

Robbins, Salomon & Patt, Ltd.

Quarterly

SPRING 2010

The difference is clear.®

TABLE OF CONTENTS

PAGE ONE

Illinois Condominium Property Act

PAGE TWO

The buyer's option contract

PAGE THREE

Contract dispute clauses

PAGE FOUR

Minimum wage claims

PAGE FIVE

Ultra-high interest loans

PAGE SIX

Conventional wisdom, urban legends, RSP news, recent announcements, and more.



Larry N. Woodard
Direct: 312.456.0191
lwoodard@rsplaw.com

IS YOUR CONDOMINIUM DISTRESSED OUT?

Municipalities have a new weapon to combat stalled condominium developments. The Illinois Condominium Property Act now allows municipalities to regain condominium housing stock that is lying in waste as a result of developers' fraudulent schemes or financial misfortunes. A municipality may commence a suit in court to regain control of "distressed condominium property" through either appointment of a receiver, forcing the property to be de-converted from a condominium by court order or compelling the sale of the entire project. 765 ILCS 605/14.5.

"Distressed condominium property" is property containing condominium units that are a danger, blight or nuisance to the surrounding community or the general public, with two or more of the following conditions being present:

- 50% or more of the condominium units are not occupied by persons with a legal right to reside in the units;
- the building has serious violations of any applicable local building code or zoning ordinance;
- 60% or more of the condominium units are in foreclosure or are units against which a judgment of foreclosure was entered within the last 18 months;

ROBBINS, SALOMON & PATT, LTD.

25 East Washington Street
10th Floor
Chicago IL 60602
Phone: (312) 782-9000
Fax: (312) 782-6690

2222 Chestnut Avenue
Suite 101
Glenview IL 60026
Phone: (847) 729-7300
Fax: (847) 729-7390

www.rsplaw.com



The Question (answer on page 5)

In the 1950s and 60s in Chicago, who wore an Uncle Sam suit and was always a losing candidate for public office?

- *there has been a recording of more condominium units on the parcel than physically exist;*
- *any of the essential utilities to the parcel or to 40% or more of the condominium units are terminated or threatened with termination; or*
- *there is a delinquency on the property taxes for at least 60% of the condominium units.*

This change in the condominium law reflects the legislature's recognition of problems that cities face when condominium developments are only partially sold, developers are bankrupt, units are being foreclosed upon and the association cannot organize or afford the most basic of utilities and building services. While this new law is an important step to curtail these troubled developments, unfortunately the legislature stopped short of allowing the association or the unit owners themselves to file an action under this new law. Only the local municipality may initiate the suit.

A unit owner in a distressed development certainly can urge the municipality to sue under this new law. However, in doing so, the unit owner, along with all other parties with an interest in the development, might be defendants in the lawsuit.

Also, if the municipality does sue the developer, the unit owners risk having the project de-converted and sold. In that case, the unit owners would each receive only their pro rata share of the proceeds of the sale, which could be pennies on the dollar of the unit's original purchase price.

The people who really benefit from this new law are those who live nearby, but not in the blighted condominium. If you live next to a building that can be considered "distressed condominium property," your troubles may be over: your local government can now take legal action to take over the troubled development and thereby preserve the value of your own property.

✦ *Larry N. Woodard*



Michael D. Schlesinger
Direct: 312.456.0370
mschlesinger@rsplaw.com

THE BUYER'S OPTION CONTRACT: A GOOD DEAL FOR ALL

Manufacturers are under pressure to devise creative ways to preserve their customer base. In better times, some manufacturers made contracts to manufacture products at a specified price for an agreed length of time. Such agreements are sometimes called "requirements contracts." That's a misnomer, because generally they do not require the customer to buy all or any specific quantity of the manufacturer's products. Courts have more properly described such contracts as "buyer's option contracts."

A requirements contract exists only when the contract obligates the customer to buy products from the manufacturer, and to buy all or a specified quantity of its requirements for products of a particular kind.

On the other hand, a buyer's option contract does not obligate the buyer to purchase any specified quantity from the manufacturer. It merely sets forth the terms that govern the contract when the customer places an order. In effect, a buyer's option contract can be viewed as a series of separate contracts with terms relating back to the original contract that sets forth the price and term during which the offer to manufacture is available.

This creates a dilemma for the manufacturer. Because a buyer's option contract specifies the price and length of time the manufacturer is obliged to manufacture products, the manufacturer is locked-in to make the product, but there is no corresponding obligation on the customer to buy the product. While this may be unfair, it is often simply a matter of the manufacturer having made, in retrospect, a bad deal. The law will never save a party to a contract just because he made a bad bargain.

What is a manufacturer to do? Here are some suggestions for the manufacturer's protection that can be incorporated into a buyer's option contract.

