

The Warranty of Habitability: Often Used, But Often Abused

The Warranty of Habitability is a defense that Tenants often assert in non-payment cases, trying to seek abatements in the rent that is due.

Therefore, Owners ask: "What is the Warranty of Habitability?"; "What constitutes a breach of the Warranty of Habitability warranting an abatement?"

The statute defining the Warranty of Habitability is Real Property Law Section 235-b, which states that in every written or oral lease or rental agreement for a residential apartment there is deemed an implied promise by the Owner to the Tenant that the apartment is fit for human habitation and that there are not any conditions that are dangerous, hazardous, or

detrimental to the Tenant's life, health, or safety.

The appellate courts have interpreted Real Property Law 235-b to mean that the Warranty of Habitability is not breached by a mere nuisance or a minor annoying condition. Small or minor conditions do not give rise to an abatement in rent. The warranty threshold requires that life, health or safety is compromised.

If a Tenant wants to make a claim for an abatement in Housing Court, the Tenant has an obligation to either notify the Owner in writing of the conditions in the apartment or prove that the Owner had notice or was aware of the conditions in the apartment. In other
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MCI's : Calculation, Collection and Caps

UPDATE previously described the rules and regulations regarding the filing of a major capital improvement ("MCI") rent increase application. This article will explain how an Owner can legally and properly charge the Tenant the correct rent adjustment.

After an application has been submitted to DHCR, the agency will notify the Tenants and give them an opportunity to review and respond to the application. No increase in rent may be charged or collected until such time as DHCR issues an order approving the application. If all is found to be in order, DHCR will eventually issue an order granting the MCI application in whole or in part. DHCR calculates the rent adjustment for a rent stabilized or rent controlled apartment based upon a seven year period of amortization of the cost of the MCI and then divides

this number by the total number of rooms in the building. Thus, the total approved MCI expense is divided by 84 and then further divided by the total number of rooms in the building. This gives a per room rent increase. This increase is then multiplied by the number of rooms for each apartment. This rent adjustment then becomes a permanent part of the monthly legal regulated or maximum rent

However, there is one final hurdle that an owner must clear before it can collect the rent adjustment. For New York City rent stabilized apartments, the rent adjustment collectible in any one year may not exceed six percent of the tenant's rent as listed on the schedule of monthly rental income that is filed with the owner's original MCI application.

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Special Points of Interest:

- **What you need to know to charge tenants the correct MCI rent adjustment and avoid potential overcharges or undercharges.**
- **Learn what constitutes a breach of the warranty of habitability warranting a rent abatement.**

The Warranty of Habitability . . .
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words, the Owner must have been notified of the problem before the court will find that there has been a breach. If the Tenant fails to notify the Owner of the condition in the apartment or cannot show that the Owner was aware of the condition, then the Tenant is not entitled to receive an abatement for these conditions, even if the conditions do constitute a breach of the Warranty of Habitability.

As a practical pointer, to avoid abatement claims, once a Tenant gives notice of a condition (or the Owner becomes aware of a condition) it is important to immediately inspect the condition and, if necessary, take remedial action.

Sometimes Tenants try to manufacture abatement claims. This is often manifested by a Tenant making a complaint, but then refusing to provide access or dodging access appointments. Provided that the Owner takes the appropriate steps and arms itself with documentation, the Tenant who denies access, will also be denied the abatement claim.

The key for the Owner is not to become frustrated; keep attempting to gain access to the Tenant's apartment. We suggest that a letter be sent to the Tenant stating the date access is requested, the time and even the purpose and scope of work intended during the access to the apartment. It is also a good idea to state that if the date set by the Owner is not convenient, that the Tenant promptly contact the Owner to schedule a mutually agreeable date. Such letters should be sent in a manner that, at minimum, results in proof of mailing. We do not recommend mailing by certified mail, return receipt alone, since if the Tenant does not sign for the letter, the Tenant can claim that it never

received the Owner's demand for access.

