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CLIENT BULLETIN
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PROVISION IN NEW HOME LIMITED WARRANTY FOR BIA MEDIATION/GRIEVANCE PROCEDURE DOES NOT BAR A LAWSUIT BY HOMEOWNER/BUYER

In *Byers v. RLG Builder, Inc.*, 187 Ohio App. 3d 651, 2010-Ohio-2869, which was just recently published, the Fifth District Court of Appeals reversed the holding of the Delaware County Common Pleas Court that the defense of accord and satisfaction barred a lawsuit when a homeowner/purchaser of a new home receiving a Building Industry Association of Central Ohio (BIA) standard form limited warranty and homeowners manual had first proceeded to mediation before the BIA's Professional Standards Committee and received a decision with respect to alleged construction defects and unfinished work.

The Court of Appeals held that the defense of accord and satisfaction was not applicable to claims of negligence, breach of warranty and breach of contract on the alleged defects in the home where there had not been an agreement on the amount of damages from the alleged defects (the Professional Standards Committee had found defects, determined the repairs the builder needed to make, and gave the builder a deadline for making the repairs).

Additionally, and very significantly, the Court of Appeals noted that the BIA provides a mediation/grievance procedure but that the procedure states the BIA has no authority to force a builder to comply with a hearing decision, and then held that a homeowner/grievant may abandon the BIA procedures and file suit (the act of filing suit terminating the BIA procedures).

It should be noted that this case only involved the BIA limited warranty and the BIA mediation/grievance procedures, and there was not a contract between the builder and the purchaser/homeowner providing for binding arbitration, which would have made the case totally different.

TRIPLE NET LEASE CASE - PILOTS (TIF PAYMENTS) ARE NOT TAXES

Many commercial "triple net" leases provide that the tenant reimburses, or pays for through a common area maintenance fee ("CAM"), the tenant's proportionate share of real property taxes but that special assessments are to be paid by the landlord (and not reimbursed or included in CAM). In *Chu Brothers Tulsa Partnership v. Sherwin-Williams*, 187 Ohio App. 3d 261, 2010-Ohio-858, the Court of Appeals (12th District-Madison County) held that payments in lieu of taxes (PILOTS) collected by the County Treasurer pursuant to a tax increment financing (TIF) ordinance, which ordinance provided that after the date of the TIF ordinance, for a period of 15 years, any increase in the assessed value of property within the 195 acre TIF district from development/new improvements would be directed as PILOTS into a tax-increment equivalent fund to pay for public infrastructure improvements (roads, sewer, water, etc.) within the TIF district, were not real property taxes. The Court held that although PILOTS were not specifically included within the statutory definition of "special assessments," based upon a series of Ohio Supreme Court decisions regarding real property tax versus special assessment, PILOTS were special assessments and not real property taxes. In the case before it, the Court of

Appeals held that the tenant (Sherwin-Williams) was not responsible for the payment of PILOTS under a triple net lease provision for the tenant's payment of real property taxes.

The moral of this case is that care must be taken in negotiating and drafting triple net leases for properties in, or potentially in, a TIF district.

MORTGAGE COMPANY'S NEGLIGENCE IN ATTACHING WRONG LEGAL DESCRIPTION TO THE MORTGAGE IS NOT "EXCUSABLE"

Mortgages, like other contracts, can be reformed (corrected by a court) to conform to the parties' original intent due to a mutual mistake by the parties or due to a unilateral mistake by one party or one party's agent where the unilateral mistake results from inadvertence or is "excusable."

In *Wells Fargo v. Mowery*, 187 Ohio App. 3d 268, 2010-Ohio-1650 (4th District-Scioto County), the original mortgage lender (The Money Store) attached the legal description of the borrower's undeveloped parcel of land next door to the borrower's parcel of land containing the borrower's residence rather than the legal description of the residence parcel. The mortgage and note were transferred and assigned to Wells Fargo. In the foreclosure action, Wells Fargo, realizing that the mortgage's legal description was of the undeveloped parcel rather than the residence parcel, sought to "reform" the mortgage by substituting the legal description of the residence parcel and then foreclose on the residence parcel.

The Court of Appeals stated "The Money Store was in the mortgage business," that a sheriff's deputy discovered the nature of the property "simply by visiting the property" and "had The Money Store undertaken even a cursory amount of due diligence, it would have discovered the true nature" and then held "A mortgage company's failure to learn the most basic facts about a mortgaged property cannot be excusable negligence." Thus, Wells Fargo had to proceed to foreclose on an undeveloped parcel of land rather than a residence.

BUSINESS FIRST'S "2010 FAST 50"

Congratulations to Ohio Power Tool, Inc. and Reliant Capital Solutions, LLC for their inclusion in Business First's "2010 Fast 50," the list of Central Ohio's 50 fastest growing companies.

CONGRATULATIONS, INDUCTEES

Congratulations are in order to Cheri Florance, Class of 1966, and Nicholas Shaheen, Class of 1983, for their induction into the Distinguished Alumni Hall of Honor of the Delaware City Schools.