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## PREVENTING AND NAVIGATING DISABILITY ACCESSIBILITY CLAIMS AND LAWSUITS



### By Steven Kirkpatrick

Our clients have recently experienced a dramatic increase in disability accessibility lawsuits. These cases are brought under the Americans With

Disabilities Act (ADA) against building owners and tenants of commercial spaces that are open to the public. Cases against apartment building owners (including co-ops and condominiums) and their managing agents are also being brought under the Fair Housing Act (FHA). In both instances, there are also often claims under the NYC Human Rights Law.

The accessibility requirements are confusing because each statute has its own standards, and in

many cases the NYC Human Rights Law imposes more stringent ones. In many ADA cases, for example, clients believe that they are safe because they complied with the NYC Department of Buildings accessibility requirements, but that is often incorrect because the ADA and Human Rights Law standards are different, and greater accessibility may be required to comply with these. In addition, lawsuits for inaccessible websites are becoming more common and these can be more complicated (and expensive) to resolve than run of the mill physical accessibility lawsuits.

As another example, under the FHA an owner is generally not required to pay for apartment modifications, but merely to reasonably consent

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to the tenant's requests. However, under the NYC Human Rights Law, the owner may very well have to pay for required changes. The "reasonable accommodation" requirements are also confusing, and in many cases an owner has to spend a significant amount (or forego rental income) to make a reasonable accommodation before there is considered to be an "undue burden."

In ADA cases, there is no requirement to give prior notice of the condition or claim, so the first notice is often when the summons and complaint are received. And many ADA lawsuits are so-called "drive-by" cases, because they are filed after the plaintiff makes a very cursory visit to the premises. Most accessibility cases are filed in federal court, because it is viewed by plaintiffs' attorneys as a friendlier forum, particularly because judges have a fairly liberal view about awarding legal fees, and the rules favor broad discovery (which can be used by a plaintiff's attorney to quickly run-up fees and costs).

Many retail premises have ADA violations, but accessibility into the space is the most critical--any retail location with a step up or down into the space is at a high risk of being sued. There are many other requirements, which can be found [here](#), including for bathrooms, counter heights, and the placement of merchandise, and very few viable defenses to claims. Further, different standards may apply depending upon the extent of renovations and when they were performed.

In addition to the "undue burden" defense mentioned above, some other possible defenses are lack of standing (e.g., that the plaintiff does not intend to come back to the premises), that compliance is not feasible, and that compliance would fundamentally alter the way the business provides goods and services. However, defenses are difficult to assert, and an owner deciding whether or not to assert them must consider the possibility that a successful plaintiff will likely recover legal fees.

The primary strategy to avoid being sued in the first place is to perform an accessibility audit, and making proactive accessibility modifications. Since audits performed directly by owners and commercial tenants are discoverable in the event of litigation, it may be prudent to involve counsel to invoke any applicable privileges that may apply. There are also some compliance steps

that can be effective in preventing lawsuits, especially of the "drive-by" variety.

Another crucial, very fundamental, step in trying to avoid such suits is to consider carefully and promptly any requests for accommodation, whether made orally or in writing, and documenting the responses. Some common types of requests are with regard to accessibility into a building or unit, bathtub/shower modifications, emotional support animal requests in a no-pet building, parking related requests, and requests to relocate apartments in walkup buildings.

As a practical matter, for a building owner, the best way to manage the risk in getting sued is to have a lease with a good ADA provision clearly allocating responsibility for modifications and compliance. While many leases have provisions that apply, they are often unclear. Additionally, indemnification provisions may provide for the recovery of damages, settlement costs and legal fees that are paid out. When reviewing these documents, it is important to understand how they will be likely to be construed by the courts, because that is not always obvious to attorneys that draft leases but do not litigate them.

Unfortunately, many insurance policies exempt ADA and FHA claims from coverage. However, it is always worth double checking, especially if there are broad coverage liability policies, employment claim policies and director and officer (D&O) policies. In addition, there are instances where additional defendants can be joined to a case so as to spread litigation and compliance costs as much as possible.

