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MHH Condo/Co-op Digest

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This newsletter explores the emerging legal topics and issues affecting the condominium and cooperative services industry. Thought-leading attorneys from Moritt Hock & Hamroff's Condominium and Cooperative Services Practice Group share their legal insight, experience and best practices on this rapidly evolving area of law.

As always, if you have any questions regarding the matters raised in this Digest, please feel free to contact Bill McCracken of our New York City office at ***wmccracken@moritthock.com****, or your regular contact at the firm.*

About The Group

Moritt Hock & Hamroff's Condominium and Cooperative Services Practice Group represents clients in all aspects of condominium and cooperative law.

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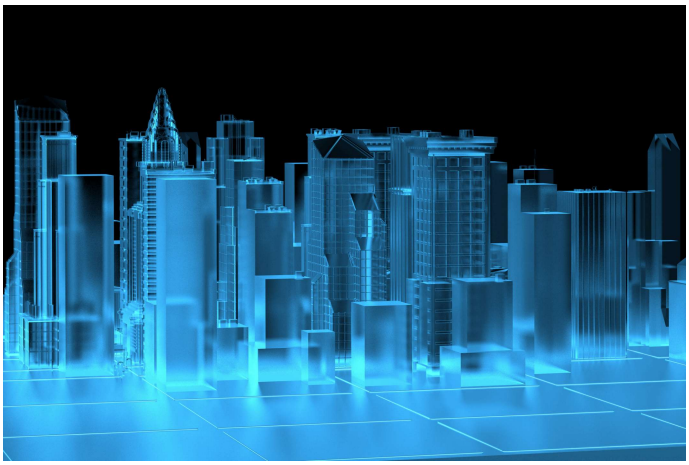


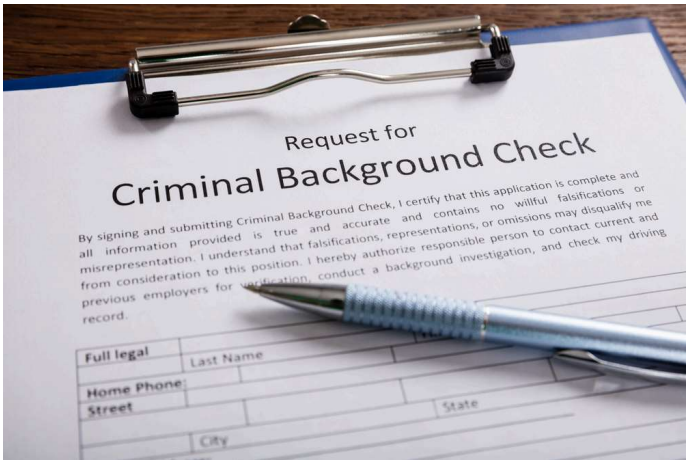
Nationwide Injunction Entered Against The Corporate Transparency Act

As we were literally going to press with "one final warning to get your BOI reports filed," **news broke** that a Federal District Court in Texas has issued a **nationwide injunction against enforcement of the Corporate Transparency Act**.

The **79-page opinion** finds, among other things, that "the Government is unable to provide the Court with any tenable theory that the CTA falls within Congress's power," and is therefore likely to be found unconstitutional. And the Court found that entering a nationwide injunction enjoining enforcement of the CTA and any reporting requirements would properly maintain the status quo while these constitutional challenges are litigated.

This is obviously a fluid, fast-moving situation. We cannot say whether this injunction will be upheld or whether the end-of-year reporting deadlines will be reinstated, but it appears that as of now, all of the CTA reporting entities have been granted a reprieve. We will be closely monitoring developments.

Meanwhile, background information on the CTA is available **here** and in **prior editions** of this Digest.



New York City Enacts The Fair Chance For Housing Act

By Danielle Halevi

The NYC Fair Chance for Housing Act (a.k.a. Local Law 24 of 2024) will go into effect on January 1, 2025. The new legislation seeks to prevent housing discrimination against those convicted of crimes by prohibiting covered housing providers, including most condominium and cooperative boards, from considering certain criminal convictions in the application process for the sale or rental of an apartment unless a series of procedural steps are followed.

The headline requirement is that housing providers may not conduct a criminal background check **at all** unless and until an applicant's other qualifications (such as credit score, income, tenant history, and pets) have first been considered. If the housing provider is satisfied with these other preliminary qualifications and decides to make (or accept) an offer to sell or lease an apartment, only then may a criminal background check of limited scope (discussed below) be conducted.

Once a criminal background check has been conducted, but before the provider takes any adverse action based on such a background check, the provider must provide the applicant with a copy of the background check and any other related materials, and then provide the applicant with five days to identify any errors or provide supplementing or mitigating information to the board in support of the application.

When deciding whether to take adverse action against an applicant, a provider can only consider what the Act defines as "reviewable criminal history." Reviewable criminal history excludes felony convictions older than five years since the applicant was released from incarceration or the date of their sentencing, misdemeanor convictions older than three years since the applicant was released from incarceration or the date of their sentencing, and any criminal actions that were resolved in favor of the applicant (such as terminated actions, youthful offender or juvenile delinquency adjudications, convictions of violations, or convictions that have been sealed, expunged, or the subject of an executive pardon). In addition, pending cases not yet adjudicated or that have been dismissed

at the time the criminal background check is conducted cannot be considered when deciding whether to take adverse action.

If, after following all of these preliminary steps, the provider does decide to take adverse action against the applicant, then the applicant must be provided with a copy of the documents that were reviewed and a written statement describing the reason for the adverse action. The written statement must demonstrate how the applicant's criminal history is relevant to a "legitimate business interest" (a concept sadly not further defined by the Act) of the provider and how the information was used in making the adverse determination.

