



Briefings

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TN TOP 5

Legal Blunders of 2011

- 1. Roger Clemens Prosecution.** In the case of alleged steroid use by the ex-baseball star — an issue for which the government had invested millions of dollars — a judge declared a mistrial. The judge had made a pre-trial ruling excluding admission of certain testimony. In disregard of that ruling, the prosecution put in evidence that included that same testimony. The judge did not take kindly to that and declared the trial over. Lucky for the prosecutors, a new trial has been scheduled for April 2012 though they may have to pay Clemens' attorneys' fees for the first botched trial.
- 2. Fake Courtroom for Credit Card Collection.** In Erie, Penn., debt collection agency, Unicredit, established a fake courtroom replete with a fake judge and employees dressed like sheriff's deputies. It appears the purpose was to intimidate consumers into making payments or surrendering valuables. The Pennsylvania Attorney General has brought charges against the company.
- 3. Foreclosure Attorney Held in Contempt.** A Florida judge held a

well-known foreclosure attorney in contempt. The attorney was seeking foreclosure on a property even though the promissory note and mortgage on which the foreclosure was based weren't filed for months after the lawsuit was started, weren't filed on the correct property, and were not properly signed or notarized. The judge also threw out the foreclosure.

- 4. Allowing Client to Lie.** New York lawyers failed to disclose to the opposing party that their client had a new job, a particularly important fact in an employment discrimination suit. They also sat idly by while their client testified that he didn't have a new job and the attorneys did nothing to correct it. The lawyers were sanctioned \$15,000 for their conduct.
- 5. Doing It Anyway.** A Texas federal judge fined a prominent "pay-up-or-else" lawyer¹ \$10,000. The lawyer had asked the judge for permission to take early discovery. The judge had denied the request. The lawyer did it anyway, in fact four times. In the order issuing the sanction, the judge noted the attorney's "staggering chutzpah" in disobeying the Court's prior order.

Guns or Roses: Read This Before a Debt Negotiation

When a lender must call a loan or line of credit — or contact borrowers to simply discuss outstanding debt — it's a stressful situation on both sides.

First, no banker wants to bring bad news to a customer. And customers may be unsure of how to respond to a request to cure the breach of a covenant or paying off a loan that has been called due.

The worst idea for either side is to ignore the issue. Instead, it's time to connect with your legal counsel for a neutral perspective on how to proceed.

Step One: Know the full story. For borrowers, the first step to any loan negotiation is to understand exactly what the lender is asking. Collect a full explanation of the problem, actions that the lender believes will solve the problem, and what is required on the borrower's side to make that happen.

Lenders should be fully aware of the documentation, past payment history and collateral, as well as liens and additional borrowers that may be liable on the account. Bank errors on documents such as missing signatures can delay or even eliminate the possibility for resolution.

Step Two: Consult your legal counsel. Once borrowers and lenders have the full picture of the situation, their first instinct will be to schedule a meeting to discuss the problem. Both may be feeling pressure to resolve the issue quickly. Plus, the emotion of the situation could lead to impulsive agreements or actions.

Instead, take a step back and contact an attorney experienced in loan workouts or debt collection. By investing an hour or two in legal advice, lenders and borrowers can more fully understand their rights and obligations — which can lead to more reasonable and cost-effective solutions.

The consequences of poorly planned or presented bank negotiations can include everything from bad feelings and breakdowns in communication to litigation.

Step Three: Lay out best and worst scenarios. Borrowers and lenders need to be honest about exactly what they hope to obtain from the negotiations — and realistic about best and worst case results.

If a borrower is in default, it makes sense to expect the lender to request payment in full either with cash or possible refinancing with another lender. However, if the borrower is a timely payer and just needs to shore up financial statements, there may be more flexibility in resolving the lender's concerns. If the relationship is otherwise strong, borrowers have more space to negotiate.

If the lender's goal is to maintain the client relationship while satisfying regulatory requirements, the suggested options will differ from a lender that prefers moving the borrower to another bank relationship.

By helping your attorney understand these goals and expectations, a step-by-step plan will evolve that can expedite resolution.

Step Four: Keep your promises. A strong payment history and regular communication with the bank will usually help borrowers leverage better options if they run into a financial snag. Due to more regulatory scrutiny of bank capitalization and loan portfolios, however, this is not always the case today. Also, the complexity of lending covenants and requirements necessitates that borrowers understand their rights under the law before and during a lending relationship.

Even in the best customer relationships, things can go wrong. Within the banking industry, a reputation of trust and security will be enhanced by clear expectations and communication with customers, strong checks and balances in the lending process and a consistent plan of action when and if a borrower runs into trouble.

Thomsen Nybeck has represented both borrowers and lenders in banking, finance and collection matters. If you have any questions about a financial transaction, loan workouts or collections, contact us.

¹FN 1—A "pay up or else" lawsuit is a new brand of lawsuit that certain "enterprising" attorneys have taken up. The lawsuits are allegations that people have pirated movies using a technology called BitTorrent. People are sent a settlement letter alleging this, most often about adult movies. Many people pay the money to avoid having a public allegation via a lawsuit that they obtained, much less pirated, an adult movie, whether or not they did it.

