



LEGAL MATTERS

JULY 2002

Read Your Fire and Property Insurance Policy Carefully

When a fire or other casualty damages your property, one of the first calls is usually to your insurance agent. The insurance agent is typically the “agent” of the insurance company for the purpose of selling insurance policies. Although most agents are helpful and a good source of information, the agent’s role in the claims adjustment process is limited

Usually, insurance companies employ or contract with adjusters to investigate and settle property insurance claims. Many claimants are unaware that they have the burden to present and establish their claim. Until a claim is properly presented and a “proof of claim” form is submitted by the claimant, the insurance company has no duty to pay the claim. Through proper claim presentation and negotiation, it is often possible to secure an advance payment from the insurance company. When filing a property insurance claim, you should consider whether your coverage has any limitations or conditional endorsements such as a coinsurance endorsement or reporting form.

The greatest surprise to most policyholders when sub-

mitting a claim is that replacement cost coverage does not always mean that the insurance company will pay the cost to replace the damage. In fact, the standard replacement cost clause includes several conditions and limitations that allow the insurance company to avoid payment of the full replacement cost in certain situations. Read your policies carefully.

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Our Newsletter

We hope to provide useful legal information to our clients, colleagues, and friends by way of this newsletter. It has been our pleasure over the past sixteen years to be of service. We hope to continue to earn your trust and we welcome your comments.

Case Notes

On June 25, 2002, the New Hampshire Supreme Court issued a decision that raises serious concerns about the consequences of entering into agreements over the internet. The case involved a New Hampshire resident who purchased a John Deere excavator on the internet auction site “eBay.” Before bidding, our New Hampshire friend sent an e-mail to the owner in New Jersey asking about the quality. Satisfied with the answer, he won the bidding and traveled to New Jersey to pick up his purchase.

When the excavator failed to meet expectations, the buyer sued in New Hampshire. The New Jersey seller said that she did not have to defend a case here in New Hampshire. Our Supreme Court agreed. According to the Court, since the New Jersey seller “did not purposely avail herself of the privilege of doing business in New Hampshire” she could not be sued here. Postings on “eBay” were not enough to satisfy this requirement.

The Court suggested that there may have been a different result if the seller operated a commercial business over the internet targeting residents of New Hampshire. This case was an isolated sale using a third party auction site. Given these circumstances, our New Hampshire friend must travel to New Jersey to resolve the matter.

Know the Requirements for Mechanic's Liens

Mechanic's liens are an issue for building contractors. In New Hampshire, building contractors have the ability to file a mechanic's lien, much like a mortgage, against a property when payment has not been received for goods and services performed. To be entitled to the benefit of a mechanic's lien, building contractors must carefully follow the law.

Before proceeding with any contract, the building contractor must identify the property owner. In many commercial jobs, the property ownership can be unclear when the actual contracting party is a tenant or management company, rather than the property owner. If the contracting party is someone other than the property owner and the party

defaults on the construction contract, there may be no recourse against the property owner or right to a mechanic's lien. The law requires the contractor to have provided the property owner with appropriate notice of the intention to provide goods and services before the work begins.

Sexual Harassment is Your Responsibility

What if you have a problem that you don't know about. One of your supervisors considers other employees a captive audience for rude jokes, crude behavior, sexual one-liners and an opportunity to fill an otherwise open social calendar. This supervisor always greets others with open arms and hugs for everyone, whether welcomed or not. Occasionally, this supervisor attempts to trade work opportunities for "personal favors." Most employees consider the supervisor harmless.

What you don't know can't hurt you, right? Wrong, nothing could be further from the truth when the issue is sexual harassment. Four years ago in June 1998, the United States Supreme Court sent a loud and clear message. The Court decided two cases on the same day and used nearly identical language in both.

Those decisions sent messages to both employers and employees. To employers, the Court said it no longer matters whether you know you have a problem supervisor. If you have a supervisor who harasses employees, the Court will presume that the employer is responsible. However, there remains a way for the employer to address the issue of harassment and avoid financial liability.

The employer must show that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior. Although the Court did not declare that all employers must have written sexual harassment policies, the Court suggested that there should be "a stated policy suitable to the employment circumstances." If there is a policy that clearly defines prohibited conduct, how to complain, and how the complaint will be addressed, the employer will have plenty to say about exercising reasonable care if the case ends up in Federal Court.

