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LANDLORD LIABILITY FOR CRIMINAL ACTS

Under Georgia law, a landlord does not have a duty to protect tenants from the criminal acts of third parties unless those acts are foreseeable. Prior crimes against tenants must be "substantially similar" in order for the crime in question to have been foreseeable. Until last year, a landlord's knowledge of prior criminal acts against the property of tenants did not establish the foreseeability of physical crimes against tenants.

In March 1997, the Georgia Supreme Court held that knowledge of prior burglaries of unoccupied apartments in an apartment complex could impose a duty on the landlord to exercise ordinary care to safeguard tenants against the risks posed by the burglaries, including the risk of physical harm to tenants. The prior acts do not need to be identical in nature to the crime in question to make that crime foreseeable. Rather, the prior acts only need to be sufficient to attract the landlord's attention to the dangerous condition. Because the landlord had actual knowledge of two prior burglaries in its vacant apartments, the Court determined that the landlord could reasonably have anticipated that another burglary might occur while an apartment was occupied and result in personal harm to a tenant.

Last November, the Georgia Supreme Court was presented with the question of whether prior property crimes involving thefts from automobiles and other acts of petty vandalism in a carport were sufficient to put the landlord on notice that a violent sexual assault and robbery against a tenant might also occur there. The Court determined that the prior crimes were not similar enough in nature to put the landlord on guard against a possible rape or robbery.

According to the Court, while thefts and vandalism in a carport and robberies of unoccupied apartments were all crimes against property, the carport thefts and vandalism would not lead a landlord to foresee that personal injury might occur, whereas robberies of unoccupied apartments would put a landlord on notice that a future robbery could occur inside an occupied apartment and result in injury to the occupant. The Court pointed out that a third party could intervene during an attack in an open carport, but that a victim subject to an attack in an apartment could not easily escape.

The liability of landlords for criminal acts remains in flux following these decisions, with no clear cut guidelines for determining what criminal

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YEAR 2000

The year 2000 and its real or potential effects on computers and businesses represents to some the next Armageddon. On the other hand, there are a few "nay-sayers" who believe that the hype and hysteria are a misguided attempt by some consultants merely to increase their revenues. In order to assist clients in separating fact from fiction, and to provide some concrete and practical strategies to deal with the effect of the year 2000, the Intellectual Property Group at Troutman Sanders has devoted the entire spring edition of Intellectual Property & The Law to this issue. If you are not already on the mailing list for Intellectual Property & The Law, please contact our Office of Practice Development at 404-885-3639 to receive a complimentary copy.

(Landlord Liability For Criminal Acts, continued from page 1)

Real Estate & The Law is a quarterly publication of the Real Estate Group of Troutman Sanders, providing up-to-date information on recent legal developments affecting real estate and general insights into related areas of interest. The Review is a free service to clients and is not designed to render legal advice or legal opinion. Such advice may only be given when related to actual fact situations.

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acts are foreseeable. For example, a recent Georgia Court of Appeals decision found the landlord of space leased to a pawn shop was not liable for a shooting inside the pawn shop. The Court stated that the determination in the case did not turn on the foreseeability of the crime, but rather on a Georgia statute imposing a duty to keep the premises and approaches safe, and according to the Court, that statute related only to common areas and not to portions of the premises over which the tenant had exclusive possession and control.

WATCH OUT FOR HIDDEN TAX LIENS AT CLOSING

Georgia statutes impose liens on real and personal property for taxes due the State or any county or municipality. A lien for property taxes attaches to property at the time fixed each year for valuation of the property, while a lien for sales and use taxes attaches on the day a vendor is required to make a return and remittance. A tax lien attaches to property of the taxpayer which is subject to taxation in Georgia and the lien remains attached until paid.

Taxes due the state for which tax liens attach include: ad valorem taxes, sales and use taxes, motor vehicle fuel taxes, income and withholding taxes, and specific or occupation taxes. Common title practice in connection with the purchase of property involves the search of the general execution docket for outstanding liens and a check of the ad valorem tax records to determine the amount of the ad valorem tax on the property and whether any ad valorem tax is overdue. Ad valorem taxes are prorated at closing and receive the attention of the seller, purchaser, closing attorney and title insurer.