Owners should keep accurate records each and every time a repair person goes to the apartment to do the work. The notes and records that the Owner keeps about its attempts at access should note the date and the time access was attempted, the person's name who attempted to gain access, the amount of time the person waited at the apartment before leaving and what exactly happened on each date. The Owner's detailed notes and records regarding access can prove to be very helpful to defend against a Tenant's claim that the Owner did nothing to correct the problem, and can help avoid, or significantly reduce, any abatement that the court may consider.

In 1995, the Court of Appeals, in *Solow v. Wellner*, required a Tenant who seeks an abatement based upon a breach of the Warranty of Habitability to prove;

- ▶ a condition exists;
- ▶ the Owner had knowledge of the condition;
- ▶ the Owner failed to act or act appropriately to correct the condition;
- ▶ the presence of the condition threatened the health, safety, and welfare of Tenants; and
- ▶ the diminished value of the apartment based upon the defective condition.

Many Housing Court Judges have adhered to the "five elements" test. Pursuant to Housing Court decisions, if the Tenant fails to show any of these requisite elements, then the Tenant will not be legally entitled to recover an abatement.

Unfortunately, not every Housing Court Judge follows the five elements test that the State's highest Court requires. Instead,



some Housing Court Judges loosely apply the standards in order to "compensate" a Tenant for relatively minor conditions that do not rise to the level of the legally defined breach of the Warranty of Habitability. As a result, Tenants are all too frequently given rent abatements for conditions that do not seem to rise to the level required by the Real Property Law and by the appellate courts.

Since the standards that Housing Court Judges apply often vary from case to case, and from judge to judge, undoubtedly the best course of action is to try to avoid the possibility of a Warranty of Habitability claim. This can be done by prompt attention to all service, repair and maintenance complaints and any conditions that might even give rise to a future complaint.

This article was written by Brian Haberly and Martin Meltzer who are an associate and partner in BBW&G's Litigation Department.



Brian Haberly



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A WINNING COMBINATION: Lease Negotiation Skill Plus Litigation Expertise

When Owners and Tenants negotiate a commercial lease, they generally have the guidance of brokers, leasing agents and attorneys to help them navigate what are often complicated and multi-faceted terms with long-term consequences. The parties to a lease negotiation certainly hope, if not expect, that theirs will be a mutually beneficial relationship. But, the unfortunate truth is that, at some point during the ensuing landlord-tenant relationship, a dispute may arise about some facet of the relationship which could involve the interpretation of a specific provision of the lease.

If the parties are unable to amicably resolve the dispute, the parties will likely end up in court. A judge will be called upon to determine the rights and obligations of the parties, interpreting the very document that, when negotiated, the parties had likely thought covered every potential contingency. The parties, their attorneys and their brokers obviously thought that they “performed their jobs.” Every “T” was supposed to have been crossed; every “I” was supposed to have been dotted.

Not exactly. As leases become more sophisticated, so does the task required to make the best airtight lease.

Once the dispute has moved from the negotiating table to the courtroom, different eyes, with different viewpoints and goals, most now deal with – and determine the intention of – a document that may have been drafted years ago by individuals no longer available to shed any light on what was meant.

One way to attempt to avoid this problem is to add some preventative medicine at the outset. At the time a commercial lease is

being negotiated, the expertise and input of a litigator may prove vital, since the litigator can examine the lease and potentially anticipate problems that could lead to litigation and seek to resolve them in advance, with an eye on “what might the judge say” if the negotiation undergoes a subsequent metamorphosis into litigation.

It is not just happenstance that many of BBW&G’s successful Transactional Department partners (Howard Wenig, Daniel T. Altman, Craig Ingber and Robert Jacobs) who handle many Commercial Leases for both Owners and Tenants have litigation experience.

A recent decision in which BBW&G prevailed for its client provides a stark example of a litigator’s involvement at the outset potentially being a crucial element of victory when the deal turned sour.

BBW&G represented a major commercial tenant with a large block of office space in a midtown office building, with a lease that was nearing its end. As is common in many commercial leases, the lease at issue contained a “Pay Now, Fight Later” provision that enables an Owner to charge a Tenant for a particular increment of additional rent (in our case, operating expenses), such that even if the Tenant wanted to challenge the charge, it must “first” pay. Only then did the Tenant earn the right to fight the charge.

