



Top 2013 court decisions affecting the real estate industry

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2013 brought several long awaited and some surprising legal developments:

JOBS Act Rules - Rulemaking progressed under two parts of the federal JOBS Act. First, the rules applicable to the formerly prohibited "general solicitation" of investors in connection with Reg D private placements became effective September 23rd, 2013, but, so far, without a flood of advertising from sponsors.

Second, the long delayed rules for crowdfunding were finally proposed and most public comments of practitioners suggested that the proposal was "balanced." 2014 should bring the final implementation of the rules.

Hotel Management Agreements - In March, New York's First Department ruled unanimously that under New York law, New York courts may not enjoin the termination of hotel management agreements by property owners even where the owner has no clear contractual right to do so. While the terminating owner may be liable for damages, New York courts, at least in the First Department, may not enjoin the termination of a hotel management contract. Thus, New York owners will have the right to regain control of their hotels subject to litigation over the amount of damages owed. See *Marriott International Inc. v. Eden Roc LLP* 653590/2013.

Empire State Building - Judge Peter Sherwood ruled in April that the REIT offering for the Empire State Building and 19 other properties could proceed given the 95% partner vote in favor despite allegations of unfairness. The initial public offering subsequently closed at \$13.10 per share and reached a high of \$15.61 in 2013.

Foreclosure Delay Permits Condo to Obtain Receiver - A May decision by New York Supreme Court Justice Barbara Jaffe in *US Bank v. Sacher* granted the condominium's request for a receiver to collect rents with respect to the unit being foreclosed since the lender had taken five years to perfect its foreclosure. Expect 2014 to bring more equitable claims by condominiums against slow mortgagees to overcome New York's tough condo lien statute (RPL Â§ 339-Z).

AG Memo on Condo Syndications - In June, the New York Department of Law published guidance permitting the syndication of partnership interests in sponsors of condo projects to an investor interested in buying a condo unit before the condo offering plan is filed as long as a syndication filing is made and no penalty is assessed if the investor elects not to purchase the unit once constructed. Combined with the relaxation of the Reg D advertising rule, 2014 might bring advertisements for opportunities to invest in New York condo projects which will include a right to buy a unit at a favorable price.

Equitable LLC Buyout - In *Mizrahi v. Cohen* 3865/10, March 27th, 2013, New York's Second Department fashioned an equitable buyout of one 50% LLC member of the other member after that member had defaulted on his obligations. What makes the remedy unique is that it is not mentioned under New York's LLC statute and no buy/sell was provided for in the parties' LLC agreement. The

statute provides only for complete dissolution, not a buyout of one member by another. So, at least in the Second Department, a court may rescue a 50/50 LLC member where the other is in default.

Delaware Fiduciary Duty - After a surprising disagreement between Delaware court decisions, Delaware's legislature amended its limited liability company statute to clarify that default fiduciary duties exist under the statute. So, absent specific written provisions to the contrary, a managing member of a Delaware LLC must act with fiduciary duty in favor of members of the company.

Delaware Duty Good Faith - With the statute amendment described above, it is now clear that default fiduciary duties exist in Delaware LLCs. But Delaware also permits limitation on fiduciary duties in writing between the members. The statute does not permit, however, waivers of the implied covenant of good faith and fair dealing. After a series of Delaware decisions gave rise to a feeling that the implied covenant was not meaningful to help a wronged partner, the 2013 Delaware Appellate Court decided in *Gerber v. Enterprise Products Holdings LLC* that using a faulty fairness opinion relied on in a merger of an LLC violated the implied covenant in spite of a clause in the LLC agreement absolving the managing member from liability if he used an outside expert fairness opinion. So the implied covenant of fair dealing lives in Delaware and remains meaningful.

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