GDB
Legal Update
PROVIDING CURRENT INFORMATION ABOUT LEGAL DEVELOPMENTS FOR OUR CLIENTS AND FRIENDS SPRING 2010

The Problem of Second-Hand Smoke By David L. Berkey, Esq.

Many of our cooperative and condominium clients have been burdened with the problem of second-hand smoke. When occupants smoke inside their own apartments, smoke sometimes migrates into neighboring apartments and public corridors. Most cooperative proprietary leases and condominium by-laws and house rules prohibit occupants from making odors that are offensive to their neighbors. However, boards are often loath to intervene in these private disputes. The failure to act can subject the cooperative and condominium boards to suits and damages for permitting a continuing nuisance. Offended owners have also successfully brought suits against smokers to abate the nuisance caused by second-hand smoke. The second-hand smoke problem is often correctible by sealing holes in walls, floors or ceilings, repairing defective ventilation systems and by using air purifiers that remove the offensive smoke particles from the air. If these remedies do not work, the board may consider the hot political problem of banning smoking in apartments.

Two cases illustrate the litigation hazards of board inaction. In Poyck v. Bryant, a case brought in the Civil Court of the City of New York in 2006, Mr. Poyck owned a condominium apartment and rented it to the Bryants for several years. New neighbors moved next door, who smoked constantly. The Bryants sealed their entry door, installed air filters, but could not stop the second-hand smoke from entering their apartment. The Bryants complained to the building superintendent and to the owner Mr. Poyck about the smoke seeping into their rented apartment and requested that they stop the ongoing health hazard. The owner took no action and the Bryants vacated, seeking a "healthier living environment." The owner sued for several months unpaid rent. The court determined that the owner was obligated to take steps to stop the health hazard caused by the Bryant's neighbors,

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Regulatory Policy on Commercial Real Estate Loan Workouts By Jay L. Hack, Esq.

Complying with federal bank regulatory policies on commercial mortgage loan modifications may be as important as reaching an agreement between the bank and the borrower when fashioning a loan workout. Ignoring the regulators' policy statement issued in late 2009 may doom workouts before they start.

WHAT CORE PRINCIPLES MUST BANKS AND TROUBLED BORROWERS REMEMBER?

- **The borrower must be "creditworthy," with the "willingness" and "ability" to repay.** A bank should not deal with a borrower that refuses to provide current financial information. Borrowers who fail to provide that information should expect the bank to show no flexibility in return.
- **A bank must do a "global" cash flow analysis of all borrower and guarantor debts to determine if they are creditworthy.** The borrower and guarantors must provide information to the bank so it can complete the analysis.

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In this issue

Gallet Dreyer & Berkey, LLP
ATTORNEYS AT LAW

Employment Law Changes for 2010 By David T. Azrin, Esq.

Employers should be aware of the following important changes in employment law for 2010.

NEW YORK EMPLOYERS MUST PROVIDE NEW EMPLOYEES WITH WRITTEN NOTICE OF THEIR RATE OF PAY

Effective October 2009, New York employers must provide all newly hired employees with written notice (which must be acknowledged in writing by the employee) of the employee's initial rate of pay. For employees eligible for overtime, the notice must specify the regular and overtime hourly rate. Employers should keep a copy of the signed written notice in their files.

This requirement supplements the existing requirement for commissioned salespersons that employers must have a written signed agreement which specifies how commissions are earned and how the salesperson will be paid.

FEDERAL GOVERNMENT STEPS UP ENFORCEMENT OF WAGE LAWS, INCLUDING MISCLASSIFICATION OF INDEPENDENT CONTRACTORS

Employers should expect increased government and private enforcement of the wage and hour laws, as the Obama administration has recently sought increased funding for enforcement of the federal wage laws, including stepped up enforcement against the misclassification of employees as independent contractors. The Department of Labor has also launched an awareness campaign for employees, which is likely to increase the number of private wage and hour lawsuits.

Employers should review their employment practices carefully to determine: 1) whether independent contractors should be treated as employees; and 2) whether persons treated as exempt (executive or administrative level salaried employees) should be treated as non-exempt, and therefore eligible for overtime.

FEDERAL TAX BREAKS FOR COMPANIES THAT HIRE NEW EMPLOYEES AND FOR SMALL BUSINESSES THAT PROVIDE HEALTH INSURANCE

In order to encourage new hiring, employers who hire a new employee after February 3, 2010 will receive a tax break which excuses the employer from paying the employer's matching share of social security taxes (6.2%) for wages paid in 2010, resulting in a potential tax savings of up to $6,621.60. In addition, if the company keeps the employee for at least a year, the employer can claim a tax credit up to $1,000.

To encourage employers to continue providing health care coverage for their employees, businesses with fewer than 25 full-time workers and who pay average annual wages below $50,000 can claim a tax credit up to 35 percent of premium costs in 2010 if they pay at least 50 percent of the cost of their employee health care coverage.

