VOL. 34 ISSUE 2 | SUMMER 2014

International Council of Shopping Centers, Inc.
1221 Avenue of the Americas, 41st floor, New York, NY 10020-1099
Phone (646) 728-3800

SHOPPING CENTER LEGAL UPDATE

THE LEGAL JOURNAL OF THE SHOPPING CENTER INDUSTRY

In Depth

Cases

From Canada

Shopping Center Legal Update is published by the Legal Department of the International Council of Shopping Centers, Inc., 1221 Avenue of the Americas, 41st floor, New York, NY 10020-1099.

Editor-in-Chief: Stephanie McEvily, Esq.

The Sun Does Not Shine on Tenants in Florida: The Disallowance of Monetary Damages for Landlord Failure

*Edward A. Chupack**
Bridgestone Americas, Inc.
Chicago, IL

The tenant may not, based upon a narrow interpretation of a recent case in Florida, be able to avail itself of the remedy for monetary damages (including lost profits) if a landlord fails to fulfill its obligations under a lease.[1] The tenant in the cited case accepted the premises in "as is" condition and the appellate court ruled that: (a) the trial court erred by using parol evidence to determine the date by which the landlord was to complete the repairs and, *more significantly,* (b) the tenant was not entitled to damages incurred as a result of a delayed opening of the building that the tenant was to occupy.

The landlord brought an action against the tenant seeking eviction and past due rent. The tenant, in turn, alleged that the landlord had breached the lease because the landlord had failed to maintain the premises; moreover, the tenant noted that it had placed the rent in escrow to the court registry (thereby "paying" the rent in order to prevent the landlord from alleging that the tenant was in breach of the lease by not paying the rent). Importantly, the tenant also counterclaimed for damages. The trial court entered judgment in favor of the tenant.

The trial court denied the landlord's breach of contract claim because the tenant had paid the landlord the rent in escrow, noting that the tenant's damages exceeded all of the liability that the tenant had to the landlord during the time that the tenant paid the rent in escrow.[2] The tenant successfully asserted its affirmative defense of set-off. *Therefore, importantly, there was no dispute that the tenant had incurred damages.*

The appellate court, in contrast to the trial court, held that the landlord could not be liable for damages incurred by the tenant as a result of the landlord's failure to complete its work, including the landlord's failure to hook up the building where the premises were located to the sewer system by a certain date, because the tenant had agreed in the lease to accept the premises without a corresponding covenant on the part of the landlord to perform the landlord's work by a certain date. The court so held, even though it affirmed that the landlord had breached the lease by failing to maintain the premises.[3] The court also pointed out that the tenant had accepted the premises in "as is" condition.[4]

The court based its denial of the tenant's claim for damages on the absence of language in the lease requiring the landlord to complete its work by a certain date[5] and the acceptance of the premises by the tenant in as is condition under the lease,[6] and invoked the parol evidence rule.[7]

The invocation of the parol evidence rule by the court was certainly in keeping with precedent[8]; however, the refusal of the court to grant the tenant damages for the failure of the landlord to fulfill its responsibilities under the lease by a certain date appears to be a decision not in keeping with either general contract law where an equitable remedy is unavailable or case law precedent.[9] Further, the court might have granted the tenant an equitable remedy: perhaps rescission prior to the lease term beginning because the landlord failed to deliver possession of the premises to the tenant by the commencement date[10] or constructive eviction, thereby giving the tenant the right to terminate the lease after the commencement of the term (particularly if the tenant had raised a misrepresentation claim against the landlord).[11]

The tenant, though, did not seek an equitable remedy and, instead, pursued an action for damages against the landlord. There is a host of articles and cases that flesh out the measurement of damages for the breach of a lease.[12] Moreover, tenants have prevailed against landlords in other jurisdictions with claims for consequential damages unless, of course, the lease prohibited the tenant from seeking consequential damages.[13] It may well be that the tenant would have been successful in obtaining damages in another jurisdiction and, although it may be improper to characterize the outcome of this case as aberrational, the result does not appear to be in keeping with a common-sense approach to the law. The many other cases cited in this article illustrate such a common-sense approach in situations in which a tenant did not receive the benefit of its bargain with the landlord and was awarded damages by the court.

Drafting a Solution

The best solution to ensure that a tenant will prevail in an action for damages against a landlord that has not fulfilled its responsibilities, is to express that remedy in the lease. This clause often takes the form of an abatement of rent for the period of time that the landlord has not fulfilled a responsibility under the lease, and is often accompanied by additional language granting a tenant the right to terminate the lease if the landlord's obligation has not been fulfilled by a certain date.

Abatement of Rent
For example:

> Notwithstanding anything to the contrary contained in this Section __, if the Commencement Date has not occurred on or before _____________, Tenant shall be entitled to a Rent abatement following the Commencement Date of $__________ for every day in the period beginning on ________________ and ending on the earlier of the Commencement Date. Landlord and Tenant acknowledge and agree that: (i) the determination of the Commencement Date shall take into consideration the effect of any Tenant delay; and (ii) shall be postponed by the number of days the Commencement Date is delayed due to events of Force Majeure. If there have been no Tenant delay or events of Force Majeure and the Commencement Date does not occur by _________ __, 20__, Tenant may terminate this Lease by giving Landlord written notice of termination on or before the Commencement Date. In such event, this Lease shall be deemed null and void and of no further force and effect and, so long as Tenant is not in Default, the parties hereto shall have no further responsibilities or obligations to each other with respect to this Lease.

Liquidated Damages
A liquidated damages clause in the lease would express the parties' intent that the tenant was entitled to damages for the landlord's failure. A liquidated damages clause often takes the form of a monetary set-off of rent for the period of time that the landlord has not fulfilled its responsibility under the lease and may be accompanied by additional language granting a tenant the right to terminate the lease if the landlord's obligation has not been fulfilled by a certain date.

For example:

> The parties agree that Landlord's failure to achieve substantial completion of the work set forth in Section __ of this Lease by _________ __, 20__, will cause Tenant to incur substantial economic damages and losses of types and in amounts that are impossible to compute and ascertain with certainty as a basis for recovery by Tenant of actual damages, and that liquidated damages represent a fair, reasonable and appropriate estimate of such damages. Therefore, in lieu of actual damages for such failure by Landlord, Landlord agrees that liquidated damages may be assessed and recovered by Tenant as against Landlord without Tenant being required to present any evidence of the amount or character of actual damages sustained by reason thereof. Therefore, Landlord shall be liable to Tenant for payment of liquidated damages in the amount of $_______________ for each day that substantial completion is delayed beyond _________ __, 20__. Such liquidated damages are intended to represent estimated actual damages and are not intended as a penalty, and Landlord shall pay them to Tenant without limiting Tenant's right to terminate this Lease for default as provided elsewhere herein.

Self-Help
The tenant may also choose to utilize self-help in order to attempt to avoid a confrontation, whether or not in the form of litigation, with the landlord. A simple self-help clause (which one would expect to be negotiated) follows:

> If Landlord fails to complete the following work by _____ __, 20__, Tenant may complete such work on and for and on the account of Landlord and make any reasonable expenditure or incur any reasonable obligation in connection therewith, and such expenditures and payments, including, but not limited to, reasonable attorneys' fees and disbursements shall be paid by Landlord to Tenant within 30 days of rendition of any bill or statement to Landlord, together with copies of relevant bills, receipts, invoices and other backup documentation, together with proof of payment thereof. Tenant shall incur only those costs and expenses as are reasonably necessary under the circumstances and shall receive no profit in connection with its performance of such work.

*EDWARD A. CHUPACK is Associate General Counsel at Bridgestone Americas, Inc., and was formerly Assistant General Counsel at Homart Development Co.; Assistant General Counsel at General Growth Properties, LLC; Senior Counsel at Equity Office Properties, Inc.; and Senior Counsel at Neal, Gerber & Eisenberg. He has written numerous legal articles on real estate matters and has lectured widely before business and legal groups on real estate law. Mr. Chupack is the editor and contributing author of the *Commercial Leasing Negotiations Handbook* [Edward Chupack, editor, ALI –ABA, (2006), and is the author of *Silver: My Own Tale As Written By Me With A Goodly Amount Of Murder*, which was published by St. Martin's Press.] The views and opinions expressed in this article are those of the author and do not represent the views and opinions of his employer or any other party.

[1] *ABGL Enterprises, LLC v. Girlcook, Inc.*, No. 4D11-2082 (Fla. 4th. DCA Sept. 5, 2012) (remanding and directing trial court to enter amended final judgment).

[2] *Id*.

[3] *Id*. The trial court, in March of 2009, severed the landlord's eviction count from the remainder of the litigation and, following a trial in May of 2009, denied the landlord's action to evict the tenant from the building.

[4] *Id*.

[5] *Rosenstein v. Rosenstein*, 976 So.2d 1148, 1149 (Fla. 4th DCA 2008).

[6] The court failed to distinguish between the tenant accepting the premises in "as is" condition and the landlord's failure to complete the work so that the tenant could occupy the building.

[7] *Allet v. Hill, 422* So.2d 1047, 1050 (Fla. 4th DCA 1982).

[8] *Carlton, Inc. v. Southland Diversified Company*, 381 So.2d 291 (Fla. 4th DCA 1980).

[9] *McIllwain v. Bank of Harrisburg*, 18 Ark. App. 213, 221 (Ct. App. 1986); *Belding v. Whittington*, 154 Ark. 561 (1922); *Dunlop v. Baker*, 239 F. 193, 204 (4th Cir. 1916).

[10] *S&D Group, Inc. v. Talamas,* 710 S.W.2d 680 (Tex. App. 1986); *Crown Plaza Corp. v. Synapse Software Sys., Inc.,* P.2d 824 (Wash. Ct. App. 1997).

[11] *See Fla. Atlantic Marine, Inc. v. Seminole Boatyard, Inc.,* 630 So. 2d 319 (Fla. Dist. Ct. App. 1993), although in contrast, the court may not alter the terms of a party's agreement by superimposing a separate agreement of unknown terms unsupported by the record. *See Rybovich Boat Works, Inc. v. Atkins,* 587 So.2d 519 (Fla. 4th DCA 1991), *rev. denied,* 599 So.2d 654 (Fla. 1992); *Balto v. Maley,* 464 So.2d 579 (Fla. 4th DCA 1985); *Simpson v. Young,* 369 So.2d 376 (Fla. 1st DCA 1979).

