



# Ganz Wolkenbreit & Siegfeld LLP

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October 2011



Conor E. Brownell



Beth E. Carey

## Two New Partners Named

*As of July 1, 2011, there have been significant changes to our firm, as the younger attorneys who have been providing services as associates have received promotions.*

**Conor E. Brownell** and **Beth E. Carey** have been elevated to the partnership and **Lianne S. Pinchuk** has been made Counsel to the firm.

Conor received his undergraduate degree from Cornell University and his JD degree from Case Western Reserve University. After serving as a clerk in the Appellate Division, Third Judicial Department, he joined the Firm in 2006. He heads the Firm's collection practice, landlord-tenant practice and is also involved in general commercial litigation. Conor currently serves as the President of the Colonie-Guilderland Rotary Club and serves on the Board of Directors of Gift of Life.

Beth received her undergraduate degree from Boston University and her JD degree from Albany Law School. She joined the Firm in 2007. Her practice is focused on real estate, employment law, estate planning and corporate formation. Beth is on the Board of Directors of Trinity Alliance and on the Board of Directors of the Capital District Women's Bar Association.

Lianne received her undergraduate degree from the University of Western Ontario and her JD degree from Columbia University. After commencing her career with a major New York City law firm, she joined Ganz Wolkenbreit & Siegfeld LLP in late 2008. Her practice focuses on commercial litigation. She serves on the Board of Trustees of Congregation Ohav Shalom. ■

## Employee vs. Independent Contractor- Revisited Again

*We have covered this topic in the past but it is still an issue that regularly arises in conversations with clients and one that we often hear is being more closely scrutinized by government authorities in general and the IRS in particular.*

Some employers still believe that by simply calling someone an independent contractor rather than an employee they can make it so. They also believe that it will save them a lot of money if they simply call an employee an independent contractor. Employers who get caught in this mistake may be liable for employment taxes that they should have paid plus numerous other penalties. They also run the risk of violating several state laws such as the requirement to provide worker's compensation coverage and state disability insurance. Further, courts look to the employee/independent contractor status of workers in assessing liability claims for injuries both to third parties and the worker.

*(continued on page 2)*



### NEWS OF THE FIRM

**Tara Fallarino** has joined our firm as our front desk administrative assistant. She brings a warm and engaging manner to her interactions with clients and is quickly learning about the practice and each of our clients' needs. ■

**Robert Ganz** has been selected, for the 4th time, as a "Super Lawyer" in the area of commercial litigation. This is a peer nomination and evaluation process and represents less than 5% of the attorneys practicing in any discipline. ■

**Conor Brownell** was appointed to the New York State Bar's Character and Fitness Committee, which conducts interviews to assess the character and fitness of each New York State Bar applicants. ■

**David Siegfeld** will be chairing a Continuing Professional Education seminar sponsored by the Jewish Community Endowment Fund of the Jewish Federation of Northeast New York in November. David also just completed a two-day legal education course concentrating on the latest revisions to the estate and gift tax laws which will assist the Firm's estate planning and administration clients in optimizing their goals. ■

**Lianne Pinchuk** was appointed co-Chair of the Capital District Women's Bar Association's mentoring committee. ■

**Cindy Mosley**, our Office Manager, has organized the Firm's donations of both money and products to assist victims of the flooding in the aftermath of Tropical Storm Irene. ■



## Employee vs. Independent Contractor *(continued)*

The General Accounting Office (GAO) has estimated that 38 percent of employers examined misclassified “independent contractors.” In fact, big companies such as WalMart and FedEx have lost lawsuits or paid penalties relating to misclassification of employees.

Some employers look for a simple test to justify such a decision and that simply is not the way this determination is made. Each case should be considered independently; but there are specific factors which one can consider in making the decision which usually make the correct classification very clear.

