REAL ESTATE

Top 13 Real Estate Laws of 2013

By Andrew Lieb

Now that 2014 is here, it is important to be aware of changes in the law, in order to properly represent our clients. This is not a list about the best events from 2013, but, instead, a list that highlights the new legal landscape that you face as real estate practitioners. Being familiar with these laws, regulations and opinions may help you to better address your clients' matters, save your license and make you money.

Defense of Marriage Act is unconstitutional

In *US v. Windsor*, the Defense of Marriage Act (DOMA) was held unconstitutional by the US Supreme Court as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment. As a result, married same-sex couples will no longer experience federal taxes incident to real estate transfers, both intervivos and testamentary, between spouses. As Edith Windsor did, same-sex couples that paid estate taxes on the death of a spouse should seek a refund.

Ability-to-repay and qualified mortgages regulations

As promulgated by the Consumer Financial Protection Bureau (CFPB), pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Regulation Z, which implements the Truth in Lending Act (TILA), has been amended, at 12 CFR 1026, to require creditors to make a reasonable, good faith determination of a consumer's ability to repay a residential mortgage. Guiding conforming loans into the future is the newly created category of "qualified mortgages," which represents a loan that is presumed to comply with the amended regulation by way of meeting certain product features.

Andrew Lieb

Real estate brokerage advertising regulations

The NY Department of State (DOS) issued revised advertising regulations, at 19 NYCRR 175.25, for the real estate brokerage industry. These expansive regulations define the concept of a "team" in brokerage, contain three pages of requirements for the "content of advertisements," and address "web-based advertising" by licensees. Operatively, the regulations include six prohibited terms in brokerage, including: "licensed sales agent;" "sales associate;" "associate;" "realty;" "group" and finally "broker" if the term "broker" is utilized without identifying that the broker is licensed in real estate as a "real estate broker."

Foreclosure Certificate of Merit Statutes

Pursuant to new CPLR §3012-b and amended CPLR §3408, plaintiffs commencing residential foreclosure actions on or after August 30, 2013 are required to serve and file a certificate of merit, together with copies of relevant financial documents, with the summons and complaint.

STAR registration

The NY Department of Taxation and Finance now requires homeowners to register with the department to receive the exemption in year 2014 and after regardless if the homeowner previously received the exemption. Taxpayers who earn more than $500,000 are not eligible for the Basic STAR exemption. Statewide, homeowners save $700 on average through the STAR program.

Real estate brokerage's use of corporate titles

The NY Department of State (DOS) issued an opinion letter, dated April 26, 2013, that clarifies the agency's interpretation of RPL §441-c(1)(a), which prohibits "dishonest or misleading advertising." Therein, DOS found "that brokerages may not provide corporate titles to agents for marketing or other purposes." Consequently, real estate salespersons and associate real estate brokers may no longer have titles of "President," "Vice President," "Senior Vice President," "Executive Vice President" and "Managing Director" where such titles are expressly reserved for the real estate broker who is affiliated with the brokerage entity.

Making Home Affordable Program extended

The Making Home Affordable Program was extended by the Obama Administration through December 31, 2015 "to provide struggling homeowners additional time to access sustainable mortgage relief." Ironically, the Mortgage Forgiveness Debt Relief Act of 2007 expired at the end of 2013, without similar extension, so any MHA workout that results in cancelation of debt income will likely result in taxable income to the struggling homeowner regardless of MHA having been extended. Therefore, MHA's benefit moving forward is significantly diminished.

Identity of User irrelevant to Land Use determination

In *Sunrise Check Cashing and Payroll Services, Inc. v. Town of Hempstead*, the NY Court of Appeals held that "zoning is concerned with the use of land, not with the identity of the user." However, the Court of Appeals, in dictum, softened its holding by analyzing the correlation between social policy grounds to restrict a particular user, such as adult entertainment, and the resulting secondary negative effects on the surrounding community. Moving forward, it appears that a zoning restriction will only be upheld based upon the identity of the user where the

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CONSUMER BANKRUPTCY

Bankruptcy Issues Concerning Disabled or Incompetent Debtors

By Craig D. Robins

This month was going to be the continuation of my article from last month, "Chapter 7 Trustees Gone Wild?" However, as there are some rapidly evolving cases on this issue, I will present that article at a future date.

