GDB LEGAL UPDATE

PROVIDING CURRENT INFORMATION ABOUT LEGAL DEVELOPMENTS FOR OUR CLIENTS AND FRIENDS SUMMER 2010

Setting Minimum Resale Prices — Don't Even Think About It

By David T. Azrin, Esq.

Franchisors and manufacturers who want to maintain control and uniformity over their products may be tempted to dictate minimum resale prices to their franchisees or distributors.

A U.S. Supreme Court decision three years ago appeared to signal that a manufacturer might be allowed to set minimum resale prices. In the Leegin decision, the Supreme Court reversed 80 years of precedent and decided that it was no longer an automatic violation of federal antitrust laws to do so. Rather, such practices would be examined on a case by case basis under a much more relaxed reasonableness standard. Because states often try to conform their antitrust laws to federal laws, it was believed that this decision might spell the end of the prohibition against minimum resale price maintenance. But recent events at the state level have made it clear that franchisors and manufacturers should not set minimum resale prices. Although it is not an automatic violation of federal law, it is still an automatic violation of many state laws.

On March 29, 2010, New York's Attorney General sued Tempur-Pedic, a leading mattress manufacturer, to impose penalties against it for engaging in alleged resale pricing policies, in violation of New York state law which prohibits vendors and producers from setting minimum resale prices. The Attorney General said that Tempur-Pedic's agreements with its authorized retailers prohibited them from engaging in discounting practices such as "free gifts with purchase," "no sales tax," and "gift cards, rebates,

Continued on page 2

Warning: Checks Marked "Payment in Full"

By Jay L. Hack, Esq.

A person who owes money sometimes sends a partial payment check, marked "Payment in Full," hoping that the recipient will deposit the check and accept it as full payment. Clients often ask – can I cross out the words "Payment in Full," deposit the check, and keep my right to collect the rest? The answer depends on what state's law applies. In most states, crossing out the words will have no effect. The recipient must either reject the check or lose the remainder of the claim. New York is the odd man out. Here, if a recipient crosses out "Payment in Full" and writes "under protest", "without prejudice", or "with full reservation of rights" on the check, the recipient can deposit the check without losing its right to go after the remaining balance, so long as the recipient has not otherwise agreed to accept the check as full payment.

New York courts describe a partial payment check as an "exquisite form of commercial torture." As a result, the courts allow the recipient to reserve rights by noting that on the check, but the recipient must be diligent. A conspicuous "Payment in Full" notation is ignored at the recipient's peril. If that check is issued in good faith, and you deposit it without a reservation of rights, the remainder of the claim disappears once the check is collected.

But what if you owe money and you want to pay what you reasonably believe you owe, but the other party unfairly demands more? How do you pay without getting sued for more later? You must get an explicit agreement of the other party to accept the check as full payment before you send it, and you should get it in writing. The alternative is to conspicuously write "Payment in Full" on the check and hope that the recipient deposits the check without reserving his rights.

Continued on page 3

In this issue

SETTINE MINIMUM RESALE PRICES BY DAVID T. AZRIN 1
WARNING: CHECKS MARKED "PAYMENT IN FULL" BY JAY L. HACK 1
FILING MECHANIC'S LIENS FOR TENANT WORK BY RANDY J. HELLER 2
CONDOMINIUM AND COOPERATIVE ANNUAL MEETINGS AND ELECTIONS BY DAVID L. BERKEY 3
CONTACT INFORMATION 4

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Filing Mechanic's Liens for Tenant Work By Randy J. Heller, Esq.

The rules involved in filing and enforcing mechanic's liens, confusing enough under ordinary circumstances, get even more complicated when the construction work is performed not for the building owner, but for a tenant. This is so whether the work is done for a small residential tenant or for a major commercial establishment renting space in a skyscraper.

There is nothing wrong, per se, with filing a mechanic's lien against a tenant's interests in the property. The Lien Law defines a tenancy as an interest in property and the tenant as an "owner" of that interest. A recent case reminds us, however, that even though the lien may be recorded against the block and lot of the building as a whole, the lien generally may be enforced only against the tenant and not the landlord.

The Lien Law provides that a landlord may be liable for a mechanic's lien filed for tenant work only where the landlord has "consented" to the work. But the consent envisioned by the law is not merely the approval of the plans and specifications. Something more is required — consent to pay the contractor if the tenant does not. Where the landlord is not a party to the construction contract and does no more than provide the consent required under the lease, the landlord is not liable under the lien.

The result of this holding is that the filing of a lien against a tenancy offers scant legal benefit. Foreclosing on a tenancy offers little of value to the lienor and the landlord can rarely be found liable for work ordered by the tenant. Alas, the true value of a mechanic's lien under those circumstances rests in the pressure that the landlord inevitably inflicts upon the tenant to "make the lien go away" lest they be evicted for breach of their lease. This practical benefit is not insignificant and keeps the lien clerks in each county quite busy docketing mechanic's liens against tenants.