“Specific or occupation taxes” include, but are not limited to, sales and use taxes, corporate net worth taxes, estate taxes, alcohol and tobacco taxes, road taxes or motor carriers, excise taxes, and license fees. An example of one such tax is the business license fee. Municipalities and counties have the authority to levy, assess and collect an occupation or business tax on businesses and practitioners of professions that have an office, have one or more employees or agents who exert substantial efforts for soliciting business or serving customers, or own personal or real property which generates

income in the applicable municipality or unincorporated part of the county. Therefore, real property may be subject to liens in favor of a county or municipality for a number of local taxes.

The sale of property which is subject to an ad valorem tax lien does not remove the lien from the property. Certain purchasers are, however, protected against other types of unrecorded tax liens. Liens for other taxes, such as specific or occupation taxes, are not superior to the title of a purchaser who purchases the property for value, in good faith, without notice of the defect in title, prior to the time the execution for the tax is entered in the general execution docket.

Thus, if, during the course of a due diligence review of property under contract for acquisition, a purchaser becomes aware of the seller’s failure to pay a tax such as business license, sales, or personal property tax, the purchaser will lose its innocent purchaser status as to the lien for such tax, and the tax lien would continue to affect the property after the purchase is consummated.

WATCH WHAT YOU DO, OR YOU MAY GET ANTI-SLAPPED

In numerous situations across the country, slander suits have been filed in an effort to prevent the defendants from making statements in public forums or governmental hearings. A developer may sue neighbors for campaigning against a development, in the process silencing the opposition when the rezoning comes before the local board. In an attempt to encourage rather than discourage public participation and comment, states across the country, including Georgia, have enacted legislation designed to make such lawsuits (“strategic lawsuits against public participation” or “SLAPP”) more difficult to maintain.

Georgia’s 1996 “anti-SLAPP” statute is one of the broadest so far enacted, applying to “any claim asserted against a person or entity arising from an act by that person or entity which could reasonably be construed as an act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the [U.S. Constitution or the Georgia Constitution] in connection with an issue of public interest or concern....”

The Georgia anti-SLAPP law is not limited to speech in front of a governmental body and can be construed to apply to statements made on television or to the print media.

The defendant in a lawsuit may file an anti-SLAPP motion to dismiss or strike. Upon the filing of that motion, all discovery and hearings or motions in the action are stayed. If the court determines that the anti-SLAPP statute is applicable to the lawsuit, the plaintiff's complaint must be verified, including a certification that the claim was not filed for "any improper purpose such as to suppress a person's or entity's right of free speech or right to petition government, or to harass, or to cause unnecessary delay or needless increase in the cost of litigation." If the court later determines that the verification was false, the court "shall impose" sanctions, which may include dismissal and an order to pay reasonable expenses.

One of the first cases under Georgia's anti-SLAPP law involved homeowners in a subdivision who opposed the rezoning attempt of an adjacent landowner. The day before a rezoning hearing, the adjacent landowner filed suit against the homeowners charging the homeowners with interference with the adjacent owner's contract rights. The adjacent owner at one time had owned the subdivision property, and had placed restrictive covenants against the subdivision property prohibiting any owner from opposing a rezoning of adjacent property.

Since the covenants attempted to restrict subsequent purchasers from exercising their rights of free speech and petition in connection with a rezoning, and were overly broad as well as vague, the Georgia Court of Appeals found the covenants invalid as against public policy, and that the lawsuit had been properly dismissed by the trial court.

The recently ended session of the Georgia Legislature modified the anti-SLAPP statute to provide that attorney's fees and expenses in a claim under the statute may be requested by motion at any time up to 45 days after final disposition of the alleged SLAPP suit, even if the suit is dismissed by the plaintiff. Prior to this modification, at least one court had held that a plaintiff could avoid liability for such fees and expenses by voluntarily dismissing the alleged SLAPP suit.