According to the IRS, in order to determine whether a worker is an independent contractor or an employee under common law, you must examine the relationship between the worker and the business. All evidence of control and independence in this relationship should be considered. The facts that provide this evidence fall into three categories – Behavioral Control, Financial Control, and the Type of Relationship.

**Behavioral Control** covers facts that show whether the business has a right to direct or control how the work is done, through instructions, training, or other means. A worker is an employee when the business has the right to direct and control the worker. The business does not have to actually direct or control the way the work is done – as long as the employer has the right to direct and control the work. In liability claims this factor is considered to be the “most crucial factor” in the analysis according to a recent appellate court decision (*Barat v. Chen*, Sept. 13, 2011.)

**Financial Control** covers facts that show whether the business has a right to direct or control the financial and business aspects of the worker's job. This includes:

- The extent to which the worker has unreimbursed business expenses
- The extent of the worker's investment in the facilities used in performing services
- The extent to which the worker makes his or her services available to the relevant market
- How the business pays the worker, and
- The extent to which the worker can realize a profit or incur a loss

**Type of Relationship** covers facts that show how the parties perceive their relationship. This includes:

- Written contracts describing the relationship the parties intend to create
- The extent to which the worker is available to perform services for other, similar businesses
- Whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay
- The permanency of the relationship, and
- The extent to which services performed by the worker are a key aspect of the regular business of the company

**In making your decision ask yourself the following questions:**

- Q. When and where will the work get done and who controls this decision?
- Q. What tools or equipment will be used and who owns them?
- Q. What workers will be hired to assist with the work and who will hire and pay them?
- Q. Who will purchase supplies and services?
- Q. What order or sequence will be followed when performing the work and who decides this?

- Q. What kind of training is provided and who provides it?
- Q. Does the worker have a significant investment in the equipment he or she uses in the work?
- Q. Is the worker responsible for unreimbursed expenses?
- Q. Is there an opportunity for the worker to make a profit or suffer a loss?
- Q. Are the worker's services available to the market?
- Q. How is he or she paid?
- Q. Is there a written contract covering the work?
- Q. Does the worker get any benefits?
- Q. How permanent is the relationship?
- Q. Are the services provided a key activity of the business?

While there is no specific rule that requires “correct” answers to all of these questions, when considered in their totality, the answers to these questions will usually make it pretty obvious whether a worker is an employee or can be treated as an independent contractor. Making the wrong decision can be very costly in that it may subject the employer to substantial penalties for nonpayment and for late payment and may in some cases require that taxes which could have been withheld from the employee be paid by the employer. It can also make an employer liable to pay the medical expenses for a worker's injury which would have been covered by workers' compensation or disability.

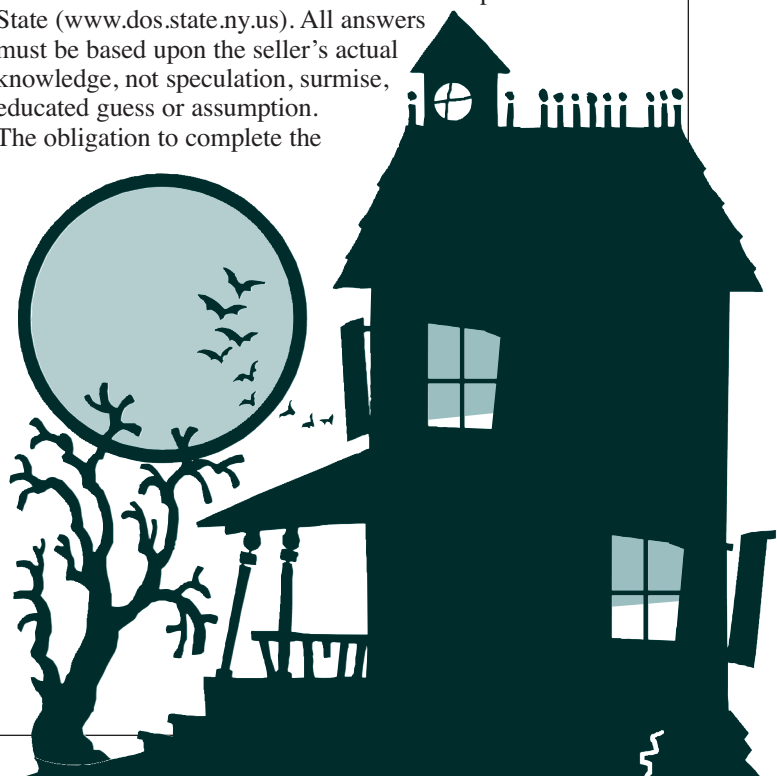
If you have an issue or a question, please call on us to help you make the right decision. ■

