

W E L C O M E

A MESSAGE FROM LAURENT DROGIN



Laurent Drogin

I am pleased to present you with our second issue of *The TKD Advisor*. At TKD, we recognize that your time is valuable, and that between e-mail, faxes, telephone calls, mail, meetings and “life itself,” there is a lot competing for your attention.

One objective of this publication is to alert you to matters of importance and interest that are coming across our desks. It is our way of keeping you abreast of such developments through a medium that you can peruse when time permits. It also enables us to introduce you to the lawyers on our team, some of whom, and whose areas of expertise, might not otherwise have been known to you.

To give you a better sense of “who we are” on a more personal level, this issue features the debut of “Getting to Know ...” a regular feature that will profile one of our attorneys. We lead off with Ed Finkelstein who, notwithstanding his allegiance to the “wrong” New York baseball team, is a terrific lawyer with a sharp and quick wit.

There are many law firms in Manhattan, and many lawyers in those firms who would welcome your business. We recognize this and value our relationships with our clients, and the trust, confidence and respect that we have earned from them.

In closing, if there is a specific topic that you would like to see addressed in a subsequent *Advisor*, please send me an e-mail to ldrogin@tarterkrinsky.com, pick up the phone, fax or mail me a letter, or just stop by.

SECOND-HAND TOBACCO SMOKE IN RESIDENTIAL APARTMENTS

By Steven Troup

A recent court decision regarding second-hand tobacco smoke from the Housing Court in Manhattan has possibly wide-ranging ramifications to apartment buildings, cooperatives, condominiums and rentals alike.



Steven Troup

The case involved a condo unit owner suing former tenants for unpaid rent which had accrued after the tenants moved out prior to the lease expiration. A respected Housing Court judge refused to dismiss the tenants’ defenses and counterclaims which were based on the warranty of habitability. The tenants had complained that tobacco smoke was filtering into their apartment, a condo unit, from a neighboring apartment and the hallway and rendered their apartment uninhabitable. One of the tenants was a cancer survivor.

The warranty of habitability is a statutory requirement that every landlord of residential units must provide their tenants with a safe and habitable home. Over the years, a huge body of case law has been written on this subject, largely in favor of tenants, especially in New York City.

The judge declined to grant the motion of the landlord, apparently the owner of just that one condo apartment, to dismiss the habitability defenses, finding that a landlord has a duty to take reasonable steps to provide a habitable environment, including the right to be free from offensive odors and smoke. A question of fact existed as to whether the landlord took any steps to address the situation with the neighbor, and if so, whether those steps were reasonable.

As you probably know, the rights of smokers and non-smokers are a fast changing area of the law. If it is further developed, and it is highly likely that it will be, more and greater duties are likely to be imposed on landlords, including cooperatives where a landlord-tenant

relationship exists between the co-op corporation and each tenant-shareholder, to provide smoke-free environments (or nearly so) for all residents of their buildings. Co-ops and rentals are subject to the warranty of habitability because of the landlord-tenant relationship that exists, whereas the relationship between condo boards and their unit owners is not, but it should not come as a surprise if this hot button issue is expanded and duties to maintain a smoke-free environment to all residential building occupants are imposed on condominiums as well as rentals and co-ops.

We had a case several years ago where a shareholder-tenant in our co-op client's building had complained to the Department of Health about second-hand



smoke, and a violation was issued. The Health Department's administrative law judge (not a sitting court judge) ruled that the co-op must take reasonable steps to prevent smoke from filtering into other tenants' apartments. As a result, the co-op spent several thousand dollars to remedy the situation.

To limit potential liability, we recommend that our co-op, condo and landlord clients consider sending out notices to all

residents reminding them that each resident is obligated to take steps to assure that offensive odors and gases do not escape his or her unit, that second-hand smoke is included in that category, and that if complaints are made, the landlord or co-op/condo board may be required to take action. Further, in co-ops and condos, if remedial work becomes necessary, such as sealing openings in walls, floors or ceilings, weather stripping doors, etc., the offending smoker will be responsible for paying for it.

About Steven Troup, Partner

Steve practices in areas of cooperative and condominium law, real estate transactions, business transactions, and commercial and real estate litigation. Steve is also experienced in counseling small businesses with respect to contract, corporate and related issues. Steve can be reached at stroup@tarterkrinsky.com.

