

# CLIENT ADVISORY

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## OFFSETTING SCAFFOLDING COSTS

Several clients have brought to our attention an interesting method that may be available to certain cooperatives and condominiums to offset scaffolding costs. Advertising companies in the New York metropolitan area are actively seeking scaffolding in highly visible locations upon which they may place "construction bridge advertising". In many instances, we understand that they may pay the entire cost of the scaffolding, as well as additional fees to the corporation or association for the privilege of placing their construction bridge advertising on the scaffold's panels that face the street. The contract for any such construction bridge advertising should be made, among other things, subject to compliance with all laws and regulations and indemnification of the corporation or association from any violations. If your building is considering an improvement project that requires the erection of scaffolding, you may want to consider utilizing such a technique to offset part of your construction project's costs. Please contact our office if you would like additional information.

## DEALING WITH ENVIRONMENTAL PROBLEMS

Notice of an environmental problem is generally greeted with great alarm and concern by cooperative and condominium boards due to the potential exposure to liability for the cost of a cleanup, as well as the "stigma" which can attach to a building with an environmental problem. One board's concerns about such liability and the future costs of a cleanup was the subject of a case entitled **87<sup>th</sup> Street Owners Corp. v. Carnegie Hill-87<sup>th</sup> Street Corp.**, (NYLJ, 08/19/2002, p. 17, col. 2). The parties to this action are two cooperative corporations owning adjoining buildings on East 87<sup>th</sup> Street. Fuel oil was discovered under and on the property of 87<sup>th</sup> Street Owners Corp. ("Plaintiff"), allegedly having leaked from the adjoining building owned by Carnegie Hill-87<sup>th</sup> Street Corp. ("Defendant"). The fuel leak contaminated the subsurface and groundwater under Plaintiff's property, and caused petroleum vapors to "bother" the building's unit owners. There was also evidence of oil under Defendant's property, with a risk of further seepage, but Defendant contested Plaintiff's claims. The New York State Department of Conservation ("DEC") was called in to investigate and devise a plan for remediation of the oil spill, and Defendant had implemented the DEC's plan. The DEC's plan, which included a system for the removal of the spilled fuel oil and for the prevention of further spills, was being operated and maintained by the Defendant, a major concern for Plaintiff. The Plaintiff feared that the DEC might some day require additional cleanup, and that the Defendant would either not maintain the current system or pay for future costs, ultimately leaving Plaintiff, and its unit owners, with a potentially enormous cleanup bill. Rather than wait for such a feared result, the Plaintiff filed an action in federal court under the Resource Conservation and Recovery Act ("RCRA"), a federal statute, requesting an order from the federal court that would require that Defendant cure the oil problem, as well as award Plaintiff damages available under New York State law. Plaintiff asserted that a fuel oil leak contaminating subsoil surfaces and groundwater poses "an imminent and substantial endangerment to health or the environment", a requirement for injunctive relief under RCRA. However, the Court noted that Defendant had been cooperating with the DEC and had followed all DEC requirements so that any imminent threat to public health or the environment had been abated. In light of Defendant's cooperation with the DEC and the implementation of its plan, the federal court dismissed Plaintiff's case. The Court surmised that the true nature of the Plaintiff's case was actually a pre-emptive attempt to obtain a determination from the federal court that the Defendant was responsible for the

contamination and all costs arising from it, a determination usually made in the first instance by a state administrative agency such as the DEC. The federal court refused, unwilling to make this decision in the DEC's place without further evidence of a change in the present circumstances, such as, for instance, the Defendant's failure or financial inability to comply with the DEC's requirements.

## **THE LATEST ON SPONSORS' OBLIGATIONS TO SELL UNSOLD SHARES**

In our July 2002 issue, we reported on the decision of New York's highest court, the Court of Appeals, which affirmed portions of the Appellate Division's decision in 511 West 232<sup>nd</sup> Street Owners Corp. v. Jennifer Realty Co. (287 A.D. 2d 947 [1<sup>st</sup> Dept. 2001]) (the Court of Appeal's decision can be found at 2002 N.Y. Slip Op. 04809 N.Y.; 2002 WL 1286050). In the Jennifer Realty case, a cooperative corporation's board of directors and several of its individual shareholders and lessees alleged that a promise by its sponsor to sell all of its unsold units within a reasonable time was implied in the conversion of their building. We had previously anticipated that the Appellate Division's decision, if upheld, might open the floodgates to a myriad of claims by cooperative and condominium apartment owners in buildings throughout New York in which sponsor-owned apartments still make up a significant percentage of the apartments in the building. However, the Court of Appeals, and now the Supreme Court, is keeping plaintiffs on a tight leash.

A reported case attempting to mirror the allegations by the purchaser/shareholders in the Jennifer Realty case has now been published. The result should be heeded by boards considering an action against a sponsor for not selling its unsold units within a reasonable time after the conversion of the building to cooperative or condominium status. In Michelangelo Apt. Inc. v. 687 Associates (NYLJ, 08/28/02, p. 24, col. 5), a cooperative corporation (the "Corporation") brought suit against a sponsor to compel the sponsor to sell its 46% of the outstanding shares of the Corporation. The Corporation alleged that the sponsor had breached representations made in the original offering plan by failing to sell apartments even though potential purchasers had approached the sponsor for the opportunity to buy apartments. The Corporation claimed that it was a "third party beneficiary" pursuant to the terms of the Offering Plan. However, Judge LaCava of the New York State Supreme Court disagreed and dismissed this Corporation's claims as pleaded.

Judge LaCava held that the fraud claims, as alleged, belonged solely to the individual purchasers who relied upon the alleged misrepresentations, none of whom were made parties to this action, and not to the Corporation itself. Judge LaCava differentiated the Michelangelo case because several of the plaintiffs in the Jennifer Realty case were individual purchasers of units. Judge LaCava also addressed the concept of a group of individual shareholders seeking court certification as a "class", permitting one action to be commenced on behalf of all persons sufficiently demonstrated to the court to share common issues of law or fact. Judge LaCava held that such a group of purchasers would most likely not be certified as a class since actions based upon fraud are reliant upon each individual's personal understanding and knowledge of the terms of the Offering Plan, rather than factual issues common to all plaintiffs. Thus, boards and board members considering such claims against sponsors need to be aware that the ability to pursue such a claim depends not only upon the terms of each individual offering plan, but may also depend upon the willingness of individual unit owners to act as plaintiffs.