

# Legislative & Case Report

April 2, 2014

*New Idaho Code § 55-115:  
Homeowner's Association -  
Prohibited Conduct*

*Effective 7/1/2014*

# Purpose for the Legislation from Senate Bill No. 1310

- ▶ HOAs enforce CC&Rs in subdivisions by fining individual home owners for violations.
- ▶ Frequently, fines are levied despite home owner attempts to comply with the CC&Rs and without any process other than a letter informing of fine.
- ▶ Bill puts reasonable requirements in place that protect the home owner against arbitrary and capricious actions by HOAs and provide standards courts can use if there is a dispute re: validity of a fine in a lien foreclosure action.

# Example from the Associated Press

1. Teacher who lived in Sen. Jim Rice's district butted heads with her HOA when the summer heat caused her lawn to turn yellow.
2. Woman began using a fertilizer treatment, but it wasn't greening up quickly enough.
3. HOA ignored multiple attempts at contact, including several phone calls and a letter.



# Definition of Homeowner's Association

- ▶ Section 55-115 incorporates the definition from Section 45-810(6) (i.e., HOA Liens Statute):

(6) As used in this section, "homeowner's association" means any incorporated or unincorporated association:

(a) In which membership is based upon owning or possessing an interest in real property; and

(b) That has the authority, pursuant to recorded covenants, bylaws or other governing instruments, to assess and record liens against the real property of its members. (emphasis added).



# New Requirements for HOA to Fine Members

No fine may be imposed for a violation of the covenants and restrictions pursuant to the rules and regulations of the HOA unless:

1. Authority to fine is clearly set forth in the covenants and restrictions;
2. A majority vote by the board occurs before fining;
3. Member is given thirty (30) days written notice; and
4. No portion of any fine is used to increase pay of any board member or agent.



# What is a “fine”?

- ▶ The ordinary meaning of “fine” is “a sum imposed as a punishment for an offense.”
- ▶ Question: If the HOA has authority in the CC&Rs to remediate violations and bill home owners for the costs incurred, is this a fine?

# What Constitutes a “Majority” of the Board?

- ▶ **Section 55–115 states:**

“A majority vote by the board shall be required prior to imposing any fine on a member for a violation of any covenants and restrictions pursuant to the rules and regulations of the homeowner’s association.”

(emphasis added).

# To Whom Does Service Need to be Given?

- ▶ **Section 55-115 requires:**

“Written notice by personal service or certified mail of the meeting during which such vote is to be taken shall be made to the member at least thirty (30) days prior to the meeting.”

(emphasis added).

# Can a Member Stop a Fine?

- ▶ Section 55-115 provides:

“In the event the member begins resolving the violation prior to the meeting, no fine shall be imposed so long as the member continues to address the violation in good faith until fully resolved.”  
(emphasis added).