The message to the employee is take advantage of the opportunities to resolve the problem provided by the employer. If the employee doesn't complain or follow the procedures, then the employer can bring this to the Court's attention and seek to avoid the financial consequences of the errant supervisor. The Court will not award damages to an employee who could have addressed the harassment by raising the matter with the employer and following a reasonable procedure in place.

There is already one exception to this newly stated rule. When the harassment has a tangible impact on the employment, no stated policy will help. For example, if the supervisor demoted employees who escaped the harassment and promoted those who

went along, the employer is responsible. The only issue will be how much the employer should pay in damages.

Although the decisions are now four years old, whether the Supreme Court has clarified sexual harassment law continues to be debated in the Courts. However, one thing is clear. Both employers and employees are responsible for ridding the workplace of sexual harassment. The employer must have an appropriately stated policy that is diligently enforced. Employees must assert their rights under the policy and work with the employer to resolve the problem. Thus, the employer and employee must work together to prevent harassment in the first place and remove it from the workplace when it occurs.

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Who is Lurking in the Common Area?

We all read the headlines - another act of violence against an innocent victim in a small community. We see the news on the criminal trial and hopefully, the offender gets his or her just punishment. What we don't see is the civil case that often follows the headlines. When the act of violence occurs on private property such as an apartment building or condominium property, is someone else financially responsible?

Property owners, managers and condominium associations have varying amounts of control over the common areas of their properties. Owners have generally unqualified rights to repair, maintain, and safeguard their property as they see fit. Property managers' rights derive from their relationship with the owner of the property. Condominium associations have the right to deal with the common area of their property as set forth in the condominium declaration and by-laws.

Courts have had to consider this issue when deciding cases in which individuals were assaulted in common areas such as the parking lot of condominiums, and a poorly lit corridor in an apartment complex. The general rule is that landlords and property owners do not have a duty to protect tenants or patrons from criminal attack. How-

ever, this general rule is not followed if action or inaction by the property owner brings about a heightened risk or opportunity for criminal activity.

In one case, a guest of a condominium unit owner was shot by a gang who often gathered in the parking lot. The association tried to have the case dismissed on the grounds that it had no obligation to prevent the criminal attack. The Court disagreed. Because the association had retained exclusive control of the common areas, the association had an affirmative obligation to exercise reasonable care to avoid causing injury to those it permitted to use the common areas. This obligation may include addressing physical conditions on the property such as inadequate lighting as well as the criminal acts of third parties. According to the Court, the particular circumstances of the case will determine "what is reasonable to protect others from foreseeable and preventable danger."

Another Court concluded that under some circumstances, the members of the board of directors of a condominium association could be held personally responsible.

Taken together, these cases provide extreme examples of liability. The facts are so egregious that some preventive behavior should

have been obvious. Faced with the facts of these cases, most reasonable people would take steps to address the problem behavior. However, when the facts are not so extreme, the required response is much less obvious. The cases say only that a property owner, manager or association must act reasonably in light of the anticipated risks. Unfortunately, there is no bright line rule. Rather, the particular facts of each matter will require individual attention.

As with any issue concerning a threat of civil liability, the property owner, manager, or association should review the matter with its insurance agent to determine the scope of insurance coverage. Generally, this issue is one of negligence which should be addressed under the terms of a general liability policy. The specific policy in force should be reviewed so that the true financial risk is completely understood.

Small Claims May Be the Way to Go

You may have heard about the recent staffing crisis in the Manchester District Court and how it affects the Court's ability to hear your small claims case. It may take up to a year for cases to be heard. In light of significant savings, the delay in having the matter resolved may not be so bad. A small claims action is a simple proceeding designed to resolve civil disputes quickly and efficiently without lawyers. Recent legislation increased the amount you can recover from \$2,500 to \$5,000. Litigants resolve these disputes by completing a simple complaint form, paying a \$35 filing fee, and presenting their case informally at their scheduled hearing.

Manchester Tax Abatement Appeals

If your request for a tax abatement with the City of Manchester was denied and you are considering an appeal of the assessment for 2001, **the deadline for filing with the Board of Tax and Land Appeals or the New Hampshire Superior Court is September 1, 2002.**

Under prior law, the deadline was extended for two months in communities involved in a general revaluation. However, the legislature changed the law this year and the extension was abolished. Mark your calendars accordingly so that all tax abatement appeals are timely filed well in advance of September 1, 2002.