

## THE CO-OP/CONDO CORNER

### What's on the Inside

### Condo Unit Owners Shielded From Individual Personal Liability in Injury Lawsuit

In *Pekelnaya v. Allyn*, the Appellate Division, First Department unanimously reversed a lower court decision and held that individual Unit Owners of a condominium were not liable for injuries suffered by a pedestrian from a fence that fell from the building's roof, which was a common element of the condominium. The Appellate Division concluded that the individual Unit Owners had no control over the roof and rooftop fence, and had no prior knowledge of any defect. The court held that the common elements of a condominium (like its roof) are solely under the control of the condominium's Board of Managers, and, therefore, only the condominium as an entity—and not the individual Unit Owners—can be held liable for any injuries arising therefrom.

**(COMMENT)**—While this ruling may seem intuitive and based on common sense, it was apparently the first time that this issue had been decided by an appellate court in New York State. This decision is very important to all condominium Unit Owners, as it overturned a lower court decision that was based on an extremely literal reading of various statutes and by-law provisions that could have wreaked havoc. This appellate ruling eliminates the dangers that could have been posed had the lower court ruling gone undisturbed.)

### Condominium Board that Borrowed Funds Without Requisite Unit Owner Consent Can be Sued by Unit Owner

In *Kwiecinski v. Sea Breeze II Condominium Association*, the Appellate Division, Second Department, ruled that a condominium's borrowing of \$52,296 for an exterior repair project without Unit Owner approval violated a provision in the bylaws that required the consent of two-thirds of the Unit Owners for any borrowing in

excess of \$50,000 during any one year. Apparently due to cash flow needs, the Board of Managers had gotten the exterior repair contractor to finance the project by allowing the condominium to pay the project costs over time. The condominium had moved to dismiss the complaint, but the Appellate Division ruled that the lawsuit could continue, in light of the apparently clear violation by the condominium's Board of Managers of the bylaws.

**(COMMENT)**—Many condominiums' bylaws contain provisions capping the amount that the Board of Managers may borrow, and/or capping the amount that the Board may spend for improvements, without Unit Owner consent. As this decision indicates, courts will enforce such provisions, and will hold condominium Boards accountable for violating their own governing documents, even when the purpose behind such borrowing is to make necessary repairs. Board members and managing agents would be well advised to become familiar with their governing documents, and to consult with counsel in interpreting them. In light of the fact that the borrowing in this case exceeded the stated cap by less than \$2,300, and actually constituted a mere payment plan to the contractor, one could surmise that the Board members may not have known that the bylaws restricted their ability to borrow, and/or did not check with their attorney.)

### Laundry Vendor That Failed to Timely Exercise a Right of First Refusal in a Co-op Laundry Lease Loses the Right to Do So

In *Inwood Park Apartments, Inc. v. Coinmach Industries Co.*, the Appellate Division, First Department held that, while a laundry vendor's right of first refusal to match the terms of a competing vendor's offer upon the scheduled expiration of a co-op laundry lease is generally enforceable, the laundry vendor seeking to exercise the

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### Special Points of Interest:

- **Avoid heat complaints to HPD by complying with temperature requirements.**
- **J-51 tax benefits are now extended to certain lead paint abatement work.**

***The Co-op/Condo Corner . . .****(Cont. from p. 1)*

right must do so within the time provided in the laundry lease, or will be deemed to have waived the right of first refusal. The Appellate Division held that to permit the vendor to exercise the right after the expiration of the stated exercise period would create, in effect, an *ad infinitum* right, which would constitute an unreasonable restraint on the transferability of real property.

**(COMMENT)**—While less common now, rights of first refusal to match terms offered by vendors seeking to acquire a laundry lease used to be fairly prevalent. Courts have typically been very careful in enforcing such rights, and have generally required that the party seeking to exercise any such right must comply strictly with all time, notice and other requirements. Cooperatives and condominiums with laundry leases that still contain rights of first refusal should be familiar with the time and other parameters attendant to such rights, and should be vigilant about a vendor's attempt to exercise such a right.)

### **Newly Adopted Co-op Subletting Rules are Binding on Shareholders Who Have Been Subletting Prior to Such Adoption**

In *Desoignies v. Cornasesk House Tenants Corp.* the Appellate Division, First Department held that a co-op Board could adopt rules imposing a 10% subletting fee, and restricting subletting to two out of any four-year period, and that such rules would be binding on a shareholder who had been subleasing her apartment cont-

inuously for more than 25 years prior to the adoption of such new rules. The Appellate Division held that the subletting restrictions were permitted under the co-op's proprietary lease and that, under the "Business Judgment Rule," such a decision by a co-op Board is immune from judicial scrutiny.