<http://sfbayview.com/2013/using-city-power-to-prevent-foreclosure/>

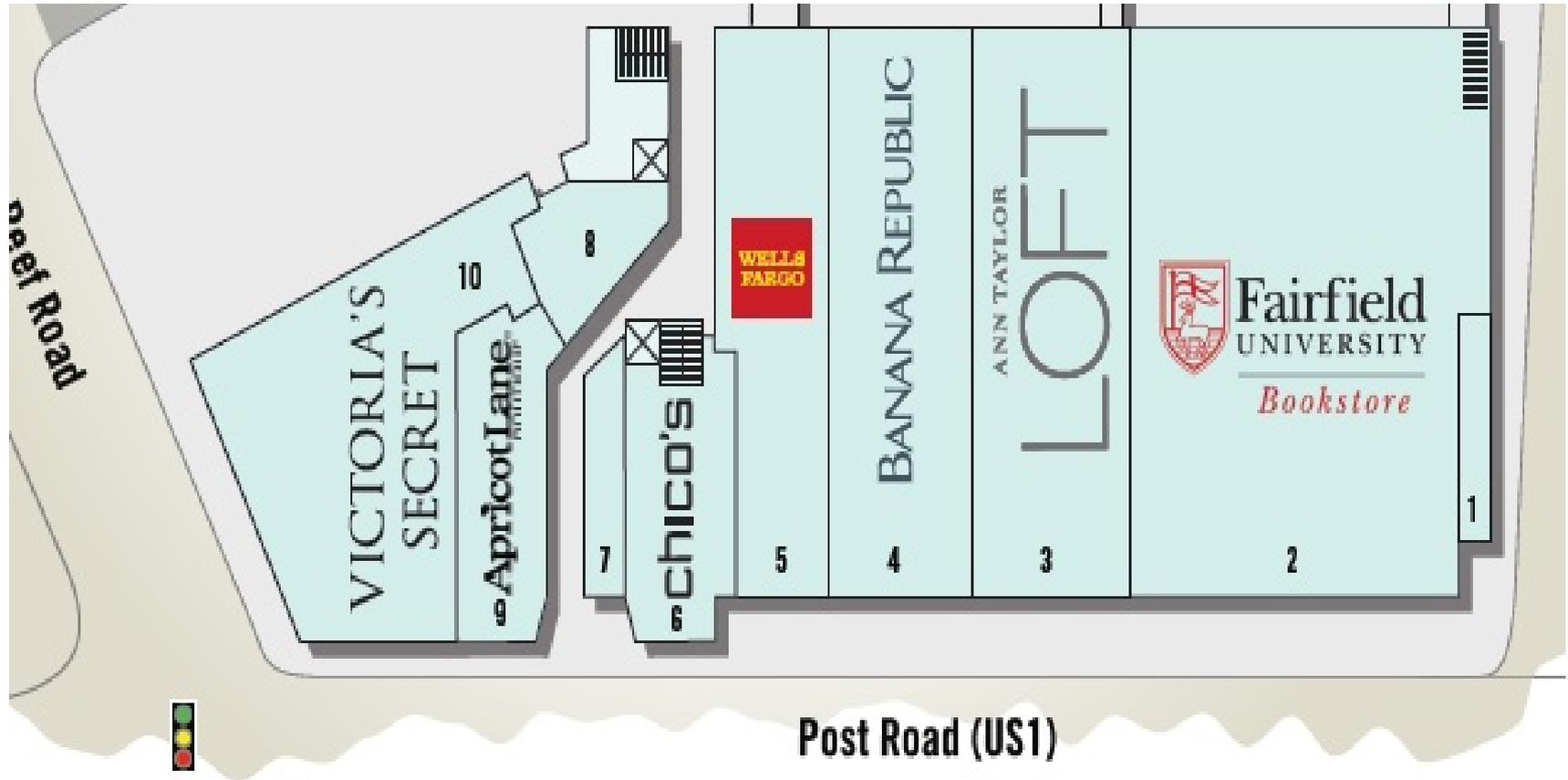
**Any additional comments  
from your own practices?**

*Kleban Holding Co., LLC v.  
Ann Taylor Retail, Inc.*, 2013  
WL 6191904 (D. Conn. 2013)

# The Fairfield Center Exterior



# The Fairfield Center Layout



[http://www.klebanproperties.com/connecticut/fairfield/thefairfieldcenterbuilding\\_floorplan.pdf](http://www.klebanproperties.com/connecticut/fairfield/thefairfieldcenterbuilding_floorplan.pdf)

# Introduction

1. **Nov. 2000** – Starwood Ceruzzi Post Road LLC (“Starwood”), entered into a ten-year lease (“Lease”) with Ann Taylor Retail, Inc. (“Ann Taylor”) for retail premises within the Fairfield Center.
2. Ann Taylor could terminate the Lease if Borders, Inc., Banana Republic and Victoria’s Secret did not sign leases in the Center by March 2001.
3. **2004** – Starwood assigned the Lease to Kleban Holding Company, LLC (“Kleban”).
4. **Apr. 2011** – Ann Taylor exercised a five-year option through January 2017.

