



## Seniority Has Its Privileges



### By Ric Di Monte

During the recent residential real estate development boom, our client, a real estate broker, and his partners successfully negotiated for a large national builder, the acquisition of two farms. The first farm, consisting of 300 acres, sold for \$16 million. The second farm, consisting of 450 acres, sold for \$30 million. At a 5% commission rate, our clients had \$2.3 million in commissions at stake! While the market was hot, the national builders were gobbling up the countryside at record prices. However, things changed once the market got cold.

After placing the farms under contract for acquisition, the builder "land banked" the farms. This consists of finding a nominee to acquire the farm at the existing contract price, and the land banker "sells" the property back to the builder at a higher, enhanced sales price.

This is also called "off-balance sheet financing." In our case, the national builder denied that it incurred liability to our client for the 5% commission because, it claimed, it had not acquired the property, the land banker had.

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## Construction Contractor Alert

By Gene Di Monte



In the construction industry, contractors commonly use tradesman as independent contractors for a specific construction project. With the recent passage of the Employee Classification Act, any contractor that utilizes a subcontractor must be certain that the subcontractor is truly an "independent contractor" and not an employee. The law becomes effective January 1, 2008, and seriously punishes private sector general and subcontractors that misclassify any worker as an "independent contractor" on construction related projects. Construction work is broadly defined and includes, for example, remodeling, landscaping, decorating, and painting.

According to the Act, an individual performing services for a contractor is deemed an employee of the contractor unless the contractor can prove: (1) that the work performed by the individual is different from the work the contractor performs; (2) that the subcontractor is engaged in an independently established business; (3) that the individual is a legitimate sole proprietor, or a member of a partnership, or an employee of a corporation established for the purpose of furnishing subcontractor services; and (4) that the contractor has no control or direction over the performance of the independent contractor's services.

The Illinois Department of Labor can enforce this law by means of an investigational audit. A \$1,500 penalty can be assessed for the first violation and \$2,500 penalties for subsequent violations within a 5-year period. Each person misclassified and each day the misclassification takes place is a separate violation. These penalties are doubled in the case of willful violations. The misclassified individual or other interested party can file a private action against the contractor and seek damages and injunctive relief. A successful

employee can recover any unpaid wages, overtime, employment benefits, liquidated damages equal to any compensatory losses, \$500 per day for each violation, and attorney's fees and costs.

How many times have we heard about construction industry employees being willing to work more than 40 hours per week for "straight" time and "waive" their right to time and a half pay for overtime, in violation of the law? This usually comes about because of the present apparent good relationship between the employer and employee and their willingness to cooperate in such an arrangement.

However, when the employer-employee relationship ends, whether on an amicable or hostile note, and regardless of whether the employee previously knew or subsequently learns his rights (often while having a beer with his friends and telling them his story), the employee can assert his right to overtime pay. These claims are often very costly to the employer as they usually result in an audit of the employer's payroll records and the government's assertion of additional claims for present or past employees who are not pursuing a claim.

This example involving extra pay for overtime is not covered by the Employee Classification Act, but is analogous of situations that will occur where a person who is hired as an "independent contractor" later decides he wants more money and brings a claim for additional wages and other benefits of employment.

There will be many lawyers out there "chomping at the bit" to file these cases. If you employ individuals as independent contractors, you must become familiar with this law and modify your practices as necessary.

Unless the subcontractor comes within the exceptions of the Act, the consequences can be very serious for you.



# Pet Trusts in Illinois

By Lin Hanson



Recent news accounts have informed us that Leona Helmsley, “the Queen of Mean,” died as she lived. She left a \$12,000,000 trust for her pet dog, “Trouble,” while disinheriting at least two of her grandchildren.

Ms. Helmsley was, fortunately for Trouble, not an Illinois resident.

While Illinois has a “Pet Trust Act” which I drafted, and which was passed in 2004, the act contains a section seeking to rein in the excesses of pet owners by providing, “The court may reduce the amount of the property transferred if it determines

that the amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property....” I believe it would be difficult indeed for an Illinois judge to hold that \$12,000,000 is “required” for the intended use - caring for Trouble for the remainder of his life, even with the best of care.

So what would happen to the excess funds left in trust for Trouble under Illinois law? There are three possible answers: (1) If the trust instrument itself provides for what happens to excess funds, that provision would control or (2) if it does not, the excess funds would pass to the “residuary” or ultimate taker under Ms.

Helmsley’s will or (c) if there is no ultimate taker eligible under her will, the excess funds would pass to her heirs at law, possibly even the two grandchildren she has chosen to disinherit.



Ms. Helmsley and Trouble

If you would like to discuss a possible trust for a companion animal under Illinois law, please feel free to email me at [Lhanson@dkehq.org](mailto:Lhanson@dkehq.org), or contact your Di Monte & Lizak, LLC attorney. ■

## D&L SPEAKS

On September 10th, Alan Stefaniak spoke at the National Business Institute seminar on Financing Roadways and Resolving Access Issues. Alan discussed problems and solutions involving the creation of public roads, the ins and out of private roads, and abandonment and vacation considerations.