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Minimum Resale Prices (continued)

coupons or other in-store credits." The Attorney General also claimed that Tempur-Pedic had advised its retailers that it "will not do business with any retailer that charges retail prices that differ from the prices set by Tempur-Pedic." The Attorney General also asserted that Tempur-Pedic had terminated retailers for discounting. The matter is still pending, but it shows that the Attorney General is not going to follow the lead of the U.S. Supreme Court. Rather, the Attorney General still considers minimum resale pricing to violate state law.

Earlier this year, the California Attorney General sued DermaQuest, a seller of beauty-care products, claiming that it had entered into illegal price fixing agreements with its distributors, in violation of the state's antitrust and unfair competition laws. The California AG alleged that DermaQuest had entered into contracts providing that its retail distributors may not resell its products below its suggested retail prices. In March 2010, DermaQuest settled the action by agreeing not to enter into such agreements in the future and to pay civil penalties and legal costs.

Courts in other states, including Tennessee and Kansas, have ruled that minimum resale price maintenance may still be an automatic violation of state antitrust laws even if they do not violate federal law, and the Maryland legislature recently adopted a state law imposing a similar prohibition.

Congress is currently considering legislation that would reverse the Supreme Court's Leegin decision and again make minimum resale price maintenance a violation of federal antitrust law. In March, such a bill was reported out of the Senate Judiciary Committee.

Manufacturers who want to control prices might consider using a different business model for distribution, which cuts out the middleperson and sells directly to end users. For example, some manufacturers use selling agents or manufacturer's representatives, who merely forward customer orders directly to the manufacturer which then ships and bills the customer directly.

But if such a business model is not an option, then franchisors and manufacturers using the franchise or distribution model should continue to avoid dictating minimum resale prices.

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"Payment in Full" (continued)

(However, what is deemed commercial torture in New York is acceptable practice in most other states.) The current version the Uniform Commercial Code — a suggested model statute developed by legal scholars and adopted by most states to create a uniform national system of commercial law — gives the opposite result. In those states, a check given in good faith to satisfy a disputed claim satisfies the entire claim if the check or a writing accompanying the check conspicuously says it is offered as payment in full. The recipient cannot simply cross out the notation and write "under protest" or "with full reservation of rights."

New Yorkers taking a partial payment check from an out-of-state payor, or as part of a transaction that could arguably be considered out-of-state, must be extremely careful before depositing the check. What law will apply depends upon the facts, and if it is the law of one of the other states which have adopted the model code, then the claim for the remainder of the claim may be lost, even if you cross out the notation.

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Condominium and Cooperative Annual Meetings and Elections — Practical Tips

By David L. Berkey, Esq.

We have just completed the annual meeting season, when most of our cooperative and condominium clients conduct their annual meetings of shareholders or unit owners. The same issues continue to arise every year, so here are a few pointers to follow to make annual meetings run smoothly and to avoid election challenges.

- **Prepare well in advance for your meeting.** Review your nomination and election procedures to determine if you will require potential candidates to be interviewed by a nominating committee, in order to be on a slate or candidate list that is recommended to shareholders or unit owners. If you will require a resume or a candidate statement to be submitted, please advise your shareholders/unit owners what form those documents should follow and what deadlines must be met in order to have the resume and/or statement circulated by the board to all shareholders or unit owners as part of the annual meeting materials.

- **Determine what type of proxy form you will be using.** Will it be a general or a directed proxy? Will one or more persons be designated as the proxy holder, will you leave a blank for the proxy grantor to select his own proxy, or will you designate a group (such as the current board) to vote the proxy as it sees fit. Section 609 of New York's Business Corporation Law, which allows proxy voting, does not require that a particular form of proxy must be used and allows electronic transmission of proxies, provided that it can be reasonably determined that the transmission was from the proxy grantor. If email proxies are used, we suggest that the proxy grantor submit a copy of his driver's license together with the emailed proxy for identification purposes.

- **Determine whether you will permit nominations from the floor.** If you will, then consider using a general form of proxy so the proxy holder can vote for any nominee, including those nominated from the floor.

- **Will you appoint inspectors of election and, if so, who will they be?** Some buildings always use their managing agent representatives to count the votes. Others have shareholders

Continued on page 4

Meetings and Elections – Practical Tips (continued)

appointed as inspectors of election and some use their accountants to count the votes. Inspectors should sign an oath that they will fairly and impartially carry out their responsibilities. After the ballots are counted, the inspectors should also prepare a written report of the election results.

■ **Give advance notice of election procedures.** Some clients have set forth their election procedures in their by-laws. Others are less formal and their boards adopt resolutions incorporating the procedures that govern their annual elections. In either case, notify all shareholders or unit owners well in advance of the meeting of all procedures adopted for the annual meeting election. Apply your procedures to all shareholders or unit owners equally to avoid complaints of discriminatory treatment and challenges to your election procedures.

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