
CLIENT ADVISORY

OCTOBER 2009

CLIENT ALERT: CONDOMINIUMS MUST REVISE THEIR POWER OF ATTORNEY FORMS

As discussed in the March 2009 and September 2009 issues of this *Client Advisory*, New York State legislation effective September 1, 2009 affects the form and substance of all powers of attorney executed in New York after that date. Among other ramifications, this will require condominiums to change the form of power of attorney that they require unit owners to execute. Enclosed with this newsletter is a Client Alert for the attention of condominium boards, sponsors, managing agents, and others who may be interested in this issue.

PROTECTION OF BUSINESS JUDGMENT RULE MAY BE UNAVAILABLE WHERE BOARD ACTION SUFFERS FROM CONFLICT OF INTEREST

The business judgment rule provides broad protection to Cooperative Boards of Directors and Condominium Boards of Managers, which may often have to make difficult and controversial decisions in the performance of their duties. This rule provides that boards and board members are generally not liable for good-faith decisions that they make in the operation of their buildings. However, the protections of the business judgment rule can be lost in certain circumstances, such as where the board's decision is affected by a conflict of interest, as in the case of **Perlbinder v. Board of Managers of 411 East 53rd Street Condominium**, 2009 WL 3079602, 2009 N.Y. Slip Op. 6737 (App. Div. 1st Dep't Sept. 29, 2009).

In this case, the plaintiffs were the owners of several unsold units in a condominium. They were designated as "sponsor representatives" in the condominium documents and entitled to select a member of the Board of Managers. Several years after the conversion, plaintiffs posted a "for sale" sign advertising that one of their units was for sale. Thereafter, an "informal poll" of the Board of Managers resulted in a decision that the sign should be removed. The board member representing plaintiffs was not included in the poll, because he was considered an "interested party." Following the board poll, plaintiffs' sign was removed. However, a sign of comparable size posted by the managing agent was allowed to remain in place.

Plaintiffs then sued the Board of Managers, seeking a determination that they had the right to post signs, as well as damages for breach of fiduciary duty. To resolve this issue, the court reviewed the language of the Condominium Declaration and By-laws. While the Board of Managers argued that the Declaration accorded the right to post signs only to the original sponsor, not to its designees, the By-laws adopted at the same time broadened that right to include designees of the sponsor as well as the sponsor itself. Accordingly, the court held that plaintiffs had the right to post their sign.

The court then turned to Plaintiffs' claim for damages for breach of fiduciary duty. The Board of Managers contended that its decision not to permit the sign was protected by the business judgment rule. The court held that "[a]bsent a showing of fraud, self-dealing or unconscionability,

the court's inquiry is ... limited and it will not inquire as to the wisdom or soundness of the business decision." However, the court continued, "the rule will not serve to shield boards from [liability for] actions that have no legitimate relationship to the welfare of the condominium, or that deliberately single out individuals for harmful treatment."

Here, the court noted that "the CEO of the condominium's management company is also a board member" and that "[t]he wife of another Board member is in the real estate business." Therefore, the court questioned the fairness of excluding plaintiffs' representative on the board from the poll while including these individuals. Moreover, the board's justification for removing the sign "because it detract[ed] from the building's appearance" was belied by its allowing the managing agent's comparable sign to remain in place, and the board's action was unauthorized to begin with because plaintiffs had the right to post their sign according to the By-laws. Under all the circumstances, the court found that the board had breached its fiduciary duty to plaintiffs and directed that a hearing be held to determine the amount of any damages that plaintiffs suffered as a result.

**OWNER'S CLAIM FOR PUNITIVE DAMAGES
AGAINST CONDOMINIUM BOARD REINSTATED**

In **Bishop v. 59 West 12th Street Condominium, 2009 WL 3126401, 2009 N.Y. Slip Op. 6766 (App. Div. 1st Dep't Oct. 1, 2009)**, the Condominium prevented the owner of a first-floor commercial unit from making alterations in the unit, which involved "venting a bathroom and new mechanical equipment in the kitchen through an exterior wall and onto the terrace owned by another unit owner, who was also a board member." The condominium documents permitted the commercial unit owner to make alterations without board approval, so long as they did not create a nuisance or interfere with other residents' possession or use of their property. The Board, however, withheld approval of the proposed alterations. According to the commercial unit owner, the board "withdrew its prior approval at the behest of a board member whose property may have been affected by the proposed alterations. In addition, plaintiff claims that the board's action took place at a secret meeting in which the affected board member participated and where no quorum was present." Finally, the plaintiff alleged that the Condominium twice interceded with the Department of Buildings, trying unsuccessfully to have the building permit for the renovations revoked.