## You Have The Right To Remain Silent

*As of March 1, 2002, the New York State Property Condition Disclosure Act requires that every seller of residential real property deliver a form disclosure*

statement to the buyer before the buyer signs a contract or the purchaser would be entitled to a \$500 credit at the time of closing.

The Property Condition Disclosure Statement is six pages long and contains 48 questions concerning the Property. It is available online at the website for the Department of State ([www.dos.state.ny.us](http://www.dos.state.ny.us)). All answers must be based upon the seller's actual knowledge, not speculation, surmise, educated guess or assumption. The obligation to complete the



disclosure statement does not require the seller to undertake or provide for any investigation or inspection of his property or check any public records. The seller's sole obligation is to provide the information based on the seller's current knowledge. It is often the case that the form is completed with the seller's realtor prior to marketing and thereafter provided to interested prospects.

The Disclosure Statement is divided into several categories. The first covers general information about the property, such as the age of the house, how long the seller has occupied the property, and whether there are any unrecorded easements or other rights the seller has given to third parties. The next section seeks environmental information about fuel storage tanks, asbestos, led plumbing and radon. The third section requests structural information, such as whether there is any rot or water damage to the structure or whether the seller knows of any material defects in the structural elements. The final section requests basic factual information regarding the mechanical systems and services.

The Act also requires a seller to revise a Property Condition Disclosure Statement if the seller acquires knowledge which makes previously provided answers materially inaccurate. The duty to revise the statement terminates once title has been transferred from the seller to the buyer or when the buyer occupies the property, whichever occurs first.

If the seller fails to perform the duty of delivering a Disclosure Statement to the buyer before the buyer signs a binding contract of sale, the buyer shall receive, upon the transfer of title, a credit of \$500.00 against the agreed-upon purchase price. **There may be transactions where it is better to provide the \$500.00 credit instead of completing and providing a buyer with the Disclosure Statement** (see below).

What if a seller makes a mistake on the Property Condition Disclosure Statement? The statute seems to create liability only for a willful failure, that is, a knowing misrepresentation. This is an area where litigation will likely flesh out the seller's duties and responsibilities.

The general rule when purchasing a house is caveat emptor, buyer beware. It is the buyer's responsibility to discover defects in the house through the use of a home inspection. **However, a seller could be held liable for active concealment of a problem with the condition of the house. An appeals Court has recently confirmed a ruling that a false representation in a Property Condition Disclosure Statement may constitute such active concealment** (*Pettis v. Haag*, May 12, 2011). While a buyer must prove that the false representation prevented the buyer from fulfilling his or her own obligations imposed by the doctrine of caveat emptor, and that the buyer justifiably relied upon the false representation because the home inspection could not reasonably uncover the facts, the existence of the Property Condition Disclosure Statement assists a buyer (or his attorney) with establishing a factual issue exists, on the issue of active concealment. Even if a seller states orally that the basement has never flooded, the seller may still be liable for any damages incurred by the buyer as a result of reliance on this statement. The written disclosure statement provides a buyer with additional documentation to assist in making a case for active concealment.

