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Client Bulletin



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ANOTHER POSSIBLE PROBLEM, POTENTIALLY CATASTROPHIC, FROM ROTE USE OF LEASE FORMS

In an article in a recent [Client Bulletin](#), we outlined some of the problems with using internet forms or prior leases in preparing new leases for a different tenant, a different type of property, a different use in a property, etc. A problem that was not mentioned in that article is one that can arise when a landlord uses a well drafted lease for the same tenant for the same premises and for the same use in the premises, but with a different, longer lease term. The potential of the problem occurring in the lease of residential property is not great as residential leases are typically for a term of one year. Commercial leases, however, are frequently for a longer term. Ohio Rev. Code § 5301.01 provides that deeds, land installment contracts, mortgages and certain other transfers of an interest in real property, including a lease for a term of three years or more, must be acknowledged before a notary public or official statutorily authorized to take acknowledgements. Although it may seem unduly harsh and hyper-technical, the Fifth District Court of Appeals in a Licking County case – *Kilcoyne Props, LLC v. Fischbach*, 2004-Ohio-7272 – held that a five year lease of commercial property properly signed by both parties – the lessor and the lessee – but not witnessed and acknowledged as required by the then-version of Ohio Rev. Code § 5301.01 was invalid and the tenancy was an oral month-to-month tenancy (at the time that case was decided and until a few years ago, the statute required that instruments subject to the statute had to be witnessed by two competent witnesses who signed their names as well as an acknowledgment, but the requirement of two witnesses has since been removed from the statutory requirements).

Depending upon the particular circumstances, the invalidation of a lease because it is not acknowledged can be a major financial loss for a landlord or for a tenant. For example, if a landlord makes tens of thousands or hundreds of thousands of dollars of leasehold improvements in reliance upon a long-term lease, with provisions for recoupment if the lease is terminated early, and the lease is supposedly secured with the guarantee of credit-worthy guarantors, if the tenant decides to go out of business, relocate to a better location, or due to an anchor tenant being lost, etc., the tenant can vacate the premises, giving appropriate notice under an oral month-to-month lease, neither the tenant nor the guarantors are liable other than for rent that would be due under an oral month-to-month lease because the written lease is invalid due to the lack of acknowledgments and the guarantors are not liable because there is no written lease that is the subject of their guarantee. If a tenant makes extensive leasehold improvements and installs furniture, fixtures and equipment that are deemed to be “affixed” to the real property, those become the property of the landlord, even if the written lease expressly provides that upon its termination, the tenant can remove such items, because if the written lease is invalid due to a lack of acknowledgments no provisions of the written lease have any force and effect, the tenancy is a common law oral month-to-month tenancy, and under the common law, fixtures remain in the real property and become the property of the landlord upon the termination of the tenant’s tenancy.

A few years ago, Ohio changed its statute to provide that an instrument of record in a recorder’s office after four years was deemed to be valid notwithstanding deficiencies in acknowledgment or other statutory requirements if the instrument was not fraudulent or procured by fraud (previously, Ohio’s statute had been 21 years, the longest in the nation). However, the change in this statute pertaining to recorded instruments will not save a lease that is invalid due to lack of acknowledgment or improper acknowledgment as (1) leases are rarely recorded (rather, any recording will be a memorandum of lease) and (2) the statute regarding instruments recorded for more than four years is for the protection of third parties later dealing with real property, not the parties to the recorded instrument with the defective acknowledgment, etc.

The bottom line is with leases (and most all instruments establishing legal relationships) two clichés/proverbs come to mind: “If it’s worth doing, it’s worth doing right,” and “Don’t be penny wise and pound foolish.”

OAK GROVE CEMETERY WALK: 2 P.M., SUNDAY, OCTOBER 7

Costumed re-enactors will portray notable Delaware County residents buried in Oak Grove Cemetery in Delaware. In 2017, the Delaware County Historical Society included re-enactors portraying the mother of and a brother of President Rutherford B. Hayes, who was born in Delaware, and Hiram Perkins of Perkins Observatory. Tickets are required and are \$10 for adult Historical Society members, \$15 for adult non-members, and \$5 for children ages 6 through 17.

THE SPANISH FLU EPIDEMIC AND EARLY 20TH CENTURY MEDICINE IN DELAWARE COUNTY: 7 PM, OCTOBER 10

At 7 p.m. on October 10 at The Barn at Stratford, 2690 Stratford Road, Delaware, Ohio, the Delaware County Historical Society is presenting a program by Dr. Alice Frazier on the Spanish Flu Epidemic in 1918 and early 20th century medicine in Delaware County. Admission is free due to sponsorship of the program by Willow Brook Christian Communities and Fidelity Federal Savings and Loan. You may reserve seats on the Historical Society's website—delawareohiohistory.org.

CHARITY SPAGHETTI DINNER: OCTOBER 15, 4:30 PM-7:30 PM

The law firm is co-sponsoring, along with Hilborn Insurance, Dusty Hostutler/Edward Jones Company and Team Waldron of Keller Williams Realty, the annual Sarah Moore Home Service Board spaghetti dinner at the Eagles Lodge, 127 East William Street in Delaware. Tickets are adults \$8, children 7-12 \$4, and children 6 and under free. Carryout is available for the same prices by calling (740) 816-2164 during the spaghetti dinner hours.

SEE THE NEW DELAWARE ENTREPRENEURIAL CENTER ON OCTOBER 18

Ohio Wesleyan University, in cooperation with the City of Delaware and the Delaware County Board of Commissioners, will be the home of the new Delaware Entrepreneurial Center. The City and the Center will host a Delaware Does meeting at 8:00 a.m., Thursday, October 18. Anyone interested in registering or presenting can go to <http://www.delawaremeansbusiness.com/event-3006783>. Manos, Martin & Pergram attorney Andrew Wecker represented Ohio Wesleyan University in contract negotiations with the City of Delaware and the Delaware County Board of Commissioners.

Every big business at some point was a small business, operating out of a spare room or shop. As described on the Center's website:

The Delaware Entrepreneurial Center at Ohio Wesleyan's mission is to create a collaborative, innovative, and imaginative space that facilitates value creation and professional development. ... The Delaware Entrepreneurial Center at OWU will be housed at 70 S. Sandusky St. and include rentable office spaces, a shared work area for center members, a conference center with digital meeting capabilities, and educational programming to support entrepreneurial understanding and success. Center members will have access to Ohio Wesleyan student-interns ... for assistance with product research, marketing strategies, budgeting, graphic design – and other needs to help them build their businesses.

In the winter of 2018, Delaware is scheduled to have another co-working space, this one in the former Delaware Gazette building, next to City Hall. Renamed as The Newsstand, this space will be operated by COhatch, whose motto is "Work. Meet. Live."

This bulletin provides general information and is not legal advice. Please contact us if you need legal advice. If you have friends or associates who you think would enjoy receiving a copy of this Client Bulletin, please feel free to forward it on. Thank you.

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