From the Law Offices of
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PERKINS & ANCTIL P.C.
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LAW QUARTERLY

IN THIS ISSUE

1
We Proudly Announce
Events
Massachusetts Appeals Court Issues Important Decision Relative To Prompt, Fair, and Equitable Settlement Of Insurance Claims
2
Liquidated Damages Clauses: A Question of Enforceability
The New Homestead Law
3
All (delinquency) Is Not Lost in New Hampshire
Keeping the Wheels of Justice Turning

WE PROUDLY ANNOUCE

Attorney David R. Chenelle has joined the Perkins & Anctil team. Attorney Chenelle comes to us from his partnership in the law firm of D'Amico & Chenelle, and will continue his practice in the representation of both business and consumer clients in all aspects of bankruptcy, including those in Chapter 7, Chapter 11 and Chapter 13 cases. We are pleased to add Attorney Chenelle's expertise to complement the firm of Perkins & Anctil.

Perkins & Anctil accepts The New England Chapter Community Associations Institute Volunteer Award. This Award is in recognition of their contributions to CAI and the Community Association Industry.

Perkins & Anctil's newsletter are now available on the Perkins & Anctil web site, www.perkinslawpc.com.

Events

Perkins & Anctil will be in attendance to the below events, please stop by to say hello and gather any needed materials.

Saturday April 2, 2011 CAI New England Condo Forum & Expo, Western MA

Tuesday May 24, 2011 The New England Condo Expo, Seaport World Trade Center, Boston , MA

Tuesday April 19, 2011 CAI, NH, Attorney Daddario of Perkins & Anctil will be speaking at Manchester Public Library regarding Fair Housing & Self-Managed Condos

Massachusetts Appeals Court Issues Important Decision Relative To Prompt, Fair, and Equitable Settlement Of Insurance Claims

By: Tricia L. DelBove, Esq.

The Massachusetts Appeals Court recently decided an important case under G.L.c. 176D, the state statute regulating unfair or deceptive acts or practices by insurance companies. *Rhodes v. AIG Domestic Claims, Inc.,* 78 Mass. App. Ct. 299 (2010). G.L.c. 176D requires insurance companies to effectuate a prompt, fair and equitable settlement. *Rhodes* may have a significant impact on the way insurers settle claims in Massachusetts as the Appeals Court sent a clear message to insurance companies that delay tactics used to gain a strategic advantage in litigation will not be tolerated. In *Rhodes*, the Appeals Court amended a lower court judgment to allow for the plaintiffs' loss of use of $3.5 million for nearly three and a half months (May 1, 2004 – August 11, 2004). Further, the Appeals Court remanded the case to the Superior Court to determine whether the damage award should either be doubled or tripled under G.L.c. 176D.

By way of background, on January 9, 2002, the plaintiff Marcia Rhodes, then forty-six years old, stopped her car, as directed by a police officer conducting traffic around a tree service crew. While her car was stopped, Mrs. Rhodes was hit from behind by an eighteen-wheel trailer truck. The driver was assigned to drive the truck for Building Materials of America (GAF). The accident left Mrs. Rhodes instantly and permanently paralyzed. Mrs. Rhodes, along with her husband, and their daughter, (collectively, the "plaintiffs), were claimants under policies of insurance issued by the defendants for Building Materials Corp. of America (GAF). The plaintiffs brought this action against the defendant insurers, under various provisions of G.L.c. 176D for failure to effectuate prompt, fair and equitable settlements of the plaintiffs' claims.

The lower court judge found that the plaintiffs incurred costs and suffered emotional distress from the uncertainties and frustrations of litigation as the matter dragged on past the point at which liability for Mrs. Rhodes injuries became clear and a settlement offer from defendants was required under the provisions of the statute. However, the lower court judge concluded that the plaintiffs suffered no actual damages as a result of the defendants' deliberate and strategic delay in making a settlement offer. In reaching this conclusion, the lower court judge relied on Mr. Rhodes' testimony that by the time of mediation, the plaintiffs would not have settled for less than $8 million. The lower court judge considered Mr. Rhodes' testimony to be proof that the plaintiffs would have rejected a $3.5 settlement offer, even if it had been offered promptly.

The Appeals Court rejected this reasoning. The Appeals Court determined that Mr. Rhodes' testimony was speculative as proof of whether the plaintiffs would have settled their claims had the defendants put forth a reasonable offer months earlier. Therefore, the Appeals Court held that Mr. Rhodes' testimony should not serve as the basis for denying recovery for the insurers' misconduct, especially given that the lower court judge had found that the unlawful delay in making a settlement offer was a strategic decision on the defendants' part. In reaching this holding, the Appeals Court stated, "Given the uncertainty of the effect that unfair settlement practices and prolonged pretrial maneuvering may have on the claimant's circumstances and outlook when a late settlement offer finally is made, we think the plaintiffs' recovery here

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should not turn on conjecture as to what they might have done had [the insurer] not abused its position. …"

Although insurance companies might be tempted to employ delay as a litigation strategy to obtain a lower settlement, the statutory multiplier contained in G.L.c. 179D serves as a deterrent to just that. Following the recent decision in *Rhodes*, insurers should be less willing to risk deliberate violations of the statute. As such, this case will become an important tool when negotiating with insurance companies.