A seller may want to consider consulting his or her attorney prior to authorizing their realtor to give a prospective buyer a Property Condition Disclosure Statement in order to avoid the possibility of later problems and potential liability. ■

## How To Maximize The Effectiveness Of Your Credit Applications

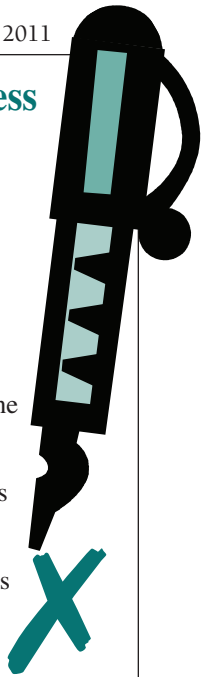
*In today's fragile economy, New York is continually passing legislation to protect debtor's assets and income to the detriment of judgment creditors.*

The success rate for businesses collecting on their receivables is decreasing and, as a result, creditors need to be smarter with their business decision to offer goods and services to customers on credit. One easy change that can have immediate impact is if businesses review their credit applications and invoices and make sure certain terms and conditions are present. In the paragraphs that follow a few suggestions are provided:

**1. Interest rate.** According to CPLR 5004, creditors are entitled to 9% interest on litigated obligations, unless a different rate is agreed to by contract (but cannot exceed the applicable usury point). This means that, in all credit applications, businesses can set their own default rate for invoices that are not paid within 30 days. Common rates include 1% per month or 1.5% per month. It is important when including the default interest language to also include the phrase "until principal is paid," as the Court of Appeals has recently ruled that this will allow the creditor to continue collecting on the higher rate even after maturity of a loan or judgment has been entered on the defaulted obligation.

**2. Attorneys fees.** Save for a few rare exceptions, unlike interest, in the business arena, there is no statute which gives a creditor an automatic right to its attorneys' fees upon default by its customer. Leases, credit applications, promissory notes, installment agreements etc., all must contain specific language to give the creditor the right to sue for its attorneys' fees incurred in collecting a past due balance. Of critical importance is that the language be specific and prominent so as to demonstrate to a judge that it is clear enough to be enforceable against a debtor who may claim they never agreed to pay attorneys fees. Having an enforceable attorneys' fees agreement not only increases the chances that the creditor will be made whole if it has to sue a

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## What We're Up To



*Jed Wolkenbreit has recently completed a comprehensive review of all new laws, regulations, and guidelines regulating the delivery of mental health services in New York State. ■*

*Rob Ganz received two favorable decisions from courts. The first dealt with issues relating to the lack of enforceability of preliminary agreements when later lease agreements have been executed. The second related to the commercial reasonableness of the sale of personal property held as collateral under a defaulted loan obligation. ■*

*Conor Brownell successfully handled a commercial eviction where the trial involved tenants who did not speak English and required a Mandarin Chinese translator. ■*

*David Siegfeld is assisting various clients with their commercial financing needs and business entity restructuring. ■*

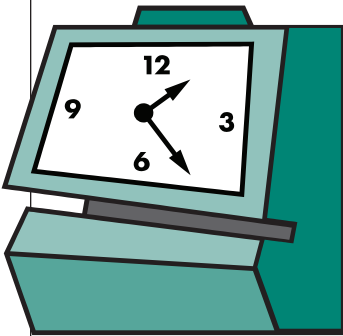
*Lianne Pinchuk recently obtained two settlements in complicated civil cases exceeding \$200,000. ■*

## Your Credit Applications *(continued)*

defaulting debtor, but it can also be significant leverage in negotiating a settlement of a disputed claim.