The court held that if the facts alleged by the commercial unit owner were proven to be true, then plaintiff might be entitled not only to compensation for his actual out-of-pocket damages, but in addition, if the "allegations of intentional and willful disregard of plaintiff's rights" were proven, the judge or jury "could well conclude that punitive damages are warranted."

**ENVIRONMENTAL CONTROL BOARD
ANNOUNCES PENALTY RELIEF PROGRAM**

The New York City Environmental Control Board (ECB), which has jurisdiction when certain Building Code, sanitation, and other violations are assessed against property owners, has announced a limited "Penalty Relief Program." According to the City's announcement, this program "allows businesses and homeowners to resolve ECF violations that are in default and for which a hearing date was scheduled before May 1, 2009. Applicants can resolve their default violations by paying the base fine and will not have to pay additional penalties, late fees or interest." The notice also states that "if a violation is associated with a correctible condition, known as a compliance violation, you must correct the condition before you may participate in the program." Further information and application forms may be found at http://www.nyc.gov/html/dof/html/jump/ecb_res.shtml

Client Alert

From: Steven R. Ganfer, Sandra Jacobus, Matthew J. Leeds ((212) 922-9250)

Date: October 5, 2009

Re: **NEW PROVISIONS REGARDING THE CONDOMINIUM POWER OF ATTORNEY GIVEN TO THE BOARD OF MANAGERS BY UNIT OWNERS**

As we have discussed in our monthly "Client Advisory" newsletters, the New York State Legislature has enacted amendments to the law governing powers of attorney of all kinds in New York, most of which took effect on September 1, 2009. We have prepared this Client Alert to describe in more detail the significant effect of those changes on the powers of attorney given to Condominium Boards of Managers. Virtually all sets of Condominium documents require each unit owner to give the Board of Managers a power of attorney so that the Board has legal authority to conduct certain business of the Condominium, such as enforcing its rights against defaulting unit owners.

The new power of attorney law contains both substantive and ministerial requirements that suggest that all existing forms of powers of attorney signed after August 31, 2009 might not be effective to grant the authority to the Board that is intended. PLEASE NOTE: The law for this purpose only affects new powers of attorney signed on or after September 1, 2009 and in most cases will not affect powers of attorney signed before September 1, 2009.

Among many other things, the law requires that:

- The power of attorney must include specific language contained in the statute explaining the obligations and authority given to the Board of Managers under the power of attorney.
- The power of attorney will now have to be signed on behalf of the Board of Managers, as well as the unit owner, and acknowledged by each before a notary public.
- The power of attorney itself must be in at least 12-point type.

Failure to have new unit owners sign the appropriate form of power of attorney might lead to an inability of the Board to perform certain acts and could drastically impede the Board's ability to function in such matters as the collection of delinquent common charges from unit owners.

Unfortunately, it does not appear that there can be a "one size fits all" fix to the forms that might be used for a particular Condominium. Accordingly, we urge management and Condominium clients to review the new law and to implement changes that might be needed to each of their forms of power of attorney. Boards should be aware that some sets of Condominium documents might not

permit any changes in the form of power of attorney without a more formal vote of unit owners for an amendment to the Condominium's By-laws, in which case the Boards will want to consider whether to undertake the appropriate amendment process.

We do note that although efforts at legislation to address some issues raised by the new law are being discussed by various interested organizations, such as Bar Associations in which some of our partners are active, there is no imminent relief other than amending a Condominium's existing forms.

Other potential technical issues have been voiced in some circles about the new law that might go beyond the currently recognized issues relating only to the execution of new powers of attorney. For example, there is a concern that if a unit owner gives a power of attorney to somebody else for a completely unrelated reason after having delivered the power to the Board, the law might automatically deem the owner to have revoked all prior powers, including the power of attorney given to the Board. Whether this is an issue that will require consideration for further action by Boards might become clearer in the coming weeks. We will advise about developments of interest in subsequent monthly Client Advisory newsletters or updates.

Please feel free to call any of us or any other contact at the Firm to discuss the situation as it affects your building.

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