[12] Eugene L. Grant, *Disturbing Concepts: Quiet Enjoyment and Constructive Eviction in the Modern Commercial Lease*, 35 Real Prop. Prob. & Tr. L. J. 255 (1993); damages are often measured by the loss of rental value to the tenant. See *Ribenbard v. Finis P. Ernest, Inc.* (1976), 37 Ill.App.3d 536, 346 N.E.2d 494.); *Barton Chemical Corp. v. Pennwalt Corp.* (1982), 106 Ill.App.3d 561, 436 N.E.2d 51*; S.A. Maxwell Co. v. DeSoto, Inc.* (1979), 73 Ill.App.3d 844, 392 N.E.2d 33.; *Sigsbee v. Swathwood*, 419 N.E.2d 789 (Ind. Ct. App. 1992). There are also cases under which the amount of damages is measured by the lost profit, although these generally are cases in which the landlord is the plaintiff and the tenant is the defendant. *See Parkinson v. Langdon* (Dis. Ct. of App., Cal., 1918), 171 Pac 710; *Griffin v. Colver,* 16 N.Y. 489; *Wright v. Mulvaney,* 78 Wis. 89*; Hodges v. Fries,* 34 Fla. 63*; Dennis v. Maxfield,* 92 Mass. 138 (10 Allen). The tenant also has an action for damages if it cures the landlord's default. *See Anchor Inn of Mich., Inc. v. Knopman, 246 N.W.2d 416 (Mich. Ct. App. 1976);* F.G. Madara, Annotation, *Rights and Remedies of Tenant Upon Landlord's Breach of Covenant to Repair,* 28 A.L.R. 2d 446, 473 (1953 & Supp. 2003).

[13] *See Zion Indus., Inc. v. Loy*, 46 Ill. App. 3d 902, 361 N.E.2d 605 (1977); *Swisscraft Novelty Co., Inc. v. Alad Realty Corp*., 113 N.J. Super. 416, 274 A.2d 59 (Ct. App. 1971); *Smith v. Smith*, 375 So.2d 1041 (Miss. 1979); *Meyer v. Caribbean Interiors, Inc.*, 435 So.2d 936 (Fla. Dist. Ct. App. 1983); *Fena v. Wickstrom*, 348 N.W.2d 389 (Minn. Ct. App. 1984).

Stormwater Utility Fees Wash Over Maryland

*M. Trent Zivkovich**
Whiteford, Taylor & Preston, LLP
Baltimore, MD

Maryland's largest jurisdictions have recently implemented local stormwater utility fees that may have a material impact on businesses and their clients. Derided by some as a far-reaching "rain tax" and hailed by others as a key step toward protecting the state's beloved Chesapeake and local waterways, the stormwater fees were mandated in 2012 by the Maryland General Assembly for the state's urban and suburban core counties and the City of Baltimore. Driven in large part by a federal mandate to reduce pollution in stormwater flowing into the Bay, Maryland citizens and businesses are now paying what can be substantial new fees to fund stormwater management system upgrades. It is also likely that other jurisdictions, notably those in large parts of Virginia and Pennsylvania, will consider similar stormwater utility fees to satisfy their own requirements for funding in the near future.

Why Here and Now?

Stormwater utility fees are fairly common across the United States. With an estimated 1,400 jurisdictions utilizing the dedicated income, these fees can provide money to fund construction, maintenance and operation of stormwater management systems.[1] While more common in the Midwest, Southeast and West Coast, such fees have historically not been utilized in the Mid-Atlantic and Northeast regions. However, following the 2010 adoption of the Chesapeake Bay Total Maximum Daily Load ("TMDL") by the U.S. Environmental Protection Agency, it is likely that citizens and businesses in the Bay's 64,000-square-mile watershed (encompassing parts of New York, Pennsylvania, Delaware, Maryland, Virginia, West Virginia and the District of Columbia) will be seeing more of these fees in the next few years.

The TMDL mandates a "pollution diet" for waterways that feed the Chesapeake Bay, establishing just how much nitrogen, phosphorus and sediments can reach the various tributaries throughout its watershed in accordance with the Federal *Clean Water Act*. These pollutants come from wastewater treatment plants; agriculture; septic systems; air pollution; and, critically, stormwater runoff from impervious surfaces. As with many public utilities that are "out of sight and out of mind," stormwater management system maintenance and construction have often been left underfunded. Now, with the Federal mandate to reduce the amount of pollutants running off impervious surfaces such as driveways, parking lots and rooftops to local waterways and eventually the Bay, local jurisdictions and states are struggling to identify funding mechanisms that will allow them to meet their obligations.

Maryland's Experience

Because the Chesapeake Bay is truly part of its economic and cultural fabric, Maryland is generally considered to be among the most aggressive among its neighbors in regulating measures to allow it to meet its TMDL goals. In past years, the state has enacted various laws and promulgated regulations to address pollution coming from the other sources, leaving stormwater runoff from existing impervious areas as the last significant challenge. The direct regulatory driver for the new stormwater fees is the state's Municipal Separate Storm Sewer System ("MS4") Phase I permit. This permit, issued to governments in Maryland's urban and suburban core, requires the local governments to regulate stormwater flow from property and stormwater conveyance systems in their jurisdictions. The latest generation of the MS4 permit requires local governments to physically remove or treat stormwater runoff from 20 percent of the jurisdiction's untreated impervious surface area. The estimated five-year cost for the state's 10 largest jurisdictions to comply with these new MS4 permits is approximately $2.1 billion.[2]

In order to provide a dedicated source of funding for this need, the 2012 state law required each of these 10 jurisdictions to implement a local Watershed Protection and Restoration Program and establish an associated fund.[3] The state law provides a general broad outline of what is required in each jurisdiction's program, leaving the structure and operational details up to each individual jurisdiction, including exactly how each jurisdiction may generate the necessary funds. Jurisdictions are authorized to charge property owners flat rate fees, graduated amounts based on the amount of impervious surfaces identified on a particular property or any other approach they prefer; however, the jurisdictions must allow property owners to apply for credits based on existing stormwater management features. From a legal perspective, these local laws establish what are considered to be either regulatory fees or an excise tax—not an *ad valorem* tax.[4]

Each jurisdiction has responded to the state's mandate in one way or another. One factor in Maryland is that the fees charged by local jurisdictions vary greatly. Certain counties will charge a symbolic $0.01 per parcel per year, others an equivalent $400 to $660 per acre of impervious area per year (IA) and still others an equivalent $1,400 to $1,600 IA—topping out at an equivalent $2,500 IA.[5] While these rates are less than what is seen in other nearby areas outside of Maryland, they can pose a real and ongoing challenge for businesses and homeowners.[6]

Lessons Learned

Because of the federal mandate and growing awareness that long-neglected stormwater systems require significant capital, Maryland's stormwater utility fees are not going away anytime soon and are likely to only increase. In addition, other areas throughout our region, and likely throughout the nation, could very well see the same type of utility fees instituted in the coming months and years for the same reasons. Regardless of where a property or business is located, there are several key concepts for readers to remember:

- *Stay engaged.* Because of pending federal TMDL 2017 and 2025 deadlines, and a historic lack of funding, it should be anticipated that local governments throughout the rest of the Bay's watershed will consider implementing similar stormwater utility fees in the near future. Already, county and city governments in northern Virginia are discussing such fees, and it is generally expected that urbanized areas of Pennsylvania will follow as well. The form and practical function of Maryland's local laws and regulations have been significantly shaped by public and political input, and stakeholders are well advised to stay engaged in any such discussions.
- *Check bills, and apply for credits when available.* Charges for commercial properties are often based on aerial photography to determine just what is and is not an impervious area. Mistakes happen, so request and check the specific calculations and assumptions underlying the fees charged. In Maryland and with most other stormwater utility fees, there are relatively straightforward means of documenting and applying for credits against the fees charged. These credits can be truly significant and are well worth investigating, especially when a property faces five- and six-figure annual charges.
- *Check lease language.* Whether or not the fees charged under these new programs can be passed along from landlords to tenants is typically dependent on lease provisions. Specifically, watch for terms relating to "government charges" that may or may not define stormwater or IA fees. Some charges appear on real property tax bills, others on water bills. Consider language restricting the effective date of or future application of such charges.
- Consider how "capital improvements" provisions in a lease allowing for pass-through of expenses that are "reasonably intended to produce a reduction in operating expenses" might pertain to upgrades of site stormwater management practices and qualify as reduced government fees.

*__M. Trent Zivkovich__ is Counsel in the Baltimore office of Whiteford, Taylor & Preston, LLP, and heads the firm's Environmental Law Practice in Maryland. He focuses on environmental and corporate regulatory matters impacting real estate owners, developers and industrial clients, including providing direct advocacy before the state legislature and executive agencies.

[1] Western Kentucky University, Stormwater Utility Survey 2013 1 (2013).

[2] Office of Policy Analysis, Md. Dept. of Legislative Services, Stormwater Remediation Fees in Maryland: Local Implementation of House Bill 987 of 2012 29 (Nov. 2013).

[3] 2012 Md. Laws 151, Md. Code Ann., Envir. § 4-202.1 (2012).

[4] *See generally* 91 Op. Att'y 152 (2006) (discussing how a stormwater charge would be characterized depends on the terminology of the local implementing legislation), 91 Op. Att'y 14 (2006) (discussing the requirement for delegated authority from the state to a local jurisdiction in order to impose a charge on its citizens) and 96 Op. Att'y 61 (2011) (discussing when a charge assessed against citizens for stormwater management programs can be used to construct and maintain curbs).

[5] Office of Policy Analysis, *supra* note 2, at 12.

[6] For example, Philadelphia and the District of Columbia's fees are significantly higher in large part because many of their sanitary sewer lines also carry stormwater flows. Thus, any moderate rainfall event can overwhelm each City's wastewater treatment plants, causing diluted raw sewage to flow directly to local waterways. In part, because these combined sewers are larger and more extensive, the cost of upgrading this infrastructure is much higher. The District charges a combined equivalent $7,590 IA and Philadelphia charges a combined equivalent $5,287 IA.

Rights of First Refusal—Large and Small

*Mitchell S. Block**
Smith, Robertson, Elliott & Douglas, L.L.P.
Austin, TX

Four clients walk into their real estate attorney's office. All of the clients have questions related to a right of first refusal to lease additional space contained in their respective leases. Each client leases space in different retail shopping centers, each of which contains about 75,000 square feet of leasable floor area in a single one-story building. The four clients have become aware that their landlords have received bona fide offers to lease space in their centers. The attorney agrees to meet with each client individually.

Client Large's ("Large") lease contains a provision that states:

> It is expressly understood and agreed that if at any time during the term of this Lease or any renewal or extension thereof, Landlord should receive a bona fide offer from any person, persons, organization or organizations to lease in whole or in part, any space within the Center, Landlord shall send Tenant a copy of the proposed New Lease and notify Tenant of its intentions to accept the same. Tenant shall have the right within fifteen (15) days of receipt of the proposed New Lease to accept the terms of the New Lease in writing and within forty-five (45) days thereafter to enter into a lease of the above described space, for the rent and on the terms specified in said New Lease.

Client Small's ("Small") lease contains an almost identical provision, except that it only applies to an offer "to lease in whole or in part Space 1-A in the Center, as shown on the Site Plan." The right of first refusal provisions in Client Right ("Right") and Client Wrong's ("Wrong") leases are identical to the provision in Small's lease. Their rights only apply to Space 1-A in their respective centers.

Large received notice from her landlord informing her that it received and intended to accept a bona fide offer from Jones to lease all of the vacant space in the center, with a copy of the proposed New Lease enclosed. The proposed New Lease states that Jones will pay a gross rent of $25 per square foot of leasable floor area ("GLA") for premises containing a total of 50,000 sf of GLA. The premises is defined in the New Lease to include Spaces 1-A, 2, 3 and 4 as shown on a Site Plan exhibit attached to the New Lease.