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Short Statute of Limitations Frustrates Building Owner's Claim against Engineer for Construction Defects By Randy J. Heller, Esq.

An owner of a six-story residential condominium on the Upper West Side learned the hard way the consequences of the short statute of limitations applicable to structural engineers. Not even a clever use of an alternative theory borrowed from medical malpractice actions could salvage its claim.

In a recent case, a structural engineer was hired by a building owner to provide engineering services for the framing of five additional floors on top of the existing six-story structure and to supervise the construction. The expansion was completed in October 2002. In the spring of 2004, leaks began to appear in the building. The engineer was called back to inspect the cracking and leaks, but determined there was no structural cause for the leaks. In June 2007, with the leaks spreading, the owner sued the engineer for breach of contract and negligence.

In its recent decision, the Appellate Division, First Department, held that the claims were barred by a three year statue of limitations. From its decision, a number of basic lessons in construction law can be learned.

Some might remember that the statute of limitations for breach of contract is six years and that the statute of limitations for engineering malpractice is three years. Which applies here? The Court held that the shorter — 3-year — statute applies.

The Court stated that the clock started ticking on the statute of limitations when the engineer completed his performance of "significant" work under the contract. Here, the engineer finished his work in 2002, so the action commenced in 2007 (after more than 3 years) was untimely.

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…it is prudent to assert your claims at the earliest possible stage, as soon as the problems appear, rather than waiting and relying upon clever theories to save your case from dismissal.

Second-Hand Smoke (continued)

and found that the warranty of habitability, which protects tenants against health hazards, applied to the second-hand smoke problem, even though the problem was caused by the neighbor who was not within the owner's control.

In Ritter & Ritter, Inc. v. The Churchill Condominium Association, a 2008 California case involving a residential apartment building that was converted to a condominium, the builder did not properly fireproof the floor penetrations in the concrete slabs and smoke and odors from the apartment below passed into the Ritter's apartment. The condominium board determined that the Ritters should have filled the holes in the concrete adjacent to their apartments and refused to perform the corrective work. In addition, the board fined the Ritters $200 per day for their failure to fill the holes. The holes could have been repaired for approximately $2700. The Ritters sued the board and each member of the board for nuisance, negligence, breach of fiduciary duty, breach of the condominium documents and other claims. The case went to trial and the jury rendered a verdict for the Ritters against the condominium (but dismissed claims against the individual members of the board). The Ritters recovered their economic losses of $4,620 and attorneys' fees of $551,000.

The lesson learned from these cases is that inaction is not a proper response to complaints of second-hand smoke. Boards of cooperatives and condominiums should investigate the causes of the problems and require the apartment owners who smoke to remedy the problem which they are causing. If the problem arises due to common area defects, the board may be required to remedy the problem itself, or consider imposing a smoking ban throughout the building.

The lesson learned from these cases is that inaction is not a proper response to complaints of second-hand smoke.

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Regulatory Policy on Loan Workouts (continued)

- **The collateral must support the workout, but a workout is not doomed just because the borrower is upside down.** The collateral value plus the financial ability of the borrower must combine to justify any modification. If the borrower has the ability to repay the debt on modified terms, then the loan "will not be subject to adverse classification" just because the value of the collateral exceeds the loan amount.
- **The bank must have support for its current estimate of collateral value.** The bank must internally adjust the appraisal to reflect market conditions. If the property is rented, the bank must collect rent data and consider the strength of tenants to evaluate collateral values. If special conditions indicate a value decline more than surrounding property, a new appraisal should be considered.
- **Satisfactory payment history indicates future payment ability.** Borrowers should not be tricked by "loan modification experts" who tell them that defaults gain leverage and sympathy. Defaults make workouts more difficult. Borrowers with difficulties should approach the bank sooner, rather than later. Once repayment under modified terms becomes unlikely, the bank should consider liquidation of collateral by foreclosure.

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Short Statute of Limitations (continued)

The owner argued that the doctrine of "continuous treatment" (borrowed from medical malpractice actions) should apply, extending the accrual date until at least the spring of 2004, because the engineer had visited the building again in 2004. Under this doctrine, the accrual of a statute of limitations is deemed to be "tolled" so long as the professional continues to supply services to the plaintiff.

The Court held that while this doctrine of "continuous treatment" might apply to construction defect claims in other cases, it did not apply in this case. The engineer's spring 2004 inspection was neither related to his original professional services, nor was it part of any ongoing services.

Reading between the lines, one gets the sense that the Court was looking to provide some closure. The lesson to be learned is that it is prudent to assert your claims at the earliest possible stage, as soon as the problems appear, rather than waiting and relying upon clever theories to save your case from dismissal.

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