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From the Law Offices of
PERKINS & ANCTIL P.C.
ATTORNEYS AT LAW

IN THIS ISSUE

L A W Q U A R T E R L Y

Announcements

We are delighted to announce that Partner Scott Eriksen has been appointed as a Co-Chair of CAI New England Chapter Attorneys' Committee.

Also, Perkins & Anctil is pleased to present the first seminar in our 2016 educational series. Our well received seminars have been filled to capacity in the past, so don't hesitate to sign up for this learning/networking opportunity. Call Samantha at (978) 496-2000 to reserve a seat. We look forward to seeing you there on **Thurs., Jan. 28, 2016 Real Estate Seminar for "*Consumer Financial Protection Bureau (CFPB) Effect on Real Estate Closings*"**

Know Thy Association – Corporation or Trust

By: Scott J. Eriksen, Esq.

Is your condominium association organized as a corporation or a trust? Without peeking at your governing documents, could you answer the question? Did you know that there was a difference? Some of you may have been able to guess the answer from the title of the individuals serving on your association's governing board. If they are called "trustees," chances are your association is a trust. If they are "directors" or "managers," your association may be organized as a corporate or other limited liability entity. "Ok, fine," you say, "so I didn't know, but does it really matter? Isn't that just some esoteric distinction that only a lawyer would care about?" Not necessarily.

Condominiums in Massachusetts are, in legal parlance, "creatures of statute." That is to say that a statute (Chapter 183A of the General Laws of Massachusetts) enables the creation of condominiums and condominium associations here in the Commonwealth. When we talk about "condominium associations" we are really talking about the "organization of unit owners" – the collective of individual owners – of a particular condominium. By statute, the organization of unit owners may be organized as a corporation or trust and in either case it is charged with the management and regulation of the condominium. Each owner in the condominium has an undivided interest in the organization represented by his or her respective percentage interest (as expressed in the master deed).

In many respects, whether the organization of unit owners of a condominium is established as a trust or a corporation doesn't really matter. In either case, the association is charged with overseeing the administration of the common areas, the collection of condominium assessments and the enforcement of condominium covenants. Also in either case the association is governed by a board of elected or appointed individuals who are empowered, both by statute and the governing documents, to carry out the business of the association. The statute sets forth a number of mandatory provisions which must be included in the association's governing documents, thus the fundamental terms of the documents of all associations will (or at least should) be similar.

But there ***is*** a difference between corporations and trusts. Corporations, like condominiums, are also creatures of statute. In Massachusetts, there are different types of corporate and business entities, and volumes could be written on the nuances and

distinctions among them. Suffice to say for our purposes that most condominiums in Massachusetts organized as "corporations" are organized as domestic non-profit corporations. (A quick side note – the fact that some condominium associations are organized as non-profit organizations does not mean that your assessments are tax deductible – there is a distinction between non-profit and tax-exempt which, again, is subject for another forum). Non-profit corporations, like other corporations organized in the Commonwealth, are required to file annual reports with the Secretary of the Commonwealth's office. In our experience, this may be news to board members who may come to find out that their corporate entity has been administratively dissolved by the Secretary's office for failure to file these reports. This can become a problem (and, frankly, is usually only discovered) when the entity goes to borrow or execute an amendment to its By-laws and while reinstating the entity is not a difficult task, it can be expensive and time consuming.

If you think your association may be organized as a corporate or limited liability entity, it's worth dusting off that old set of documents to be sure. You may also want to consider visiting http://corp.sec.state.ma.us/corpweb/CorpSearch/CorpSearch.aspx to determine whether the entity is still in good standing and when the last annual report was filed. If you find it's been a while since your last filing – or worse, that you've been dissolved without your knowing – you should contact counsel to remedy the situation.

"DRONING ON"

By: Charles A. Perkins, Jr.

While we have all heard and read much about the new technology associated with Drones, it is clear that we are not prepared to deal with the privacy issues associated with Drones both legislatively on the Federal and State level as well as philosophically.

These devices have appeared crashing into the US Open, encroaching on the White House including one that crash landed on the South Lawn, and interfering with air space.

The purpose of this brief article is not to cover all the facets associated with Drones but to raise awareness of the social issues that will arise because Drones. For example, how much privacy are we willing to lose? Are we willing to allow Drones to take pictures of common areas and/or exclusive use common areas? Will we tolerate the use of Drones to confirm work being performed by contractors or municipal employees?

There is also the question of what happens when Amazon decides to start using Drones to deliver its packages. Will condominiums be required to modify their grounds and create an exclusive landing area for Drones and, if so, who is ultimately responsible for these deliveries? It was recently announced that Amazon has created Amazon Prime Air for deliveries. See the video at https://www.youtube.com/watch?v=MXo_d6tNWuY

There is also the issue of insurance and liability as a result of the use of Drones. From Drone racing to blowing up an enemy target, it is clear that Drone technology will be become more complicated, less expensive and present more viable uses as well as threats in the years to come.