Large occupies Space 1 in the center. Her business has grown steadily since she opened her store, and she has been thinking about talking to her landlord about the possibility of expanding her premises to include Spaces 1-A and 2. She tells the attorney that she would like to exercise her right of first refusal, but only as to Spaces 1-A and 2 and not for the entire premises that Jones has offered to lease. The attorney responds that he will review her lease and the applicable case law so that he can propose appropriate next steps.

Small received notice from his landlord informing him that it received and intended to accept a bona fide offer from Smith to lease the half of Space 1-A adjacent to Small's premises in the center, with a copy of the proposed New Lease enclosed. The proposed New Lease states that Jones will pay a gross rent of $25 per square foot of GLA for Space 1-A. Small occupies Space 1 in the center. His business has grown steadily since he opened his store, and he has been thinking about talking to his landlord about the possibility of expanding his premises to include Space 1-A. He tells the attorney that he would like to exercise his right of first refusal, but as to all of Space 1-A—not just for the portion of Space 1-A that Smith has offered to lease. The attorney responds that he will review Small's lease and the applicable case law so that he can propose appropriate next steps.

Right and Wrong, whose right-of-first-refusal provisions are identical to those of Small, received notice from their landlords informing them that their landlords received and intended to accept bona fide offers from Blue and Sky, respectively, to lease all of the vacant space in the centers, each with a copy of the proposed New Lease enclosed. Each proposed New Lease states that the new tenant will pay a gross rent of $25 per square foot of GLA for premises containing a total of 50,000 sf of GLA. The premises is defined in the New Leases to include Spaces 1-A, 2, 3 and 4 as shown on a Site Plan exhibit attached to the New Leases.

Right, who occupies Space 1, is also experiencing growth in her business. She tells the attorney that she would like to exercise her right to take Space 1-A on the offered terms. Wrong, also occupying Space 1 in his center, tells the attorney that he would like to exercise his right of first refusal to include not only Space 1-A but also Space 2. The attorney tells Right, and later tells Wrong, that he will review their leases and the applicable case law so that he can propose appropriate next steps.

Before reviewing any of his clients' leases, the attorney first searches for cases interpreting, in general, a tenant's right to exercise a right of first refusal. In addressing the issue of how to interpret the right of first refusal contained in a lease, a Texas Court of Civil Appeals stated:

> The first rule of construction of a written contract is that the intention of the parties be ascertained and given effect. In that regard, it is not the intention which the parties may have had but failed to express in the instrument, but it is the intention which, by said instrument, they did express.[1]

A contract is construed "from a utilitarian standpoint bearing in mind the particular business activity sought to be served" and "will avoid[,] when possible and proper[,] a construction which is unreasonable, inequitable, and oppressive."[2]

In Large's lease, her right of first refusal applies "in whole or in part, to any space within the Center," and she wants to exercise this right with respect to Spaces 1-A and 2 only, even though her landlord gave her notice of its intention to accept an offer to lease those as well as other spaces in the Center. In construing a lease that gave the tenant a right of first refusal to purchase the leased premises where the landlord has received an offer to purchase the tenant's leased premises as well as other condominium units in the project, the court of appeals stated:

> Appellants' lease, as written, expresses no intent to exclude the single rented unit from any future transfer of multiple condominium units by the owner. Nor does the record contain any written modification of the right of first refusal as mandated by the lease. Therefore, under the facts of this case, the trial court erred in holding that a transfer of multiple condominiums, which includes the burdened property, does not evince an intent to transfer the burdened condominium alone. Such a holding, implying that the unit must be sold alone to activate the right of first refusal, would, in effect, engraft new language onto the lease contract that was not agreed to by the parties.[3]

This holding gives Large the right of first refusal, under these facts, to lease Spaces 1-A and 2 under the terms offered, without having to lease the remaining vacant spaces covered by Jones's offer.

Small, on the other hand, would like to lease more space than Smith has offered to lease. It is well-settled law, however, that "Unlike an option contract, a right of first refusal does not give the lessee the power to compel an unwilling owner to sell."[4]

An owner does not have to sell and, until the owner decides to sell, there is nothing to exercise and it is not possible to fix a certain purchase price.[5] The same principles apply to a right of first refusal to lease. Since Small's landlord received an offer from Smith to lease only a portion of Space 1-A, Small's right is limited to that portion and Small has no right to compel the landlord to lease to him the remaining portion of Space 1-A not covered by Smith's offer.

"If the rightholder proposes a new demand, condition, or modification of the terms, he is treated as having rejected the offer."[6] This means that if Small notifies his landlord that he wants to lease all of Space 1-A, he will be treated as having rejected the offer and his landlord will be free to lease to Smith the portion of Space 1-A covered by Smith's offer. However, if Small notifies his landlord that he accepts the offer to lease only the portion of Space 1-A covered by Smith's offer, then Small's right has ripened into an enforceable option.

Based on the holdings cited above, Right can exercise her right of first refusal to lease Space 1-A by giving her landlord notice that she accepts the offer as to Space 1-A. The attorney so advises Right, and Right delivers notice to her landlord of her election to accept the offer to lease Space 1-A to her.

For the same reasons set forth above (an offer by Small to lease more than his right covers will be treated as a rejection of the offer), an offer by Wrong to lease Spaces 1-A and 2, where Wrong only has such right with respect to Space 1-A, will be treated as a rejection of the offer to lease Space 1-A.

The attorney so advises Wrong, and Wrong tells the attorney that he would now like to exercise his right to lease half of Space 1-A since he has the right of first refusal "to lease in whole or in part Space 1-A."

Wrong's attorney again asks for more time to take a closer look at the lease and applicable case law. Finding the *Riley* case cited above, the attorney advises Wrong that his right of first refusal as worded in his lease does give Wrong the ability to exercise his right as it applies to part of Space 1-A. Wrong then sends notice to his landlord that he is exercising his right to lease half of Space 1-A on the terms, prorated based on square footage, offered by Sky for Spaces 1-A, 2, 3 and 4.

The landlord immediately sends a written response to Wrong, rejecting his attempt to exercise his right of first refusal, stating that such right is expressly made subject in the lease to the same terms and conditions offered by a prospective, bona fide, third-party tenant.

The general rule is that the holder of a preferential right cannot be compelled to lease assets beyond the scope of the agreement subject to the preferential right in order to exercise that right:

> An exception to this rule exists, however, when the preferential right is expressly made subject to the same terms and conditions offered by a prospective, bona fide, third-party .... In such a case, the question of whether the holder of a preferential right must purchase the additional assets turns on whether the condition that requires the purchase of additional assets is commercially reasonable, imposed in good faith, and not specifically designed to defeat the preferential right. *See W. Tex. Transmission,* 907 F.2d at 1563. While this exception has been applied to cases involving the conveyance of a single asset, we have not been shown any reason why it should not apply equally to cases involving multiple assets.[7]

Based on the *FWT* case, the provisions in Wrong's lease and the factors surrounding Sky's offer, the attorney advises Wrong that the landlord's position is correct and that Wrong would need to exercise his right for all of the spaces covered by Sky's offer.

In any event, a right of first refusal for the lease of real property is unenforceable unless it satisfies the statute of frauds. The right satisfies the statute of frauds only if the property description is so definite and certain that the land can be identified with reasonable certainty. It is the property to be conveyed pursuant to the option that must be identified with reasonable certainty.[8]

Whether the property description in a writing is sufficient to comply with the statute of frauds is a question of law.[9]

In a recent case, the rightholder argued that anyone could identify the property referred to by the address, the identity of the owners and the identity of the lessee. However, the Fourth Court of Appeals of Texas disagreed: "The address in the description of the premises in the lease is incorrect and the lease does not identify the owner of the property, only the lessor."[10]

More importantly,

> [A] deed purporting to convey land, which describes it only by quantity and as being part of a larger tract, with nothing whereby to identify what specific portion of the larger tract is intended to be conveyed, is void for uncertainty of description.[11]

Other cases support the need for specificity.[12]

Conclusion

Always be careful with your drafting. Because rights of first refusal are seen as a restraint on alienation and are not favored under the law, it is wise to be very clear in expressing the parties' intent and the scope of the right with a precise description of the burdened property. Poor drafting can render a right of first refusal ineffective or even unenforceable. This is not the place to take shortcuts in your documents.

***Mitchell S. Block** is Of Counsel with Smith, Robertson, Elliott & Douglas, L.L.P., in Austin. His practice focuses primarily on commercial real estate transactions, including leasing on behalf of both tenants and landlords, as well as acquisitions, sales and sale/leasebacks. The author wishes to thank Bridget O'Shaughnessy for research assistance.

[1] *Moore v. Dodge*, 603 S.W.2d 236, 238 (Tex.Civ.App. —El Paso, 1980).

[2] *Frost Nat'l Bank*, 165 S.W.3d at 312 [quoting *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 530 (Tex.1987)].

[3] *Riley v. Campeau Homes (Texas), Inc.*, 808 S.W.2d 184 [Tex.App.—Houston (14 Dist.) 1991].

[4] *Sanchez v. Dickinson,* 551 S.W.2d 481, 484 (Tex.Civ.App.—San Antonio 1977, no writ).

[5] *Id.* at 485.

[6] *Riley*, at 881.

[7] *FWT, Inc. v. Haskin Wallace Mason Property Management, L.L.P.*, 301 S.W.3d 787 (Tex.App.-Fort Worth 2009).

[8] *Ardmore, Inc. v. Rex Group, Inc.*, 377 S.W.3d 45, 57 [Tex. App.-Houston (1st Dist.) 2012, pet. denied].

[9] *Dixon v. Amoco Prod. Co.*, 150 S.W.3d 191, 194 (Tex. App.-Tyler 2004, pet. denied).

[10] *See Matney*, 210 S.W.2d at 983 ("It will not necessarily be inferred that he owned the land simply because he signed the lease contract as lessor.")

[11] *Matney*, 210 S.W.2d at 983 [quoting *Smith v. Sorelle*, 126 Tex. 353, 87 S.W.2d 703, 705 (1935)].

[12] *See Texas Builders v. Keller*, 928 S.W.2d 479, 481–82 (Tex. 1996) (holding that a description of the property as "58, 333 square feet ... at 12050 Rojas" is insufficient to identify the property with reasonable certainty where the property at that address contained 100,000 sf and nothing in the document identifies which part of the property is being referred to); *Hereford v. Tilson*, 145 Tex. 600, 200 S.W.2d 985, 988–89 (1947) (holding that where the lease provided the lessee with an option to purchase part of the property at a given location, but it could not be determined what part of the property was included, without resorting to parol evidence, the option violated the statute of frauds and would not be enforced); *Old Tin Roof Steakhouse, LLC v. Haskett*, 04-12-00363-CV.

Joint Employer Liability: Sexual Harassment Claim Ensnares General Contractor

*Daniel Brennan**
Laurie & Brennan LLP
Chicago, IL

General contractors and subcontractors have long faced legal entanglements based on the joint employer doctrine. The joint employer doctrine can make an upstream contractor potentially liable for the sins of its downstream contractors (or joint-venture partners) if the upstream contractor has, and exerts, a certain measure of control over the activities of an employee of the downstream contractor.

