

LEGAL MATTERS



FALL 2004

We're on the Web!

Since our last newsletter, we have devoted our attention to putting the finishing touches on our website. You can visit the website at www.croninbisson.com. We hope that you find the information useful.

Our website includes biographical information and email addresses for each member of our staff. The site offers samplings of some of the matters we have worked on over the years. In addition, you can find prior editions of our newsletter.

Over the coming months, we expect to add links to websites which may be of interest to our clients. We hope you will visit our site often. You will note that we have links to the websites of some of our clients. If you would like us to display a link to your website, please let us know.

Whether you need our assistance or have a suggestion, we encourage you to contact us by email. Rest assured that we will review your concern and respond.

We also welcome your general comments about our website. Please let us know if there is anything else that you might find useful.

Thank you to our
website design team at
Brainium, Inc.

New Faces

We are pleased to announce two new additions to our firm. Attorney **John E. (Ned) Lucas** has joined the firm. Ned has been practicing law since 1975. He joins us after serving as a New Hampshire Assistant Attorney General. Previously, he was a partner in the law firm of Wiggin & Nourie in Manchester, New Hampshire. He will focus his practice in the areas of real estate development, land use regulation, title review and insurance, and condominium creation and conversion.

Barbara Morgan joins us with over eighteen years of experience working with other law firms in the Manchester area. Barbara has significant experience in several areas including general corporate, commercial lending, real estate, bankruptcy, litigation, and utilities.

Case Notes

Landlords who collect past due rent from tenants while an eviction is pending should be aware that they will be creating a new lease arrangement with the tenant if they do not advise the tenant otherwise in writing. In a recent New Hampshire Supreme Court case, a landlord entered into a lease agreement with tenants running from June 1, 2001 to May 25, 2002 calling for a monthly rent of \$2,000. The tenants failed to pay the April 2002 rent in full on time and the landlord brought an eviction action resulting in a writ of possession for the landlord on April 19, 2002.

Subsequently, the tenants met with the landlord's representative and the parties agreed that the tenants would pay \$3,200 for April 1, 2002 through May 25, 2002. After the check cleared, the tenants held a party, which the landlord believed to be in violation of the previous written lease. The tenants were evicted on May 1, 2002. The tenants sued the landlord, claiming that under New Hampshire RSA 540:13, VII, the parties created a new tenancy "at will" when the landlord accepted the \$3,200 during the eviction action. The New Hampshire Supreme Court agreed. Despite damages to the apartment exceeding \$2,000, the landlord had to return the \$2,000 rent for the month of May, plus \$1,000 for the unlawful eviction, and \$600 in attorney's fees to the tenants.

Therefore, if a landlord accepts any payment from a tenant while an eviction action is pending, the law specifies that a new lease agreement is created unless the landlord advises the tenant in writing that this is not the case. It is best if both parties sign a written agreement outlining their understanding at the time any payment is made under these circumstances.

Officers and Directors — Beware

You just received a call from your neighbor in the condominium where you live. The Board of Directors is recruiting and they want you to get involved. Before you say yes, there are some important things you should know.

Condominium and homeowners' associations are comprised of members of the community that the particular association governs. The Board of Directors is the primary decision making body of the association. Most associations are legal entities that are governed by a set of bylaws, as well as laws and regulations of the jurisdiction in which the entity exists. Most directors' positions are voluntary in nature and are filled by individuals with varied backgrounds. Often, not all directors are aware of the full scope of their duties and the rules that govern their actions. Despite the best intentions of a Board Member, ignorance of the duties of the position and the Association framework can spell trouble.

Before joining a Board, you should research your current homeowner's insurance policy. Many people carry officers and directors liability coverage on their homeowners policy and are not aware of it. If it isn't part of your coverage, ask for quotes. You may find that for a small increase in your premium, you can protect yourself from a possible claim in connection with your service on the Board.

The following are some of the precautions that can help directors prevent potential claims. First, read your community's governing documents. Know the rules and follow them as best you can. The urge to make proceedings informal may be strong, but if you stay within the framework set up by your documents, you close the door to claims

that things were not done by the book.

One of the most difficult jobs a Board will have is developing a budget that will keep assessments as low as possible. However, this need to keep the budget as lean as possible should not deter the community from hiring outside professionals when necessary. Accountants, attorneys, and property managers are a few examples of the outside professionals a Board may need to hire.

Although seeking the advice of outside professionals can be costly, the money paid could help save money further down the road. For example, your Board has hired a roof contractor who hasn't lived up to his obligations under the contract. The Board wants him fired. Unfortunately, the contract with the roofer doesn't provide for termination, so you call your attorney for help. If the attorney had been consulted before the contract was executed, the lack of clear termination provisions would have been discovered and at a much smaller financial cost to the association. In addition, when the Board relies on the advice of professionals, the Board's decision is less subject to challenge as an unreasonable exercise of power.