There is also a new market that is developing devices to prevent the use of Drones. Hopefully the FAA and the legislature will start to catch up with this technology and create firm regulations but in the meantime many association will be forced to create their own regulations with respect to the use of Drones in and around their common areas.

How Far does the Homestead Protection Go?
Answer: Pretty far!

By: David R. Chenelle, Esq.

The story begins when Walter Catton bought his home in 1981. The property was a two-story building and zoned by the City of Lowell as Urban Single Family (USF). Under the City's zoning ordinances, USF zoning allows as a matter of right "a business or occupation to be run out of the home provided that, among other things, the business is conducted solely by the person(s) occupying the dwelling as a primary residence …, is clearly incidental and secondary to the use of the premises for the residential purposes ..". Mr. Canton moved into the second floor of his new home shortly after purchasing it, and on the first floor opened up the Catton Insurance Agency.

Mr. Catton complied with all requirements of the city ordinances including the limitation of having just one sign on the outside of the building indicating the existence of the business. He continued to live in his home and run his insurance business for the next 33 years without concern.

As a result of continued financial distress and in preparation for the filing for protection under the U.S. Bankruptcy Code, Mr. Catton recorded a Declaration of Elderly Homestead on June 27, 2014. Several days later, Mr. Catton filed a Chapter 7 Bankruptcy Petition and using the newly filed Homestead, exempted the whole of his residence value. Shortly after his case was filed, David Nickless was appointed as the Chapter 7 Trustee and thereafter filed an objection to the use of the Massachusetts Homestead claiming that it is not available for mixed residential and commercial activities. For the next 2 years Mr. Catton was involved in an odyssey

of opposing the Trustee who was driven to take his home and sell it for the benefit of Mr. Catton's unsecured creditors!

Following a number of actions by both sides, the dispute came to a head at an evidentiary hearing in the Bankruptcy Court on October 5, 2014. Following the filing of additional briefings, the court, J. Hoffman found for Mr. Catton in overruling the Trustee's Objection.

Within the published decision, the court narrowed the arguments down to two points: The court held that the mere fact that a property is not used exclusively as a residence does not preclude such property from being a single-family dwelling for exemption purposes, but concluded that an analysis to determine if the commercial use predominates over the residential use was needed. Although the court determined that this approach requires a "fact intensive, case by case inquiry", in at least Mr. Catton's case, it found that the insurance agency was not the predominant use. The Court concluded by stating that to accept the Trustee's interpretation would "leave unprotected every home in which an owner operates a business, no matter how insubstantial."

The Trustee thereafter appealed to the U.S. District Court. Upon the filing of briefs by both parties, the District Court issued its decision without conducting a further hearing. The District Court, in affirming the Bankruptcy Court's decision followed the reasoning of the lower court and found that the Chapter 7 Trustee's argument was an absolute and ran contrary to common sense. The court provided examples of what would occur should it adopt the Trustee's position. It stated that such activities as: small children selling lemonade in the yard during hot summer days; a homeowner renting out parking spots to Patriots fans; and children operating a lawn mowing or snow shoveling service would all render their home (or their parents' home) to no longer qualify as a residence, thereby eliminating the ability to claim a homestead! In Denying Mr. Nickless' appeal the court held that "the mere use of a residence for a non-residential purpose, at least when the predominant purpose is residential, does not, by itself, preclude an exemption for the Property".

Good News for Employers: Court Upholds Non-Compete Agreement Entered *During* Employment.

By: Kimberly A. Alley, Esq.

It's a simple fact: Massachusetts is an employee-friendly state. Non-competition agreements and other employment covenants that restrict an employee have become increasingly disfavored by the courts. The recent trend has been toward the elimination of enforcing non-competition agreements altogether.

Why? Employers are viewed as the proverbial Goliath in the battle against David. Employees are deemed to have little bargaining power - particularly when such agreements are drafted and mandated by the employer. For this reason, restrictive employment agreements signed *after* the employee begins working are particularly disavowed by the courts.

However, in a recent victory for employers, on December 1, 2015, the United States District Court for the District of Massachusetts ("USDC") upheld a non-compete agreement signed seven months after an employee began work. In the case entitled *American Well Corporation v. Obourn*, the USDC rejected the employee's efforts to dismiss the employer's lawsuit asserting violations of the non-compete agreement after the employee went to work for an alleged competitor. Specifically, the Court found that the employee's continued employment and access to confidential information supported an enforceable agreement.