In a recent case out of Tennessee, a federal appeals court extended the application of the joint employer doctrine to claims of racial discrimination and harassment arising under Title VII of the *Civil Rights Act.*[1] While other federal courts have applied the joint employer doctrine in Title VII cases, this latest decision is a reminder of the potential risks that await a contractor who infiltrates itself, even with good intentions, into the affairs of the employer-employee relationship of its subcontractors. This article will look at the facts of this recent case, examine the scope of joint employer liability from other cases, identify some lessons learned and suggest some preventive measures to avoid problems arising from the application of the joint employer doctrine for claims under Title VII.

EEOC v. Skanska USA Building, Inc.

In the decision, *EEOC v. Skanska USA Building, Inc.*,[2] the Sixth Circuit U.S. Court of Appeals, found that Skanska, the construction manager for a hospital in Memphis, TN, exerted sufficient control over the activities of the employees of one of its subcontractors to be considered a joint employer. This joint employer status therefore potentially made Skanska liable for the racial discrimination inflicted upon the complaining parties that prompted the Equal Employment Opportunity Commission ("EEOC") to bring suit.

On the project, Skanska was the general contractor for the construction of a new hospital. Skanska hired C-1, Inc. ("C-1"), to provide operators for temporary hoists. C-1 hired a number of African-American workers to serve as operators of the hoists. In the subcontract between Skanska and C-1, C-1 was to supervise the operators, but Skanska retained the right to terminate the operators if their performance was incompetent or otherwise unsatisfactory.

As sometimes happens, reality did not match the contract language. C-1 did little supervising of the operators. Skanska, however, did. Skanska instructed the operators on how to use the hoists, established their work hours, directed their daily assignments and responsibilities, and collected their time sheets. In addition, Skanska carried workers' compensation and liability insurance to cover the operators.

The person from C-1 who was supposed to supervise the operators was rarely on-site. When Skanska requested that a C-1 employee be removed, it was done with little or no inquiry by C-1, which essentially rubber-stamped Skanska's decision. Skanska also recommended the hourly wage that C-1 should pay the operators.

One of the African-American hoist operators was Maurice Knox. Shortly after beginning work on the site, Knox was the target of racial slurs from other workers. Racist graffiti appeared on the job site. Knox (and other African-American operators) complained to C-1 and to Skanska managers. The Skanska managers took no action in response.

The situation worsened. Certain African-American operators reported hearing racial slurs on the walkie-talkies used on the project. Knox was specifically targeted when liquid from a porta-potty was dumped on him. Soon after, Knox was involved in a physical altercation at the site.

Skanska then terminated all of the hoist operators. After C-1 appealed to the hospital owner, Skanska rehired all of them. When the hoist operators returned to the job site, a Skanska executive met with them and reportedly told them that the operators "represented" Skanska and that the fighting and tension must cease. Skanska distributed a written document that outlined the duties of the hoist operators. A short time later, Skanska fired Knox for using a cell phone on the job site.

The EEOC (and later Knox) sued Skanska, claiming that Skanska was the joint employer of the African-American hoist operators, had created or permitted a hostile work environment, and retaliated against Knox for complaining about the harassment—all in violation of Title VII of the *Civil Rights Act*. Both Skanska and the EEOC moved for summary judgment. The district court ruled in favor of Skanska, but the court of appeals reversed.

The Sixth Circuit based its decision on the joint employer doctrine. The court observed that it had mentioned the applicability of the joint employer doctrine in *dicta* in earlier decisions arising under Title VII. The Sixth Circuit took this case as the opportunity to hold clearly that joint employer liability was applicable under Title VII. The court stated that entities are joint employers if they "share or co-determine those matters governing essential terms and conditions of employment."

Factors to consider include: (1) the power to hire, discipline and fire employees; (2) the ability to affect compensation and benefits; and (3) the authority to direct the employees' activities. Skanska had—and exercised—all of these.

C-1 was, as noted by the court, a "nonentity" on the project. The court easily swept aside the subcontract's allocation of a supervisory role to C-1 as "besides the point." The Sixth Circuit sent the case back to the district court for further proceedings.

Other Examples of Joint Employer Liability

Joint employer liability has been applied in a variety of circumstances including wage claims, overtime disputes, wrongful termination and others. The *Skanska* decision is simply the latest application of the joint employer doctrine in the Sixth Circuit in the context of racial harassment claims under Title VII. Several other federal circuits have already recognized that Title VII harassment claims can be brought under a joint employer theory.

In *Virgo v. Riviera Beach Associates, Ltd.*,[3] the U.S. Court of Appeals for the Eleventh Circuit upheld a district court's finding of liability for sexual harassment against a hotel partnership that contracted out the management of the hotel. The victim of the harassment was an employee of the management company. The perpetrator of the harassment was also an employee of the management company. Nevertheless, both the district court and the court of appeals found that the partnership had the right to and, in fact, did exercise sufficient control over the terms and conditions of the employment of the management company's workers to be considered a joint employer. As in *Skanska*, the Eleventh Circuit focused on the control that the partnership exerted over the terms of employment and specifically borrowed from factors that the National Labor Relations Board examines to determine joint employer liability. The Eleventh Circuit observed as follows (quoting from another decision):

> [t]he basis of the finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Thus the joint employer concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment. (Citation omitted).[4]

The U.S. Court of Appeals for the Third Circuit likewise allowed a sexual harassment claim to proceed, based on allegations by court clerks that they were jointly employed by both the judicial branch of the Commonwealth of Pennsylvania and the local county. In *Graves v. Lowery*, 117 F.3d 723 (3rd Cir. 1997), the district court granted the county's motion to dismiss the complaint but the court of appeals reversed. The court of appeals, taking all well-pled allegations as true, concluded that the plaintiffs had alleged sufficient facts regarding the county's funding, actions and policies regarding the clerks' employment to survive a motion to dismiss.

Lessons Learned, Preventive Measures and Insurance Options

For owners, contractors and subcontractors, the realities of executing a construction project will, at times, place them in a position of interceding into the activities of downstream parties. These efforts usually amount to only managing an arms-length contract relationship; at other times, such as in *Skanska*, the involvement may be much more. In circumstances where a party exerts a high degree of control over the activities of another party's employees, joint employer liability can be both alleged and proven for claims of harassment (and for other claims).

The most common-sense preventive measure is to train employees adequately regarding harassment issues. This training, if done correctly and repeated at appropriate intervals, will go a long way to create a culture that recognizes and avoids inappropriate behavior. While this training will usually focus on relations among employees of the same company, a cultural change in workers' attitudes will sensitize workers to recognize issues on the job site and work through the appropriate contracting parties to rectify problems before they grow into legal liabilities.

Anyone who has been through litigation realizes that the cost of litigating (aside from whether a party is ultimately found liable) can be significant. The cost to litigate is often reason enough to settle a claim. Aside from what that says about the civil justice system in the United States, the risk of costly litigation from joint employer liability cannot be ignored. There are, however, insurance products available to provide both defense and indemnity against employment-related claims.

Employment practices liability insurance ("EPLI") is one such product. EPLI protects employers from liability for wrongful employment practices. Most EPLI policies cover claims for sexual harassment, discrimination and wrongful termination.[5] Employers can obtain coverage for employment practices liability by either (a) purchasing a stand-alone policy such as an EPLI policy or a Management Liability Policy or (b) by endorsement to an existing policy such as a CGL (Comprehensive General Liability insurance) or D&O (Directors and Officers liability insurance) policy.[6]

The major difference between stand-alone policies and coverage by endorsement may be the breadth of coverage. Another important difference involves policy limits. Stand-alone EPLI policies come with their own separate policy limits.[7] Additionally, carriers ordinarily write EPLI policies on a claims-made basis. CGL policies usually offer occurrence-based coverage.[8]

The *Skanska* decision is a reminder of the potential pitfalls of managing workers who are employed by downstream contractors. While there may be compelling reasons to intercede in the employment relationships of downstream contractors, there are certain risks. Owners, contractors and subcontractors should be vigilant in conducting their relationships with all workers on a project in accordance with applicable laws that govern the employer-employee relationship. The extent of employment-related liabilities may not end when work is contracted.

*DANIEL BRENNAN, Founding Partner at Chicago's Laurie & Brennan, LLP, concentrates his practice on advising owners, designers and contractors on risk management in the construction process; prosecuting and defending construction claims including professional negligence, personal injury and delay claims; negotiating and drafting construction and design contracts for architects, engineers and owners; and advising clients with respect to design and construction of accessible facilities under Title III of the *Americans with Disabilities Act* and *Fair Housing Act*. This article originally appeared in Laurie & Brennan's e-newsletter. The copyright remains with the author and his firm.

[1] 42 U.S.C. § 2000e *et seq*.

[2] *EEOC v. Skanska USA Bldg., Inc.,* 2013 BL 341867, 6th Cir., No. 12-5967, *unpublished opinion* (12/10/13).

[3] 30 F.3d 1350 (11th Cir. 1994).

[4] *Id.* at 1360.

[5] *See, e.g.,* E. Blomquist, B. Kahn and P. Palmer, *Employment Practices Liability Coverage: Updates and Strategies in Addressing Employment-Based Claims,* ABA Section of Litigation Insurance Coverage Litigation Committee CLE Seminar, March 4-6, 2010.

[6] *Id.*

[7] *Id.*

[8] *Id.*

Knowing When (or Whether) to Say When—A Survey of Public Access and Free Speech Rights at U.S. Shopping Centers

*Brian D. Huben**
*Janella T. Gholian***
Katten Muchin Rosenman LLP
Los Angeles, CA

The right to free speech in the United States traces its roots back to the founding of the republic. The same cannot be said of public access to privately owned shopping centers. Yet, the intersection of the two concepts has, for shopping center owners and managers in some states, created a challenging balancing act. This article examines the competing interests of shopping center owners seeking to control access to their private property and of persons seeking to exercise free speech rights on the same private property.

The Federal View

In 1968, the United States Supreme Court considered the case of *Food Employees v. Logan Valley Plaza*.[1] The shopping center in *Logan Valley* was an open-air center surrounded by heavily trafficked highways. At the time Logan Valley Mall opened in 1965, it consisted of a Weis supermarket, a Sears department store and a common parking area; however, additional tenants were added in subsequent years. The Weis employees were not unionized, and the Food Employees Union began picketing on the privately owned covered patio in front of the supermarket (i.e., the parcel pickup area where patrons could have their groceries loaded into a vehicle during inclement weather) with signs stating the market was nonunion. The lower court enjoined the union's activity. The United States Supreme Court, relying heavily upon its ruling in *Marsh v. State of Alabama*,[2] held the union could petition in the privately owned covered patio area, finding that the center served as a "community business block" open to people engaging in such activity, and that the picketing was directed specifically at patrons of the supermarket and related to the shopping center's operations. The Court, however, was quick to point out that the First Amendment did not mean that the center was without power to limit the use of its private property in a reasonable manner.