**3. Personal guarantee.** In business to business lending and credit purchasing, perhaps the most powerful tool to include in an agreement is a personal guarantee. This language makes an officer of the corporation or LLC (generally the primary shareholder, owner, or top executive officer), personally liable for all debts of the business arising from a business relationship by which a vendor provides goods or services. In a lawsuit against the customer for defaulting on a contractual obligation, the business entity as well as the individual will be named as a defendant and both parties will be jointly and severally liable for the debt. As one can imagine, protecting personal assets of the owner often will get a debtor's attention quickly, and make the creditor, which holds the guarantee by the owner, a payment priority over other creditors that have claims only against the business entity itself. ■

## Wage Theft Prevention Act



*On December 10, 2010, Governor Patterson signed into law the Wage Theft Prevention Act ("WTPA"), which amends section 195 of the New York State Labor Law, requiring employers to provide more extensive wage notices to employees as well as imposing more severe civil and criminal penalties for employers who violate the WTPA.*

Effective April 9, 2011, all private sector employers must provide employees with a written notice that contains the following information:

1. The rate of pay, including the overtime rate of pay for non-exempt employees;
2. How wages are paid, whether hour, shift, day, week, salary, piece, commission, etc;
3. Any additional allowances such as part of the minimum wage, including tip, meal, or lodging allowances;
4. The day the employee will be paid;
5. The name of the employer, including any "doing business as" names;
6. The physical address of the employer's main office or principal place of business, and a mailing address if different;
7. The telephone number of the employer;

Employers must provide employees with this written notice at the time of their hire AND **between January 1 and February 1 of each subsequent year of the employee's employment.** The first yearly notice to existing employees must be given between **January 1, 2012 and February 1, 2012.**

The notice must be provided in the employee's primary language, as identified by the employee, through translated notices provided by the Department of Labor. The employee must sign and date the notice, and this notice must be kept in the employee's personnel file. The employer must keep this acknowledged notice for a period of six years from the date it is signed. The written acknowledgement shall include an

affirmation by the employee that the employee accurately identified his or her primary language to the employer, and that the notice provided by the employer to such employee pursuant to this subdivision was in the language so identified.

The Department of Labor has templates on their website of appropriate forms for the written notice, as well as notices in different languages. These templates can be found at <http://www.labor.ny.gov/foimsdocs/wp/ellsformsandpublications.shtm>

Employers can be assessed damages by the Department of Labor of \$50.00 per week per worker if the written notice is not given. Also, an employee can sue the employer for not receiving the required notice, but damages are capped at \$2,500.00 per worker.

Effective April 9, 2011, the WTPA also requires employers to provide employees with a wage statement (i.e. pay stub) along with every payment of wages that includes the following information:

1. The dates of work covered by that payment of wages;
2. Name of employee;
3. Name of employer;
4. Address and phone number of employer;
5. Rate of pay,
6. How the employee is paid such as by the hour, shift, day, week, salary, piece, commission, or other;
7. Gross wages;
8. Deductions
9. Allowances, if any, claimed as part of the minimum wage;
10. Net wages.

Moreover, for non-exempt employees, the wage statement must also include the employee's overtime pay rate and the number of regular and overtime hours that the employee worked. A sample wage statement can be found at the NYS Department of Labor website at <http://www.labor.ny.gov/workerprotectionllaborstandards/workprot/lshmpg.shtm>

Employers should review their current payroll statements provided to employees to be sure it includes all the information required by the WTPA. These statements can also be given to employees electronically as long as the employee has the ability to print out the statements.

In addition, if you change the payments owed to the employee as provided in their yearly notice, you must have their payroll statements reflect the new information. If the payroll statements do not reflect the new amounts then, you must provide another notice within 7 days prior to changing the wages.

Employers can be assessed damages by the Department of Labor of \$100.00 per week per worker if the wage statement is not given. Also, an employee can sue the employer for not receiving a proper wage statement, but damages are capped at \$2,500.00 per worker.

As the above demonstrates this statute requires employers to be diligent in providing their employees detailed notices or be subject to substantial fines. ■



**DISCLAIMER** Actual resolution of legal issues depends upon many factors, including variations of facts and the application of such facts to state and federal statutory and common law. This Newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this Newsletter.