**(COMMENT)**—This decision continues the line of authority that generally affords co-op Boards great latitude in setting rules that govern internal operations such as subletting. The fact that the new rules would effectively stop a shareholder from being able to engage in a practice that had been ongoing for more than 25 years was held to be of no moment.)

### **Landlord Required to Install a Wheelchair Ramp for a Disabled Tenant**

While involving a rental apartment building, the holding in *Matter of T.K. Management Inc.* is important to cooperative and condominium Boards. In this case, the court held that the owner of the building was required to comply with the New York City Human Rights Law and install various disabled access improvements, including a ramp, for a disabled tenant, even though the tenant was residing in a rehabilitation center and was unlikely to return to his apartment without long-term assistance. The court analyzed—and agreed with—an underlying determination by the New York City Commission on Human Rights that had found that the tenant was entitled to have the access means installed, and that the installation would not constitute an undue economic hardship for the building owner. The court analyzed

the evidence of the costs of such installation and held that, in light of the (albeit small) positive cash flow enjoyed by the building owner, the owner could afford to install the requested access means.

**(COMMENT)**—This case indicates the degree to which courts generally accord great latitude to requests by persons with disabilities, and great weight to the decisions of administrative agencies that are created to protect them. A co-op or condominium that is presented with a request for disabled access should consider such a request very seriously and should try to grant them whenever feasible. A Board that denies such a request may very well be faced with a complaint of discrimination based on disability, and/or a lawsuit. All things being equal, such a complaint or suit is more likely than not to be decided in favor of the disabled person.)

This article was written by Aaron Shmulewitz, who heads BBW&G's Co-op/Condo Department. Mr. Shmulewitz represents more than 300 co-op and condo Boards throughout the City, as well as sponsors of condominium conversions, and numerous purchasers and sellers of co-op and condo apartments, buildings, residences and other properties.



Aaron Shmulewitz

## **Temperature's Down: Heat Must Come Up!**

**N**ot only have the leaves began to fall but the temperatures too! The heating season is upon us and Owners are required to maintain certain temperatures within each Tenant's Apartment. The heating season begins each year on October 1 and runs through May 31. During this eight month period,

Owners must maintain the following temperatures for both heat and hot water:

- From 6:00AM to 10:00PM, if the outside temperature falls below 55 degrees, the temperature inside an Apartment must register at least 68 degrees.

- From 10:00PM to 6:00AM, if the outside temperature falls below 40 degrees, the temperature inside an Apartment must register at least 55 degrees.
- The temperature of hot water must be maintained at or above

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**Temperature's Down . . .***(Cont. from p. 2)*

120 degrees, 24 hours a day, 365 days a year.

Failing to maintain these temperatures can result in Tenants contacting a 24 hour, seven day a week emergency hotline serviced by the New York City Housing Preservation and Development (HPD) which logs

all heat and hot water complaints and dispatches an inspector within 48 hours of the complaint being registered. Tenants can also file heat and hot water complaints with the DHCR which may result in the issuance of an order reducing the rent. The failure to maintain the proper heat and hot water levels can also result in the issuance of a violation, rent abatement and/or the imposition

of fines and other penalties.

Accordingly, with skyrocketing fuel costs, it is important to make certain that your heating systems are properly operating so that legal requirements can be met at peak efficiency.

*This article was written by Thomas Bannon, a Legal Assistant in BBW&G's Administrative Law Department.*

**Tax Benefits for Removal of Lead Paint**

**R**ecently, the City Council passed new legislation which extends J-51 tax benefits to certain lead paint removal work. By following certain procedures, an Owner can obtain valuable monetary benefits, after carrying out lead paint abatement in its building.

The legislation provides that any lead abatement work carried out after August 2, 2004 may be eligible for these tax benefits. An Owner may now obtain tax relief for all lead paint abatement work, regardless of whether a child resides in a particular apartment, as well as being applicable to lead paint abatement work carried out in a building's common areas.

It is important to note that an owner **cannot** obtain J-51 tax benefits if there is a pending lead paint violation. In other words, the City is encouraging Owners to eliminate any lead paint, before the need arises to send out a City inspector.