Four years later, in *Lloyd Corp. v. Tanner*,[3] the United States Supreme Court took up a question it specifically reserved in the *Logan Valley* case: Is it the privately owned shopping center's right to prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations? *Lloyd* involved a traditional enclosed multi-level shopping center, with retail stores and common areas. Since it opened in 1960, the center had (and strictly enforced) a policy against handbilling inside the enclosed center. At various locations inside the center, embedded small signs in the sidewalk read:

> NOTICE
> Areas In Lloyd Center Used By The Public Are Not Public Ways But Are For The Use Of Lloyd Center Tenants And The Public Transacting Business With Them. Permission To Use Said Areas May Be Revoked At Any Time.
> *Lloyd Corporation, Ltd*.

In November 1968, individuals were distributing handbills protesting the draft and the Vietnam War. The individuals were told that they were trespassing, and asked to use the public sidewalks outside of the center. The district court found the center's rule prohibiting distribution of the handbills to be a violation of the First Amendment and the Ninth Circuit affirmed. The Supreme Court reversed, finding that allowing the individuals to protest inside the center went further than any prior case because the anti-war message was directed to all members of the public, not solely to the center's patrons or its retailers. The Court found that the handbills could have been distributed on any public street and, as such, the protesters did not have any First Amendment right to access the center's private property for their activity. The *Lloyd* court distinguished between *Marsh* and *Logan Valley*, holding that those rulings never went so far as to say that shopping centers were analogous to publicly owned facilities for *all* purposes.

Thus, other than private property access rights under specific federal regulations (e.g., *the National Labor Relations Act*), there is no recognized Federal First Amendment right to access private property for expressive activity. That said, nothing in the United States Supreme Court's decisions prohibits individual states from providing broader protection than access allowed under the First Amendment of the United States Constitution. As a result, what has evolved since the late 1960s is a spectrum of decisions that vary from state to state, ranging from equating privately owned shopping centers to public forums, to prohibiting all access to privately owned shopping centers for free speech activity. This broad range of decisions requires shopping center owners and managers to develop and implement distinct policies and procedures to manage free speech activities on a state-by-state basis.

The States' Views

Nine years after the United States Supreme Court's decision in *Lloyd*, the California Supreme Court diverged from the United States Supreme Court when it upheld the rights of students to engage in expressive activity at the privately owned Pruneyard shopping center near San Jose, CA.[4] In *Robins v. Pruneyard*, the property was a traditional, enclosed shopping center with 65 retail shops, restaurants and a cinema. The center prohibited all expressive activity not directly related to the center's commercial purposes. The plaintiff-appellants were high school students who wanted to solicit signatures at the center for a resolution against Zionism. The court addressed the issue of whether California's free speech provision (Article 1, § 2, of the California Constitution) provides broader protection than the First Amendment, and, if so, whether it protects free speech activity on private property. The *Pruneyard* court answered both questions in the affirmative, holding that by inviting the public onto the private property to congregate, shopping centers have replaced traditional town centers and, as such, a handful of additional orderly persons engaging in peaceful free speech activity on the center's private property are protected under the free speech provision of the California Constitution.

Since *Robins v. Pruneyard*, the California judiciary has continued to expand the protections of Article I, § 2, of the California Constitution, leading to decisions that privately owned shopping centers are the equivalent of public forums for purposes of free speech activities. California courts still uphold the right of shopping centers to regulate access with content-neutral time, place and manner rules, but the criteria for content-neutrality appears to be trending narrower with each decision.

Several years ago, in *Best Friends Animal Soc'y v. Macerich Westside Pavilion Prop., LLC*,[5] the California Court of Appeal held that shopping centers cannot impose blanket bans on speech without objective evidence supporting the business judgment to limit expressive activity on certain days. Therefore, a rule prohibiting all activity on a holiday such as Black Friday, without any objective evidence of increased patron activity, reduced floor space, increased center-sponsored activity or other objective evidence supporting the restriction may likely be found unconstitutional.

Another state that has followed the *Pruneyard* decision and allows broad access to privately owned shopping centers for free speech activity is New Jersey whose courts have upheld access to shopping centers based on the extent and nature of their invitation to the public to use the property. New Jersey courts have found that there is no property more thoroughly "dedicated" to public use than community shopping centers, which necessarily includes an implied invitation for free speech activity. As such, managing access to shopping centers for free speech activity in states such as New Jersey and California can prove to be a significant undertaking.

Other states have a less expansive view of free speech rights and allow access on a more limited basis. For example, Washington State allows access to shopping centers only for the purpose of election petitioning. Similarly, Massachusetts allows access to shopping centers to solicit signatures for election purposes, but the judiciary has limited access on the basis that election petitioning is an activity of fundamental importance.

States such as Michigan, Minnesota and Hawaii have found that persons are not entitled to access privately owned shopping centers to engage in free speech activity. Unlike New Jersey and California, the Hawaii judiciary rejects the notion that shopping centers have become the modern and functional equivalent of a town center.

In many states, the issue of free speech activity in shopping centers remains unaddressed (*e.g.,* New Hampshire, Nebraska, Mississippi, Kentucky, Delaware), but there are some indications of how the judiciary may rule. For example, Nebraska courts have appeared to focus on whether governmental or government-sponsored activity violates free speech rights. In Delaware, although courts have denied access to certain private property, courts have left open the possibility that private property held open as a public space could potentially trigger free speech protection.

It remains to be seen how the judiciary in these states will regulate access to shopping centers. In the interim, shopping center owners, developers and managers will have to develop state-specific strategies to manage free speech activity.

For example, in determining whether shopping center owners are unlawfully prohibiting access in states allowing access, courts engage in a traditional First Amendment analysis of lawful content-neutral restrictions on speech versus unlawful, content-based restrictions on speech. In these states, shopping center owners should develop objective rules and guidelines for regulating access to avoid any appearance of any unconstitutional, content-based regulation of access. Conversely, in states not allowing access, shopping center owners should ensure uniform enforcement of a no-access policy to avoid any allegation of discriminatory enforcement and/or waiver by allowing access.

The Future

Many of the opinions referenced herein justify public access to private property as part of the balancing necessary to provide a forum in which a message of some kind may be conveyed to the broadest possible audience. It remains to be seen whether the continuing evolution of social media and the ability of an individual to widely disseminate a message (be it more or less than 140 characters!) will tilt the scales in favor of owners seeking to restrict public access to private property. Until then, when individuals arrive at a privately owned shopping center to engage in some form of expressive activity, it is important to know whether (or when) a shopping center owner can say when.

The following chart reflects a summary of reported cases and statutes as of May 30, 2014, and is provided solely for reference purposes. Private shopping center owners should not rely upon the summary to determine a course of action in response to persons seeking access to a shopping center; an attorney experienced in public access laws in the relevant jurisdiction should be consulted.

Summary of Public Access and Free Speech Rights at Shopping Centers

State	Very Broad	Limited	No Access	No Governing Case Law
Alabama				•
Alaska				•
Arizona			•	
Arkansas				•
California	•			
Colorado		•		
Connecticut			•	
Delaware				•
Florida				•
Georgia			•	
Hawaii			•	
Idaho				•
Illinois				•
Indiana				•
Iowa			•	
Kansas				•
Kentucky				•
Louisiana				•
Maine				•
Maryland				•
Massachusetts		•		
Michigan			•	
Minnesota			•	
Mississippi				•
Missouri				•
Montana			•	
Nebraska				•
Nevada			•	
New Hampshire				•
New Jersey	•			
New Mexico				•
New York			•	
North Carolina			•	
North Dakota				•
Ohio			•	
Oklahoma				•
Oregon			•	
Pennsylvania			•	
Rhode Island				•
South Carolina			•	
South Dakota				•
Tennessee				•
Texas				•
Utah				•
Vermont				•
Virginia				•
Washington		•		
West Virginia				•
Wisconsin			•	
Wyoming				•

*__Brian D. Huben,__ a Partner at Katten Muchin Rosenman LLP, in Los Angeles, concentrates his practice in commercial litigation in state and federal courts. His practice focuses on the representation of commercial landlords and shopping center owners, managers and developers. Brian represents landlords and other creditors throughout the United States in retailer bankruptcies, often providing counsel to dozens of shopping center owners in each case. He also counsels commercial landlords in day-to-day operational matters such as evictions, breach of lease issues, public access and the *Americans with Disabilities Act*.

**__Janella Gholian,__ an Associate at Katten Muchin Rosenman LLP, in Los Angeles, concentrates her practice in litigation matters.

[1] *Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 88 S.Ct. 1601 (1968).

[2] *Marsh v. State of Alabama*, 326 U.S. 501, 66 S.Ct. 276 (1946). In *Marsh*, the Supreme Court allowed a Jehovah's Witness to distribute religious literature on a sidewalk in the business district of Chickasaw, AL, even though Chickasaw was a "company town" wholly (and privately) owned by Gulf Shipbuilding Corporation. The *Marsh* court opined that the Chickasaw business district was indistinguishable from the "business block" of a true municipality, and a prohibition on the distribution of literature violated the First Amendment.

[3] *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219 (1972); *aff'd* in *Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029 (1976).

[4] *Robins v. Pruneyard*, 23 Cal.3d 899, 153 Cal.Rptr. 854 (1979).

[5] *Best Friends Animal Soc'y v. Macerich Westside Pavilion Prop., LLC*, 193 Cal.App.4th 1168, 122 Cal.Rptr.3d 277 (2011).

When Loss of Access to a Public Street Is Compensable: *An Arizona Case Study*

*Jeffrey Gross**
*Jennifer Cranston***
Gallagher & Kennedy, P.A.
Phoenix, AZ

Access—The ability to get to one's property from a public road—is a vital part of property ownership, particularly for commercial land such as shopping centers. Unfortunately, access is often restricted or eliminated by government actions, which can have a significant, negative impact on the value of the land.

On April 17, 2014, the Arizona Supreme Court issued a decision in *City of Phoenix v. Garretson*[1] that could open the door for landowners in Arizona to receive compensation when a government action results in loss of existing access to a public street. Because the rationale for the decision involved a provision of the Arizona Constitution that is common in the constitutions of many other states, *Garretson*'s impact could be felt beyond Arizona's borders.

Facts

Garretson owns a commercial parking lot, slightly less than an acre, at the southwest corner of Jefferson and First Streets in downtown Phoenix. In 2005, the property was adjacent to the path of the City's planned light rail project along Jefferson Street. At the time, the property had two driveways onto Jefferson Street, an access point on Madison Street to the south (a minor neighborhood street) and future access to First Street to the east.

In 2007, the City filed an action condemning a temporary right of entry to Garretson's property, but did not take any land. As part of the light rail project, the City built train tracks and a concrete curb that permanently blocked both driveways along Jefferson. The curbing destroyed access to and from Jefferson, but did not affect access to or from Madison or First Streets.

Believing that the property had been left with inferior access that negatively impacted its value, Garretson hired an appraiser who was prepared to testify that the potential development of the interim parking lot use for office space was harmed by the loss of access to Jefferson, which decreased its value by almost $2 million.

The City's position was that the property still had access to Madison Street and potential access to First Street, so Garretson could not seek compensation as a matter of law. The City's primary argument, based on Arizona precedent, was that closure of the driveways was simply a restriction on traffic flow, and hence a valid exercise of the police power that was non-compensable as long as the property retained reasonable access to the street system. After the trial court agreed with the City and entered summary judgment barring Garretson from seeking damages for loss of access, the parties stipulated to a judgment that permitted Garretson to appeal the access issue.

