PERSPECTIVES

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THE STRENGTH OF PARTNERSHIP

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November 2020

Scherer Smith & Kenny LLP serves mid-sized and fast-growing entrepreneurial companies. From complex litigation to business, real estate, intellectual property and employment law, our team brings strategic thinking, pragmatism and intense dedication to our clients' success.

Two Notable New Laws For 2021 That Affect Condominium Rentals, Apartment Subleases, And Your PPP Loan

Over 370 bills were signed into law in California this year. With about as many new laws taking effect on January 1, 2021 – and everything else that has happened in 2020 – to say there is plenty to track would be an understatement.

There are two particularly notable laws affecting our common interest development ("CID") and business clients that are summarized below.

Please note that we will not be covering the new employment laws taking effect on January 1, as our colleagues are doing so in this edition of Perspectives.

AB 3182 – Rental or Leasing of Separate Interests

Assembly Bill 3182 ("AB 3182") would enact changes to the Civil Code that would greatly affect CIDs that currently regulate the rental or leasing of separate interests. As you may know, "separate interests" are the units, apartments, or lots you purchase and have the exclusive right to occupy when you purchase real estate in a CID. The new law has already caused some controversy among CID attorneys due to its poor drafting, which has brought competing interpretations of some of its clauses. Below is our explanation of the law, the intent of which is to further limit CID's power and authority to restrict its members' right to rent their homes.

Under a broad reading of new Civil Code Section 4741, an owner in a CID ("Owner") would not be subject to a governing document provision that prohibits, has the effect of prohibiting, or unreasonably restricts the rental or leasing of any separate interests, accessory dwelling units ("ADUs"), or junior ADUs.

This is a significant departure from existing law, which states that an Owner shall not be subject to a governing document provision effective on or after January 1, 2012 that prohibits the rental or leasing of a separate interest unless that provision was (a) effective before the Owner acquired title to their separate interest, or (b) unless that Owner expressly consented to be subject to the provision after the effective date of January 1, 2012. For a governing document provision effective before January 1, 2012 that prohibits the rental or leasing of a separate interest, an Owner would be subject to that prohibition regardless of whether the prohibition was in effect before the Owner acquired title to their separate interest, under existing law.

In This Issue

William Scherer

HAPPY HOLIDAYS AND CONGRATULATIONS – WE'VE MADE IT!

The Holidays are here, and there are many reasons to celebrate as the year comes to a close – and not only because I want 2020 to end! This Holiday season will be

AB 3182 also effectively prevents CIDs from adopting new prohibitions against the leasing of a separate interest after the effective date of the law, January 1, 2021. Under the existing law, Section 4740 did not preclude the adoption of a new or amended prohibition. Beginning January 1, 2021, CIDs are, in effect, unable to adopt or amend provisions that prohibit, have the effect of prohibiting, or unreasonably restricting the rental of Owners' separate interests.

The new law has a couple "safe harbors" with regard to what restrictions CIDs may enact and enforce. First, it *would* permit CIDs to adopt or enforce a provision in the governing documents that restricts the rental of Owners' separate interests within a CID to as low as twenty-five percent (25%) of the total number of separate interests.

Second, a CID's ability to prohibit short-term rentals – that is, rentals of 30 days or less – has been left intact by the AB 3182. Specifically, new Section 4741(c) states that CIDs would not be prohibited from adopting and enforcing a provision in a governing document that prohibits transient or short-term rental of a separate interest for a period of 30 days or less.

CIDs would be required to comply with the new law beginning January 1, 2021. To the extent that the governing documents (*i.e.,* your CC&Rs or Proprietary Lease) are out of compliance with the law, those CIDs are required to amend their governing documents to conform with Section 4741 by December 31, 2021. CIDs that "willfully" violate Civil Code Section 4741 would be liable for actual damages and a civil penalty of up to $1,000.

One of the many unclear aspects about the new law is that there is no standard set forth as to what would qualify as an "unreasonable" restriction of the rental of separate interests. Another is that Civil Code Section 4741(h) states that Section 4741 does not change the right of an Owner who acquired title before January 1, 2020 to rent or lease their property, referencing Section 4740. Put simply, the language of this new law greatly complicates the interpretation of existing restrictions and places doubt as to whether they would be viewed as "reasonable" or "unreasonable."

If Sections 4740 and 4741 are read narrowly:

- Owners, who acquired title to their separate interest **before January 1, 2021**, but after the effective date of a governing document provision that prohibits or restricts the rental or leasing of separate interests, *would be* subject to the rental prohibition or restriction.

