

IGDB LEGAL UPDATE

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WHEN SPONSORS TRANSFER CONTROL OF CONDOMINIUMS TO UNIT OWNERS — ADVICE TO NEW BOARD MEMBERS

By: Peter R. Massa, Esq.

MANY CONDOMINIUMS BUILT DURING THE CONSTRUCTION BOOM HAVE RECENTLY TRANSITIONED FROM BEING CONTROLLED BY THE SPONSOR THAT ORIGINALLY DEVELOPED AND BUILT THE CONDOMINIUM TO BEING CONTROLLED BY THE RESIDENT UNIT OWNERS. ONCE THE SPONSOR TURNS OVER CONTROL OF THE BUILDING TO THE UNIT OWNERS, AN ELECTION IS HELD IN WHICH

unit owners can run for the board of managers, which controls the condominium's affairs. These first new board members have important responsibilities and make several important decisions that will chart the building's future.

The new board must hire competent professionals to assist in determining whether the sponsor met all of its obligations under the condominium's offering plan, and to guide the board to take appropriate actions where the sponsor did not meet its obligations.

If the building was newly constructed or had substantial renovations, the new board should hire an independent engineer or architect to review the construction and identify any deficiencies. The board should carefully examine whether the construction met the requirements of the building code and the condominium's offering plan.

The new board must select a managing agent and a condominium accountant. The

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NEW LAW REQUIRES EMPLOYERS TO GIVE ANNUAL PAY NOTICE TO ALL EMPLOYEES STARTING JANUARY 2012

By: David T. Azrin, Esq.

STARTING JANUARY 2012, NEW YORK EMPLOYERS MUST GIVE AN ANNUAL PAY NOTICE TO EVERY EMPLOYEE EXPLAINING THEIR PAY RATE AND OBTAIN A SIGNED ACKNOWLEDGEMENT, BETWEEN JANUARY 1 AND FEBRUARY 1 EACH YEAR, EVEN IF THEIR PAY RATE HAS NOT CHANGED. IT ALSO MUST BE GIVEN TO NEW EMPLOYEES AT THE TIME OF HIRE.

The notice can be given electronically, as long as the employee acknowledges receipt of the notice, the employee can print the notice, and the employer keeps a copy of the notice and acknowledgement. The notice must be in English and the employee's primary language if other than English. The employer must keep a copy of the notice and acknowledgment for six years.

The notice must state: 1) the employee's rate of pay, 2) how the employee is paid (i.e., hourly, salary, commission), 3) the designated regular payday, 4) the employer's name, business name, address, and phone number, and 5) if it applies, the overtime wage rate and any allowances (tip credits or meal allowances) used to comply with the minimum wage.

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ATTORNEYS AT LAW

GETTING YOUR FREE CREDIT REPORT — NO STRINGS ATTACHED

By: Jay L. Hack, Esq.

CREDIT REPORTS ARE USED FOR MORE THAN JUST EVALUATING NEW LOAN APPLICATIONS. IF YOU HAVE A HOME EQUITY LINE OF CREDIT, ADVERSE INFORMATION IN A CREDIT REPORT COULD AFFECT YOUR LINE OF CREDIT.

Credit reports can also be used for employment purposes, to evaluate whether you can obtain insurance, and even to determine whether you can obtain some government-issued licenses. To protect against errors, you should review your credit report periodically. Federal law lets you easily get a copy for free, no strings attached.

Federal law requires that each national credit bureau give you a FREE copy of your credit report once each year. The three national credit bureaus, Equifax, Experian and Transunion, have set up an Internet site to deliver the free credit reports. You do not have to get "Credit Card Fraud Protection," sign up for a monitoring service, or pay for any other product or service to get your free report.

If you want your free credit report, just go to www.annualcreditreport.com, choose one of the three companies, and follow the directions. Based on information in your credit report, they will ask you multiple difficult security questions to make sure that you are who you say you are. I was asked the model of the car I bought two years ago and which bank made me a mortgage loan five years ago (the correct answer to that one was "None of the Above"). After you answer the questions so the company veri-

Federal law lets you easily get a copy for free, no strings attached.

fies your identity, you can view, download and print your credit report. If you find any errors, follow the credit bureau's instructions to dispute the incorrect information. If you dispute anything in your credit report, Federal law requires that the credit bureau follow specific procedures to verify the accuracy of the information.

There are three national credit bureaus, so you can rotate your Internet requests among them and get a free credit report every four months. If you request a report and find an error, you should dispute the error. When it is corrected, you should check the other two companies and make sure they do not have the same error.