On appeal, the case would hinge on this question: Does the government's destruction of existing access to a public street give rise to a claim for just compensation when the property retains secondary access to other public streets?

The Arizona Supreme Court Recognizes a Claim for Loss of Access to an Existing Public Street

Before the Arizona Supreme Court's ruling in *Garretson*, a common notion among Arizona condemnation attorneys was that property owners were entitled to compensation for loss of access under very limited circumstances. Specifically, earlier cases suggested that loss of access was not compensable unless (1) some of the landowner's property was being acquired for a public project[2] and (2) the loss of access left the property totally or effectively landlocked.[3]

In *Garretson*, the court clarified that a property owner is entitled to just compensation under the Arizona Constitution for loss of existing access to a public street even if no portion of the property is being taken for a government project. And the property owner may have a claim for compensation if access to a public street is destroyed, even though the property has other means of access. Accordingly, the court permitted Garretson to pursue a claim for the loss of value to his property caused by the City's elimination of access to Jefferson Street for its light rail project despite the fact that the property remained accessible via Madison Street and, in the future, from First Street.[4]

The court also reaffirmed the rule that a property owner may be entitled to compensation, even when direct access is not destroyed, if the value of the land is reduced by a change that substantially impairs access. However, a property owner who claims only substantial impairment of access is not entitled to compensation unless the remaining access is "unreasonably circuitous," which will depend on the facts of each case. Though the court did not give any examples of situations that would rise to the level of substantial impairment of access, the following possible scenarios could support an unreasonable circuitry claim:

- Redirecting traffic from direct access to a highway to a frontage road that requires visitors to drive a significant distance out of their way to get to the property;

- Replacing direct access to a major arterial with cross-access easements to neighboring property that would require drivers to negotiate access to the major arterial through a busy or convoluted parking lot or would create an unreasonable burden on business-related traffic (such as large delivery vehicles);
- Relocating a major thoroughfare as part of approval of a master plan that substitutes indirect access to and from feeder streets or driveways for prior direct access to the major thoroughfare.

Following *Garretson*, if access to Arizona property is destroyed or substantially impaired, the owner is entitled to just compensation. Ordinarily, the amount of compensation will be measured by the difference in value with and without the access, and in Arizona will be determined by a jury in the event the parties cannot agree.

The Impact of *Garretson* in Arizona and Beyond

The court's decision in *Garretson* can provide a means of recourse to landowners whose access is affected by a government act. The court has made it clear that cities, counties and the state are no longer free to cut off a property's access to a street as part of a public project, such as light rail, without paying just compensation.

However, the reach of *Garretson* may go beyond the realm of traditional condemnation. The court explicitly stated that its holding was based on the "damages" provision of Arizona's constitution: "No private property shall be taken or **damaged** for public or private use without just compensation . . ."[5] Indeed, the court recognized that the case did not involve a "taking" or "severance damages" as traditionally understood in eminent domain cases, but whether the elimination of preexisting access damaged the property.[6] And the court broadly held that a landowner's existing means of ingress and egress is a property right that is protected by the constitutional damages provision.[7] Thus, the *Garretson* analysis could theoretically apply to any public act that either eliminates access points or substantially impairs access without actually invading or taking any property rights.[8]

For example, cities have been known to impose access restrictions on approvals of site plans for shopping centers, such as requiring driveways from public streets to corner "pad" sites to be relocated to the interior of the center, or entirely eliminating access to and from neighborhood streets. While *Garretson* has not changed the law that alterations in traffic flow (such as limiting access to right in/right out or installing a median divider) are non-compensable, removing access to a public street through an administrative process may be "damage" to property for purposes of just compensation under Arizona's constitution.

Finally, Arizona is among the approximately two dozen states that recognize a constitutional right to compensation for "damage" to private property. Therefore, the Arizona Supreme Court's opinion in *Garretson* may provide precedent for property owner rights outside Arizona.

*__Jeffrey Gross__ is a Shareholder at Gallagher & Kennedy, P.A., a full-service business law firm. He concentrates his practice in real estate-related litigation, including eminent domain, zoning disputes, inverse condemnation and real estate valuation.

**__Jennifer Cranston__ is a Shareholder at Gallagher & Kennedy, P.A., a full-service business law firm. Her practice has three primary focuses: condemnation and valuation matters, insurance coverage analysis and bad faith litigation, and public utility regulation.

[1] 322 P.3d 149 (Ariz. 2014). Available at http://www.azcourts.gov/Portals/0/OpinionFiles/Supreme/2014/CV-13-0181-178550.pdf.

[2] *Rutledge v. State*, 100 Ariz. 174, 412 P.2d 467 (1966) (no compensation for damages where there is no physical invasion of property).

[3] *State ex rel. Herman v. Wilson*, 103 Ariz. 194, 438 P.2d 760 (1968) (destruction of access compensable where substitute access was unreasonably circuitous).

[4] In fact, Garretson later installed a driveway to First Street.

[5] Ariz. Const. art. 2, § 17 (emphasis added).

[6] 322 P.3d at 151.

[7] *Id.* at 153.

[8] The court stated that "there is no constitutionally protected right of access to a particular roadway," 322 P.3d at 153-154, but held that there is a constitutionally recognized right to compensation for destruction of a preexisting means of access to a roadway.

Self-Help Remedies: Are They Really Helpful?

*Howard K. Jeruchimowitz**
*Martin S. Kedziora***
Greenberg Traurig, LLP
Chicago, IL

Landlords and tenants often negotiate self-help remedies in their leases. For example, in commercial leases, landlords reserve the right to re-enter the premises without the need for court process upon a tenant default, termination of the lease or abandoning the premises. Tenants typically reserve the self-help right to terminate the lease and vacate the premises, withhold rent or make repairs. This article examines the enforceability of these self-help remedies and, even if valid, other issues the landlord or tenant may consider before exercising the remedy.

Self-Help Remedies for Landlords

Although "eviction through legal process is undoubtedly the most secure method,"[1] in certain commercial leases, landlords expressly reserve the right to re-enter the leased premises without resorting to court process upon a tenant's default, termination of the lease or abandoning the premises.[2]

This peaceable "self-help" remedy is available as a common law remedy and not abrogated by statute in at least 12 states.[3] In seven states, the commercial landlord can only use self-help in cases of abandonment or other limited circumstances.[4] In 18 states and the District of Columbia, however, the use of self-help is prohibited and commercial landlords are required to use only the judicial process to remove tenants.[5]

For example, the Illinois courts make clear:

> [T]he Forcible Entry and Detainer Act put an end to the practice of self-help and provides the sole means for settling a dispute over possession rights to real property.[6]
>
> The statute prohibits any actual or constructive self-help through force, including changing locks or locking someone out of his land.[7]

Finally, in the remaining 13 states, there are no statutes or reported court decisions that prohibit the use of self-help; therefore, the common law remedy may still be available in those states.[8]

Even in states where the self-help remedy is available, that remedy is often not utilized because of concerns that courts are hostile to the landlord's use of self-help before a tenant can litigate its right to remain in possession. Also, courts will not allow the self-help remedy where it is not explicitly reserved in the lease. For example, in *Greaves Lane, LLC v. NBM Development, LLC*, the New York State court found that although New York allows the landlord to self-help if expressly reserved in the lease, the lease at issue allowed re-entry and removal only "by summary dispossess proceedings [or] by any suitable action or proceeding at law."[9]

Importantly, landlords might want to be cautious in utilizing the self-help remedy because landlords that wrongfully evict commercial tenants prematurely from real property by force or other unlawful means may be liable for damages or compelled to restore possession of the property to the tenant. For example, in *Wagner v. Weaver*, the Ohio Court of Appeals affirmed the trial court's decision to award the commercial tenant the retail value of goods damaged by the landlord's wrongful eviction of the tenant where the landlord elected to use self-help by changing the locks on the premises without giving notice to the tenant in violation of the landlord's own lease agreement.[10]

In *In re 1345 Main Partners, Ltd.*, the bankruptcy court restored possession to the tenant even though Ohio law allows a commercial lessor to resort to self-help repossession. The court found that the tenant's technical breach of withholding rent pending resolution of its dispute with the landlord (concerning the landlord's removal of lights that the tenant installed) did not permit the landlord to declare a forfeiture. In this case, the landlord acted without notice to the tenant in a manner that was at odds with the parties' prior settlement attempts and after the tenant made substantial improvements to the leased premises.[11]

Self-Help Remedies for Tenants

While several states abrogate or restrict self-help remedies available to commercial landlords, the availability of such remedy to commercial tenants depends primarily upon whether the covenants in the lease are dependent or independent. Covenants in leases have traditionally been held to be independent unless the lease expressly makes them conditional and dependent.[12]

Under this view, a breach of a lease by a landlord does not justify the tenant in terminating the lease or refusing to pay rent.[13] Most states still adhere to the traditional view and consider the covenants in commercial leases to be independent, unless the lease agreement expressly provides otherwise.[14] For example, the Illinois Appellate Court recently held that even if the landlord breached the lease, that fact alone did not relieve the tenant of its obligations to pay rent.[15] Similarly, New York courts consider the obligation to pay rent pursuant to a commercial lease an independent covenant, which cannot be relieved by allegations of a landlord's breach, absent an express provision to the contrary.[16]

On the other hand, some courts abrogated the "independent covenants" rule and, in its place, adopted the rule of mutually dependent covenants formulated by Restatement (Second) of Property (Landlord and Tenant).[17] Under this view, the tenant can terminate the lease and withhold rent if the landlord breaches the lease and thus deprives the tenant of the substantial benefit significant to the purpose for which the lease was entered.[18] In *In re Tiny's Cafe, Inc.*, the court held that the tenant was entitled to withhold rent, even where the lease expressly provided that the landlord's failure to maintain the roof "shall not be grounds for the tenant to stop paying rent."[19] The court held that it would not allow the landlord "to reap an unfair benefit from a clause of the lease that requires [tenant] to pay rent, indefinitely, while he refuses to fulfill his bargained for duty."[20]

Even where a lease specifically provides for a self-help remedy upon a landlord's breach, tenants should use caution before utilizing such a remedy. For example, tenants often invoke a right to withhold the rent when they believe that the landlord failed to make repairs or maintain the premises in good state of repair. This can be risky because if the landlord and, subsequently, the court, find that the tenant was not entitled to withhold the rent, the landlord may terminate the lease and evict the tenant. The following case illustrates the issues that tenants may consider before resorting to self-help.

Example:
In *South Willow Properties, LLC v. Burlington Coat Factory of New Hampshire, LLC,* the court considered whether the tenant breached the lease by replacing the leaking roof without the landlord's permission.[21] The tenant maintained that replacement of the leaking roof was the landlord's responsibility and, because the landlord failed to make repairs, the tenant was authorized to replace the roof on the landlord's behalf and at the landlord's expense. The court disagreed and found that because the tenant itself caused damage to the roof, the tenant had an obligation to repair it.[22] Moreover, the lease required the tenant to submit plans and specifications for the proposed work to the landlord and receive written approval before performing any structural work. The court found that the work bids submitted by the tenant were insufficient and, accordingly the demolition and replacement of the roof constituted a material breach of the lease and grounds for eviction.[23]

Lessons Learned
The above example demonstrates that landlords and tenants should know the common law in their jurisdictions before using a self-help remedy, even if provided for in the lease. Commercial landlords should negotiate carefully, as in states that allow self-help, the courts will evaluate strictly. Landlords should also consider using the judicial process, even if the state allows the self-help remedy, because of potential damages for a wrongful self-help eviction. Similarly, commercial tenants should consider using the judicial process because of the risk that—by improperly utilizing a self-help remedy—tenants themselves may be found in material breach of a lease and evicted. If utilizing a self-help remedy, tenants and landlords should document all communications and comply strictly with the terms of the lease.