I routinely get requests to represent consumer debtors who, for one reason or another, will have difficulty either signing the petition, or attending the meeting of creditors. This month I will address how to address these situations.

Sometimes the debtor is fully competent but can't travel because he or she is hospitalized, severely disabled, or incarcerated. Being attached to an artificial lung machine can make attending a court hearing difficult. Other times a family member tells me the client (or potential client), is incompetent due to senility or even being comatose in a hospital or nursing home and cannot sign any papers or even come to a consultation. I've had several recent clients who were in long-term, out-of-state drug rehab programs which had strict prohibitions about leaving the facilities.

There are solutions for dealing with these situations that will enable a debtor, who legitimately cannot attend the meeting of creditors at the courthouse, to still be examined, or in the case of incompetency, to still obtain bankruptcy relief.

Although there are some statutory provisions that address these issues, the real challenge is navigating through local practice and procedure. This typically involves dealing with the Chapter 7 or 13 trustee, the Office of the U.S. Trustee, and others. By learning how to address these matters now, you will be prepared to handle them later when these issues arise.

Unfortunately, in our jurisdiction, there is no absolute standardized way or official procedure for approaching these situations and the Bankruptcy Code and Rules do not address many of the actual practical issues involved. In addition, it seems that the Office of the U.S. Trustee changes their requirements from time to time, and individual trustees each have their own approaches. Nevertheless, I will attempt to provide some guidance.

Craig D. Robins

Inability to sign the petition

Let's start with incompetent debtors. Family members often recognize a need to resolve an incompetent relative's debt problems, especially if it enables assets to be protected. There is nothing in the bankruptcy code that requires a debtor to be of sound mind or able to physically sign the petition.

With incompetent debtors, I often proceed by utilizing a power of attorney. Bankruptcy Rule 9010(a) states that a debtor may appear by an authorized agent or attorney in fact. It is well-settled that an attorney-in-fact may commence a bankruptcy case in appropriate circumstances. Keep in mind that there must either be an existing power of attorney or the debtor must have a sufficiently lucid moment to competently sign a power of attorney. The attorney-in-fact will ultimately testify at the meeting of creditors and therefore must be knowledgeable about the debtor's finances.

The power of attorney form should ideally indicate that the attorney-in-fact has the power to file a bankruptcy case. The standard New York State Statutory Power of Attorney short form enables the user to describe specialized powers, so you can indicate "bankruptcy filings and all other matters related to bankruptcy."

Although there is no case law in our jurisdiction (the Second Circuit) addressing this, some courts have held that "general authority to litigate" is sufficient whereas other courts have held that the power of attorney must expressly authorize the bankruptcy filing.

The attorney-in-fact should sign the bankruptcy petition as "John Doe, attorney-in-fact for Joe Debtor." Debtor's counsel, upon filing the bankruptcy petition by ECF, should also file a copy of the power of attorney, together with an affidavit signed by the attorney-in-fact, in which he attests to his capacity, and explains why a power of attorney is necessary. I like to attach a doctor's note or affidavit as well. The attorney-in-fact must maintain an original copy of the power of attorney and be prepared to show it.

If there is no power of attorney, and the debtor is too incompetent to sign one, then the only way to proceed would be for the debtor's relatives to bring a guardianship and/or conservatorship proceeding in state court. However, it should be noted that Bankruptcy Rule 7017, which recognizes the value of representation on behalf of persons not in a position to protect their own interests, gives the court wide latitude to fashion sufficient relief for protecting an incompetent – a way to possibly bypass a state court proceeding, although this may be more applicable to adversary proceedings than meetings of creditors.

Inability to appear at meeting of creditors

If a debtor is genuinely unable to travel to the meeting of creditors, and will be unable to do so for an extended or indefinite period of time, there are alternate mechanisms for enabling the trustee to examine the debtor. The most common one is a telephonic 341 meeting.

At one time it was standard practice in our jurisdiction for debtor's counsel to bring a motion seeking authorization to conduct the meeting of creditors by telephone. Now, however, that does not seem to be necessary.

Current practice is to contact the trustee and explain why a telephonic 341 is necessary. Once the trustee consents, some trustees will require debtor's counsel to then seek approval from the Office of the U.S. Trustee, which can be done by sending them a letter with supporting documentation demonstrating the inability to appear. However, some trustees do not require this.

