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STRENGTH IN PARTNERSHIP

ALERT

July 2012

LESSOR DODGES A BULLET AFTER FAILURE TO COMPLY WITH NEW YORK'S NOTICE REQUIREMENT FOR AUTOMATIC LEASE RENEWALS

Many leases of personal property and contracts for service, maintenance or repairs, contain an automatic renewal provision that provides, in effect, that the lease or contract will automatically renew for a specified term unless the lessee or party receiving the service, maintenance or repairs sends notice prior to the expiration of the lease or contract of their intention not to renew. **Such provisions are unenforceable under New York law** (and several other states) unless the lessor or service provider sends by certified mail or serves personally, written notice to the lessee or the party receiving the service, maintenance or repairs, calling that party's attention to the existence of such a provision. The notice must be received **at least 15, but not more than 30 days** prior to the time the lessee or party receiving the service, maintenance or repairs is required to give notice of their intention not to renew. The New York law has been on the books in one form or another since 1953. We have previously addressed New York's notice statute in Client Alerts in May 2002 and September 2003.

The recent case of *Ovitz v. Bloomberg L.P.* made it all the way to New York's highest court, where, over a strenuous dissent, the lessor/service provider dodged a bullet and was successful in having a class action complaint dismissed on the pleadings, notwithstanding that the plaintiff had clearly alleged that the lessor/service provider had violated the New York Statute. In *Ovitz*, the plaintiff's complaint alleged that the original term of the lease/service contract expired in 2002 and that the defendant did not send the statutory notice of automatic renewal. The plaintiff continued to use and pay for the equipment and services until 2008, at which time it notified the defendant that it wished to terminate. However, the defendant responded to the plaintiff by advising him that the lease/service agreement had automatically renewed to 2010. After an exchange of emails between the parties and unsuccessful demands by the defendant for payment, the plaintiff filed a class action complaint against the defendant alleging various statutory and common law claims, and seeking declaratory and injunctive relief, among other relief. Two weeks after the suit was filed, the defendant waived all fees "as an accommodation" to the plaintiff.

After several years of litigation, the defendant finally prevailed and the case was dismissed, primarily because the plaintiff had not paid for any services it did not receive and thus, no monetary damages were suffered. In effect, the court held "no harm, no foul". However, there was a strenuous dissent to the

decision, which stressed the defendant's alleged admission that it was its "policy" not to send renewal notices and to then vigorously pursue its lessees to collect unenforceable fees. In the dissent's view, the "no harm, no foul" approach was inappropriate and the case should have been allowed to proceed.

In our view, the defendant dodged a bullet, solely because it was unsuccessful in collecting any fees after the plaintiff elected to terminate the agreement. Had the defendant been more "successful" in collecting those fees, it likely would have been less successful in the litigation.

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