If a provider hires a third-party service provider to conduct the background check, it must ensure that any information outside the bounds of reviewable criminal history is not knowingly received. If such information is received and an action is brought against the provider, a rebuttable presumption that the provider relied on such information in its determination will arise. To rebut the presumption, the provider will need to make an **affirmative** showing that they did **not** do so, which for obvious reasons, may be a high bar to clear.

On the other hand, the Act does allow providers to review any sex offense registered in a state or federal registry, no matter how long ago the applicant was released from incarceration or was sentenced, any act of physical violence committed by the applicant against another person or property on the premises, or any act that would adversely affect the health, safety, or welfare of other residents. In addition, the Act does not prevent providers from reviewing certain information to comply with other laws, such as those relating to domestic violence, sex offenses, or stalking.

This new procedural architecture, not to mention the prospect of personal and entity liability for housing discrimination for missteps, means that co-op and condo boards must proceed very carefully should they wish to investigate a potential buyer's or renter's criminal history.

New NYC Law Enhances Bedbug Notification Requirements For Landlords

By Nicole Malen

New York State has **adopted new rules concerning active bedbug infestations**. While current laws require landlords to disclose a building's bedbug history to new tenants and to file annual bedbug reports with the NYC Department of Housing Preservation and Development, the new law addresses a critical information gap for current residents – prompt notification of active infestations.

The new law, codified as Section 235-j of the Real Property Law, which goes into effect later this month, will require landlords to notify certain tenants in writing within 72 hours of discovery of a bedbug infestation. Written notification is only required for tenants in close proximity or otherwise at risk of exposure. For infestations in common areas, such as lobbies or laundry rooms, landlords can fulfill their obligation by posting public notices to alert residents. Unfortunately, what constitutes "close proximity" and even how an "infestation" was not defined, opening the door to disputes about how to properly apply the new law. The law also does not specify what penalties, if any, apply for providers who disregard the 72-hour notification rule. The original version of the law that passed provided for a 24-hour notice period, but Governor Hochul signed the law on condition that the notification period be extended to 72 hours.

In Dispute Over Fifth Avenue Roof Garden, Court To Rule On "Strategic" Expiration Of Proprietary Lease

Whenever we are asked to review a co-op's proprietary lease for potential amendments, the first provision we check is usually the term of the lease. We invariably recommend extending the lease term, especially if it is due to expire in less than 30 years, because an approaching lease expiration can adversely affect the ability of shareholders to borrow or to market their apartments.

That is one reason why a recent decision of the board of the cooperative located at 1010 Fifth Avenue – to allow its proprietary lease term to run all the way down to its September 30, 2024 expiration date before adopting a new lease – is so extraordinary.

As the parties' submissions reveal in ***Hubshman v. 1010 Tenants Corp.*, Sup. Ct. N.Y. Co. Index No. 157779/2024**, there is nothing ordinary at all about the current situation at 1010 Fifth Avenue.

This litigation, which was filed in August in Manhattan Supreme Court, is only the latest in a long-running feud between the co-op and its penthouse apartment owner, Barbara Hubshman. As the litigation filings tell it, the seeds of this dispute were sown 100 years ago, in 1924, when the building was built by Fred F. French, a prominent developer of the period, to accommodate a massive roof garden appurtenant to the penthouse apartment. That penthouse apartment became Mr. French's personal residence.

Ownership of the penthouse, and the building as a whole, ended up with O. Roy Chalk, who later sponsored the building's conversion to a co-op in 1979. Mr. Chalk's daughter, Barbara Hubshman, has lived in the apartment as a shareholder of the co-op ever since.

The proprietary lease promulgated by Mr. Chalk contained a very unusual provision regarding the roof terrace. Among other things, Paragraph 7 of the lease gave the penthouse apartment owner "exclusive use" of the roof. It further permitted the shareholder to manage the "top soil, earth, bushes or other plantings, fences, structures or lattices" on the roof garden as she saw fit, without any Board approval. But if any such installations were "removed for the purpose of repairs, upkeep or maintenance of the building," the restoration expenses would be borne by the co-op, not by the shareholder. Moreover, if the co-op was ever required to perform any work on the roof, the shareholder had the option to have the work done by her own contractors, again at the co-op's expense. The proprietary lease further provided that any amendment to Paragraph 7 required the shareholder's consent.

This arrangement almost inevitably resulted in several litigations over the years, but the board was never successful in eroding this basic arrangement in favor of Ms. Hubshman.

At some point, the co-op board determined that the best way to get out from under the situation was to let the proprietary lease containing these unfavorable provisions expire by its own terms and adopt a new and different form of lease in its place.

As noted above, the existing proprietary lease was set to expire on September 30, 2024. In April 2024, the board proposed two resolutions to the shareholders – to continue operating the building as a co-op, and to adopt a new form of lease to replace the prior form. Not coincidentally, the new lease reversed all of the special accommodations in favor of Ms. Hubshman with respect to the roof garden. The two resolutions were overwhelmingly adopted by the co-op's shareholders, and so the new lease with the new terms was set to come into effect at the moment the old lease expired.

Before that happened, however, Ms. Hubshman filed this lawsuit. Her position is that, among other things, there is no temporal limitation in Paragraph 7 of the prior lease, and thus the protections in her favor continue for as long as the building operates as a co-op. Letting the prior lease expire was an illegitimate and ineffective way to wrest Ms. Hubshman's special roof rights away from her.

Aside from entering a temporary restraining order at the outset of the case, the court has not yet issued any decisions on the merits. In all likelihood, however, the court will soon rule on this interesting and novel issue of co-op law, and given the stakes involved, it is also likely that the court's ruling will be taken up on appeal by whichever side loses out.

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