Although the goal is always to prevent a case from being brought, if a lawsuit is filed, it is important to involve knowledgeable counsel early on to minimize costs, and to achieve the best possible outcome overall. Because in many cases the plaintiff will likely be deemed the prevailing party entitled to recover legal fees, it is important to carefully consider strategies to minimize fees on all sides. By analyzing the applicable lease provisions and evaluating creative solutions regarding accessibility modifications, we are often able to resolve these cases in a cost-effective manner.

*Steven Kirkpatrick is a partner in the Firm's Litigation Department.*

# FINCEN CONTINUES TO CRACK DOWN ON THE USE OF RESIDENTIAL REAL ESTATE TRANSACTIONS AS A MEANS OF MONEY LAUNDERING



**By Craig L. Price  
and Kayla Laskin**

This article follows up on our article “FinCEN, a Look Behind the Curtain”, which appeared in the [November, 2017 BBWG newsletter](#).

[2017 BBWG newsletter](#).

Our previous article discussed how the Financial Crimes Enforcement Network (“FinCEN”) of the United States Department of the Treasury adopted regulations effective March 1, 2016 intended to combat money laundering and prevent individuals from hiding the proceeds of criminal activity through anonymous real estate purchases. This article seeks to explain how the FinCEN requirements have been altered, and provides further instructions on how to proceed with purchases that fall within the new FinCEN guidelines.

As a reminder, FinCEN seeks to identify the individual(s) who are the true beneficial owner(s) behind shell entities that purchase high-end residential real estate. FinCEN procedures apply to the purchase above specified price levels of condominium units, as well as to one to four family properties in any of the five boroughs of New York City (and to a handful of other areas in the country that have been popular with foreign purchasers). When the purchaser of such a premise is a corporation, limited liability company, partnership, or other entity, the FinCEN procedures are designed to determine whether such buyer (or its subsidiaries or agents) is involved in illegal activity or money laundering.

Effective April 13, 2018, FinCEN issued a fifth Geographic Targeting Order (“GTO”) further altering the original FinCEN requirements. Previously, the threshold amount that triggered FinCEN compliance was \$3,000,000 in Manhattan and \$1,500,000 in the other four boroughs. Under the new GTO, the threshold amount that triggers FinCEN compliance is now a uniform amount of \$300,000 regardless of the location of the premises being purchased. The relatively low level of that trigger amount means that the vast majority of New York City



real estate transactions will now fall within the FinCEN provisions.

Additionally, purchases of residential real property by trusts, previously exempt, are now subject to the FinCEN provisions. Furthermore, virtual currency has been added to the list of transactions that fall within FinCEN covered purchases.

Previously, FinCEN guidelines required that title companies work with purchaser’s counsel to complete and file an IRS Form 8300 at the time of closing. However, Form 8300 has been replaced by the FinCEN Currency Transaction Report (CTR) which must now be filed within 30 days of the closing and e-filed through the BSA E-filing system.

As FinCEN continues to evolve, we will continue to provide updates on relevant procedures and regulations. If FinCEN does apply to your transaction, it is vital to become familiar with the relevant procedures, and to begin to gather all required documentation and information well ahead of the closing. BBWG is ready to assist in this regard.

*Craig L. Price is a partner in the Firm’s Transactional Department. Kayla Laskin, a summer associate, assisted with this article.*



# BEWARE OF “RENT DISCOUNT” PROVISIONS IN RENT-STABILIZED LEASES



**By Phillip L. Billet**

Not surprisingly, it is important to property owners that rents are paid in a timely manner, and, to this end, owners are often willing to offer incentives to tenants to do so.

One such incentive which owners have utilized is a “rent discount provision” in a lease, which provides that, if a residential tenant pays his or her rent in a timely manner (for example, by the 5th day of the month), (s)he will be permitted to pay a lesser amount than the amount otherwise provided for in the lease.