- Owners, who acquired title to their separate interest **before January 1, 2021**, and before the effective date of a governing document provision that prohibits or restricts the rental or leasing of separate interests, *would not be* subject to the rental prohibition or restriction.

- Owners, who acquire title to their separate interest **on or after January 1, 2021**, would not be subject to a governing document provision that prohibits, has the effect of prohibiting, or unreasonably restricts the rental or leasing of any separate interest, except that a CID may adopt or enforce a limitation of rentals to no lower than 25% of all separate interest and a CID may adopt and enforce a provision that prohibits short-term rentals.

The importance of whether AB 3182 is narrowly or broadly read greatly depends on your CID's governing documents and how rentals are restricted. We recommend a review of your CID's governing documents with counsel.

We are aware that some CIDs have one or more provisions in their governing documents the restrict short-term rentals by imposing minimum terms for any rental or leasing of units. For example, a section in a CID's Declaration of Restrictions may state that any lease shall be for a term of no less than six months or one year. Such a provision should be reviewed by association counsel in light of Civil Code Section 4741.

Finally, for our clients who are members of CIDs that are not condominium projects or stock cooperatives, AB 3182 includes further complications in connection with ADUs and junior ADUs. Under Section 4741, an ADU or

different from those of the past, of course, but it will still hold other promises and surprises.

I have always spent Thanksgiving holiday with my partner, Dean's, large, extended family on the East Coast, traveling among the many feasts held at his relatives' homes throughout Virginia Beach, Virginia. The parties start at noon and don't stop until bedtime after we are completely sated. I also love the Saturday before Christmas, when my own family has had its Christmas party, and I get to hug and sit down and eat with my Dad and sisters, nieces and nephews, their husbands and wives – and now, three great-nieces; more than 25 people in all. Since 2001, Christmas Eve has been at my partner, Brandon's, home with his family, including his parents, followed by a fun Christmas morning of opening gifts, brunch and relaxation with Dean. These events have formed the foundation around which circled an orbit of steak nights and Holiday parties, including our Scherer Smith & Kenny party, which all remind us of our connections and fill us with gratitude as we look back on a year of effort and forward towards a year of promise.

This year? On the surface, not so much; not at all, really! Thanksgiving in the City will be with just one other couple, no in-person Holiday parties or time with family members – at least not in groups of more than 2 or so. Our SS&K Holiday party will be virtual and of course truncated (while it's always great to see everyone, zoom parties have serious limitations that demand they be mercifully short). Like everything else during

junior ADU is not counted as a separate interest in and of itself. Also, under Section 4741, a separate interest lot shall not be counted as rented or leased if some other part of the lot – the home, ADU, or junior ADU – is occupied by the Owner. Essentially, if any part of a separate interest lot is occupied by the Owner, regardless if another portion of the separate interest is being rented, then that separate interest is not counted as being rented.

Please let us know if you would like us to review your governing documents for compliance with AB 3182.

AB 1577

Assembly Bill 1577 ("AB 1577") took immediate effect on September 9, 2020 and will exclude Paycheck Protection Program ("PPP") loans that were forgiven from gross income.

One of the most attractive features of the PPP, which was intended to provide small business affected under the federal COVID-19 Emergency Declaration, is that qualified PPP loans may be forgiven up to the full principal amount. Federal law already excludes the amount of PPP loans forgiven under the CARES Act, as amended and supplemented by subsequent law, from gross income for federal income tax purposes. AB 1577 extends that exclusion of state income tax purposes from gross income.

AB 1577 added new sections to the Revenue and Taxation Code, affecting personal income and corporate taxes. Those new sections state that for taxable years beginning on and after ***January 1, 2020***, gross income does not include any covered loan (as defined in the CARES Act) forgiven pursuant to the CARES Act or other specified federal law.

If you have further questions regarding these new laws and their impact upon your common interest development or business, please contact Bill Scherer at wms@sfcounsel.com or Louis Sarmiento at ljs@sfcounsel.com.

- Written by William Scherer and Louis Sarmiento

California Legislative Alert: California Enacts AB 2257 To Modify Parts of the AB 5 Independent Contractor Classification Law

Those who are or use independent contractors ("***IC***") know that effective January 1, 2020, Assembly Bill 5 ("***AB 5***") codified the ABC Test for classifying ICs and expanded its application to all Labor Code claims, the Unemployment Insurance Code, and the Wage Orders of the Industrial Welfare Commission. *See, e.g.,* Cal. Lab. Code § 2750.3 (repealed by Assembly Bill 2257). (Our November 2019 article, "Employment Law Updates: (1) Independent Contractor Classification (AB5) and (2) Mandatory Sexual Harassment Training for Small California Employers," discussed the impact and questions left open by AB 5).

