies of policies with endorsements that provide that the owner will be notified in advance if the policy is terminated early. If these policies are filed away and not studied for coverages, the protection bought in a construction contract is diminished.

Contractors typically demonstrate their insurance with a form certificate of insurance. The form contains cursory listings of coverages with an X in a box and a few words. The form states on its face that it is for information only, does not create a contractual relationship, and does not alter the terms of insurance policies. The form does not explain the nuances of an exclusion or coverage. A form stating the owner is an additional insured does not explain whether coverage is broad or narrow. In rare circumstances, the

Continued on page 5

Defaulting Condominium Sponsor or Commercial Unit Owner — Receivership May be the Answer

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

As one of the consequences of the economic downturn, our firm is regularly consulted by Boards of Managers for advice regarding sponsors and/or commercial unit owners who have paid no common charges for several months and in some instances, several years.

What actions should the board take

In general, we recommend that our clients file a lien for unpaid common charges on behalf of the condominium in the County Clerk's Office ("Condominium Lien"). The Condominium Lien is inexpensive to prepare and file, continues in effect until all sums are paid or until the expiration of six (6) years from the date of filing, and has priority of payment over all other liens except the unpaid portion of a first mortgage and for unpaid taxes on the unit.

Continued on page 3

In this issue

HIRING A RISK MANAGER BY EUGENE H. GOLDBERG	1
RECEIVERSHIP BY EDWARD M. CUDDY III	1
THE CONSUMER FINANCIAL PROTECTION BUREAU REPORT CARD BY JAY L. HACK	2
WAGE AND HOUR LAW QUESTIONS AND ANSWERS BY DAVID T. AZRIN	6
LIABILITY FOR ACCIDENTAL INJURIES IN THE GYM BY MARC J. LUXEMBURG	8
MOLD RESULTING FROM WATER INFILTRATION BY MORRELL L. BERKOWITZ	10
FIRM NEWS	4
CONTACT INFORMATION	11

Gallet Dreyer & Berkey, LLP
ATTORNEYS AT LAW

The Consumer Financial Protection Bureau — a Nine-Month Report Card

By Jay L. Hack, Esq.

The Consumer Financial Protection Bureau ("CFPB"), a new federal agency, has broad authority to regulate any consumer financial practices. It has yet to adopt regulations governing the areas of most significant concern to consumers, but it recently announced ambitious plans to address a broad range of practices, including mortgage servicing companies, lending practices, bank overdraft protection policies, and the use of mandatory arbitration clauses. As a result, we should expect new regulations in these areas soon.

The CFPB was created as part of the Dodd–Frank Wall Street Reform and Consumer Protection Act ("the Dodd-Frank Act"), enacted in the summer of 2010, which revamped federal laws regulating banks, securities firms, commodities traders and other financial firms. The law also gave the CFPB authority to regulate, or prohibit, any act or practice involving consumer financial products that the Bureau considers to be unfair, deceptive or abusive. Since "unfairness" is in the eye of the beholder, the CFPB has broad authority to outlaw or regulate almost any consumer financial practice it doesn't like, ranging from credit cards and residential mortgage loans to bank deposits and ATM cards.

The agency took over most consumer financial regulation about nine months ago, on July 21, 2011, one year after Dodd-Frank was enacted. In its first regulatory actions, it picked some low hanging fruit — requiring disclosure to consumers who send money overseas. There were no existing federal rules of significance on this issue, so the Bureau was writing on a blank slate. As a result of these new regulations, beginning in February 2013, companies that send foreign remittances for consumers must provide detailed disclosures regarding fees, transfer amounts, conversion rates, taxes imposed, and when the funds will be available in the foreign country. The Bureau also created a procedure for resolving errors if something goes awry. However, foreign remittance transactions are not at the top of most people's list of urgent concerns.

The CFPB has also embarked upon an ambitious program to address more significant concerns to consumers. In April this year, the CFPB announced that it is tackling the problem of mortgage servicers — those companies that collect residential mortgage payments and administer the loans, even though they often do not own the loan. The CFPB has also announced that it is investigating check and ATM card overdraft programs and mandatory arbitration clauses in consumer contracts to determine whether current practices are unfair and should be restricted. Just a few weeks ago, the CFPB proposed simplifying the process of charging origination fees and points on residential mortgage loans by prohibiting certain types of fees.