In order to qualify for the J-51 tax benefits, an Owner must demonstrate in its J-51 application (among other things), that:

- *It hired an EPA certified lead based paint inspector to examine the building and determine whether there is evidence of lead-based paint;*
- *If an inspector finds evidence of paint hazards, then the abatement work must be done with an EPA certified firm using EPA certified workers;*
- *After the lead work is finished, the Owner must hire an independent EPA certified risk assessor to conduct dust clearance testing;*
- *The contract must separately itemize each component on which lead base paint hazard abatement was performed and for which J-51 benefits are claimed.*

The high cost of lead paint removal is well known and the burden is placed upon a property Owner to remove the lead paint. This new legislation provides an extremely important new tool to property Owners to somewhat reduce the financial burden.

*This article was written by Martin Heistein, who practices in BBW&G's Administrative Law Department. For more information on the new law discussed in this article, please contact Mr. Heistein.*



Martin Heistein

**The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Ramifications for Commercial and Residential Owners**

**T**he bane of many an owner's existence is when its tenant files for bankruptcy. The filing for protection from creditors pursuant to the United States Bankruptcy Code (the "Code") unleashes a plethora of issues affecting an owner's rights to recover possession of the leasehold property,

as well as its ability to recover rental payments owed both prior and subsequent to the tenant's bankruptcy filing.

On April 20, 2005, President Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Reform Act"), which became effective on October

17, 2005. The Reform Act contains significant changes that will likely have a positive affect on the position of owners.

The stated purpose of the Reform Act is to curtail abuse of the existing Bankruptcy Code by individuals who run up tens of

*(Cont. on p. 4)*

### ***Ramifications for Commercial and Residential Owners***

*(Cont. from p. 3)*

thousands of dollars in credit card bills with no intention of ever paying the bill. Many real property owners are saddled with tenants who similarly abuse the bankruptcy process, to the detriment of the owner and the owner's property. It is not uncommon for a commercial or residential tenant to file for bankruptcy after the owner obtains a judgment of possession so as to hinder the landlord from recovering its property, while failing to cure any of their rental arrears.

The Reform Act is intended to make it harder for abusive debtors to be protected from their creditors by filing for bankruptcy, while striving to provide legitimate debtors with a "fresh start"—the very purpose of the bankruptcy laws (as opposed to the draconian measures of earlier times).

Below is a brief synopsis of the Reform Act as it applies to real estate. It bears noting, however, that since the law is brand new, there are no court decisions upon which we may rely. For this reason, the following discussion reflects our understanding of the Reform Act and how we *anticipate that it will be interpreted* in the near future.

#### **The Automatic Stay and Owner's Rights**

Upon filing for bankruptcy, the Bankruptcy Code imposes an automatic stay which prohibits all creditors from taking any action which would adversely affect the debtor's interest in property, including any action to collect a debt (i.e., rent owed by the debtor/tenant). When a bankruptcy petition is filed, the debtor is automatically protected by §362 of the Bankruptcy Code, which is commonly referred to as the "automatic stay" provision. This section prohibits all creditors from taking action against the debtor or property of the debtor's bankruptcy estate, without first obtaining permission of the Court—known as "lifting" the stay. Pursuant to the Reform Act, the amendments to the Bankruptcy Code, significantly

revise the effect of the automatic stay on owners, and their ability to evict residential tenants. While the automatic stay protects the debtor from being evicted from his apartment, the Code now provides an owner of residential properties with new exceptions to the imposition and/or continuation of the automatic stay.

#### **A. Pre-Petition Rental Defaults**

A new section of the Code, Section 362(b) (22), provides that an owner who has obtained a judgment of possession prior to a debtor filing for Bankruptcy may proceed to the issuance and execution of a warrant of eviction without having to file a motion with the Court seeking to lift the automatic stay.

Prior to enactment of the Reform Act, even if an owner had obtained a judgment of possession, the Bankruptcy Court rarely lifted the automatic stay as long as the debtor made timely payments of post-petition rent. In fact, many courts refused to lift the stay even where the warrant of eviction issued prior to the Tenant filing for bankruptcy.

The new law provides that if an owner of residential real property has already filed a summary non-payment proceeding against a tenant and obtained a judgment of possession, the filing of a bankruptcy petition no longer automatically stops the eviction from going forward. However, even if an owner obtains a judgment of possession before the tenant's bankruptcy filing, the owner can be barred from evicting the tenant if the tenant timely takes the following steps:

- (a) At the time the bankruptcy petition is filed, the tenant files a statement under the penalties of perjury certifying that state law would let him cure his monetary lease default by paying to the owner the overdue rent, even after judgment is entered; and
- (b) At the time the Bankruptcy petition is filed, the tenant deposits with the bankruptcy clerk, the rent which would become due during the 30 days after filing; and



- (c) Within 30 days of filing the bankruptcy petition, the tenant is required to file a second certification stating that the entire monetary default which caused entry of the judgment has been cured.