- *Set the unit price based on a mutually agreed upon estimated purchase volume of a product.*
- *If the number of units purchased increases or decreases from the estimated purchase volume by a specified percentage or more, provide there will be an adjustment of the unit price of the product.*
- *Provide that a change in the cost of labor or materials will result in an adjustment of the unit price of the product.*

- *If special tooling is required to manufacture a product, specify whether it will be a manufacturer's or a customer's cost.*
- *Specify that customer changes in product design or specifications will result in a unit price adjustment.*
- *If the customer requires the manufacturer to initiate an inventory-stocking program, provide that the customer will be obligated to pay for inventory that has not been incorporated into the product within a specified period.*
- *Provide for a default delivery schedule if the customer delays delivery of the product for more than a specified period.*
- *If, with the customer's agreement, the manufacturer incurs a surcharge above the normal cost to purchase parts, provide that the cost of the surcharge will be paid by the customer.*
- *If the customer agrees that the manufacturer may purchase parts in the secondary market or parts that do not conform*

to the customer's specifications, provide that upon return of a defective product the customer will pay for the manufacturer's labor and material cost to repair or replace the defective part.

- *If the customer fails to purchase a minimum number of units of the product within a specified period or there is a decrease in the number of units of a product purchased from the estimated purchase volume by more than an agreed upon percentage, provide that the manufacturer may terminate the buyer's option contract.*

Manufacturers can adapt these suggestions to the particular needs of their business. Properly crafted, the buyer's option contract can create a platform to forge a lasting, cooperative relationship between manufacturer and customer that mutually benefits both parties.

✦ *Michael D. Schlesinger*



Vincent Borst
Direct: 312.456.0182
vborst@rsplaw.com

WHERE SHALL WE FIGHT, AND WHOSE RULES WILL APPLY?

Contracts sometimes contain two clauses that are glossed over until a dispute arises – and then they may become of paramount importance. They are the choice of law clause and the choice of forum clause.

Choice of Law Clause

A choice of law clause names the state of the Union whose substantive law will apply to the dispute, but it says nothing about where the dispute will take place. To the extent you have the opportunity to choose the law of more than one state in your contract, careful selection of the state whose law is most favorable to your cause limits your risk.

Choice of Forum Clause

A choice of forum clause names the state or county where disputes physically must be litigated, but it says nothing about what state's law will be applied. The right (or wrong) choice of forum clause can affect the risk and cost of litigation. Most litigants want to litigate in their own back yard. A major employer in a small community would certainly want to tap into its local good will and have disputes litigated in its home town court. On the other hand, a major polluter in a small community would want to litigate as far away as possible in some distant court that will dispassionately weigh the facts and law.

Factors to keep in mind when writing a choice of forum clause are: your location, the location of potential witnesses, and the location of documents.

To be legally valid, the state or county named as the choice of forum must bear some relationship to the location of the parties or the place of performance of the contract. A party trying to invalidate a forum selection clause would have to show that the location chosen was unreasonable. To determine if the chosen location is unreasonable, a court will look at:

- *the law governing the agreement;*
- *where the parties reside;*
- *where the contract was performed;*
- *where likely witnesses reside; and*
- *the bargaining power of the parties in negotiating the choice of forum clause.*

As an example, two parties to a contract, both residing in Illinois and entering into a contract to be performed in Illinois, most likely could not lawfully choose Alaska as a place where suits must be brought.

A choice of forum clause may be used to confer personal jurisdiction over a non-resident defendant, presuming



Jennifer Tweeton
Direct: 312.456.0379
jtweeton@rsplaw.com

the defendant is a sophisticated business rather than an “unsophisticated” consumer. For example, a party to a contract who does not reside in Illinois, and in fact has never been to Illinois, could be forced to litigate his claim in Illinois by signing a contract containing a choice of forum clause that names Illinois.

Floating Clauses

Where the contract is likely to be assigned to another party, the correct choice of law and choice of forum clauses can affect the contract’s assignability. For these contracts, a floating choice of law and a floating choice of forum clause may be best.

Often a potential purchaser of contracts such as negotiable instruments has no interest in purchasing a

contract that requires him to apply law other than from his own state or to litigate in a court far from his home town. A floating choice of law or forum clause typically states that the choice of either the law to be applied or the location of any litigation must fall within the home state of one of the original contracting parties, or, if assigned, the home state of the party purchasing the contract. Such floating clauses are generally enforceable where the parties to the contract are businesses. A floating choice of law or choice of forum clause can therefore make contracts such as loans, equipment leases or other such contracts more appealing to potential purchasers of the contract.