Continued on page 7

The CFPB has broad authority to outlaw or regulate almost any consumer financial practice it doesn't like, ranging from credit cards and residential mortgage loans to bank deposits and ATM cards.

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.*

RECEIVERSHIP (CONTINUED FROM PAGE 1)

HOW IS THE CONDOMINIUM BENEFITED BY FILING THE LIEN

Section 339aa of the Condominium Act ("Act") provides that the Condominium Lien may be foreclosed on the defaulting unit by the Board of Managers commencing an action in the New York State Supreme Court in the County in which the unit is located. The Act provides that the defaulting unit owner must pay a reasonable rent for the unit for any period prior to sale pursuant to a judgment of foreclosure and sale if so provided in the By-Laws. The Condominium is entitled to the appointment of a Receiver to collect the reasonable rent.

WHAT IS A RECEIVER

A Receiver is a person who receives his or her appointment, duties, power and compensation directly from the Court. In the context of this discussion, a Receiver is typically directed to collect reasonable rent from the defaulting owner who is in occupancy or to lease the unit and collect the rent if vacant. In the case of a commercial unit (such as a garage) the Receiver may be empowered by the Court to manage the operations and collect all income.

HOW DOES THE APPOINTMENT OF A RECEIVER BENEFIT THE CONDOMINIUM

In a recent case handled by our office entitled "Board of Managers of Boulevard Towers Condominium v. Ezra Academy of Queens", the Supreme Court of Queens County granted our motion on behalf of the Condominium for the appointment of a Receiver empowering him to collect tuition payments from students attending Ezra Academy (The Condominium Owner),

A Receiver is a person who receives his or her appointment, duties, power and compensation directly from the Court.

rental payments from Ezra Academy's commercial tenant, and reasonable rent from Ezra Academy. The Court directed that the money so collected be used by the Receiver to pay current common charges and assessments, real estate taxes, and "any other expenditure as necessary to preserve and maintain the premises during the pendency of the Receivership." Once in place a receivership is designed to maintain the unit and to pay the Board the current common charges, assessments, water and sewer costs pending the judicial foreclosure of the Condominium Lien and sale of the unit at auction.

Practice Hint

The Receiver may only be authorized to pay the Board the common charges and assessments which accrue during the receivership. Arrears may only be paid from the monies collected from the judicial sale of the unit(s).

Where appropriate, we generally recommend filing the motion for a Receiver as soon as practicable and to proceed by Order to Show Cause.

IF THE CONDOMINIUM IS NAMED AS A DEFENDANT IN A MORTGAGE FORECLOSURE ACTION

A sponsor or a commercial unit owner who has defaulted in the payment of its common charges may be, and often is, equally deficient in meeting its mortgage commitment. Traditionally, a Condominium has been at a distinct disadvantage in such a situation. The law is clear that the unpaid balance of a first mortgage lien is superior to a lien for unpaid common charges. Consequently, recovery of the Condominium's arrears, including the common charges and assessments incurred during the period pending the foreclosure and sale of the unit, could only be collected from surplus monies after the full satisfaction of the mortgage. The mortgagee bank would sometimes seek the appointment of a Receiver. Any monies collected by the Receiver appointed in a mortgage foreclosure action would be used to pay down the arrears of the mortgage pending the sale of the unit at auction.

In some more recent cases, the courts have recognized that the primary duty of a Receiver in a foreclosure action is to preserve the property pending judicial sale. Applying this understanding, the courts have ruled that the Receiver should pay the current common charges, taxes, insurance, water and sewage, as well as other expenses to maintain the property, before applying any money to the reduction of the first mortgage.

For example, in the Boulevard Towers action, the mortgagee Bank sought to require that any monies collected be placed in escrow pending the foreclosure and sale of the commercial unit.

Continued on page 4

Firm News and Honors

THE FIRM WELCOMES TWO NEW ATTORNEYS.

- **Tobias F. Ziegler.** In May 2012, the firm welcomed Tobias F. Ziegler, to our international corporate practice. Mr. Ziegler, formerly with Bressler, Amery & Ross, P.C., and Jones Day in Paris, brings substantial experience in representing foreign and domestic entities in all areas of corporate work, including mergers, acquisitions, sales, corporate structuring, partnership and operating agreements, lending and borrowing transactions, real estate, financing, and securities. Mr. Tobias, a native of Germany, speaks four languages, including German, French, and Spanish, and received legal training in Germany and France, before attending law school in the United States.