David Arena and Julia Jensen Smolka spoke at the Illinois State Bar Association’s televised Illinois Law program. They addressed the issues of mortgage foreclosure and measures property owners should take when entering into home improvement projects. ■

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Of course, that argument ignored the fact that the builder and the land banker were under a separate contract to sell and purchase the property in the future. With more than \$2 million at stake, the real estate brokers were vitally interested in getting the case concluded *pronto*.

However, our court system moves slowly. We had two national corporate defendants with large treasuries devoted to paying attorneys; a crowded court system; and judges with too many cases. Luckily, one of the brokers was over 70 years old, 85

to be exact, and subject to preferential treatment according to Section 2-1007.1 of the Code of Civil Procedure. The law provides that individuals who have reached the age of 70 years be entitled to preference in setting for trial. Of course, using our client’s age as an advantage, we filed suit and immediately requested the court to set the case for trial in a few months.

Our strategy worked. The court learned the plaintiff was 85 years old. The court set the case for trial nine months later (that

is pretty fast for Cook County, Illinois). The lawyers had a compressed schedule for taking depositions, producing documents and exchanging pre-trial information. This caused the lawyers to put pressure on the clients to settle the case and the elderly client received a very favorable award. Of course, the other brokers under the age of 70 received the same benefit as the one over 70. They had the good luck of partnering-up with someone who received a preference for trial. As we have heard in the past, seniority should have its privileges! ■

# Immigration Status Not a Bar To Illegal Aliens Suing Employers For Civil Rights Actions

By Margherita M. Albarello



In our July newsletter, I wrote about the government's increased crack-down on illegal aliens and the employers who employ them. You may think that employers of illegals are immune from lawsuits filed by

illegals for race, national origin, or any other kind of workplace discrimination. Wrong. As a recent Title VII sex harassment case illustrates, undocumented workers are covered by the federal employment discrimination statutes and it is as illegal for employers to discriminate against them as it is to discriminate against individuals authorized to work in the United States.

## *The Torres Case Against Perkins Restaurant - Food For Thought*

In a recent United States District Court case in Minnesota, Maria Torres and the U.S. Equal Employment Opportunity Commission sued Perkins Restaurants for sexual harassment and retaliatory discharge. Torres, a cook, claimed

that kitchen manager Centano made sexual comments to her, rubbed up against her, and came to her house uninvited. She claimed that when she refused Centano's advances, he began treating her less favorably than other workers and threatened to report her to the immigration authorities for being an undocumented alien. Torres eventually complained to senior management about the harassment and explained that Centano threatened to have her deported.

Perkins investigated Torres' complaints. Perkins decided that Centano should get a written warning. It also decided to call the Social Security Administration, which reported that Torres' name did not match her social security number. Perkins told Torres it no longer could employ her and that she could come back to work when she had proper documentation. Torres sued Perkins for sexual harassment and for retaliatory discharge.

In its defense, Perkins argued that because the Immigration Reform and

Control Act compels an employer to discharge employees upon discovery of their undocumented status, Torres was not an "employee" protected under Title VII. Perkins also argued that even if Torres is protected, she can't be awarded lost wages because she was not entitled to them anyway (remember, she was here illegally). The court rejected Perkins' position, stating that its argument would incentivize employers to hire undocumented workers because of their inability to enforce workplace rights available to documented workers.

## *Worker's Compensation Cases*

What about worker's compensation benefits? The Illinois Workers' Compensation Act provides that "aliens" are covered employees, but does not address whether or not illegal status exempts the "alien" from coverage. However, the Workers' Compensation Commission deems undocumented aliens to be covered by the Act and able to collect worker's compensation benefits. ■

## **Di Monte & Lizak Secures \$6.88 Million Judgment in Lender Fraud Trial**

Bob Minetz helped secure a \$6.88 million judgment in favor of a group of 10 building subcontractors in a complex trial which involved allegations of fraud against a lender who lured them back to a construction job but never intended to pay them. The award included about \$1 million in punitive damages.

The subcontractors were engaged by general contractor United Homes, Inc. to work on various residential housing projects. United Homes used money loaned by Residential Funding Company (RFC), a lending subsidiary of General Motors Acceptance Corporation, to buy the land and to build the housing. RFC's loans were secured by the land and housing being built. After United Homes stopped paying the subcontractors' invoices, they walked off the job. RFC stepped in and the subcontractors were told that they would be paid for all arrearages and future services if they would resume work.

After a 13-day bench trial, Cook County Circuit Judge Nancy Arnold found that RFC had concealed and misrepresented facts about its plan to pay the subcontractors so that they would continue to supply labor and materials to the housing projects and increase the probability that RFC's loans would be repaid by United Homes. According to Judge Arnold, even as RFC was luring the subcontractors to come back on the job, RFC knew that it was not the lender on all of the homes in the project and therefore "would not be paying for work on units in which it had no interest." Also, "RFC was in the process of pressuring United Homes to replace it as the lender for all or some of the identified projects, and once RFC was no longer the lender for these projects, it would not be paying for current work." When RFC was replaced as the lender, it failed to tell the subcontractors and the subcontractors continued to build homes with no source of payment. According to Judge Arnold's 22-page opinion, "the subcontractors were used – used by RFC for its own benefit and at the subcontractor's expense. By knowingly misrepresenting material facts, and intending that the subcontractors rely on them, RFC perpetrated a fraud" on the subcontractors. ■

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