✦ *Vincent Borst & Jennifer Tweeton*



Tracy E. Stevenson
Direct: 312.456.0384
tstevenson@rsplaw.com

MINIMUM WAGE CLAIMS – EMPLOYEES WIN

Employers paying minimum wages are sometimes tempted to circumvent the law and pay less than the minimum wage. All attempts to do so are unlawful and void. 820 ILCS 115/9.

Even if they want to do so, employees are not permitted to contract out of their minimum wage benefits. An employee earning less than minimum wage who signs a document releasing his employer from all claims under the minimum wage law is signing an agreement that is void. Thus, even when an employee agrees in writing to a wage reduction, an employer is not free from liability, if the amount goes below minimum wage.

An employer may have a truly noble purpose of having its employees agree to take a reduced wage. Perhaps he is trying to allow all the employees to continue their employment rather than endure some layoffs. Notwithstanding the employer’s pure heart, the agreement is void if the contracted wages go below minimum wage. Even if the employee is a member of a union and the union agrees to a reduction in pay, if the wage goes below minimum wage the agreement is void.

Sometimes an employer wants to assist its employees by offering them food at reduced prices while on the job. However, if the employer makes a charge for the food that causes the effective wage of the employee to go below minimum wage, the employer will have liability under the law.

Recently, a popular Chicago restaurant was deducting 25 cents per hour from each employee’s wages in exchange for granting the employees the ability to eat meals while on duty at the restaurant. Deducting the 25 cents drove the wages of some employees below minimum wage. When the employer got caught and the employees filed a class action lawsuit, the employer gave each of its employees \$10 to sign a release of all claims. The Illinois Appellate Court had no problem holding the releases void. *Lewis v. Giordano’s Enterprises, Inc.*, 921 N.E. 2d 740 (2009).

For some of the employees who signed the release, the 25 cent charge did not drive their wages below minimum wage. The employer contended that those employees should be allowed to settle their claims for \$10 if they want to. Nothing doing, said the Appellate Court: private settlements of wage claims are not permitted, unless supervised by the Secretary of Labor, or reviewed and approved by a court for fairness.

Thus, simply because an employer and an employee agree to a resolution between themselves of an employment wage issue, that does not necessarily mean that the employee cannot later file suit. The employer must follow proper legal channels or risk a lawsuit that it likely will find difficult to win.

✦ *Tracy E. Stevenson*



Richard Lee Stavins
Direct: 312.456.0371
rstavins@rsplaw.com

ULTRA-HIGH INTEREST PAYDAY AND CAR TITLE LOANS: GOOD, BAD OR INDIFFERENT?

Springing up in poor and not-so-poor neighborhoods are stores where payday loans and car title loans are made to desperate consumers. These are lending institutions that make unsecured loans to people in financial extremis. Often the interest charged by the lender would make the Mafia blush. Annualized rates of interest over 300% are not uncommon (and you thought your home mortgage's 6% rate was outrageous). Any loan that commands that kind of interest rate must be all bad – or is it?

Richard Posner, a former professor of law and economics at the University of Chicago, and currently an esteemed Judge of the United States Court of Appeals in Chicago, recently authored a decision in which he explained the competing societal values in evaluating the worth or lack of worth of these ultra-high interest payday loans and car title loans. *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660 (7th Cir. 2010).

Judge Posner explains that on the one hand are those who believe that most consumers are incapable of making sensible decisions about credit. According to that view, many consumers can't understand the interest rates and other fees charged by loan companies, in part because of the complexity of most loan documents. They end up paying absurdly high rates when they could borrow at much lower rates from a bank or, without having to borrow at all, could draw upon savings that earn low interest. Many of the borrowers, lacking self-control – but unaware of this and therefore unable to take counter-measures – are incapable of moderating their desire for goods and services and end up overindebted.

A contrary school of thought, explains Judge Posner, holds that many people cannot borrow from a bank because they have poor credit and may need a loan desperately. If a ceiling is placed on interest rates,

these unfortunates may be unable to borrow because the ceiling is too low for the interest rate to compensate the lender for the risk of default. As a result, these distressed individuals may lose their house or car or other property or find themselves at the mercy of loan sharks. An annual interest rate of 300 percent is astronomical, but a person who borrows \$5,000 at that rate and repays it two weeks later pays only \$577 in interest, and the loan may have enabled him to avert foreclosure on his house, or some other dire event that would have cost him far more than \$577.

Against this benign view of 300% payday and title loans, it has been argued that many of the borrowers end up rolling over their loans from month to month, which runs counter to the theory that these are short-term loans rationally incurred. The balance owed quickly becomes unbearable.

Being a wise judge, Judge Posner declined to take sides in this controversy. Being a wise author, the author of this article will do likewise.