The USDC relied on legal precedent from Massachusetts' cases decided in 1922 and 1935. Historically, it has been recognized that a non-competition agreement signed during employment contains sufficient legal consideration (or mutual exchange) to support a binding contract because it offers continued employment. Despite this precedent, many recent decisions have determined that continued employment alone is not sufficient consideration for a non-compete agreement.

Despite this victory, employers should still tread lightly when asking an employee to sign a non-compete agreement. There is ample room in the USDC decision for it to be arguably aligned with the recent trend. Specifically, the employee in *American Well Corporation* was offered more than just continued employment – she was also allowed access to confidential information.

It is important to review all of your company's employment agreements to ensure they comply with recent employment trends and legal requirements. Please feel free to contact Attorney Kimberly Alley of Perkins & Anctil if you would like an analysis of your company's employment practices for the upcoming New Year.

Holiday Wishes Can Come True

By: Fredrick J. Dunn, Esq.

In 1983, Disney released the holiday favorite, *Mickey's Christmas Carol*, which many of us enjoy year after year. Perhaps some of us relate to the ever optimistic Mickey character, Bob Chratchit, while others relate to the miserly financier,

Ebeneezer Scrooge, played by Scrooge McDuck. Hardly any of us can forget Mr Scrooge's, famous, if not infamous saying, "Bah Humbug!" and I am certain that some of us have uttered this a time or two during the busy holiday season. In 2011, when the SJC delivered its ruling in ***U.S. Bank National Association vs. Ibanez***, virtually all closing attorneys, borrowers, sellers, lenders, and title insurers uttered a "Bah Humbug!" or two. Even the mention of an "Ibanez Problem" was seen as a death knell for many transactions. However, thanks to Governor Charlie Baker, who recently signed the "Act Clearing Title to Foreclosed Properties" those "Bah Humbugs!" have been replaced with holiday cheer. In fact, if you listen closely, you may just hear the angels' voices as they celebrate this holiday miracle!

First, a bit of history. *Ibanez* voided many foreclosures that failed to include valid assignments prior to the initiation of the foreclosure process. Overnight, many homeowners and the titles to their properties were negatively impacted – through no fault of their own. With such title defects in place, sales, refinances, and purchases were brought to a halt, while the industry sought solutions to remedy such issues. Often times, these remedies would be quite costly to the homeowner, title insurer, lender, etc. For years the industry has lobbied for something that would resolve these issues. Notably, a similar bill was passed by the legislature during Governor Patrick's tenure, only to be vetoed at the last second. Finally, on November 25, 2015, Governor Baker delivered the new law, which will go into effect on December 31, 2015.

The new law allows a foreclosed borrower a three year window (statute of limitations), after a foreclosure, to challenge the foreclosure and regain title to the foreclosed property. The three year period begins at the time the affidavit of sale is recorded with a foreclosure deed. Once the three years has elapsed, the foreclosure is deemed to have been conducted properly. The foreclosed borrower does retain the right to seek compensatory and punitive damages for a wrongful foreclosure within said statute of limitations. Further, a borrower that retains possession of a foreclosed property as his/her primary residence is free to challenge the validity of the foreclosure outside of the three year window. As such, it is important to confirm that the property is no longer occupied by said borrower, or those claiming under them. Also, for foreclosures that have affidavits recorded more than three years prior to the effective date of the new law, there is a year-long waiting period for the affidavit to be conclusive evidence of a proper foreclosure. However, for those that have been plagued by an *Ibanez* title defect, this is a small time to wait.

This office has had the privilege of seeking a resolution to an *Ibanez* issue and knows firsthand the devastating ramifications that such issues can have on transactions for both buyers and sellers. Fortunately, we were able to successfully resolve our issue. Others have not had such luck. This is why we can safely say that some holiday wishes do come true. Governor Baker certainly delivered a bit of holiday cheer for many when signing this new bill into law. While we may grumble a "Bah Humbug!" or two during the hustle and bustle of the holiday season, those in the conveyancing community can celebrate that it will likely not be caused by the stresses of an *Ibanez* issue.

About Our Law Firm

Perkins & Anctil, P.C. is one of Massachusetts' and New Hampshire's leading firms practicing condominium law, condominium conversions, real estate law, developer and lender representation, representation before town and municipal boards, landlord/tenant matters, civil litigation, employment law and bankruptcy.

Our distinguished attorneys and skilled support staff form a cohesive group that delivers the exceptional legal services our firm was founded upon in 1988. Combining knowledge, experience, and the enthusiasm of our people together with the effective use of technology, Perkins & Anctil is the small firm that makes a big impact. Follow us: www.perkinslawpc.com,www.perkinslawpcblog.com

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