LEGISLATIVE UPDATE

TRANSFER TAX INCREASE; LAND, WATER, AND WILDLIFE HERITAGE FUND (SENATE RESOLUTION 532)

- Provides for a constitutional amendment to be submitted to voters for ratification or rejection increasing the Real Estate Transfer Tax from \$1.00 to \$2.00 per \$1,000.00, requiring the General Assembly to provide by law for the creation of a Land, Water, and Wildlife Heritage Fund (see Senate Bill 496 below) from which funds would be disbursed for the purpose of acquiring, conserving, managing, and preserving Georgia's natural and historic areas, water resources, and wildlife habitats, and requiring that a portion of the increase in the Real Estate Transfer Tax be deposited into the Heritage Fund.
- Signed by the Governor: April 20, 1998

CREATION OF LAND, WATER, AND WILDLIFE HERITAGE FUND (SENATE BILL 496)

- Creates the Land, Water and Wildlife Heritage Fund to be administered by the Department of Natural Resources for acquiring, conserving, managing and preserving Georgia's natural and historic areas, water resources and wildlife habitats meeting certain enumerated purposes. The Fund will be funded by the increase in Real Estate Transfer Tax, if any, approved by the voters, and by contributions after January 1, 1999, from individuals and from state and local public or governmental entities.
- Signed by the Governor: April 20, 1998

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(Legislative Update, continued from page 3)

TRANSFER TAX INCREASE **(HOUSE BILL 1551)**

- Increases the Real Estate Transfer Tax to \$2.00 per \$1,000.00 for the period January 1, 1999, through December 31, 2002; provides that the tax increase may be renewed for successive six year periods if approved by a referendum of voters; and provides that one half of the tax during the applicable period (as renewed) will be deposited in the Land, Water and Wildlife Heritage Fund.
- Effective Date: **January 1, 1999**, but only if constitutional amendment under Senate Resolution 532 is approved by voters; otherwise, the bill is null and void.

DISPOSSESSORY PROCEEDINGS **(SENATE BILL 525)**

- Amends the Georgia dispossessionary statute to provide that when a tenant tenders rent to the landlord and the landlord refuses to accept the tender, and such tender would be a defense to the dispossessionary action, the court shall order the tenant to pay the appropriate sum to landlord within three days, or the refused tender will not be a defense to the dispossessionary action.
- Effective Date: **July 1, 1998**

RECORD NOTICE OF CONSERVATION **USE PROPERTY (HOUSE BILL 1189)**

- Requires the county board of tax assessors to file in the real estate records of the applicable county copies of the applications for preferential assessment of property approved after June 30, 1998; provides that the application fees shall include the recording fees; provides that applications approved prior to July 1, 1998, be recorded without payment of any fee; and provides that if the approved application is not filed in the applicable real estate records, a transferee of the property will not be bound by the covenant or subject to a penalty for breach.
- Effective Date: **July 1, 1998**

RECENT DECISIONS

Individual Signing Corporate Check Personally Liable Under Bad Check Law For Amount of Check Plus Damages Where Insufficient Funds in Account

Stuart Cohen was president and sole shareholder of Amalgamated T-Shirts, Inc. As president, Cohen signed a rent check from the corporation to Kolodkin. After Kolodkin deposited the check in his account, the check was returned for insufficient funds.

Cohen failed to respond to several letters regarding the returned check sent by Kolodkin's attorney. Kolodkin subsequently filed suit under Georgia's bad check law. The trial court denied Kolodkin's motion for summary judgment.

On appeal, the Georgia Court of Appeals (*Kolodkin v. Cohen* Case No. A97A2142 January 29, 1998) held that Cohen was personally liable under the statute for the amount of the check plus damages whether or not Cohen knew there were insufficient funds in the account and in spite of the fact that the check was an Amalgamated check signed by Cohen as president of Amalgamated and not individually.

Assignee Liable For All Obligations of Assignor Under Lease Where Assignment of Lease Failed to Limit Assumption to Post Transfer Obligations

Dental One was the assignee of the original tenant of JKR Realty. The lease assignment provided that Dental One "assume[d] all of the terms, provisions, obligations, responsibilities and liabilities ... of the Tenant under the Lease." The original tenant had filed for protection under the Bankruptcy laws. JKR attempted to collect from Dental One over \$120,000 in back

rent owed by the original tenant. When Dental One refused to pay, JKR sued Dental One for the unpaid rent.