I get the opinion that the U.S. Trustee is delegating authority to the panel trustees to let them decide when telephonic 341s

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are appropriate. I tried confirming this with the local UST office, but because of rigid UST requirements, they can't make any direct comments as all inquires must go through the main Washington D.C. office.

Even though the debtor cannot appear at the 341 meeting room, debtor's counsel must appear. The trustee will then call the debtor from the hearing room.

I have found that it is easier to work with some trustees than others when it comes to scheduling. Some trustees will give counsel several possible dates, whereas others are not so flexible. Some trustees prefer conducting telephonic 341 hearings before their regular calendar. That could mean doing it at 8:30 a.m.

A witness must be present with the debtor at the time of the telephonic meeting. The U.S. Trustee has a standard form entitled, "Declaration Regarding Confirmation of Identity," which they require the witness to execute at the time of the telephonic meeting. This form, which must be notarized, states that the witness personally verified the identity of the debtor by checking the same type of government-issued photo ID that trustees typically require debtors to produce at the meetings of creditors in the courthouse.

If counsel knows that his client will not be able to appear, counsel should contact the trustee as soon as possible and not wait until the last minute.

I have had several cases in which I represented clients in nursing homes who were not only unable to appear, but unable to testify as well. In those cases I filed the petition with a power of attorney, and the attorney-in-fact testified at a regularly scheduled 341 hearing on behalf of the debtor. In both cases the trustee required me to bring a motion excusing the debtor's attendance, which was routinely granted.

In order to totally excuse the debtor's appearance, complete mental or physical incapacity is necessary. For example, in another case of mine, the debtor-husband had a post-petition stroke, was hospitalized, and could not testify. I brought a motion seeking to waive his appearance, which was granted, and just the wife testified.

I have also had several cases with debtors who were incarcerated. Telephonic 341 hearings for all of them worked out, but not without frustrations. Be prepared that it can take a good amount of time and effort to work with prison authorities to make suitable arrangements. Sometimes it is very difficult to get the prison to enable the debtor to be present in a room with a phone, and with a witness, at a designated time.

If a debtor should die after a bankruptcy case is filed, the case can still continue according to Bankruptcy Rule 1016, in which event an individual with knowledge of the debtor's finances can testify.

Moving out of state or traveling out of the country for a period of time is generally not an accepted reason to request a telephonic 341 unless the debtor is in the military on active duty or has an extraordinary reason for being unable to travel back to New York.

If it appears that the debtor's inability to appear is temporary, such as the case where the debtor is hospitalized, but is scheduled to be released in the near future, or was called out of town for a family emergency, arranging for a telephonic 341 may be inappropriate. In these instances, merely contacting the trustee, explaining the situation, and requesting an adjournment will usually be sufficient. If there is good reason for why the debtor cannot appear, most trustees will agree to adjourn the 341 hearing several times, usually in two-week increments.

When the debtor cannot appear at the meeting of creditors, additional work is always necessary. Accordingly, counsel should factor this is in when determining the legal fee.

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day or day of the week. On some channels, you'll want to post the same content multiple times. For example, many experts say you should post links to each new blog post at least 4 times on Twitter, at different days and different times, so that you reach different audiences when they are looking at Twitter.

As you might imagine, it's helpful if your editorial calendar keeps track of what you post, where, and when. This is also helpful when you want to get more traffic to older content that is still relevant.

Create the Schedule

The editorial calendar itself is simply a schedule to plan and keep track of your content. It should include:

- Who will post (if the channel has multiple authors, managers or administrators, such as a law firm blog or website, firm social media pages, etc.)
- How frequently you will post (daily, weekly, monthly, etc.)
- When you will post (specific day and/or time)
- Themes
- Post topics
- Post titles
- Images associated with the post
- Post keywords
- Post categories or tags
- Post audience
- Post deadline
- Actual post date
- URL of the post
- Content type
- Channel(s) to post to

Although the editorial calendar is a useful planning tool and a helpful guideline, as you can see, it can also be used to keep track of what has actually been posted. This will help you to identify topics, posts, or themes that you 'missed,' either due to a failure to post or because a more pressing issue arose which 'bumped' your original plan.

There are many tools available to help you create and implement a successful content marketing plan using your editorial calendar. For example, scheduling tools like Buffer or Hootsuite will let you write posts in advance and schedule them when you want them to appear online. If you use WordPress, you can try the WordPress Editorial Calendar plugin, which will give you an overview of your blog and scheduled posts. You can drag and drop to change post publication dates, and edit posts directly from the calendar.