A short nine months after AB 5 became effective, on September 4, 2020, California Governor Gavin Newsom signed into law Assembly Bill 2257 ("***AB 2257***"), which took effect immediately. AB 2257 replaces AB 5 and can be found in Labor Code Sections 2775 to 2786, among other statutory provisions. *See generally* Assembly Bill No. 2257, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB2257; Assemblywoman Lorena Gonzalez, Fact Sheet for AB 2257 (Gonzalez): Protecting Workers, Businesses, and Taxpayers Against Misclassification, *available at* https://a80.asmdc.org/article/fact-sheet-ab-2257-gonzalez-protecting-workers-businesses-and-taxpayers-against.

In brief, AB 2257, which was authored by the same author of AB 5 (Assembly member Lorena Gonzalez (D-San Diego)), maintains the essential framework of (in an arguably easier to read framework) and modifies AB 5 by adding some additional types of occupations and business relationships as exempt from AB 5's strict ABC Test. We note, though, that

this pandemic year, the Holidays will require resilience, ingenuity, and adapting Holiday traditions to our COVID reality.

But really, while the manner in which we celebrate might change, the reason for celebration during the Holidays has not. Ultimately, we are still able to recognize and celebrate our blessings and all that we are fortunate to have, from our health to friends and family to a safe and warm home and the hope for a good year ahead.

One surprising benefit from this year of COVID, courtesy of the public health restrictions we live under, is the added time I have for introspection, reading, personal goals and – God, I love this – a good night's sleep. These activities have filled time I once used for commuting, dinners out, events and meetings. Until March I always felt that I was pulled in far too many directions and juggled way too much to have any time to focus on myself. Those feelings are largely gone because I've reclaimed time to just sit and think.

Thoughtfulness is carrying into the Holidays, and we can all use this time to think of others and reach out with gestures of good will. While we may not see as many people this year as in past years, we can still connect with those close to us, even if it is not in person.

So while I greatly miss the ability to travel and to get together in large groups to celebrate, share, and connect, the simpler life I've been forced to live has provided more grounding and a greater opportunity to plan my days with intention. And perhaps I can retain some

while AB 2257 exempts additional occupations and business relationships from the ABC Test, the independent contractor compliance assessment does not end there; the *Borello* factors remain the default test for determining a worker's status as an independent contractor.

Turning to AB 2257, the additional freelancers include people who provide underwriting inspections and other services for the insurance industry, a manufactured housing salesperson, people engaged by an international exchange visitor program, consulting services, animal services, competition judges, licensed landscape architects, specialized performers teaching master classes, registered professional foresters, real estate appraisers and home inspectors, and feedback aggregators. *See* Legislative Counsel's Digest to AB 2257. Moreover, under AB 5, freelance writers, photographers, photojournalists, editors, and cartoonists were exempt from the ABC Test *if* they submitted content no more than 35 times a year; AB 2257 eliminates the numerical limit.

As you may have noticed in the above list, freelance writers and photographers, along with freelance editors, cartoonists, and musicians, feature prominently in the additional ABC test exceptions included in the law. Their addition was the result of concerted lobbying efforts by interested industry groups.

In addition to adding more freelancers to the list of those exempt from the ABC Test and subject to the more multi-factor *Borello* test, AB 2257 also modifies in more modest ways the business-to-business, professional services, and referral agency exemptions of AB 5. Of particular note, AB 2257:

- Creates an exemption from the ABC Test for "single-engagement events," including single-engagement live performance events where the musician or musical group is a headliner at a venue with more than 1,500 attendees or is performing at a festival that sells more than 18,000 ticket tickets per day and a more general non-musical event exception which allows for individuals to work together to create a single event, or a series of events in the same location no more than once a week. Cal. Lab. Code § 2779.

- Expands the business-to-business exemption by allowing for a service provider to perform services directly to the customers of the contracting business if the service provider's employees are solely performing services under the name of the business service provider and the business service provider regularly contracts with other businesses.

Ultimately, the law in California remains protective of workers and militates against independent contractor classification. Just because a services engagement may meet an exemption to the ABC Test, does not mean viable independent contractor classification will follow. It just means that you have to analyze the relationship under the multi-factor *Borello* test. Best practices dictate that you should seek assistance from experienced counsel before making any definitive IC classification decision.