- **Eugene "Gene" H. Goldberg.** In February 2012, the firm welcomed Eugene "Gene" H. Goldberg, to our real estate litigation practice. Mr. Goldberg, formerly with McDonough Marcus Cohn Tretter Heller & Kanca LLP and Wilson Elser Moskowitz Edelman & Dicker, brings substantial experience in complex commercial litigation involving construction and commercial matters, insurance coverage, professional malpractice claims involving architects and engineers, and liability claims, as well as drafting and negotiating construction related contracts. Mr. Goldberg has written numerous articles in legal publications, and is the former editor of the New York State Bar Association Construction and Surety Division Newsletter. Mr. Goldberg has received the highest "AV" rating in the peer review conducted by the Martindale Hubbell legal directory.

RECEIVERSHIP (CONTINUED FROM PAGE 1,3)

The Court denied the mortgagee bank's attempt to prevent the Receiver from using monies collected to preserve and maintain the property.

Practice Hint

We generally recommend to the Board of Managers in a mortgage foreclosure that it take full advantage of the judicial priority given to the payment of common charges during a receivership by seeking the appointment of a Receiver by Order to Show Cause. Again, time is of the essence since the Receiver may only pay common charges during the receivership.

CONCLUSION

In recent years the courts have granted more authority to receivers. They are often empowered to generate income from the collection of rent from occupied units and to lease those which have been vacated and to prioritize the payment of current common charges. This trend shows that the courts recognize the financial problems caused to the other owners of residential units when a sponsor owning multiple units and/or a commercial unit owner defaults. A receivership provides the Board of Managers with an alternative to raising common charges and/or imposing a special assessment on unit owners who are meeting their obligations to the condominium. This relief, however, is only available once the receivership has been ordered by the court, so it rests with the Board of Managers to proceed as expeditiously as possible. ■

A receivership provides the Board of Managers with an alternative to raising common charges and/or imposing a special assessment on unit owners who are meeting their obligations to the condominum.

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 has extensive experience in drafting architectural, construction and management contracts. He also has substantial experience in admiralty law, and has been designated a Proctor Member of the Maritime Law Association, a senior designation given based on experience and qualifications. 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.*

Hiring a Risk Manager (continued from page 1)

form issued by the insurer's agent (not a broker) may be relied upon against an insurer.

The form is at most a photograph of insurance at one moment in time. It does not speak to the future. An insurer may terminate a policy early for nonpayment of premiums, or for certain other limited reasons.

When an incident happens, the risk manager can ensure that proper notice is given to all applicable insurers including an insurer providing coverage to an additional insured. Failing to do so can have monetary consequences. For example, on a New York City public works contract, if the City fails to notify an insurer providing it additional insured coverage and the insurer declines coverage because it did not receive proper notice, then the City may withhold from the contractor's earned requisitions monies to pay for a threatened claim arising out of the incident. Sometimes it is in the contractor's best interest to notify an insurer on behalf of a sleeping owner.

To keep track of all these insurance issues when planning for a construction project, an owner should consider assigning an employee to the dedicated task of administering insurance during construction. The need for a full-time risk manager will vary, of course, depending on the size of the construction project. While painting the laundry room may not merit a full time risk manager, building a 45 story hotel may. ■

When an incident happens, the risk manager can ensure that proper notice is given to all applicable insurers including an insurer providing coverage to an additional insured. Failing to do so can have monetary consequences.

About the author: *Eugene H. Goldberg is an associate at Gallet Dreyer & Berkey, LLP. He handles complex litigation involving construction matters, insurance coverage, professional malpractice claims involving architects and engineers, surety bond claims, and general liability claims. He also drafts and negotiates contracts relating to the construction industry. Mr. Goldberg has published numerous articles in legal journals, and is the former editor of the New York State Bar Association Construction and Surety Division Newsletter. Mr. Goldberg can be reached at ehg@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

Marc J. Luxemburg
mjlh@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

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

Three Commonly Asked Wage and Hour Law Questions

By: David T. Azrin, Esq.

The following are answers to three commonly asked wage and hour law questions, for New York employers:

1. CAN I USE UNPAID INTERNS?

Yes, but only in very narrow circumstances, where the intern is truly being used to provide training for the benefit of the intern and not to do work that would otherwise be done by a paid employee.