If you've never tried using an editorial calendar before, give it a try and see how much easier – and less stressful – it can make the content creation process.

Note: Allison C. Shields, Esq. is the President of Legal Ease Consulting, Inc., which provides marketing, practice management and productivity coaching and consulting services for lawyers and law firms nationwide. More information can be obtained through her website, www.LawyerMeltdown.com or blog at www.LegalEaseConsulting.com. A version of this article originally appeared on Slaw.ca.

3D Printing and Intellectual Property (Continued from page 8)

property protection are in place to protect the fruits of the creator's labor.

Note: James J. Lillie, a former engineer, is a patent attorney and the founding member of LILLIE LAW, LLC, which has entered its 12th year of business. In 2004, he began teaching courses at St. Joseph's College that address Intellectual Property Law, which include Business Law, and Constitutional Law. He also works with various non-profits, including the BSA and local sports programs. He can be contacted at jlillie@lillielaw.com.

1. *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 209-210, 54 USPQ2d 1065, 1065-66 (2000).

2. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 764 n.1, 23 USPQ2d 1081, 1082 n.1 (1992).

3. *Wal-Mart* ., 529 U.S. at 205, 54 USPQ2d at 1065 (design of children's outfits constitutes product design); *Two Pesos,* 505 U.S. at 763, 23 USPQ2d at 1081 (interior of a restaurant is akin to product packaging); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161 (1995) (color alone may be protectible); *In re N.V. Organon*, 79 USPQ2d 1639 (TTAB 2006) (flavor is analogous to product design and may be protectible unless it is functional).

4. *Qualitex,* 514 U.S. at 162, 34 USPQ2d at 1162.

5. *Wal-Mart* , 529 U.S. at 215, 54 USPQ2d at 1066.

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particular user is expressly identified in the municipal ordinance with an express statutory purpose that demonstrates that the subject user adversely affects the surrounding community and where such correlation actually is generally accepted.

New York Rising program to recover from Superstorm Sandy

Created by Governor Cuomo in the aftermath of the devastation felt by Hurricane Sandy, this NYS Program, which is administered by the Office of Storm Recovery, includes: (1) the Housing Recovery program; (2) the Small Business program; and (3) the Community Reconstruction Program. NY Rising provides grants and low-interest loans for recovery from the storm, increases resiliency to future storms and helps those most affected receive buyouts for their lost homes.

Real estate appraiser assistant regulations

The NY Department of State (DOS) issued revised scope of practice regulations, at 19 NYCRR 1101.4, for real estate appraiser assistants. The revised regulations provide that a supervisor must have been certified for a minimum of three years to qualify in supervising assistants.

Breach of real estate contract damages

In *White v. Farrell*, the NY Court of Appeals held that where a purchaser breaches the contract of sale and there is not a liquidated damages clause in the contract, the measure of damages is defined by the time-of-the-breach rule. Pursuant thereto, damages are defined as "the difference, if any, between the contract price and the fair market value of the property at the time of the breach." The fair market value represents a question of fact where the resale value is only but one factor in the determination by a trier of fact and is not dispositive.

Municipalities cannot require offsite mitigation incident to Land Use Application

In *Koontz v. St. Johns River Water Management Dist.*, the US Supreme Court held, pursuant to the Unconstitutional Conditions Doctrine, that a municipality could not deny a land use permit where an applicant refused its demands to expend monies on offsite properties that were not owned by the applicant and had no nexus or rough proportionality to the proposal. In so holding, municipalities have been limited in their efforts to extort monies from applicants seeking permission to build.

Loss mitigation regulations

As promulgated by the Consumer Financial Protection Bureau (CFPB), pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Regulation X, which implements the Real Estate Settlement Procedures Act of 1974, has been amended, at 12 CFR 1024, to require servicers to evaluate borrowers' applications for loss mitigation options as well as providing borrowers with continuity of contact with personnel throughout the process. Additionally, the amended regulation protects borrowers in connection with force-placed insurance and requires servicers to properly address errors asserted by borrowers.

This list only provides a small blurb on each new law, regulation and opinion. There may be further discussion on these topics going forward as they get fleshed out in the Courts. So stay tuned.

Note: Andrew M. Lieb is Managing Attorney of Lieb at Law. P.C. and a frequent contributor to this publication.