Our employment law team at Scherer Smith & Kenny LLP remains available to address any questions you may have related to these or other employment- or business-related issues. For additional information, please contact Denis Kenny at dsk@sfcounsel.com, Ryan Stahl at rws@sfcounsel.com, or John Lough, Jr., at jbl@sfcounsel.com

- Written by Denis Kenny

Federal District Court Reverses DOL's "Final Rule" on Vertical Joint Employment By Reverting to FLSA Economic-Realities Test

On September 8, 2020, in a case entitled *State of New York et al. v. Scalia et al.* (Case No. 1:20-cv-01689-GHW), the U.S. District Court for the Southern

of this grounding once our lives move back to a form of "normal."

All of these positive thoughts notwithstanding, there is no escaping how hard this year has been for many of us and the toll it has taken; from financial hardships to health issues, adapting to teaching our children schoolwork at home, doing our jobs from home, worrying about providing for others, the stress of simply going outdoors or seeing others for fear of catching this deadly disease, to name just a few. Further, there is no doubt that this pandemic has impacted many people much worse than others due to the industries and occupations they operate in.

Despite these challenges I've been awed by how our clients and the people with whom I work and come into contact have adapted positively to meet the uncertain challenges of these times with aplomb, even as we have all had our share of desperate, quiet moments.

Certainly I can only write about "silver linings" today due to my changing viewpoint of the pandemic and its disruptions since March – I do not see the world today as the immediate threat to my life and livelihood that it appeared early on. Instead, as I've accepted the upheaval and uncertainty of this year, I now see the pandemic as threatening, but manageable. And increasingly more manageable as news of promising vaccines have hit the headlines. So perhaps resilience is the greatest gift imparted by this trying, frustrating, and maddening year.

I so look forward to turning the page on this year! Each of us has

District of New York rejected the U.S. Department of Labor's ("***DOL***") "final rule" (the "***Rule***") concerning vertical joint employment under the Fair Labor Standards Act ("***FLSA***"). Here is a link to the District Court's opinion: https://cases.justia.com/federal/district-courts/new-york/nysdce/1:2020cv01689/533016/74/0.pdf?ts=1591176124.

The Rule, issued by the DOL in January 2020 after over a year of public comment and internal debate, narrowed the test for "vertical" joint employment under the FLSA. The DOL largely derived the Rule from California's four-factor joint employment test commonly known as the Bonnette factors/test (taken from the case entitled *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), in which the U.S. Court of Appeals for the Ninth Circuit ruled that state and county agencies were jointly liable as "employers" of in-home supportive services workers for purposes of the minimum wage provisions of the FLSA).

As brief context, vertical joint employment occurs when (1) two or more entities simultaneously benefit from the services performed by the same worker, and (2) each entity exercises or retains the ability to exercise some level of control over the terms and conditions of the working relationship with that worker. The most common examples of vertical joint employment occur in staffing agency, employer of record, subcontractor, and franchise relationships.

The DOL's vertical joint employment / Bonnette-factors Rule focused on the entity's degree of control over the worker by examining and weighing the ability to hire and fire, the right to supervise the employee's work schedule, authority over the worker's pay, and maintenance of employment records. The DOL has historically applied the economic-realities test to this issue which examines the totality of the working relationship between the worker and the potential joint employer to determine whether the economic realities show that the employee is economically dependent on the potential joint employer.

In sum, the District Court concluded that the DOL's reliance on the FLSA definition of "employer" in its Rule to narrow the joint-employer test ignores the well-established principle that the FLSA's terms must be interpreted expansively to meet the FLSA's broad remedial purpose. The District Court explained that this purpose is achieved by defining the joint-employment relationship based on the economic dependence of the worker, not restricting it to a four-part test based entirely on control.

It remains to be seen whether the DOL will appeal this decision. At least for now, companies engaged in multi-party, staffing, contingent workforce management and franchisor/franchisee relationships, must be vigilant about the economic realities that define vertical joint employment. More times than not, vertical joint employment is an unavoidable reality for those involved in these types of working relationships. This is why companies looking to outsource contingent workforce management must seek robust indemnity provisions and additional-insured coverage from well-established staffing and employer of record vendors to provide financial protection when, not if, joint employment-related liability occurs.

We here at Scherer Smith & Kenny LLP remain available to address any questions you may have related to these or other employment- or business-related issues. For additional information, please contact Denis Kenny at dsk@sfcounsel.com, Ryan Stahl at rws@sfcounsel.com, or John Lough, Jr., at jbl@sfcounsel.com.

- Written by Denis Kenny

survived and adapted, seen our world through new prisms, and grown. But it's time we move on towards a more promising year in 2021. Happy Holidays to all of you, and a blessed New Year.

- Written By William Scherer

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