At trial, Dental One argued that the assignment was ambiguous and should not be construed to apply to any prior obligations prior to the date of the assignment. The Court ruled in favor of JKR, and Dental One appealed.

In *Dental One Associates, Inc. v. JKR Realty Associates Ltd.*, Georgia Court of Appeals Case No. A97A1167 (August 11, 1997), the Court rejected Dental One's claims that the lease assignment was ambiguous as to what responsibilities Dental One actually assumed, and that Dental One intended only to assume the prospective obligations under the lease and not any arrearages. According to the Georgia Court of Appeals, if Dental One had intended to assume only the prospective obligations of the assignor, Dental One should have expressly stated that intention in the assignment.

Guaranty Unenforceable Due to Omission of Name of Principal Debtor

Charlton Real Estate, Inc. purchased food and kitchen supply items from Sysco pursuant to a terms agreement. Coleman personally guaranteed the obligations of Charlton under the agreement. Charlton defaulted on payment. Sysco sued Coleman on the guaranty.

The terms agreement between Sysco and Charlton, and Coleman's guaranty, were on the top and bottom, respectively, of a single page. Charlton's name was filled in as "purchaser" on the terms agreement, but in the guaranty, the name of the debtor and the name of the guarantor were left blank. The trial court determined that the omission of the name of the debtor made the guaranty unenforceable, and the omission could not be corrected by reference to the terms agreement appearing on the same page because neither the guaranty nor the terms agreement incorporated the other by reference. Sysco appealed.

In *Sysco Food Services, Inc. v. Coleman*, Georgia Court of Appeals Case No. A97A0828

(July 16, 1997), the Court upheld the trial court's decision, stating that if a guaranty omits the name of the debtor, it is unenforceable as a matter of law, "[e]ven where the intent of the parties is manifestly obvious" because the instrument fails to satisfy the Statute of Frauds.

Knowledge of Dirt Road Crossing Property Creates Duty to Investigate; Failure to Investigate Defeats Claim For Breach of Warranty of Title

Richitt bought two lots from Southern Pine in a new development. A title search prior to closing did not reveal that a public road crossed the property. However, Richitt knew there was a dirt road on the property that was used by the public. Southern Pine was not aware of the public road.

After purchasing the lots, Richitt erected a gate across the road. County officials told Richitt the road was a public road and to remove the gate. Richitt filed suit to quiet title. When the road was determined in that suit to be a public road, Richitt filed an action against Southern Pine for breach of warranty of title. The trial court granted summary judgment for Southern Pine, holding that before he purchased the property Richitt knew about the road and that the road was being used by the public. Richitt appealed.

In *Richitt v. Southern Pine Plantation, Inc.*, Georgia Court of Appeals Case No. A97A1246 (September 2, 1997), the Court held that Richitt was on notice that the road existed and that it was used by the public; therefore, he had a duty to inquire about the interests possessed by those using it. Richitt did not investigate; therefore, he could not sue Southern Pine for breach of warranty of title. No mention is made in the decision of the apparently contradictory Georgia statute which provides that "a general warranty of title against the claims of all persons covers defects in the title even if they are known to the purchaser at the time he takes the deed."

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(Recent Decisions, continued from page 5)

In addition to this Review, Troutman Sanders LLP also publishes six other newsletters:

Business & The Law addresses the needs of publicly and privately held companies and seeks to provide items of interest to owners and executives of these companies.

Employment & The Law details current issues in labor, compensation, ERISA and tax that impact the relationship between employers and employees.

Environment & The Law tracks developing trends in environmental law, including air and water quality and hazardous substances.

Intellectual Property & The Law covers current issues in intellectual property/high tech areas, including copyrights, trademarks, patents, trade secrets, employment agreements and tax issues applicable to the development of technology.

International Business & The Law details current issues that impact international business transactions, trade in merchandise and services, and international investment opportunities.

Lending & The Law details current issues that arise in the commercial loan industry.

Please contact the Office of Practice Development at 404-885-3639 if you would like to receive any of these publications.