Owners can contest a tenant's certifications by filing an objection with the Bankruptcy Court. In the event that such objection is filed, the Court is required to hold a hearing on the matter within 10 days of the filing of the objection. In the event that the landlord prevails, the automatic stay is immediately vacated and the owner may proceed to eviction. If the tenant's certification is sustained, the stay remains in place.

#### **B. Endangerment of Property or Illegal Use of Controlled Substance**

The Reform Act also covers pending eviction proceedings (holdover or ejection) based on endangerment of the property or the illegal use of a controlled substance. The mechanics are similar to where the owner has a final judgment of possession in a non-payment proceeding, but here the owner does not need a final judgment of possession before the owner can avail itself of these provisions nullifying the automatic stay.

#### **Repeat Filers**

Prior to the enactment of the

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### ***Ramifications for Commercial and Residential Owners***

*(Cont. from p. 4)*

Reform Act, tenants were able to halt non-payment and holdover proceedings from going forward by filing successive bankruptcy petitions. Tenants would either withdraw one proceeding just prior to the owner obtaining an order lifting the automatic stay, or allow the petition to be dismissed by not cooperating with the various bankruptcy deadlines. The tenant would then immediately file another petition with the attendant new automatic stay being imposed, which then relegated the owner to filing another application with the court to vacate the automatic stay.

The Reform Act provides new grounds for seeking relief from the automatic stay based upon a debtor's fraudulent repetitive filings. Section 362(d)(4) provides relief from the automatic stay if the Court finds that the debtor's bankruptcy filing was part of a scheme to delay, hinder and defraud creditors that involve either of the following:

- (a) a transfer of all or part ownership of or other interests in, such real property without the consent of the secured creditor or Court approval, or
- (b) multiple bankruptcy filings affecting such property.

If the Court grants the creditor relief from the automatic stay on either of these grounds, the Order will be binding and enforceable in any bankruptcy case filed within two years of the entry date and of the order. However, a debtor may move to have the stay imposed based upon changed circumstances from those which existed when the Order was granted or for "good cause" shown.

The Reform Act specifically authorizes the filing/recording of the Order so as to give notice to any potential transferee that a subsequent bankruptcy petition filed by the debtor does not operate as a stay.

### ***Time Limitation on Tenant's Ability to Assume or Reject Commercial Leases***

Other changes included in the Reform Act include new time constraints on a debtor. Previously, Bankruptcy Code § 365(d)(4) provided a debtor with sixty (60) days to assume or reject a non-residential real property lease unless the debtor obtained an extension of time from the Bankruptcy Court "for cause." However, the courts routinely granted debtors multiple and/or lengthy extensions of time in which to assume or reject a non-residential lease. The Reform Act has modified § 365(d)(4) to provide that a debtor must assume or reject an unexpired lease of non-residential real property by the earlier of the following:

- (a) 120 days from the date of the order for relief (the date the petition was filed), or
- (b) The date of confirmation of a plan.

A debtor's failure to assume or reject a lease by such date will automatically result in the debtor's lease being rejected.

A bankruptcy judge may extend the deadline up to 90 days for cause demonstrated by the debtor. Thereafter, the bankruptcy judge may only grant subsequent extensions upon prior written consent of the owner to each subsequent extension. Thus, unless the owner's consent is secured, the maximum amount of time for a non-residential tenant to assume or reject a lease is 210 days from date the Bankruptcy petition was filed.

For property owners, the changes to § 365(d)(4) significantly decrease the amount of time an owner must wait to hear whether its lease will be assumed or rejected by a debtor.

### ***Personal Property (Cooperative Apartments and Leases)***

In New York, cooperative apartments are deemed personal property, and have leasehold characteristics (occupancy is controlled in significant

part by proprietary leases). The Code now states that the automatic stay is terminated as to personal property of an individual or of the debtor securing in whole or in part a claim, or subject to an unexpired lease (which would appear to cover cooperative apartments, as well as any residential lease), if the debtor does not timely file a statement of the debtor's intention with respect to that personal property within 30 days of the filing of the petition, subject to the debtor's ability to extend that period to assume or reject the lease under section 365 of the Code.

### **Conclusion**

This was a brief summary of some of the key Code amendments of interest to property owners. The Bankruptcy and Federal appellate courts will ultimately interpret and decide the manner in which the Reform Act sections will be implemented and enforced.