When you ask for your free report, the company will offer to sell you your credit score, but it is optional. Refusing to buy your credit score will not affect your ability to get a free credit report.

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COMPANIES USING SALES REPRESENTATIVES — IMPORTANT ISSUES TO CONSIDER

By: Aaron N. Wise, Esq.

COMPANIES USING SALES REPRESENTATIVES MUST HAVE A CAREFULLY DRAFTED WRITTEN AGREEMENT IN PLACE WITH THEIR SALES REPRESENTATIVES, TO PROTECT THE COMPANY FROM LIABILITY AND AVOID DISPUTES.

The following are a few points to bear in mind in connection with such contracts:

COMMISSION, RATE AND BASIS

These terms must be carefully negotiated and drafted in the agreement. The agreement should answer such questions as: On which sales does the sales representative earn its commission and at what point in time? If the principal has more than one sales representative for a particular territory, who earns what commissions on which sales?

SALES REPRESENTATIVE ACCEPTING ORDERS

Generally speaking, a company should avoid allowing its sales representatives to accept orders for its goods (or services). Allowing a sales representative to accept orders can result in legal problems for the principal, particularly a foreign company. The company should be the only one to accept (or decline) orders. Those points should be clearly specified in the agreement; and the company should, in actual practice, adhere to them.

ADVANCES

If the company plans to allow a sales representative to receive advances against future commissions, the contract should be very clear that these are advances to be repaid within a specified time — for example, if earned commissions do not equal the advances.

NON-COMPETITION PROVISIONS

Whether such clauses are valid and enforceable will depend on the applicable U.S. state law. In some states, non-competition clauses on the representative may not be enforceable at all. In others, including New York, they are enforceable subject to certain requirements and limits. Clauses prohibiting the representative's disclosure/use of the company's confidential information after the agreement ends, and clauses prohibiting the representative from soliciting customers of the company or the company's employees after the contract ends may, if properly drafted, be enforceable.

IS THE REPRESENTATIVE AN EMPLOYEE OR INDEPENDENT CONTRACTOR?

If the representative is an individual, it is quite possible that he/she will be legally characterized as the company's "employee" for U.S. legal and tax purposes. Simply writing in the contract that he/she is not the company's employee probably will not do the trick. There are specific rules governing when an individual is or is not the "employee," rather than an independent contractor. If, in fact, the individual should successfully claim he/she is an employee and that certain payments should have been made to him or on his behalf by the "employer" that were not made, the "employer" may have serious tax and other liabilities. Foreign companies may not want to have any U.S. employees soliciting and taking orders for good or services on its behalf within the United States for tax liability reasons as well.

DISPUTE RESOLUTION

The agreement should address where and how disputes will be resolved. Often times, the contract will include an arbitration clause which will dictate that disputes must be resolved by private arbitration rather than be decided by a judge or jury.

Foreign companies may not want to have any U.S. employees soliciting and taking orders for good or services on its behalf within the United States for tax liability reasons.

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CONTROL OF CONDOMINIUMS (CONTINUED FROM PAGE 1)

If the building was newly constructed or had substantial renovations, the new board should hire an independent engineer or architect to review the construction and identify any deficiencies.

managing agent will be responsible for the day to day management of the building. The board should ensure that the managing agent is independent from the sponsor. Many sponsors install managing agents that are affiliated with the sponsor. Sometimes, such managing agents do not always put the resident unit owners' best interests first.

The same theory holds true for the condominium's accountant. Once the first board takes control, it is important to learn whether the sponsor spent the condominium's money properly. An independent

managing agent and accountant should review all expenditures of condominium funds by the sponsor and its affiliated managing agent, to ensure the monies were spent properly on condominium projects for which the sponsor was responsible.

Once the board has the appropriate information to determine whether there was any improper conduct by the sponsor, either by misappropriation of funds or faulty construction, it should consult an attorney to review its options for recovery. In many instances, the sponsor has used a shell enti-

ty with no other assets, and by the time the board speaks to an attorney, the sponsor no longer owns any units in the building. As a result, filing a lawsuit and getting a judgment against the sponsor may not result in the board seeing any money. We have found that in disputes with sponsors, typically the best method is to try to negotiate with the sponsor and, where necessary and appropriate, to bring complaints to governmental agencies, such as the New York State Attorney General and the Department of Housing Preservation and Development.