This Pay Now Fight Later provision permitted the Owner to estimate an upcoming year’s operating expenses and bill the Tenant that estimated amount for the upcoming year (the “Estimated Expense Payment”). The Pay Now Fight Later provision provided a mechanism whereby, at the end of the lease

year, actual operating expenses are audited and reconciled against the Estimated Expense Payments (“the Expense Statement”). The lease also provided that when the actual operating expenses for a lease year exceeded the Estimated Expense Payments, the Owner would bill the Tenant for any sum due per the Expense Statement, but when the actual expenses were less than the Estimated Expense Payments, the Owner must reimburse the Tenant any overage.

Generally, Pay Now Fight Later provisions provide that if a Tenant disputes the calculation of any sum demanded by the Owner (such as specific items included by Owner in calculating operating expenses), the Tenant is required to make the disputed payment and then, typically, submit the disputed sum to arbitration.

Pay Now Fight Later provisions are favored by Owners because such provisions ensure that the commercial Tenant will pay rent when due. This ensures the Owner of the revenue stream necessary to maintain and operate the building. Ample New York case law upholds such a provision as a fully enforceable contract term.

In BBW&G’s recent case, with the lease coming to the end of its term, the Owner demanded hundreds of thousands of dollars in retroactive operating expenses. There was no issue with respect to base rent and the estimated expense payments; the tenant had paid all such sums. The issue was solely the amounts due for operating expenses, which the Owner claimed were due after reconciling the Estimated Expense Payments with actual operating expenses for several lease years.

When the Tenant disputed

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MCI's: . . .*(Cont. from p. 1)*

Therefore, if at the time of the filing of the application, a tenant's monthly rent was \$1,000.00, the owner may not collect more than a monthly cap of \$60.00 in MCI rent increases for the first year after the MCI Order has been issued. Further, this remains the annual cap amount for the MCI rent adjustment going forward. But annual amounts will keep adding on until the full MCI is part of the rent.

The MCI rent increase has two components: a permanent prospective rent increase and a temporary retroactive rent adjustment. The retroactive payment represents those rent increases owed between the

time that the MCI application was filed and the issuance date of the DHCR Order granting the MCI. The retroactive payments apply only to rent stabilized apartments and represents a temporary adjustment until the full retroactive rent increase is paid.

The permanent prospective rent increase is collected first and then, the retroactive rent increase may be charged.

For all rent controlled apartments and any rent stabilized apartments outside New York City, the permanent adjustment in rent may not exceed 15% of the tenant's rent as of the date that the MCI Order is issued. In addition, there is no retroactive adjustment for rent controlled

apartments and/or stabilized apartments outside New York City.

This article was written by Martin Heistein, a BBW&G partner practicing in the firm's Administrative Law Department. For more information pertaining to MCI's (as well as tax abatements), please can contact Martin Heistein or Paul Kazanecki.



Martin Heistein

A Winning Combination . . .*(Cont. from p. 3)*

the sums demanded, the Owner sued in the landlord-tenant part of the New York County Civil Court. The Owner then moved for summary judgment, claiming that there were no triable issues of fact because the Pay Now Fight Later provision obligated the Tenant to pay the amount demanded, such that any dispute the Tenant had with the Owner's demand did not require a trial.

After closely scrutinizing the Pay Now Fight Later provision and other related lease terms, BBW&G convinced the Court that the only available interpretation was that the Pay Now Fight Later provision applied to the Estimated Expense Payment, but not to the Expense Statement.

