

PUBLICATION UPDATE

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White, New York Business Entities

Publication 812 Release 86

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HIGHLIGHTS

- **Statutory Amendments**
(detailed below)
- **Caselaw Developments**
(detailed below)

General Statutory Amendments

Amendments Effecting Residential Cooperatives. Noting that individuals who own or reside in condominiums or cooperative buildings are subject to rules and bylaws created by a board of directors for their building and that prior to 2020, there had been no legal requirement that the board of directors notify shareholders or tenants of new rules or changes to the existing rules, the New York Legislature enacted a series of amendments that impact residential cooperatives. The Legislature added provisions to Business Corporation Law Section 708 and Not-for-

Profit Corporation Law Section 602 to require that in the case of corporations that own or lease residential premises and operate them as cooperatives, any changes by the board of directors, such as the adoption, amendment, or repeal of any bylaws, must be provided to the members, stockholders, and delegates of the corporation in writing, either physically or electronically, within ten days of the change (BCL § 708(e) & N-PCL § 602(g)). Further, when such a change to the bylaws by the board of directors would have a direct effect on the resident's occupancy or the rules of the cooperative building, the board must post the changes conspicuously so that the tenants will be made aware of them (BCL § 708(f) & N-PCL § 624). See discussions at ¶¶ B708.07, N602.02, N624.01.

Not-for-Profit Provisions Now Apply to "Key Persons." Every

New York not-for-profit corporation reaching certain size thresholds must have a whistleblower policy that provides procedures for reporting illegality and violations of adopted policies and to protect directors, officers, employees, or volunteers who report such issues from retaliation. With an amendment in November 2019, these provisions now apply to “key persons” as well (N-PCL § 715-b). A “key person” is defined in N-PCL § 102(25) as a person who has responsibilities or exercises power or influence similar to a director or officer, manages a substantial portion of the activities or assets of the corporation, or controls or determines a large part of the corporation’s budget. Similarly, in addition to directors and officers, key persons are now prohibited from receiving loans from non-profits pursuant to N-PCL § 716; are expected to discharge the duties of their positions in good faith and the care of an ordinarily prudent person pursuant to N-PCL § 717; must be included on the list of directors and officers subject to demand for inspection pursuant to N-PCL § 718; and are included with directors and officers in the provision designed to protect uncompensated individuals from liability pursuant to N-PCL § 720-a. See discussions at ¶¶ N715-b.03, N716.01, N717.01, N718.01, and N720-a.01.

Recent Developments in Caselaw

Business Corporation Law

Medical Service Corporation Improperly Controlled by Nonphysi-

cians Ineligible to Recover Insurance Benefits. Pursuant to BCL § 1507, a professional service corporation can only issue shares to individuals who are authorized to practice that profession in New York. In the healthcare field, the policy rationale behind this requirement is clear, as the New York Court of Appeals noted: “Only licensed physicians may practice medicine in New York. The unlicensed are not bound by the ethical rules that govern the quality of care delivered by a physician to a patient. By statute, regulation, and the common law, the corporate form cannot be used as a device to allow nonphysicians to control the practice of medicine.” The Court of Appeals recently had an opportunity to further clarify its position in *State Farm Mut. Auto. Ins. Co. v. Mallela*, 4 N.Y.3d 313, 794 N.Y.S.2d 700, 827 N.E.2d 758 (2005) by holding that a finding of fraud is not required to determine that a medical service corporation has been fraudulently incorporated under BCL § 1507, was improperly controlled by nonphysicians, and was ineligible to recover no-fault insurance benefits. *Andrew Carothers, M.D., P.C. v. Progressive Ins. Co.*, 33 N.Y.3d 389, 403–405, 104 N.Y.S.3d 26, 128 N.E.3d 153 (2019). See ¶¶ B1503.02, 1507.01, 1508.01.

Former Members of Self-Insured Workers’ Compensation Trust Liable for Trust Deficit. The New York Workers’ Compensation Board, as successor to a dissolved trust that had been set up as a self-insured trust to provide workers’ compensation for employees, sought an order that the

defendants were liable for the trust deficit. The court found that the dissolved corporation defendants' liability to the trust, since it was a known, pre-dissolution liability, was an "unliquidated or contingent claim" under BCL § 1007(a). *New York State Workers' Compensation Bd. v. 21st Century Constr. Corp.*, 2018 N.Y. Misc. LEXIS 88 *40, 58 Misc. 3d 1211(A), 95 N.Y.S.3d 125 (Sup. Ct. Albany County 2018). See §§ B1006.06, 1007.05.

Not-for-Profit Corporation Law

Permanent Fund Not Relevant to Financial Operating Health of Cemetery Corporation. In determining that a cemetery was not suffering financial hardship that would

warrant it granting a use variance so that the cemetery could construct a crematory on its premises, a zoning board failed to differentiate investment income in the cemetery corporation's permanent fund from its operating funds. The cemetery corporation had operated at a loss in the previous five years and the permanent fund balance is inviolate but for maintenance and preservation of the cemetery grounds, pursuant to N-PCL § 1507(a)(2). The court determined that the variance to build the crematory should have been granted. *In re White Plains Rural Cemetery Ass'n v. City of White Plains*, 168 A.D.3d 1068, 93 N.Y.S.3d 103 (2d Dep't 2019). See ¶ N1507.01[2].

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