# Introduction Cont.

1. Lease required Ann Taylor to pay a Minimum Annual Rent of \$170,100 payable in equal monthly payments of \$14,175.
2. Lease required payment of monthly rent without set-offs or deductions.

# Lease Clause at Issue

- ▶ The Lease stated, in relevant part, the following:

“In the event Borders, Inc. or fifty percent (50%) of the other retail space in the Center, excluding [Ann Taylor], are not open and operating, [Ann Taylor] shall be entitled to abate the Minimum Annual Rent and in lieu thereof pay five percent (5%) of Gross Sales, not to exceed the Minimum Annual Rent otherwise payable . . . until the tenants meeting the foregoing requirements are again open and operating.”



# History re: Borders, Inc.'s "Space"

1. **May 16, 2011** – Borders closed its store in the Fairfield Center in connection with its bankruptcy filing.
2. **May 18, 2011** – Kleban replaced Borders with Book Warehouse, which closed on Sept. 10, 2011.
3. **July 2011** – Ann Taylor started abating monthly rent.
4. **Nov. 11, 2011** – Kleban replaced Book Warehouse with Fairview University Bookstore.
5. **Dec. 2011** – Kleban filed breach & anticipatory breach of contract claims for Ann Taylor's abatement of rent even though Kleban filled the "space" vacated by Borders.

# Borders, Inc.'s Former Location



From Google Earth



# Federal Court's Recitation of Connecticut Contract Law

1. Lease must be construed to effectuate the intent of parties.
2. Intent is determined from the common, natural and ordinary meaning of the language used.
3. Give all clauses meaning (none are superfluous).
4. Unambiguous contract – no extrinsic evidence is available to interpret the contract.
5. Contract is unambiguous if its language is clear and conveys a definite and precise intent.



# Federal Court's Recitation of Connecticut Contract Law Cont.

1. Presumption that language used is definitive when parties are sophisticated and the contract is commercial in nature.
2. Where contractual language is ambiguous, it is construed against the drafter.
3. Courts do not unmake bargains unwisely made.

# Court's Analysis of Lease Clause

“In the event Borders, Inc. **or** fifty percent (50%) of the other retail space in the Center, excluding Tenant, are not open and operating . . . .”  
(emphasis added).

1. The word “**or**” creates two potential events that are separate and independent of one another.
2. Either Borders is not open and operating or 50% of the other retail space isn't open and operating.
3. Either condition allows Ann Taylor to abate rent until **both** independent conditions are satisfied.

# Court's Analysis of Lease Clause Continued

1. Kleban's (actually Starwood's) choice to name Borders, Inc. rather than a description of the "space" that Borders occupied created a presumption the language was definitive.
2. Kleban could have stated "Borders, Inc. or an equivalent retailer."
3. The Lease specifically refers to Banana Republic and Victoria's Secret.



# Kleban's Final Argument

Kleban argued that no reasonable landlord would agree to a clause where the loss of Borders would trigger an abatement of rent until Borders (and only Borders) returned.

1. Court held that Kleban and Ann Taylor -- both of whom are sophisticated commercial entities -- **did agree** to this language.
2. Court also pointed out that Kleban had the benefit of drafting the Lease.
3. Therefore, until Borders returns, Ann Taylor has a right to pay reduced rent.

# Lessons Learned from *Ann Taylor*

1. Be careful when mentioning tenants by name in other leases.
2. If we name tenants in other leases, we should refer to the “spaces” leased instead the tenants themselves.
3. Be careful with the use of “or,” as it creates independent conditions.
4. As drafters in sophisticated commercial settings, we must take extra precautions to represent our clients’ intent with the words we use.
5. In this case, the use of Borders’ name and the word “or” cost Kleban approximately \$800,000 in lost rent.

**Any additional comments  
from your own practices?**