> "if the employer is providing job shadowing opportunities where the worker learns certain functions under the close and constant supervision of regular employees, but performs no or minimal work, this type of activity is more likely to be a bona fide training program."

Employers need to be particularly careful, because government regulators have indicated they are interested in increasing enforcement action in this area, and plaintiffs' lawyers have been busy filing private class action lawsuits. In March this year, a class action lawsuit was filed in New York federal court against magazine publisher The Hearst Corporation for allegedly using unpaid interns as messengers, delivery people, assistants and secretaries. And last fall, a class action lawsuit was filed in New York federal court against Fox Searchlight Pictures for allegedly using unpaid interns to perform the work of bookkeepers, production assistants, secretaries and janitors on their films.

U.S. Department of Labor guidelines provide that an employer cannot use an unpaid intern — without violating the minimum wage laws — unless all of the following factors are met: 1) the trainee is receiving training similar to what the trainee would receive in a vocational school or academic program; 2) the trainee does not displace regular employees; 3) the training is for the benefit of the trainee; 4) the employer derives no immediate advantage from the trainee's activities, and on occasion the trainee may actually impede the employer's operations; and 5) the trainee understands he/she is not necessarily entitled to a job at the end of the training, and that the program is unpaid.

The third and fourth factors are the ones that are most commonly overlooked by employers, and most likely to cause potential legal problems.

The guidelines explain, "if the workers are engaged in the primary operations of the employer and are performing productive work (for example, filing, performing other clerical work, or assisting customers), then the fact that they may be receiving some benefits in the form of a new skill or improved work habits is unlikely to make them trainees given the benefits received by the employer."

On the other hand, the guidelines explain, "if the employer is providing job shadowing opportunities where the worker learns certain functions under the close and constant supervision of regular employees, but performs no or minimal work, this type of activity is more likely to be a bona fide training program."

New York Department of Labor guidelines impose additional requirements. They require that: 1) training must be performed under the supervision and direction of people who are knowledgeable and experienced in the activity; 2) interns may not receive employee benefits such as insurance; 3) the training must provide the intern with skills to work in any similar business, and not just the employer offering the program; and 4) advertisements for the position must clearly focus on education or training elements, and not on employment.

2. ARE EMPLOYERS REQUIRED TO PROVIDE A CERTAIN NUMBER OF PAID SICK DAYS, VACATION DAYS, OR A CERTAIN AMOUNT OF BREAKS?

There is no legal requirement to provide an employee with any number of paid sick days or vacation days, assuming an employee is non-union and does not have any written employment agreement which addresses the issue. Of course, if there is an announced policy, it should be followed in a non-discriminatory manner.

Also, if the company has 50 or more employees, the employer is required under the federal Family and Medical Leave Act to provide up to 12 weeks of unpaid medical leave each year to employees who have been working for the company for at least one year.

Regarding breaks and meal periods, for non-factory employees working more than six hours during a normal workday (starting in the morning and ending before 7 p.m.), New York law only requires a half hour break sometime between 11 a.m. and 2 p.m. No other breaks or rest periods are legally required.

3. DO EMPLOYERS HAVE TO GIVE ANY NOTICE OR PAY ANY SEVERANCE TO A TERMINATED EMPLOYEE?

No. An employer is not legally required to give any advance notice or pay any severance to a terminated employee (assuming that the employee is an "at-will" employee, there is no union agreement, and there is no written employment agreement which addresses the issue).

Nevertheless, even though it is not legally required, offering severance can be useful for a number of reasons, including maintaining good morale for remaining employees, and offering something in return for asking the employee to sign a release. ■

CFPB Report Card

(CONTINUED FROM PAGE 2)

The Bureau is also investigating the possibility of requiring lenders to use simplified loan disclosure forms and has promised to step up enforcement against lenders whose practices discriminate against consumers. Payday lenders — who make short term high interest loans — are also in the cross hairs, with the CFPB issuing examination procedures for its staff to use when examining legal compliance by those companies.