*This article was written by Daniel Altman, William Rifkin, Stewart Smith and Joshua Losardo who comprise BBW&G's Bankruptcy Department.*



Daniel T. Altman



William Rifkin



Stewart Smith



Joshua Losardo

## AN OWNER'S 2006 NEW YEAR WISH LIST

*As 2005 draws to a close, it is time to reflect on the past, while also focusing on the future. In that vein, a reflective, wistful, but eternally hopeful Jeffrey L. Goldman, a BBW&G Litigation Department partner, with tongue firmly planted in cheek, offers his wishes to property Owners for the New Year, undoubtedly based upon his experiences in the L&T trenches in years past.*



Jeffrey L. Goldman

1. May all monthly rent be paid in good funds before the rent bills are mailed.
2. May all tenants cure their defaults when notified and surrender possession in broom clean condition when their leases expire.
3. In victory, may all legal fees and costs be reimbursed by the Tenant, and if I lose (only because the Judge made a mistake), then may the court hold that the Tenant is not to be reimbursed.
4. May it not be so rare that Judges say to Tenants "You are wrong and the Owner is right."
5. May the surveillance videos that are needed to show that a Tenant is not living in his/her apartment, notwithstanding the Tenant's sworn statements to the contrary, have a secondary market on the show "Funniest Home Videos."
6. May the RGB insert a "1" before any percentage increase it proposes.
7. May the Legislature realize that it is fairer to decontrol an apartment if you make more than \$175,000.00 a year and you pay less, not more, than \$2,000.00 per month.
8. May commercial tenants accept the Owner's first draft of the Lease Agreement, agree to perform all renovations and personally guaranty all obligations.
9. May Judges deny a Tenant's Order to Show Cause. If it is too much for that prayer to be answered, how about denying the second, third, fourth . . . ?

## BBW&G NEWS

### MAY I QUOTE YOU?



**Robert Jacobs**, a BBW&G Transactional Department partner, was on a panel presented by the New York City Bar Association on Commercial Leasing. Mr. Jacobs addressed topics such as lease covenants, conditional limitations and tenant defenses.

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**Daniel Altman**, another BBW&G Transactional Department partner, lectured at NYU's Real Estate Institute's Asset Management class on Commercial Leasing. Mr. Altman covered lease drafting issues and typical problems encountered by both commercial owners and tenants.



**Magda Cruz**, who argues BBW&G's appeals, was also on a panel presented by the New York City Bar Association, addressing the concerns of legal practitioners. Ms. Cruz's recent article in BBW&G's Update regarding the Court of Appeals' decision in *Thornton v. Baron* was re-printed in the November issue of the CHIP newsletter.



**Orie Shapiro**, who principally works in the firm's Administrative Law Department, made a presentation to representatives from the Halstead Property Company regarding practice before the Environmental Control Board. Mr. Shapiro has handled many matters before the ECB and authored an article in the November 2005 issue of BBW&G's *UPDATE* regarding such proceedings.



**Aaron Shmulewitz**, who heads BBW&G's Co-op/Condo Department, was prominently featured and photographed in the *New York Times*' feature Sunday Real Estate Section article, "How a Co-op Lost Millions." Mr. Shmulewitz is described as the attorney who came into the picture after a co-op's treasurer had absconded with nearly \$5,000,000.00, and "helped the co-op track down the missing money." Mr. Shmulewitz was also quoted in *The New York Times* "Q&A" column regarding a co-op board's power to amend its bylaws without a shareholder, which he noted "must be set forth in the bylaws themselves."



**Sherwin Belkin**, who practices in BBW&G's Administrative Law Department, was a speaker at the Real Estate Board's presentation "The Townhouse in New York." Mr. Belkin addressed the issues that a would-be purchaser might confront in dealing with occupied residential units, when the purchaser's goal was to occupy the entirety of the townhouse as a family residence. Mr. Belkin was also quoted in *The New York Times* "Q&A" column regarding heating prices and Rent Stabilization. The query came from a rent stabilized tenant who was concerned that his landlord was going to charge him for increased heating prices. Mr. Belkin noted that such increases are intended to be considered by the Rent Guidelines Board when it promulgates its annual increases, and absent specific authorization by Guideline or law, such increased costs cannot automatically be passed along.

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**PLEASE NOTE:** This newsletter is intended for informational purposes only and should not be construed as providing legal advice. This newsletter provides only a brief summary of complex legal issues. The applicability of all or any of the issues described in this newsletter is dependent upon your particular facts and circumstances. Accordingly, it is suggested that prior to attempting to utilize or implement any of the suggestions provided in this newsletter, you should make sure to consult with your attorney.

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**Legal Update**

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