***Howard K. Jeruchimowitz** is a Shareholder in Greenberg Traurig's Litigation Group in Chicago. He concentrates his practice on commercial litigation, with an emphasis on real estate litigation, including representing a broad spectrum of shopping center owners, developers, managers, lenders and tenants in landlord-tenant, shopping center, mechanics lien, foreclosure, and construction disputes in federal and state court, as well as mediations and arbitrations across the country. Mr. Jeruchimowitz can be reached at (312) 476-5037 or jeruchimowitzh@gtlaw.com.

****Martin S. Kedziora** is a Practice Group Attorney in Greenberg Traurig's Litigation Group in Chicago. He concentrates his litigation practice on complex business disputes, real estate litigation, collection and post-judgment proceedings, and bankruptcy-related litigation. He can be reached at (312) 236-4386 or kedzioram@gtlaw.com.

[1] *Sol De Ibiza, LLC v. Panjo Realty, Inc.*, 29 Misc.3d 72, 75 (N.Y. Sup. Ct. 2010).

[2] *See* Adam Leitman Bailey and John M. Desiderio, "The Availability of Self-Help Evictions to Commercial Landlords," Commercial Leasing Law and Strategy (LJN, Jan. 2006)

[3] The 12 states are Alabama, Alaska, Arizona, Georgia, Hawaii, Maryland, Mississippi, New Jersey, New York, Ohio, Texas and Wisconsin.

[4] The seven states include Idaho, Massachusetts, Missouri, Montana, North Dakota, Virginia and West Virginia.

[5] The 18 states include Arkansas, California, Connecticut, Delaware, Florida, Illinois, Louisiana, Maine, Michigan, Minnesota, Nebraska, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, Tennessee and Washington.

[6] *Fortech L.L.C v. R.W. Dunteman Co.*, 852 N.E.2d 451, 459 (Ill. App. 1st Dist. 2006).

[7] *Id.*

[8] The remaining states include Colorado, Indiana, Iowa, Kansas, Kentucky, Nevada, New Hampshire, Oregon, South Carolina, South Dakota, Utah, Vermont and Wyoming.

[9] 2002 WL 1868882, at *9-*10 (N.Y. City Civ. Ct. 2002).

[10] 2010 WL 892108 (Ohio App. 3d Dist. 2010).

[11] 215 B.R. 536, 542 (Bankr. S.D. Ohio 1997).

[12] 15 Williston on Contracts § 44:42 (4th ed.).

[13] *Id*.

[14] *See* Gary Goldman, *Uniform Commercial Landlord and Tenant Act—A Proposal to Reform "Law Out of Context,"* 19 T.M. Cooley L. Rev. 175, 184 (2002).

[15] *Vill. of Palatine v. Palatine Associates, LLC*, 2012 IL App (1st) 102707, ¶ 87.

[16] *Universal Commc'ns Network, Inc. v. 229 W. 28th Owner, LLC*, 926 N.Y.S.2d 479, 480 (1st Dep't 2011).

[17] *See e.g. Wesson v. Leone Enterprises, Inc.*, 437 Mass. 708, 709 (2002).

[18] *Id*.

[19] 322 B.R. 224, 227-29 (Bankr. D. Mass. 2005).

[20] *Id*. at 228.

[21] 159 N.H. 494, 496 (2009).

[22] *Id*. at 502.

[23] *Id*. at 502-03.

Cases

*John H. Lewis**
Hartman Simons & Wood LLP
Atlanta, GA

LEASES—OPERATING COVENANT AND CO-TENANCY PROVISION

The Court of Appeals of Indiana has found that the language of an operating covenant and co-tenancy provision of a retail lease supported the tenant's act of vacating the premises and, in effect, terminating the lease without further notice. *Claire's Boutiques, Inc. v. Brownsburg Station Partners LLC*, No. 32A01-1209-CC-438 (Ind. App., November 4, 2013).

This is a case that highlights the importance of careful drafting, to ensure that the language of a lease truly accomplishes the parties' intent.

The parties in this case were Brownsburg Station Partners LLC ("Brownsburg"), the owner of a shopping center, and Claire's Boutiques, Inc. ("Claire's"), a tenant in that center. Approximately two years into the term of the lease, Claire's decided to close its store for underperformance, so it removed its personal property and vacated the premises without further notice to Brownsburg or its property manager. Shortly thereafter, Brownsburg sent a notice of default to Claire's, including a purported termination of the lease; thereafter, Brownsburg filed a complaint for breach of the lease.

At issue in this case was the following lease provision:

> Section 2.06 Operating Co-Tenancy. Notwithstanding anything to the contrary contained in this Lease, in the event that the Shopping Center's occupancy level falls below 70% of the non-department retail store tenants in Buildings A1 and A3 or either Kohl's or Lowe's and [sic] open for business, [Claire's] shall pay percentage rent only (at the rate of 5% of gross sales) and Basic Annual Rent and all other charges to [Claire's] hereunder shall abate until such time as the occupancy level increases to over 70% of the non-department retail store tenants in Buildings A1 and A3 and at least Kohl's and Lowe's or any comparable replacement thereof in terms of size and quality is open for business. If the occupancy level remains below the level specified herein for the period of one year or more, [Claire's] shall have the option of terminating this Lease effective immediately.

The appellate decision focused on two portions of this provision: (i) the 70 percent co-tenancy trigger and (ii) the option to terminate.

Brownsburg contended that the reference in the last sentence of § 2.06 to "the occupancy level" meant that Claire's only had the right to terminate the lease if occupancy stayed below 70 percent of the gross leasable area of Buildings A1 and A3 for one year or more, while Claire's argued that the first sentence of the section, which referred to the occupancy level falling below "70% of the non-department retail store tenants," controlled. The court agreed with Claire's, noting that the terms of the lease were clear and unambiguous and made no mention of gross leasable area or square footage. The court concluded: "The seventy percent rate clearly applies to the percentage of tenants, not to the percentage of gross leasable area."

On the issue of termination, the court also agreed with Claire's. The court observed that the lease did not state any required means of exercising the tenant's right of termination under § 2.06, and concluded that "Claire's exercised its option to terminate the Lease when it vacated the premises pursuant to the operating co-tenancy provision and that the Lease does not require any other notice or action by Claire's."

RECIPROCAL EASEMENT AGREEMENTS

The Florida Third District Court of Appeal has examined whether provisions in a recorded reciprocal easement agreement restricted construction on a parcel subject to the agreement, concluding that the language was unambiguous and did not prohibit the proposed construction. *Casino Investment, Inc. v. Palm Springs Mile Associates, Ltd.*, 123 So.3d 98 (Fla. 3rd DCA 2013).

This is a case that should alert practitioners to consider carefully the language they draft and whether it both accomplishes the drafter's intent and avoids unintended consequences.

The litigants in this case owned property that was subject to a Declaration of Easement (the "Declaration"). Palm Springs Mile Associates, Ltd. ("Palm Springs") originally owned the entire shopping center and recorded the Declaration, which affected the entire center. Casino Investment, Inc. ("Casino"), subsequently acquired a parcel within the shopping center, and proposed to construct a building at the north end of that parcel.

The trial court entered a partial summary judgment in favor of Palm Springs, concluding that Casino's proposed construction "violated the clear and unambiguous terms of the Declaration." Casino appealed. In presenting the matter to the district court of appeal, the parties agreed that the provisions at issue were clear and unambiguous; however, despite this apparent agreement, each party had a different opinion as to what the clear and unambiguous meaning of those provisions actually was.

At issue were two separate provisions of the Declaration. First, the court examined what it called the Impediment Provision, which stated:

> In the event that a conveyed portion of the Property (the "Conveyed Portion(s)") is contiguous to a part of the Property owned and operated by Owner, its successors and/or assigns, both parties agree that no fence or other obstruction will be erected between the Conveyed Portion(s) and the adjacent Property so as to obstruct or impede vehicular and pedestrian traffic between the two parcels of land.

Palm Springs argued that Casino's proposed construction would be an obstruction to vehicular and pedestrian traffic. However, the appellate court took the view that the provision was intended only to address access *between* the two affected parcels, and concluded that the proposed construction solely on Casino's parcel would do nothing to impede or obstruct such access. In fact, the court noted that the proposed construction would leave existing access open from one end of the shopping center to the other and would have no effect on ingress and egress.

The court also examined a provision of the Declaration dealing with parking, which stated:

> In addition, any parties affected by this Agreement agree that the parking areas, sidewalks and "common areas" of the shopping center and of the Conveyed Portion(s) will be available for use by the parties hereto, their tenants, customers, invitees and employees, in common with each other so that, in effect, the purchaser of the Conveyed Portion(s), its tenants, customers, invitees and employees, may use the so-called "common areas" of the adjacent shopping center in common with Owner, its tenants, customers, invitees and employees; and, by the same token, Owner, its tenants, customers, invitees and employees, may use the parking areas and sidewalk areas of the Conveyed Portion(s) in common with the new owner, its tenants, customers, invitees and employees.

The proposed construction would eliminate a row of parking located entirely on the Casino parcel. Palm Springs contended that since the proposed construction would eliminate parking spaces, it would violate the foregoing Declaration provision. The court disagreed, saying that the clear, unambiguous language of the Declaration gives all parties the right to use the parking areas on the other party's parcel, but does not include any requirement that any owner "maintain a certain number of parking spaces or a certain parking configuration."

Accordingly, the court reversed the partial summary and injunction that the trial court had entered in favor of Palm Springs.

RESTRICTIVE COVENANTS

The Court of Appeals of Iowa has examined the issues surrounding a use restriction set forth in a deed, and what circumstances rendered the interpretation of such a provision ripe for determination. *Mealy v. Nash Finch Company*, No. 3-1115/13-0635 (Iowa App., February 5, 2014).

Mealy purchased the commercial property involved in this case from Nash Finch Company in 2004. The deed conveying the property to Mealy included the following restrictive covenant:

> The Property (or any part thereof) hereby conveyed shall not be used or occupied as a supermarket or grocery store, which shall be defined as any store or department primarily devoted to the retail sale of food for off-premises consumption. Furthermore, in addition, no portion of the Property hereby conveyed shall be used for parking, ingress or egress for any property owned, used or occupied for any of the foregoing uses. The restriction set forth above commences on the date of this conveyance and shall remain in effect for a period of three (3) years from and after the date of this conveyance, or until Grantor, or any of its affiliates, subsidiaries, successors or assigns, or any entity to which Grantor, or any of its affiliates, subsidiaries, successors or assigns supplies groceries to, ceases to operate a retail grocery store in Muscatine, Iowa, whichever occurs last.