CASE NOTE: REQUIRED INSURANCE COVERAGE FOR CONTRACEPTIVES

By Anthony Dougherty

In a recent case, the Catholic Charities of the Diocese of Albany and other faith-based social service organizations opposed to contraception on religious grounds sought declaration that the Women's Health and Wellness Act (the "Act") violated the free exercise provision of state and federal constitutions. The question raised was whether requiring coverage for prescription contraceptives violated the free exercise provisions of state and federal constitutions.

BACKGROUND

In 2002, the New York State Legislature passed the Act, mandating expanded health insurance coverage for a variety of services needed by women, including mammography, cervical cytology and bone density screening. The issue before the Court was the provision of the Act that required that an employer health insurance contract "which provides

coverage for prescription drugs shall include coverage for the cost of contraceptive drugs or devices."

HOLDING

The New York Court of Appeals, the State's highest court, held that the Act did not violate either the Federal or New York constitutions. The Court ruled that the Act was "[d]esigned to advance both women's health and the equal treatment of men and women." Supported by U.S. Supreme Court citations, the Court stressed that this is a "neutral law of general applicability" that aims at no particular religion. To find the Act in violation, religion would have to be shown to be its "target." The Court found that it was not, so the law stands.

The Court did find, however, that, "The burden the [Act] places on plaintiffs' religious practices is a serious one, but the

[Act] does not literally compel them to purchase contraceptive coverage for their employees, in violation of their religious beliefs; it only requires that policies that provide prescription drug coverage include coverage for contraceptives."



Anthony Dougherty

Anthony Dougherty, Partner

Anthony Dougherty practices in the areas of education, labor and not-for-profit law including laws pertaining to religious and charitable institutions. His clients include several religious orders, not-for-profit foundations as well as private preparatory and post-secondary institutions, and he serves as general counsel to Iona College, the Congregation of Christian Brothers and the Eastern Economic Association. Anthony can be reached at adougherty@tarterkrinsky.com.

REGULATORY RISKS BECOME OPPORTUNITIES FOR PIPES INVESTORS

By James G. Smith

The Securities and Exchange Commission's shift in interpretation of Rule 415 under the Securities Act of 1933 fundamentally altered the microcap "PIPE" market. Without reciting its entire history, Rule 415 allows a publicly traded issuer to sell shares on a delayed or continuous basis in the future if the issuer or the type of offering meets one of several criteria. One of those criteria, which PIPES investors have traditionally relied, is the registered offering for resale by selling shareholders. The number of securities, presumably common stock, being registered for resale by the issuer can be significantly large and, if too large, under the staff's interpretation, will cause the PIPES investor to become an underwriter and not a selling shareholder. The staff informally defines "too large" at about 30% of the issuer's outstanding shares. Absent the issuer or the transaction falling within one of the other Rule 415 criteria, the resale by the PIPES investor into the market must be at a fixed price.

As a result of this shift in interpretation, PIPES investors and the issuers that rely on PIPES financing have assumed that PIPES transactions, at least in the smallcap and microcap markets, are essentially dead. News of such demise is greatly exaggerated.

Where opportunities in the traditional PIPES market have been stalled by regulatory hurdles, new opportunities for PIPES investors, particularly those PIPES investors which tend to focus on a long term strategy, have been created. These PIPES investors are taking long term strategies – from one to two or more years before a liquidation event. These strategies are shorter than traditional venture capital investors' strategies,

typically five to seven years, but longer than many PIPES short term investors, seeking to start liquidating within three to six months.

What makes this opportunity attractive? Valuation. By taking a long term strategy, these PIPES investors are looking to command a greater discount to the issuer's market price. But the long term strategy also has its share of concerns that PIPES investors should consider.

STRENGTHEN COVENANTS

Heavily negotiated provisions in a PIPES deal frequently surround the registration rights agreement, which usually include various liquidated damages upon the issuer's failure to file, and get effective, a resale registration statement within a certain period of time. Long term investors should focus on other protections to make sure investments are reasonably protected, such as:

- forfeit mandatory and demand registration rights, but protect piggyback registration rights
- consider restrictive covenants—both negative covenants (what the issuer may not do without the investor's consent) and positive covenants (what the issuer must do without the investor's waiver)
- secure convertible debt with liens on the issuer's assets

PROTECT RIGHTS UPON OTHER LIQUIDITY EVENTS

Short-term PIPES investors have traditionally looked at selling in the public markets as the liquidity event. Long term investors need to protect their resale rights into the public markets, but must also look to other liquidity events, such as:

- a merger of the issuer
- a sale of the issuer's assets

- redemption of the securities by the issuer
- management buyout
- sales to a strategic third party



James G. Smith

Each liquidity event poses its own problems, and opportunities, to a PIPES investor. Longer liquidity horizons add risk that events will shift the direction of the issuer, and shift the ability, and profitability, of the PIPES investor's liquidity event. Negotiating protective provisions in the purchase agreement will reduce these risks.