The specific provision of the Lease provided:

The expense statements furnished to Tenant shall constitute a final determination as between Landlord and Tenant of the expenses for the peri-

ods represented thereby, unless Tenant, within forty (40) days after they are furnished, shall give a notice to Landlord that it disputes the accuracy or appropriateness of any of same, which notice shall specify to the extent possible the particular respects in which the disputed statement is inaccurate or inappropriate. Pending the resolution of such dispute pursuant to Section 4.01G, Tenant shall pay the Estimated Expense Payments to Landlord in accordance with the Estimated Expense Statement furnished by Landlord. Tenant shall have the right, during reasonable business hours and upon not less than (10) business days prior written notice to Landlord, to examine Landlord's books and records with respect to any Expense Statement, provided such examination is commenced within thirty

(30) days and concluded within ninety (90) days following the rendition of the Expense Statement in question.

As a result, Owner's motion for summary judgment was denied.

The problem with the lease can be characterized as a drafting mistake. The Owner may have intended to draft a Lease with the intention that all Expense Statements would be subject to the Pay Now Fight Later provision. However, the actual lease language did not reflect the Owner's contention that the Pay Now Fight Later provision controlled the Expense Statement.

The Owner also argued that even if the Pay Now Fight Later provision did not apply, the arbitration provision of the lease controlled, which the Landlord maintained obligated the Tenant to pay the disputed Expense Statements before fighting over the outstanding operating expenses. BBW&G argued, and the Civil Court agreed, that

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when general provisions of a lease (here, that any dispute over calculation of Expense Statements had to be arbitrated) were in conflict with specific provision of the Lease (here, that the Pay Now Fight Later provision did not apply to Expense Statements), the specific provision of the lease controls, not the general provision.

Had the Owner been correct in its lease interpretation, the Tenant would have been required to pay the huge disputed amount before it had a right to challenge the Owner's claims for outstanding operating expenses. As a result of it being denied summary judgment, the Owner has been left in a position of having to establish its entitlement to

the more than \$800,000.00 it claims is owed by the Tenant.

While BBWG neither promises nor guarantees that every possible problem or contingency can be avoided or eliminated by a litigator's review of a lease as it is being drafted, perhaps this problem and others like it can be avoided with greater care in drafting coupled with a litigator's scrutiny, experience and advice.

The litigator brings a view point that is quite different from a transactional attorney. Does every lease negotiation require that a litigator review every clause? Of course not! Perhaps such heightened scrutiny should be considered for those leases that are more complicated, detailed or costly. An Owner should also consider having its lease and riders reviewed every

once in a while by a litigator once the lease is in place. A regular "check up," comparing what the lease says, to how it is being implemented, could not hurt, and might identify significant issues before they become major disputes.

This article was written by Lewis A. Lindenberg and Robert T. Holland, partners in BBW&G's Litigation Department, who handled the litigation that is discussed.



Lewis A. Lindenberg



Robert T. Holland

BBW&G NEWS

"MAY I QUOTE YOU?"

The New York Post featured the development of the site formerly occupied by The Mayflower Hotel. The Mayflower, which had been purchased by a group led by BBW&G clients **William L. Zeckendorf** and **Arthur Zeckendorf**, was vacated by the BBW&G team of **Sherwin Belkin, Kara Rakowski, Edward Baer** and **Brian Haberly**.

Jeffrey L. Goldman was heard on WINS radio regarding his representation of the owners of The Plaza Hotel in litigation brought by a jeweler with two shops in The Plaza regarding the owners' plan to close the Hotel. The jeweler is trying to compel the owners to continue running The Plaza as a hotel. Mr. Goldman stated: "The hotel should not be compelled to continue operating at a loss for 613 square feet." Mr. Goldman's representation of The Plaza Hotel's owners was also the subject of an article in *The Daily News*.

David Skaller's successful representation of the owner in *116 2nd Avenue LLC v. Bachachenksky* was featured in *The New York Law Journal's* "Realty Law Digest." The case was notable for the court's finding that the recent Court of Appeals *Landaverde* decision, which requires that five days be added onto the notice requirements of certain notices, did not apply in that instance. Mr. Skaller stated: "the decision is of interest since the court found that *Landaverde* is inapplicable to the service of a 30-day notice of termination that was served pursuant to RPAPL §735 [actual attempts at personal service to be made, followed by posting on the door], as opposed to serving a notice to cure only by mail, as was the case in *Landaverde*."

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