At a recent meeting of the Banking Law Committee of the NY State Bar Association, a representative of the CFPB acknowledged that the Bureau has virtually unlimited authority to prohibit any consumer financial transactions that it finds inappropriate. At the same time, the representative insisted the CFPB would never attempt to micromanage consumer financial products, nor would it seek to impose its view of fairness on the financial industry. Only time will tell. ■

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 has taught employment law courses for small businesses for the City of New York Business Solutions program. He has been named one of the top 125 franchise attorneys in the country by* Franchise Times *magazine. Mr. Azrin can be reached at dta@gdblaw.com.*

Cooperatives and Condominiums are at Risk for Liability for Accidental Injuries in the Gym

By: Marc J. Luxemburg, Esq.

A recent case demonstrates that cooperatives and condominiums may be held liable for accidental injuries occurring in the gym (or health club, or exercise room) despite the existence of a waiver of liability signed by the gym user.

In *Roer v. 150 West End Ave. Owners Corp.,* The Plaintiff stated in his Complaint that, while exercising on a treadmill in the gym, he was caused to fall and injure himself due to a loose exercise ball. The Plaintiff claimed that his injuries were caused by the negligence of the Co-op and another shareholder in the gym. He claimed the Co-op failed to take reasonable measures to ensure that the exercise ball would be secured when not in use; and that the other shareholder was negligent in her placement of the exercise ball in proximity to the treadmill that the Plaintiff was using.

A video surveillance camera was operating in the gym at the time of the accident. The video shows the Plaintiff jogging on a treadmill. A knee height exercise ball is in a stationary position immediately to the right of the Plaintiff and his treadmill. The other shareholder, who is also in the gym, rolls the ball out of her way and towards a weight machine several feet behind the treadmill. The ball slowly rebounds back towards the Plaintiff's treadmill, to the point it is immediately behind the treadmill and physically touching the belt of the Plaintiff's treadmill. Slightly less than one minute later, the exercise ball gets sucked under the belt of the treadmill, and the rear of the treadmill is lifted a couple of inches, propelling the machine forward several feet where it hits the wall and causes the Plaintiff to fall.

The Court stated that in order to recover in a claim for negligence, a plaintiff must show that there existed a duty on the part of the defendant owed to the plaintiff, and that the defendant breached this duty. The claim was that the Co-op had a duty to secure the exercise ball in order to prevent it from moving freely about the gym and becoming a hazard. The Co-op's summary judgment motion to dismiss the case was denied because the issue of whether the occurrence which caused the Plaintiff's injuries was caused by a breach of duty by the Co-op presented a disputed issue of fact which had to be resolved at a trial, and thus could not be resolved by the Court on a motion for summary judgment.

The Court stated that a jury might find that it was foreseeable that placing an exercise ball in proximity to a moving treadmill, where it could come into contact with the belt and disturb the treadmill's functionality, posed a danger to the person using the treadmill. Similarly, a jury could find that the Co-op's failure to provide storage racks or other means to prevent the free movement of the balls throughout the gym was a proximate cause of the Plaintiff's injuries.

The Court rejected the Co-op's argument that the gym membership contract signed by the Plaintiff relieved the Co-op of any liability. The contract provided:

"The undersigned hereby waives to the fullest extent permitted by law any and all claims which I/we may have against the Corporation, its directors, officers, agents and employees of any associated party, arising out of our use of the facilities, and injuries sustained in, or near the Exercise Room premises."

The Court held that in order for a waiver to insulate the Co-op from liability for its own negligence, such waiver must contain plain and unmistakable language to that effect, and that even if the waiver could be read to provide that the Co-op is not liable for any claims resulting from its own negligence, such a waiver would be unenforceable under *General Obligations Law §5-326,* which provides that any contractual provision which exempts the owner or operator of a gymnasium from liability for damages caused by its own negligence is "void as against public policy and wholly unenforceable."

A reading of the statute shows that it was aimed at commercial gymnasiums operated for profit, and not at exercise rooms in cooperatives and condominiums. Unfortunately, many gym contracts in

The waiver may not sufficiently place the burden on the exercising shareholder to take any action to avoid or minimize possibly hazardous conditions in the exercise room, and thus does not minimize the risk of having the court treat the Co-op as having a duty to take care of the shareholder.

use by coops and condos were based on forms used by commercial gyms, and appear to create an arms-length relationship between the Co-op as operator and the shareholder as user. As a result the waiver may not sufficiently place the burden on the exercising shareholder to take any action to avoid or minimize possibly hazardous conditions in the exercise room, and thus does not minimize the risk of having the court treat the Co-op as having a duty to take care of the shareholder.