While rent discount provisions logically benefit both owners and tenants in that they provide owners with an increased likelihood of receiving rent in a timely manner and provide conscientious tenants with financial rewards for prompt payment, the courts and DHCR have almost universally invalidated such provisions, ruling that a rent discount provision creates an impermissible “late charge.” Such court and DHCR decisions have relied on DHCR’s “Fact Sheets #40 and #44,” which limit the late fee that an owner may charge to a rent-stabilized tenant to no more than 5%.

In reaching this conclusion, the courts and DHCR apparently reasoned that, if an apartment owner agrees to accept a lesser amount of rent from the tenant if the tenant pays during the first portion of the month, then the actual rent provided for in the lease must somehow be deemed to include a late fee; and if this actual rent is more than 5% greater than the discounted rent, the resulting “late fee” is deemed unlawful.

In fact, some courts have characterized the “late charge” resulting from a rent discount provision as “excessive and grossly disproportionate to any damages that could be sustained as a result of tenant’s failure to pay rent on time.”

Accordingly, in such cases, DHCR and the courts have ruled that the discounted rent will become the legally collectible rent, and the tenant will be obligated to pay only the discounted rent—regardless of when it is paid. (Please note, however, that in a recent contrary decision, a court found that a discounted rent did not become the legal rent, ruling that “there is nothing in Fact Sheet #40 to suggest that an on-time discount will become the legal rent.”)

In some cases, DHCR and the courts have ruled that a discounted rent will become a “preferential rent” which may be increased upon the expiration of the lease term, while in other cases, DHCR and the courts have ruled that a discounted rent will become the “legal rent” upon which all future rents must be based. In either case, however, the discounted rent will become the legally-collectible rent, at least during the lease term.

Moreover, a consequence of DHCR’s interpretation of Fact Sheets #40 and #44 is that, if the actual rent provided for in the lease is 5% higher than the discounted rent and the owner at some point collects the rent provided for in the lease, the owner will actually be guilty of a rent overcharge for charging a late fee of more than 5%.

Accordingly, an owner who wishes to provide a tenant with a rent discount as an incentive to pay rent in a timely manner should ensure that the rent provided for in the tenant’s lease is no more than 5% greater than the discounted rent. Thus, if a tenant’s lease provides for a rent of \$1,000/month, the owner should not provide the tenant with a discounted rent lower than \$950. While such discount may not provide much of an incentive for a tenant to pay rent in a timely manner, it should at least protect the owner from having the discount provision invalidated and allowing the tenant to pay the discounted rent regardless of when paid.

*Phillip Billet is a member of BBWG’s Administrative Department.*

# LEGISLATIVE/REGULATORY UPDATE—CORRECTION AND COMMON SENSE



**By Aaron Shmulewitz**

In our [November, 2017 newsletter](#) I had advised of the new State Board Conflicts Disclosure Law (BCL §727) and the fact that, due to an apparent drafting error, the new law would not apply to most condominiums.

The State Legislature has now corrected that error, and Governor Cuomo signed the amended law into effect in April, 2018. As such, the conflicts disclosure requirements now apply to condominium Boards as well as co-op Boards, effective immediately.

In addition, in our [September, 2017 newsletter](#), I had advised of a new City Department of Buildings policy on terraces,

balconies and other outdoor enclosures that could have required the removal of all of such structures that were built without permits, with attendant uncertainty over who would bear the cost and other economic impact of such removal. Thankfully, the DOB rescinded that policy change in April, 2018, and will no longer require the removal of such enclosures merely because they were built without permits. However, all such enclosures must be inspected and confirmed as safe as part of a building's Local Law 11 review; removal could still be required of any unsafe structure.

*Aaron Shmulewitz (ashmulewitz@bbwg.com) heads the firm's Co-op/Condo practice.*

## BBWG IN THE NEWS

Founding partner **Sherwin Belkin** was quoted in *The Commercial Observer* on [April 26](#) regarding the Court of Appeals pro-owner decision in the *Altman* case, in which the Firm had filed an amicus brief on behalf of industry groups the Real Estate Board of New York, the Rent Stabilization Association, and the Community Housing Improvement Program. **Mr. Belkin** was also quoted in *The Real Deal* on [May 1](#) with regard to Cynthia Nixon's candidacy for governor, and in *The Commercial Observer* on [May 16](#) on the feud between Governor Cuomo and Mayor De Blasio and its impact on City real estate.