About the author: Peter R. Massa is an associate at Gallet Dreyer & Berkey LLP. His practice focuses on real estate law, corporate law, and cooperative and condominium law. He handles real estate transactions, commercial leasing matters, cooperative and condominium governance issues, and commercial mortgage transactions. Mr. Massa can be reached at prm@gdblaw.com.

ANNUAL PAY NOTICE

(CONTINUED FROM PAGE 1)

If an employer wants to reduce an employee's pay rate during the course of the year, the employer must give the employee at least seven days advance written notice and obtain a signed acknowledgment before making the change. No advance notice is required before increasing pay.

The new law requires that every pay stub must include detailed information including the employee's name, the employee's pay rate, how the employee is paid (i.e., hourly, salary, commission), regular and overtime hours worked (if paid hourly), dates covered

by the payment, gross pay, deductions and allowances, and employer's name, address and phone number. This information can be provided electronically instead of in writing, as long as the employee can print it out and the employer keeps a copy.

The Department of Labor can impose penalties for non-compliance, and employees can sue for violations.

Further details and forms can be found on the Department of Labor website, at: <http://www.labor.ny.gov/workerprotection/laborstandards/workprot/lshmpg.shtm>.

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COOPERATIVES REFINANCING THEIR MORTGAGES — KEY ISSUES TO CONSIDER CONCERNING BANK COMMITMENT LETTERS

By: Marc J. Luxemburg, Esq.

WITH INTEREST RATES AT THEIR CURRENT LOW LEVELS, MANY COOPERATIVES HAVE BEEN LOOKING INTO REFINANCING THEIR EXISTING MORTGAGE, EVEN IF IT HAS SEVERAL YEARS TO RUN AND THERE IS STILL A PREPAYMENT PENALTY TO BE PAID. THE REDUCTION IN RATES MAY WELL MAKE IT ECONOMICALLY BENEFICIAL TO REFINANCE AT THIS TIME.

The bank will require the filing of an extensive application, and after some due diligence a proposed commitment letter will be issued.

It is very important to send the commitment letter to your attorney, because it contains many terms that can be harmful to the cooperative, and these terms may be eliminated or modified by negotiation with the bank before the commitment is signed. Once the commitment is signed, the cooperative is locked in. It is very difficult to negotiate the terms of the final mortgage documents once the commitment has been signed.

Some of the more significant issues that the cooperative's attorney may negotiate include:

- Is the good faith deposit refundable? Many commitments provide that if the loan does not close the bank gets to keep the good faith deposit. This should be changed so that the deposit is refundable unless the cooperative willfully defaults under the commitment.
- Is the cooperative required to escrow real estate tax or other payments with the bank? Commitments typically require such escrows that may also include insurance premiums, and water and sewer charges. This will tie up hundreds of thousands of dollars of operating funds with

no interest being paid, and the bank does not escrow them at all — in the event of a default they can be used to pay down the loan if the bank so elects. This obligation may be reduced or eliminated.

- How much of a reserve fund is the cooperative required to maintain at the bank? Banks are now asking that substantial reserve funds be deposited with them — often at low interest rates. The amount of the required deposit and the interest rate may be negotiable.

It is very difficult to negotiate the terms of the final mortgage documents once the commitment has been signed.

- Is secondary financing prohibited? This is often the case, and the cooperative needs to either have such financing allowed up to a cap, or have the bank offer such financing on terms to be agreed in the commitment.
- What happens to insurance proceeds in the event of damage to the building? Most mortgage documents provide that use of insurance proceeds in the event of damage to the building is within the discretion of the bank, and the bank has the right to use such proceeds to pay down

the loan (and charge a prepayment penalty) instead of using them to repair the building, leaving the cooperative with a damaged building and no insurance proceeds to pay for repairs. The use of these funds needs to be negotiated.

- Is there a limit on contracts that can be signed by the cooperative without the bank's consent? Often the mortgage documents will prohibit the cooperative from signing any contract in excess of \$50,000 without getting consent from the bank. This adds unnecessary time and expense to any repair or Local Law 11 work. The limit on the size the contract that can be signed is negotiable.

- Is the bank's consent required for amending the terms of the proprietary lease, combining apartments or other alterations, or for entering into any commercial leases or licenses?

There are many other clauses that can be detrimental to the cooperative that can be improved or eliminated by negotiation. The legal fees incurred in negotiating the terms of the commitment are the most important fees in the transaction. While this may add to the overall cost of the closing, it is money well spent.

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