PROTECT RULE 144 RESALE RIGHTS

Where registration rights were the focus of the traditional PIPES investor, protecting rights to resell under Rule 144 is much more important to the long-term PIPES investor. Generally, a shareholder may resell securities of an issuer that is reporting under the Securities Exchange Act of 1934 provided the shareholder has held for at least one year. Resales of securities of OTCBB-traded companies are limited to 1% of such outstanding securities every three months. If the shareholder has held the securities for at least two years, then there is no 1% limit. PIPES investors should carefully consider protecting resale rights, such as negotiating in the purchase agreement the issuer's irrevocable consent allowing its transfer agent to accept the investor's counsel's Rule 144 legal opinion.

About James G. Smith, Partner

James G. Smith practices in the areas of securities and corporate transactions, investment management and corporate law. James can be reached at jsmith@tarterkrinsky.com

GETTING TO KNOW..... ED FINKELSTEIN



Ed Finkelstein represents individual and corporate clients in a broad range of commercial litigation matters, with an emphasis on real estate, creditor's rights, employment, commercial torts, banking and financial transactions and contract and partnership oriented disputes. In addition to regularly appearing in the state and federal courts of New York, Mr. Finkelstein is also experienced in alternative dispute resolution. He has lectured on litigation and the court system to accounting, medical and real estate related professional organizations. Ed can be reached at efinkelstein@tarterkrinsky.com.

What do you find most satisfying about practicing law? I enjoy building friendships with clients and helping them solve problems. It's also interesting to see the underlying relationship dynamics when problems arise—there's often more going on than meets the eye.

What was your most memorable legal assignment? On my second day of work at a previous firm, a senior partner came into my office and told me that he needed

me to prepare a subpoena in a very simple case. Little did I know that the "simple" case would become a ten-year, multi-million dollar odyssey involving at least 20 different lawsuits in 4 states and a United States territory!

The case took several soap-opera-like turns with the emergence of several murders, money laundering, bankruptcy fraud, racketeering and drug trafficking. I essentially became a detective and eventually testified at one of the criminal trials. The entire matter provided an incredible legal experience while helping the client obtain a recovery. It was also nice to see justice actually served.

How did you know that you wanted to become a lawyer? Growing up, two wonderful family friends who were lawyers, were important mentors to me. I have also always enjoyed reading, writing and investigating.

Which historical figure do you most admire? Sigmund Freud because his insights and works have had such a

profound effect on modern intellectual development.

What is your favorite sports team?

The New York Mets

If you weren't a lawyer, what would you be?

A history professor or a psychotherapist because both professions analyze the past to help understand where we are today and perhaps provide guidance for the future.

What is your favorite city in the world, and why? That's easy: New York, because of its dynamic energy and interesting people. I've lived here my whole life.

CLARIFICATION

As a clarification of our previous issue, Anthony Dougherty began his legal career at the New York City based firm, Davidoff & Malito and, under John J. Duffy, Esq., gained specialized experience in representing not-for-profit, educational and religious institutions. He was not a member of that firm. Anthony currently serves as a member of the board of Directors for The Christian Brothers Foundation. He also serves as a member of the board of Directors for St. Joseph Residence, Inc.

F I R M N E W S

James Smith Tours China with Financial Advisors

James Smith, a corporate partner, recently toured China with New York and China-based financial advisors. Jim visited several businesses in Shandong Province and in the City of Shanghai meeting corporate executives and government officials. The purpose of the meetings was to assist local companies in accessing U.S. financial markets.

TKD Offers Managing Agent Seminar

TKD is pleased to announce that the firm's Labor and Employment group has developed a special Wage and Hour seminar program for Managing Agents. Our labor and employment partners, Laurent Drogin and Richard Steer, will speak on emerging issues in wage and hour law, as they impact Managing Agents, at an upcoming Spring 2007 program. Invitations will follow. For more information, please contact Tanya Duprey at (212) 481-8585.