When your phone rings, and you are asked to be on the Board of your community association, first do your homework. Everyone in your community bought their unit subject to the provisions in the condominium documents. If they ever want to challenge an action taken by the Board, they will look to the documents. If the Board is following the letter of the documents, it greatly reduces the risk of claims. If you decide to get involved, keep these ideas in mind to insure a positive and claim free term of service.

Seminar

Announcement

We are proud to announce that Attorney Ned Lucas will be hosting a National Business Institute continuing legal education seminar titled *Advanced Real Estate Law in New Hampshire* on November 15, 2004 at the Courtyard Hotel in Concord, New Hampshire.

The program deals with issues presented principally by the development or transfer of non-residential real estate. The material that will be covered is useful to attorneys, real estate brokers, real estate appraisers, and members of municipal planning and zoning boards. The information includes:

- title insurance endorsement, the availability of survey coverage, and authority issues presented by different forms of entities holding real estate;
- environmental issues in real estate including environmental liability, mastering site assessments, and buying and selling of contaminated property;
- smart growth (alternatives to sprawl);
- liens and credit issues, including evolving bankruptcy and creditor rights

PLEASE NOTE

The City of Manchester reports that the revaluation initially scheduled for 2005 is not likely to occur until 2006.

The Preference Action

Most businesses, in the course of their lifetimes, have a customer that goes bankrupt, leaving unpaid bills. If this happens, the first step is to file a "proof of claim" with the bankruptcy court. If the bankruptcy estate recovers any assets, you may receive some payment on your claim. Sometimes, however, the court demands you pay back to the bankrupt debtor any money you received in the ninety days before it went bankrupt -- the so-called "preference action." How can it be that the court wants you to pay back money to a customer that still owes you money?

The purpose of a "preference action" is to ensure that some creditors did not get special treatment in the ninety days before the debtor entered bankruptcy. The debtor, or its trustee, attempts to collect any payments that appear to have unfairly preferred one creditor over another. Particularly suspect are payments to "insiders" and relatives. After collecting any "preferred payments", the debtor will then redistribute the funds in a manner deemed equitable by the Bankruptcy Code.

Certain types of transactions are exempt from "preference actions" under the Bankruptcy Code. For example, payments made in the regular course of business on a regular basis and in line with industry practices can usually be retained by the creditor. These are items such as utility bills paid every month, or routine payments for regular deliveries of an item the debtor uses in business. The key is the regularity of the payment which indicates that it was not preferential.

The second exception is payments made either for subsequent shipments or services, or prepayments. These include lease payments made in advance, or down payments on services to be rendered. A third type of payment that is exempt from a preference action is one made at the time of delivery or C.O.D. This third type, known as a "contemporaneous" exchange for value, does not always have to happen at the exact moment goods or services are exchanged, but the closer in time the better. If you presently conduct business in one of these ways, you may have a viable defense to a "preference action."

Businesses who deliver first and get paid later and are potentially subject to the "preference action" of a customer in bankruptcy. If your customer begins to exhibit signs of financial difficulty, you the creditor, have a few options. First, for small transactions, require the customer pay C.O.D. This may seem harsh, but keep in mind that a bankrupt party gets to keep his salary regardless of the amount, while you as the creditor may not get paid. Second, for larger transactions, where a customer may not be able to pay cash, you may request security for the customer's obligations. Security may include opening a line of credit or placing a lien on the customer's property. In most instances, secured creditors have priority for getting paid over those that are unsecured. Third, cash all checks immediately; sometimes a preference action is a matter of receiving payment on the 89th day instead of the 91st day before bankruptcy. Finally, if you are concerned about the financial stability of one of your customers, consult your attorney to assist you in maximizing your defenses to a preference action.

Warning to Commercial Property Owners

Commercial property owners should be aware that some communities have changed the method of responding to challenged assessments of commercial real estate. Many communities are taking an aggressive approach to commercial assessments. Rather than settle tax abatement appeals, the communities are defending their assessments by litigating. The most serious change relates to the method of determining market value, which is the cornerstone of all abatement cases. In many transactions, prudent buyers and sellers determine value by capitalizing the income stream generated by the property. Most properly managed properties have a range of rents depending on the date the lease was entered into and the term of the lease. As long as the income, expenses, and resulting net operating income are reasonable, the analysis produces market value. Now, however, many communities contend in technical terms that the procedure simply determines the leased fee value of the property. The communities contend further that they must evaluate properties for assessment purposes based on the fee simple approach. In assessing properties, these communities determine value by making the fictitious assumption that every tenant will be paying full market value on the date of assessment. The likely result is the assessment will exceed the value a prudent buyer will pay for the property. Please keep this change in practice in mind.