Legislative Changes to MCIOA

Significant legislative changes were made to the Minnesota Common Interest Ownership Act (MCIOA), Chapter 515B. This article briefly highlights relevant changes to MCIOA and is not exhaustive. The 2011 amendment restored sections of MCIOA revised in 2010 to the 2009 version and created new statutes for 2010 amendments. The 2010 amendment was problematic in that statutory changes could only be applied to CICs created on or after August 1, 2010 or for fiscal years beginning on or after January 1, 2012. As a result, the 2010 amendment eliminated the language of the 2009 version of the statute for CICs created prior to August 1, 2010 or for fiscal years beginning prior to January 1, 2012. The 2011 amendment improved MCIOA by compiling both versions into one complete version of the statute.

The following sections of MCIOA were restored to their 2009 version and apply to CICs created before August 1, 2010: 515B.1-103(a); 515B.2-110; 515B.3-105; 515B.3-115; 515B.4-102; and 515B.4-115. The 2011 amendment created new sections of the statute, which apply to CICs created on or after August 1, 2010: 515B.1-103(33b); 515B.2-1101; 515B.3-1051; 515B.3-1151; 515B.4-1021; 515B.4-1151; and 515B.4-1152.

New law was created governing replacement reserves for fiscal years beginning on or after January 1, 2012 (515B.3-1141). Per 515B.3-1141. Any replacement reserve plan does not need to include: 1) components with a useful life of more than 30 years at the time of budget planning; or 2) limited common elements whose replacement will be funded by assessments against the homeowner. If authorized by the Declaration, and subject to statutory conditions, the association may adopt a plan to avoid reserving for components: 3) whose replacement will be paid for by special assessments; or 4) whose replacement will be paid for by assessments levied exclusively against the benefitted units per 515B.3-1151(e)(2). The approval of a plan for either 3) or 4) shall be effective for no more than the association's current and following three fiscal years. Replacement reserves must be kept in a separate account from operating funds and may not be used to cover operating expenses if funds are insufficient.

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Bill Sjöholm Attorney Profile

Why are you passionate about your career choice?

The privilege of being entrusted with important matters of clients and assisting them in achieving a favorable result or resolving a troublesome issue can be very rewarding. Being sensitive to client needs and working to creatively accomplish an objective or obtaining a desirable outcome in the face of an adversary is challenging and often especially interesting. Generally I enjoy problem resolution and being involved in the litigation and administrative processes.

Describe a success story related to your practice.

Whenever I am able to help a client achieve an important goal, eliminate a problem or reach a favorable decision in a contested matter, my effort is successful. In litigation or administrative proceedings that last for months or sometimes years, working closely with the client to achieve a result the client wants is a success I never tire of achieving. Whether I defeat wrongful claims asserted by others or secure a favorable recovery for my client, the gratitude of my client for the successful result is what makes my practice a success for me.

What are you known for among clients, your personal brand?

My clients seem to particularly appreciate my sensitivity to their issues, my diligent and aggressive pursuit of their objectives, my attention to detail, and my efforts to keep them promptly informed about the progress made on their files. My clients seem to appreciate my efforts to explain what is happening and also involve them in the process to the extent they desire to be involved.

What piece of advice would you offer to younger or aspiring attorneys?

Listen to your clients, be patient and empathic, remain aware of the important role you serve, and never compromise your commitment to excellence.

Favorite vacation?

Traveling to remote areas of Costa Rica to see amazing natural phenomena with my family. Sharing the experience of viewing exotic wildlife is unforgettable.

Most prized memories?

Getting married and experiencing the births of my children.



Gretchen Schellhas (1) was the featured presenter at the CIC Midwest Lunch & Learn, an event for a trade association devoted to common interest communities. Her presentation was titled "How to Deal with Association Units in Mortgage Foreclosure, and How to Deal with Maintenance and Winterizing Issues."



Gretchen Schellhas (1) was presented with an honor titled "Major Award" by the CIC Midwest for her outstanding contributions to the organization.



David McGee (2) presented to a client's owners, supervisors and employees regarding workplace policies for avoiding potential claims for harassment or hostile work environment.



The Metropolitan Airports Commission elected to continue its contract with Thomsen Nybeck for non-felony prosecution services.

Matt Drewes (3) was interviewed for an article that will appear on MSN.com regarding common disputes between community associations and their members. Matt was also quoted in several articles published at HOALeader.com in August and September 2011 regarding a variety of issues related to homeowners associations and the boards that help govern them.

Natalie Walz (4) competed in the New York City Marathon on November 5 and finished with a time of 3:18:02.

WE'RE THANKFUL FOR YOU!

During this season of thanks, Thomsen Nybeck would like to extend a thank you to all of our clients and friends of the firm for the continued support.

ATTORNEYS

This newsletter is presented to you by the attorneys of Thomsen Nybeck:

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Financing
Personal Injury
Real Estate
Taxation
Townhome & Condominium Law
Wind Energy