Subsequent Developer Not Protected by Settlement Agreement Contemplating Transfer

The Hadaways sued Douglas Dowd and other entities developing a subdivision upstream from their property for damages caused by increased silt in the creek on their property. The parties settled and, in the settlement agreement, the parties acknowledged the plan to sell the upstream development to Arvida which would resume construction, and that further siltation might result from Arvida's construction. However, when Arvida resumed the construction of the upstream subdivision, the Hadaways sued Arvida for damages caused by increased siltation. The Hadaways were awarded damages in the trial court, and Arvida appealed.

In *Arvida/JMB Partners L.P.-II v. Hadaway*, Georgia Court of Appeals, Case No. A97A0408 (July 15, 1997), the Georgia Court of Appeals upheld the trial court, and determined that there was no clear language in the settlement agreement that made Arvida a third party beneficiary. According to the Court, the settlement agreement was ambiguous as to whether it was intended to benefit Arvida even though the agreement disclosed that Arvida was going to purchase the upstream subdivision and commence construction, and even though the plaintiffs had acknowledged in the agreement that further siltation would likely occur when construction resumed. The acknowledgment that further siltation would occur when construction resumed did not equate to consent by the Hadaways to the siltation.

Condominium Association's Lien For Pre-Foreclosure Fees and Assessments Has Priority Over Secondary Purchase-Money Mortgage Where Grantee Originally Obtained Mortgage When Grantee Sold Unit

Under Georgia law, the lien for condominium assessments has priority over most other liens, but is subordinate to, among other things, a

secondary purchase-money mortgage, provided that neither the grantee nor successor grantee on the mortgage is the seller of the unit. Gregory financed the sale of his condominium unit to Barker who sold the unit to Francisco. Francisco assumed the debt to Gregory, but failed to make payments to Gregory and failed to pay association fees to Dunhill Condominium Association. Gregory foreclosed and repurchased the unit. The Association sought to collect from Gregory the fees, penalties and attorneys' fees owed by Francisco. Gregory sued and the trial court ruled that since Francisco had not bought the unit from Gregory, Gregory was not the seller of the unit even though the secondary mortgage had been granted in connection with Gregory's sale of the unit to Barker. The Association appealed.

In *Dunhill Condominium Association, Inc. v. Gregory*, Georgia Court of Appeals Case No. A97A1093 (August 6, 1997), the Georgia Court of Appeals focused on whether Gregory was "the seller of the unit" within the meaning of the Georgia Condominium Act. The Court determined that the logical interpretation of the word "seller" is the seller in the sales transaction in which the mortgage was created rather than the sales transaction in which the ultimately defaulting debtor purchased the property.

Accordingly, the Court reversed the trial court and ruled that the Association's lien was superior to Gregory's purchase-money mortgage and the Association could collect the pre-foreclosure fees and assessments from Gregory.

What Can I Do to Discourage Retaliation Lawsuits?

Susan L. Arrington

Oppressive supervision; institution of special conditions on the employee; discharge, transfer or demotion; withholding of wages; or negative references – these are some of the many actions in the workplace which could trigger a retaliation suit from an employee who files or participates in a discrimination or similar claim, or who files for worker’s compensation benefits. Most companies and managers practice good “human resources” skills in handling situations which can lead to a retaliation claim by consistently following and implementing company policies, keeping matters confidential, creating proper documentation, and remaining sensitive to the possible applicability of federal and state employment laws.

However, sometimes it is the non-legal aspects of an employment situation which prove to be the proverbial straw that breaks the camel’s back and sends an employee looking for an attorney. Although there are no laws or cases that expound upon these aspects, they are still very important and should be included in management training and company policies. Here are some “non-legal” ways to deal with employment situations that may help ward off a retaliation claim from an employee:

- ***Think First, Act Later.*** Never act instinctively and rush to judgment without first getting a clear picture of the facts surrounding the situation. Not only is it important to make an informed decision based on all of the facts, but it is also important to consider future consequences of your actions. The company should want to take the same course of action the next time an employee is in a similar situation.
- ***Use Kindness and Dignity To Soothe Hostile Feelings.*** Many retaliation claims occur because an employee believes he was treated unfairly by his employer. An angry employee terminated for good and legitimate reasons but, who coincidentally was recently injured on the job and filed a workers’ compensation claim or who recently testified in favor of a fellow employee’s ADA claim, can be a dangerous employee with some facts in his favor. However, even a bitter employee who is presented with documentation on why he was fired, is treated the same as other employees, and is shown respect and common courtesy is less likely to consult an attorney regarding a possible retaliation claim than is an employee who is offended and insulted.
- ***Ensure That Your Company Policy Encourages Employees to Report Discrimination.*** Your company policies and employee handbook should make it clear that employees should report discrimination, oppose discriminatory treatment, and freely participate in helping themselves and others in hearings or investigations to challenge discrimination. In addition, a policy should ensure employees that they will not suffer any adverse action for reporting discrimination or harassment.

DISCIPLINARY SALARY DEDUCTIONS FOR OVERTIME EXEMPT EMPLOYEES

John S. Snelling

Most managers, executives, administrators, and professionals are exempt from the Fair Labor Standards Act's overtime pay requirements. In order to satisfy the test for overtime exempt status, such employees must be paid on a salary basis. If a qualifying exempt employee is paid on an hourly basis, the exemption is forfeited and the employee is entitled to overtime pay for all hours worked in excess of forty in any given workweek. As a practical matter, exempt status is rarely forfeited in this manner, simply because managers, executives, administrators, and professionals have traditionally been paid on a salary basis. There are, however, other less obvious ways in which an employer can lose the overtime exemption for salaried employees.

The U.S. Supreme Court recently ruled in the case of *Auer v. Robbins* that the overtime exempt status is lost if an employer docks an exempt employee's pay as a form of disciplinary action. The Court further held the exemption is forfeited if an employer has a policy which communicates that pay can be docked for disciplinary infractions even if the employer never actually docks any exempt employee's pay.

Most employers know that an exempt employee's salary cannot be docked when the salaried employee misses certain hours of work. This rule seems to make sense because exempt salaried employees should not be treated like non-exempt hourly employees who are docked by the hour for time missed, just as they are paid by the hour for time worked. The *Auer* case, however, highlights a less obvious pitfall for employers. Some employers have attempted to reserve the right in their disciplinary policies to impose financial penalties against any employee who violates company policy. It is now clear, however, that a salaried, exempt employee should not be docked salary for any reason, including a disciplinary measure.

MANDATORY BINDING ARBITRATION

Laura H. Kriteaman

Employment discrimination claims have flooded state and federal courts in recent years. By one estimate, employment litigation has grown twenty-fold in the last two decades, an increase almost 1000-percent greater than the increase in all other types of civil litigation combined. As a result of this litigation explosion, there is widespread employer concern regarding the increase in time and expense necessary to litigate these claims and the uncertainty of potentially large jury awards.

A sensible alternative to litigation is the use of Alternative Dispute Resolution (ADR), which includes mediation, conciliation, non-binding arbitration, and binding arbitration. Of the various types of ADR, only binding arbitration has the same impact as a judicial determination. Specifically, a mandatory arbitration determination of liability is enforceable through courts of competent jurisdiction.

In an arbitration agreement, the parties agree to forgo their rights to a jury trial in favor of having the dispute decided by a neutral, private arbitrator, who essentially acts as a private judge. There are several compelling reasons for employers to favor mandatory binding arbitration over traditional litigation. Not only is arbitration much less expensive and generally faster than a court proceeding, but arbitration proceedings are conducted in private, and an arbitrator's award is treated as confidential unless the parties otherwise agree. Furthermore, a court judgment may be appealed, leading to additional time, expense, and exposure. In contrast, a court may vacate an arbitrator's award only if the award was procured by fraud, or the arbitrator exceeded his or her jurisdiction by deciding an issue not submitted for decision. Therefore, mandatory arbitration provisions tend to be final and binding.

The use of mandatory binding arbitration with regard to employment discrimination claims is booming due to three factors. First, in 1991 the Supreme Court held for the first time that an agreement to arbitrate an employment