In 2009, Mealy sought a declaratory judgment stating that the restrictive covenant was unenforceable, and later amended the complaint to also seek interpretation of the restriction. Nash Finch filed a motion for summary judgment on both counts. The trial court denied summary judgment on the first count regarding enforceability, finding that a genuine issue of material fact existed as to whether the covenant interfered with the interests of the public. On the second count, seeking interpretation of the covenant (particularly the meaning of "primarily devoted to the retail sale of food"), the trial court found that no justiciable controversy existed and dismissed that part of the action. Mealy appealed the dismissal of the second count.

The trial court had based its dismissal of the interpretation count on the fact that

> Mealy has no concrete plans to lease or sell the Property for use as a grocery store, and no such arrangements have been recently proposed by any individual or entity. A declaratory judgment cannot be had on the possibility that Mealy will one day locate such a lessor or purchaser for the Property.

The appellate court, however, noted that the issue would still be the same even if Mealy had a ready buyer or tenant. Mealy argued that the restriction had "warded off" potential purchasers and tenants, and without an interpretation of the covenant she would not know which tenants she should or could even solicit for the property. In fact, Mealy had proposed one tenant, Dollar General, which Nash Finch had rejected on the basis of the restrictive covenant; Nash Finch had also rejected Mealy's proposal to pay $5,000 to rescind the restriction. The appellate court agreed with Mealy, saying:

> Mealy should not have to continually seek approval from Nash Finch to assure its satisfaction of a tenant or buyer to avoid future litigation. The restrictive covenant does not require the sale or use of the property to be approved by Nash Finch. In essence, without an adjudication, Nash Finch would continue to play hide the ball concerning its interpretation of the phrase, "primarily devoted to," and thereby seemingly have the authority to preapprove any prospective tenant or buyer.

The court reversed the dismissal and remanded the case for further proceedings.

TORT LIABILITY: INJURIES SUFFERED BY INVITEES IN COMMON AREAS
The Appellate Court of Illinois, Second District, has examined the question of whether a retail tenant may have a duty to protect the public from the risk of injury suffered on adjacent common areas. *Hougan v. Ulta Salon, Cosmetics and Fragrance, Inc.*, 2013 IL App. (2d) 130270 (Ill. App., November 18, 2013).

This is a personal injury case that addresses the relative duties of a landlord and a tenant to third parties for injuries suffered in a common area. The plaintiff, Susan Hougan, had exited the Ulta store and was standing on the sidewalk immediately outside the store entrance when a car being driven to pick up other emerging Ulta customers accidentally jumped the curb and struck her. She sued Ulta.

The plaintiff argued that Ulta owed a duty to protect customers from the risk of such an accident and that Ulta had breached such duty by, among other things, not installing bollards or other barriers or otherwise providing protections, or requiring the landlord to provide protections, for customers using the sidewalk. The trial court granted Ulta's motion for summary judgment.

The sidewalk in question was 7 ft., 8 in. in width, separated from the parking area by a 5-in. curb. Under the lease, the leased premises clearly did not include the sidewalk; rather, the sidewalk was included within the definition of common areas. The lease required the landlord to maintain the common areas and all exterior and structural portions of the premises, and the lease also prohibited the tenant from making any alterations or improvements to the exterior of the premises without the landlord's consent, which consent was to be granted or withheld in the landlord's sole discretion.

The court noted that certain relationships, "including the relationship between a business invitor and invitee, can give rise to an affirmative duty to protect another against an unreasonable risk of physical harm." But the court went on to distinguish prior cases, which had found a duty to protect invitees from harm that occurred on the invitor's property or that occurred just outside the invitee's property involving circumstances in which the invitor controlled the sidewalk or had sent invitees out of its premises under circumstances in which it was likely that they would be injured based upon prior events. The court stated:

> Here, in contrast, nothing occurred immediately prior to the accident such that Ulta should not have let Susan exit at the time she did, and Ulta did not take any affirmative actions to control the sidewalk.

The appellate court affirmed the trial court's summary judgment for Ulta, concluding that Ulta did not owe a duty to the plaintiff because the sidewalk on which she was standing and the allegedly dangerous parking lot were under the exclusive control of the landlord. The court also concluded that Ulta did not have a duty to warn the plaintiff of the dangers of store-facing parking stalls, particularly since the plaintiff had testified that she was aware of such dangers.

*John H. Lewis is Senior Counsel with the firm of Hartman Simons & Wood LLP in Atlanta, GA. He conducts a national commercial real estate practice and is admitted to the bar in Florida, Massachusetts, Georgia and North Carolina.

BCCA Clarifies 'Materiality Threshold' for Purchaser's Right to Rescind Under REDMA

*Jennifer Chan**
*Greg Umbach***
Blake, Cassels & Graydon LLP (Blakes)
Vancouver, Canada

A recent decision of the British Columbia Court of Appeal ("BCCA") reaffirms the need to balance the interests of developers and purchasers under the B.C. *Real Estate Development Marketing Act* ("REDMA"). That decision clarifies the "materiality threshold" underlying a developer's obligation to disclose facts and the concomitant right of a purchaser to rescind a purchase agreement for inadequate disclosure. In finding for the developer, the BCCA held that a developer's failure to provide purchasers with an amendment to a disclosure statement did not give rise to a purchaser's right of rescission under REDMA, where such amendment did not contain objectively material facts or relate to adverse effects on the purchaser.

In *Woo v. Onni Ioco Road Five Development Limited Partnership*, 2014 BCCA 76, May 23, 2012, the developer prepared a disclosure statement in compliance with REDMA for the sale of units in a residential development. The disclosure statement relied on policy statements from the Superintendent of Real Estate for pre-construction marketing prior to securing a building permit. Subsequently, in 2006, the respondent-purchasers received the disclosure statement and entered into purchase agreements with the developer. In 2008, construction was completed, and the purchasers took title to their properties. In 2009, the purchasers learned that they had not received a 2007 amendment to the disclosure statement; in 2010, the purchasers served notices to rescind their purchase agreements.

The amendment to the disclosure statement that the purchasers did not receive included updates on a revenue agreement entered into by the developer; receipt of subdivision approval; receipt of the building permit; and satisfaction of municipal conditions for strata lot creation. The purchasers argued that they were entitled to receive the amendment pursuant to § 16(1)(b)(i) of REDMA and that the developer's inadvertent failure to provide them with it gave rise to a right of rescission pursuant to § 21(3) of REDMA.

Section 21(3) of REDMA provides:

> Regardless of whether title, or other interest for which a purchaser has contracted, to a development unit has been transferred, if a purchaser is entitled to a disclosure statement in respect of a development property under this Act and does not receive the disclosure statement, the purchaser may rescind, at any time, a purchase agreement of a development unit in that development property by serving a written notice of rescission to the developer.

At trial, the Supreme Court of British Columbia judge "accepted that the facts disclosed in the amendment confirmed that events predicted in the disclosure statement had occurred as and when predicted." Nevertheless, the judge found that the facts contained in the amendment were material because they "reduced the risk that the developer might not complete the project as contemplated." The trial judge held that the purchasers were entitled to rescind their purchase agreements, and awarded them the return of the purchase price plus interest. The developer's counterclaim for occupational rent from the purchasers, who continued to live in the disputed properties, was denied.

On appeal, the BCCA applied general principles of statutory interpretation to reaffirm the twin goals of REDMA as not only protecting consumers by ensuring that developers disclose material facts, but also "enabling the efficient and productive operation of this sector of real estate development." The BCCA then reviewed the "materiality threshold" underlying the disclosure obligations in REDMA.

Materiality Threshold

REDMA prohibits a developer from marketing a development property prior to its construction unless the developer has first prepared a disclosure statement that must, among other things, "without misrepresentation, plainly disclose all material facts." An amendment is required if that disclosure statement no longer complies with the requirements for a disclosure statement or contains a misrepresentation in respect of a material fact, which is defined in this context:

> '[M]aterial fact' means, in relation to a development unit or development property, any of the following … a fact, or a proposal to do something, that affects or could reasonably be expected to affect, the value, price or use of the development unit or development property.

First, in order for a fact to be material, the BCCA reasoned, it must be considered in context. Absent evidence of such context, a "reasonable person" could not conclude that the disclosure in the amendment was material. In this case, there was no evidence that the amendment had any impact on value, price or use of the properties.

Second, even if the amendment disclosed facts that could affect property prices, the purchasers had not presented any evidence as to how significant such an effect might be. According to the BCCA, a "minimum threshold consequence on price, value or use is built into the purpose of consumer protection"; it was up to the purchasers to provide the court with objective evidence as to the degree to which their interests had been affected.

Third, the BCCA read into the definition of "material fact" a requirement that the effect on value, price and use be "adverse to the interests of the purchasers and not to their benefit." This adverse effect requirement is rooted in the purpose of REDMA as consumer protection legislation, while at the same time promoting the real estate development industry. Therefore, even if the amendment disclosed facts that could affect the price or value of the properties, that effect was positive and not negative, and so the purchasers had not suffered any prejudice.

Impact of Decision and Best Practices

In moderation of recent cases in B.C. involving purchaser rescission rights under REDMA, this decision moves toward a more balanced approach to implementing REDMA. The importance of both consumer protection and efficient promotion and development of real estate is recognized as a consideration in interpreting the provisions of REDMA. The decision removes the potential windfall situation created by the trial decision in *Woo*, whereby a purchaser was entitled to rescind a purchase agreement at any time, receive interest on the purchase price and live rent-free upon discovering the inadvertent failure by a developer to disclose facts that had no material or adverse impact on that purchaser.

However, this judgment also creates new uncertainties. It leaves to future cases the determination of what types of evidence will be sufficient for a purchaser to demonstrate a material and adverse effect on value, price or use of a property—and whether such effect has reached an objective threshold necessary to support a right of rescission. Further, it is unclear how, in practice, the inherently subjective decision to purchase a particular home will be reconciled with the objective materiality threshold and adverse effect requirement articulated by the court.

This decision should not be read as weakening the ongoing and continual disclosure obligations of developers under REDMA. The statement given previously in the court of appeal still applies in that "… the strictness of the [REDMA disclosure] filing regime must be maintained in order for protection to be meaningful to the consumer …." As a result, developers should continue to monitor their systems for updating disclosure filings and delivering such updates to their purchasers in a timely manner.

*JENNIFER CHAN is an Associate at Blake, Cassels & Graydon LLP (Blakes) in Vancouver. Her practice focuses on infrastructure, public-private partnerships and commercial real estate. She advises proponents, vendors and real estate developers on a wide range of corporate matters, development projects and commercial transactions. She also represents lenders and borrowers on all aspects of project financing. She can be reached at jennifer.chan@blakes.com or at 604-631-3329.

**GREG UMBACH is a Partner at Blake, Cassels & Graydon LLP (Blakes) in Vancouver. He has experience in transactions involving buying, selling, leasing, financing and the development of commercial real estate specifically relating to shopping centres, hotels, apartment buildings, office buildings and industrial properties. He has been involved with all aspects of the division and municipal approval process relating to land development. Greg has expertise relating to construction agreements and builders' liens issues. He can be reached at greg.umbach@blakes.com or at 604-631-3378.