

# CLIENT ADVISORY

JANUARY 2005

## LIABILITY FOR MOLD-RELATED INJURIES MAY ARISE FROM LANDLORD'S AWARENESS OF LEAKS

In Litwack v. Plaza Realty Investors, Inc., NYLJ December 1, 2004, p. 23, col. 1 (Sup. Ct. N.Y. Co.), a tenant claimed, among other things, that her serious asthma, allergies, chronic sinusitis, hypersensitivity pneumonitis and cognitive disorders were caused by her landlord's negligence in failing to remedy a toxic mold condition. The landlord moved for summary judgment dismissing the complaint, arguing that it did not have actual or constructive notice of the alleged toxic mold condition. It also contended that the testimony of plaintiff's expert witnesses, to the effect that exposure to mold had caused her injuries, was not supported by generally accepted scientific opinion.

The court refused to dismiss the negligence claim. It held that since the presence of mold in the air is not readily apparent without testing, the landlord's admitted awareness of leaks and damp conditions was sufficient constructive notice of the possible presence of mold, which it had a duty to correct. To hold otherwise, the court stated, would permit landlords to shield themselves from liability by deliberately refraining from testing for mold. The court permitted the negligence claim to proceed, but directed a separate hearing to determine whether the opinions of the plaintiff's experts were considered generally acceptable in the scientific community. Under New York law, such an inquiry is required before scientific or medical expert testimony may be admitted into evidence. See, People v. Wesley, 83 N.Y.2d 417, 611 N.Y.S.2d 97 (1994); Frye v. United States, 293 F. 1013 (D. C. App. 1923).

## BULK CABLE TELEVISION SERVICE CONTRACT HELD BEYOND BOARD'S AUTHORITY

In Palomino v. Board of Managers of Liberty Court Condominiums, et al., Index No. 127999/02 (Sup. Ct. N.Y. Co. September 30, 2004), the condominium offering plan stated that cable television services would be available on an individual contract basis from Manhattan Cable. Nevertheless, the Board of Managers entered into an agreement with another company for "bulk cable service" to be provided to all units in the building that wished it. A charge for the service was added to all the unit owners' monthly bills.

One of the unit owners, who claimed not to have known of this contract when he purchased his unit, tried the service briefly but became dissatisfied with it, had his decoder box removed and refused to pay the imposed cable charges. In his suit against the Condominium, the original cable company and its successor, he sought a judgment (1) declaring that the bulk service contract was invalid, and (2) requiring the cable companies to return to the

Condominium that part of the fees they had been paid for units that did not use their service. In its counterclaim, the current cable company sought a judgment declaring the bulk service contract valid, arguing that the Condominium Declaration and the by-laws gave the Board authority to grant "utility easements" for the general health or welfare of the owners and to improve the common elements. All defendants argued that the court should not disturb the Board's exercise of its business judgment.

The court first struck the plaintiff's cause of action for return of money, finding that he had no standing to seek relief on behalf of the Condominium. However, it held that the Board had exceeded its authority by contracting for a service for which all unit owners were charged a flat additional fee, whether or not they wanted the service and irrespective of the size of their respective common interests. The court dismissed the cable company's counterclaim, while permitting the plaintiff's claim to invalidate the contract to continue.

### **TAX ESCALATION CLAUSE HELD BINDING DESPITE ALLEGEDLY INCORRECT PROPORTIONAL SHARE**

Leases for commercial space, in cooperative as well as rental buildings, frequently include tax escalation clauses, which require the tenant to bear a proportional share of increases in the building's real estate taxes. A recent case demonstrates the importance of care in the drafting of such clauses.

In 609 Corp. v. Park Towers South Co. LLC, NYLJ December 8, 2004, p. 18, col. 1 (Sup. Ct. N.Y. Co.), the lease for a medical office provided that if taxes for any year were greater than those in the base year (fiscal 2001), the tenant would pay, as additional rent, its proportionate share of the increase. The term "Tenant's Proportionate Share" was defined to mean 4.5%, with the proviso that this amount should "not be deemed to constitute a representation as to any relationship between precise amount of space in the Demised Premises and the space contained in the building...." The tenant paid its 4.5% share of the tax increase for fiscal 2002; leased additional space and agreed to increase the "Tenant's Proportionate Share" of tax increases to 6%; and negotiated an extended schedule to permit it pay the increase in fiscal 2003. When the City of New York increased real estate taxes by 18% in July 2003, however, the tenant paid under protest and brought suit to limit the application of the escalation clause and to recover the past increases paid, asserting that its architect had concluded that the leased premises constituted much less than 6% of the building's space.

The court granted the landlord's motion to dismiss the complaint. It held that the parties had agreed to an unambiguous formula for determining the tax increase and the tenant could not rewrite it to alleviate a "hard or oppressive bargain." Not only had the lease "deemed" the tenant's share to be 6%, but it specifically disclaimed that the figure bore "any relationship" to the actual percentage of the building it occupied. The court found that the lease had been negotiated at arm's length by experienced parties and was binding as written.

WE WISH YOU ALL A HAPPY AND HEALTHY 2005!