The role of **Jeffrey Goldman**, co-head of the Firm's Litigation Department, as Receiver for the sale of an apartment at The Dakota, was cited in the *New York Law Journal* on [May 15](#).

Transactional partner **Craig L. Price** was quoted in *The Real Deal* on [May 9](#) regarding the practice of inflating apartment resale prices with offsetting closing credits in order to help keep comp prices at desired levels. **Mr. Price** was also quoted in an article in *The Real Deal's June edition* on a lawsuit between Hamptons real estate brokers, on the legal obligations of a broker. **Mr. Price** was also honored with the Young Leadership Award by Bi-Cultural Day School on May 6.

**Kara Rakowski**, co-head of the Firm's Administrative Law Department, was named one of *Real Estate Weekly's* Leading Ladies of Real Estate, 2018, in its [May 31](#) edition.

## TRANSACTIONS OF NOTE

Partners **Daniel T. Altman** and **Lawrence Shepps**, and associate **Nicki Neidich**, handled the simultaneous (but separate) defeasance and refinancing of a portfolio of 12 mixed-use buildings on the Upper East Side and in Greenwich Village, for an aggregate loan in excess of \$118 million.

Partners **Craig L. Price** and **Stephen Tretola**, along with associate **Michael Shampan** and summer associate **Kayla Laskin**, represented the purchaser of two abutting townhouses in the heart of Silicon Alley for nearly \$13 million. The transaction included an acquisition and construction loan in the amount of \$21 million, which will enable the purchaser to redevelop the property into a six full-floor unit boutique condominium; the representation also included negotiating a joint venture agreement with the developer's equity partners. BBWG Administrative Department associate **Damien Bernache** handled the due diligence elements of the transaction, while partners **Kara Rakowski** and **Alexa Englander** will oversee the Certificate of No Harassment application associated with the future project.

**Mr. Price** and **Mr. Shampan** also represented partner **Jeffrey Goldman**, the Receiver charged with the sale of the apartment of embattled financier Alphonse Fletcher Jr. at the iconic The Dakota.

**Stephen Tretola** represented the owner on the \$47 million refinancing of a major midtown office building; the transaction was featured in *The Commercial Observer* on [June 6](#).



# CO-OP | CONDO CORNER



**By Aaron Shmulewitz**

Aaron Shmulewitz heads the Firm's co-op/condo practice, consisting of 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. If you would like to discuss any of the cases in this article or other related matter, you can reach Aaron at 212-867-4466 or [ashmulewitz@bbwg.com](mailto:ashmulewitz@bbwg.com).

## SHAREHOLDER CAN SUE CO-OP FOR LUNG INJURIES ALLEGEDLY ARISING FROM HEATING SYSTEM DEFECTS

*Ember v. Denizard Appellate Division, 1st Department*

COMMENT | The Court held that the suit was not barred by a settlement and release in prior litigation, for technical reasons.

## CO-OP BOARD DECISION TO WITHHOLD GARAGE KEY FROM SHAREHOLDER IS PROTECTED BY BUSINESS JUDGMENT RULE

*Pettus v. Board of Directors Appellate Division, 1st Department*

COMMENT | The decision was held to be in accordance with the co-op's policy, although that policy was not explained in the decision.

## CONDO AND MANAGING AGENT NOT LIABLE FOR INJURIES TO PARKING ATTENDANT IN GARAGE UNIT IN BUILDING

*Barksdale v. BP Elevator Co. Appellate Division, 1st Department*

COMMENT | Under the Declaration and bylaws, the condo was responsible only for maintenance of common elements, not within the garage unit; also, the condo had no notice of the defective conditions that caused the injuries.