Congress is currently considering creating a federal governmental agency that will regulate ultra-high interest loans. The high interest loan industry will lobby vigorously to make sure that the law as ultimately passed will not restrict the industry's profits.

The most the statute will likely do is aim for "full disclosure." That's a euphemism for pretending that the borrower will be educated before he makes the loan, but in reality he will be inundated with more papers to sign that will be incomprehensible to anyone except the most sophisticated borrower – which payday and car title borrowers by their nature seldom are. Such is always the way of the world.

✦ *Richard Lee Stavins*



The Answer (to our quiz on page 1)

The perennial political loser who wore the Uncle Sam suit was Lar "America First" Daly. Even with the name Daly, in Chicago, he couldn't win. Maybe that was because he spelled it wrong: without the "e".



Richard Lee Stavins
Direct: 312.456.0371
rstavins@rsplaw.com

CONVENTIONAL WISDOM

Everything you never wanted to know, and more.

WORDS TO LIVE BY

From your beloved editor/publisher/copyboy...

Is it possible that my sole purpose in life is to serve as a warning to others on the dire consequences of unacceptable behavior?

GREAT URBAN LEGENDS OF THE LAW

Fact or Fiction?

It's illegal in Illinois to have any glass or clear plastic cover over your vehicle license plates.

A: Fact.

Effective June 1, 2008, the Illinois Vehicle Code has mandated that glass covers and plastic covers on license plates are absolutely banned. Previously, there was an exception for clear plastic covers that did not obstruct the visibility of the plates, but that exception was deleted in 2008. There is no exception for previously purchased covers. 625 ILCS 5/3-413(b).

So, if your car is equipped with those nice-looking license plate frames with the fancy plastic covers, you have to remove the covers and junk them, or get ready for a ticket and a fine. Some local police departments are still issuing warnings only, but that benign practice is expected to end soon.

RECENT ANNOUNCEMENTS

All the news you can use...

ACHIEVEMENTS OF NOTE

Andrés Gallegos will be a delegate this summer to the National Council on Disability's summit on disability policy in Washington, D.C. The National Council on Disability is an independent federal agency, composed of 15 members appointed by the President of the United States. It promotes policies, programs, practices and procedures that guarantee equal opportunity for all individuals with disabilities.

Andrés also was appointed by Governor Patrick Quinn as a member of the Governor's task force on employment and economic opportunities for people with disabilities. He also authored "*Americans with Disabilities Act Comes of Age: Implications for Providers*," published in *Connections*, a magazine of the American Health Lawyers Association.

Stephen Patt participated in a panel discussion for first time home buyers, sponsored by Chase Bank.

Tracy Stevenson chaired the Illinois Association of Defense Counsel's trial advocacy course for attorneys practicing in Illinois, Wisconsin and Indiana.

Richard Stavins, assisted by **Ed Salomon**, argued a case of first impression before the Supreme Court.

Ed Salomon also spoke at a Chicago Bar Association seminar for young attorneys on opening a law firm and negotiating a commercial lease.

Jeffrey Randall mentors underprivileged children through the Take Stock in Children program in Collier County, Florida. Jeff was also appointed to the Collier County Community Redevelopment Advisory Board.

Michael Hriljac addressed the Midwest Podiatry Conference on the subject of financial and medical ethics.

ROBBINS, SALOMON & PATT, LTD.

Vincent Borst
Marshall K. Brown
William A. Castle, Jr.
Kimberly A. Doucas
Richard H. Fimoff
Andrés J. Gallegos
Richard L. Gayle
Barry Glazer
Howard S. Golden
R. Kymn Harp
Crystal L. Kontny

Andrew W. Lapin
Eric G. Patt
Stephen P. Patt
Nathaniel J. Pomrenze
Diana H. Psarras
Robert F. Rabin
Arthur Radke
Jeffrey M. Randall
Andrew M. Sachs
Paul T. Saharack
Edward S. Salomon

Michael D. Schlesinger
Donna M. Shaw
Caroline S. Smith
Scott D. Spears
Richard Lee Stavins
Tracy E. Stevenson
Robert J. Trizna
Jennifer Tweeton
Robert McKenna Winter
Alan J. Wolf
Larry N. Woodard
Dr. Michael J. Hriljac *Of Counsel*

The publication of this legal newsletter by Robbins, Salomon & Patt, Ltd. is not intended as a solicitation of representation, but rather is a service to clients, other professionals and friends of the law firm. Written entirely by members of the firm, we welcome any comments or questions about topics covered in this issue. This newsletter is not intended as a replacement for individualized legal advice. The contents of this publication may be quoted or reproduced if credit is given to the source.

©2010 Robbins, Salomon & Patt, Ltd.