In order to avoid the result in this case, we recommend revising existing forms to emphasize that the exercise room is operated on a non-profit basis, that there is no supervision of the exercise room, that the user assumes the risk of and is solely responsible for insuring there are no hazardous conditions in the exercise room, and that the Co-op has no duty to the shareholder to inspect the exercise room, in addition to the waiver of liability.

While there is no guarantee that a court will recognize that an exercise room in a cooperative should not be treated as a commercial gym, a proper form of waiver agreement may help to sway the court to recognize the difference. ■

About the author: *Marc J. Luxemburg is a partner at Gallet Dreyer & Berkey, LLP. His practice focuses on real estate transactions, cooperative and condominium law, and real estate litigation. Mr. Luxemburg represents numerous buildings and sponsors in the New York City area. He is the President of the Council of New York Cooperatives and Condominiums, a non-profit membership organization with more than 2300 cooperative and condominium members, which provides educational activities and monitors legislation which affect its members. He has taught numerous seminars on the legal aspects of operating cooperatives and on the role of the Board of Directors. Mr. Luxemburg can be reached at mjlh@gdblaw.com.*

Mold: a Common Result of Water Infiltration—Not to be Ignored

By: Morrell I. Berkowitz, Esq.

Over the last several years, more and more attention has been given to the effects of water infiltration on living conditions, and in particular to the development of toxic substances that grow behind walls, under floors, behind radiators and especially above ceilings.

Just as you would not leave an ongoing leak unrepaired, you should not leave toxic substances growing in homes unremediated.

Companies specializing in testing for, and removing, such substances have become common resources utilized by managing agents and cooperative and condominium boards and the attorneys who represent them. Insurance companies have developed special endorsements to home insurance policies specifically providing for mold remediation, and the New York City Health Department has promulgated regulations requiring removal by qualified personnel when discovered.

Courts have also begun to address claims by individuals who are affected by substances that are discovered in their homes or apartments and left untreated or unremoved. This commonly occurs when a roof leaks, or other water infiltration occurs, and the building owner or management neglects to timely investigate the conditions behind walls, above ceilings and the like.

While the effects on individuals differ by length of exposure and type of bacteria, mold or other fungi, several things are absolutely clear.

If there is a dark environment exposed to moisture, then mold and other substances:

- WILL likely grow;
- will not go away by itself;
- will only get worse over time; and
- must be properly removed by persons experienced and qualified to do so.

Indeed, our firm recently handled a situation in a cooperative apartment where management failed to address the water infiltration that collected under the floor. Subsequently, when the floor boards were lifted, it was discovered that huge amounts of mold spores had actually flowered!

Our firm recently won an appeal in Manhattan in which the appellate court held that a woman could pursue her claims against a building owner for the ill effects she suffered after demolition of the basement below her apartment led to the infiltration of a "cocktail" of nearly a dozen different types of toxic mold and metals. The Court agreed that the scientific community has developed a recognized

The practical lesson for individuals who live in apartments, for managing agents, and for cooperative and condominium boards, is to promptly investigate if there is moisture or dampness behind walls, under floors, or above ceilings once water infiltration has occurred.

methodology for analyzing the effects of substances on people's health, rejected a "numbers" approach requiring a certain amount of bacteria to exist to prove the substances caused the ill effects, and concluded that injured people have a right to prove their claims before a jury.

The practical lesson for individuals who live in apartments, for managing agents, and for cooperative and condominium boards, is to promptly investigate if there is moisture or dampness behind walls, under floors, or above ceilings once water infiltration has occurred. Assumptions should be made that if there is moisture, and if those conditions existed for even a few days, it is possible that something is growing and needs to be professionally removed. Covering it up with plaster, new paint, or simply ignoring it could adversely affect the health of occupants, and in the long term be infinitely more costly.

Just as you would not leave an ongoing leak unrepaired, you should not leave toxic substances growing in homes unremediated. ■

About the author: *Morrell I. Berkowitz is a partner in our real estate litigation department. He handles a variety of disputes, involving partnerships, leases and sale transactions, disputes between co-op or condominium boards and their shareholders or unit owners, and disputes with professional contractors. He has been co-chair of the New York County Lawyers Association Supreme Committee since 2008. Mr. Berkowitz can be reached at mib@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

GALLET DREYER & BERKEY, LLP

ATTORNEYS AT LAW

845 THIRD AVENUE
NEW YORK, NY 10022-6601