## COMMERCIAL UNIT OWNER'S VARIOUS CLAIMS AGAINST CONDO BOARD DISMISSED

*Board of Managers of Honto 88 Condominium v. Red Apple Child Development Center Appellate Division, 1st Department*

COMMENT | One such claim was of discrimination based on the fact that the principals of the commercial unit owner hailed from a different part of China than did Board members.

## SHAREHOLDER CLAIMS AGAINST CO-OP BOARD OF DIRECTORS BARRED BY FOUR-MONTH STATUTE OF LIMITATIONS

*Valyrakis v. 346 West 48th Street HDFC Appellate Division, 1st Department*

COMMENT | The Court also upheld the Board's decision to effect repairs, as protected under the business judgment rule.

## CO-OP AND ITS PRESIDENT CAN SUE SHAREHOLDERS FOR DEFAMATION FOR WEBSITE POSTINGS

*Trump Village Section 4, Inc. v. Bezvoleva Appellate Division, 2nd Department*

COMMENT | Some statements were held to be protected opinion, but others were held to be actionable statements of fact. (But see different case outcome below.)

## CONDO CAN BAR UNIT OWNER FROM FLYING U.S. FLAG FROM FLAGPOLE ATTACHED TO WINDOW FRAME EXTERIOR

*Board of Managers of Clinton West Condominium v. Desmond* Supreme Court, New York County

COMMENT I The Court based its holding on the fact that the attachment point was a common element, and the potential of damage to the building and danger to pedestrians. A New York Condominium Act provision on flags was held to be no defense, as the Court ruled that it protected only a display of the flag within an apartment, not on building exterior. (Query why a law is needed to protect a flag display within one's apartment.)

## CONDO UNIT OWNER CAN COMPEL BOARD TO MAKE REPAIRS TO STOP LEAKS, BUT IS NOT ENTITLED TO COMMON CHARGE ABATEMENT

*McMahon v. The Cobblestone Lofts Condominium* Appellate Division, 1st Department

COMMENT I The abatement was denied because there was no "casualty loss" as defined in the bylaws.

## TENANT CANNOT BE EVICTED FOR SMOKING IN APARTMENT, DESPITE COMPLAINTS OF SMOKE ODORS PERMEATING INTO OTHER APARTMENTS

*Priceman Family LLC v. Kerrigan* Civil Court, Kings County, L&T Part

COMMENT I While involving a rent-stabilized tenant, this case is instructive. The Court held that the lease did not prohibit smoking, and the complaining neighbors had their own remedies which would not involve eviction of the smoker.

## CO-OP SHAREHOLDER CANNOT SUE BOARD FOR DEFAMATION

*Board of Directors of Windsor Owners Corp. v. Platt* Appellate Division, 1st Department

COMMENT I The Court held that the complained-of statements of fact, and of opinion, were protected by the common interest privilege. This holding is at variance with the holding in another defamation case, above.

## TENANT'S BREACH OF WARRANTY OF HABITABILITY CLAIMS AGAINST OWNER OF CO-OP APARTMENT DISMISSED, AS ALL CONDITIONS CURED

*Schwartz v. 170 West End Owners Corp.* Appellate Division, 1st Department

COMMENT I The Court held that the tenant failed to raise a triable issue of fact. BBWG represented the victorious apartment owner.

## ASSIGNMENT OF CONTRACT TO PURCHASE CO-OP APARTMENT AT DISCOUNTED INSIDER PRICE NOT A FRAUDULENT CONVEYANCE

*Kirchner v. Bernard* Appellate Division, 1st Department

## CO-OP, NOT SHAREHOLDER, HAS EXCLUSIVE RIGHTS TO ROOF SPACE OUTSIDE APARTMENT

*Fairmont Tenants Corp. v. Braff* Appellate Division, 1st Department

COMMENT I The Court based its ruling on the fact that the space was not delineated in the proprietary lease. The Court also held that the shareholder's allowing workers access to the space defeated his adverse possession claim, and that the co-op could invoke the non-waiver clause in the proprietary lease. To add insult to injury, the Court also enjoined the shareholder from future use of the space.





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