Liquidated Damages Clauses: A Question of Enforceability

By: Fredrick J. Dunn, Esq.

In early December, the Massachusetts Appeals Court affirmed a 2008 decision of the Superior Court in the case of *NRT New England, Inc. d/b/a Coldwell Banker Residential Brokerage v. Ashby C. Moncure, 24 Mass. L. Rep. 181 (2008)*. In question was the enforceability of the liquidated damages clause within the terms of a Purchase and Sale Agreement. In March 2004, the defendant and Seller, Ashby C. Moncure ("Moncure"), contracted with Coldwell Banker to list certain real estate. Subsequently, a Purchase and Sale Agreement was executed by Moncure and the Buyer, Plain Road. At that time, Plain Road placed a deposit of $92,500.00 with Coldwell Banker to be held in escrow. The terms of the Agreement contained a standard liquidated damages clause as follows:

> "If the Buyer shall fail to fulfill the Buyer's agreements herein, all deposits made hereunder by the Buyer shall be retained by the Seller as liquidated damages, as Seller's sole and exclusive remedy, without further recourse hereunder, in equity or at law."

On the day of the closing, Plain Road failed to appear and the transaction came to a halt. Coldwell Banker did not release the deposit monies to Moncure and instead held the funds for some time. Coldwell Banker then acted as agent for Plain Road in a subsequent unrelated transaction. Upon the completion of that transaction, Plain Road owed Coldwell Banker a brokerage commission. Coldwell Banker agreed to an assignment from Plain Road of any interest to the escrowed funds of Plain Road in connection with the transaction with Moncure. Coldwell Banker then brought an action against Moncure for declaratory judgment alleging that it was the rightful owner of the escrowed funds and that the liquidated damages clause within the Purchase and Sale Agreement with Moncure was unenforceable. Moncure moved for summary judgment in connection with a counterclaim against Coldwell Banker for breach of fiduciary duty and violation of *G.L.c. 93A*.

The issue in dispute was whether the liquidated damages clause of the Purchase and Sale Agreement was enforceable. Ultimately, the Court determined that the liquidated damages clause was enforceable and that Moncure was entitled to receive Plain Road's deposit as liquidated damages. Citing *NPS, Inc. v. Minihane, 451 Mass. 417 (2008)*, the Court indicated that such clauses should be enforced provided that the provisions of the liquidated damages clause are not so disproportionate to anticipated damages so as to amount to a penalty. Referencing the same case, the Court further stated that the burden was on the plaintiff challenging the provision to show that the liquidated damages clause is unenforceable. Here, Coldwell Banker was not able to prove that the clause should be unenforceable.

The Court also drew its opinion from *Kelly v. Marx, 428 Mass. 877 (1999)*, in which a liquidated damages clause was upheld where the Seller was able to convey the property to a subsequent Buyer for a higher amount than originally contemplated. What is interesting is that within the circumstances surrounding the *Kelly* matter, the Seller suffered no actual loss. However, the Court held that the question was not whether the Seller suffered actual damages, but rather whether the parties understood at the time the contract was signed that the potential damages for Buyer's breach were difficult to determine and, as a result, the parties agreed to certain amounts to be payable as liquidated damages. The Buyer's deposit of five percent was a reasonable forecast of Seller's losses that may result in the event of Buyer's breach as the list of unforeseeable circumstances include the time associated with finding a subsequent Buyer and the status of the real estate market. Where the potential damages were difficult to determine at the time the agreement was executed by the original parties, in the Court's opinion, the deposit amount as agreed upon as liquidated damages was a reasonable amount in the event of Buyer's future breach. The circumstances within the *Moncure* case are substantially similar.

Coldwell Banker argued that the liquidated damages clause was unenforceable as Moncure knew what his actual damages would be. Upon learning that the closing with Plain Road might fail, Moncure took steps to obtain financing for the purchase of other real property that was originally to be purchased with the proceeds from the sale to Plain Road. Thus, Coldwell Banker alleged that Moncure knew his actual damages and was able to prevent his inability to purchase the subsequent property by obtaining financing. The Court did not agree. While Moncure was able to determine potential losses just before the failed closing, such loses were not similar to the anticipated losses at the time the Purchase and Sale Agreement was signed. The Court stated that at the time of the Purchase and Sale Agreement, the Seller could not know what delays might become prevalent in finding a subsequent Buyer, how the failed sale might affect Seller's future plans, or what might occur in the real estate market after a failed sale. Even where Moncure was fortunate enough to secure financing just before the failed sale, the Court stated that it does not mean that Moncure's actual damages were ascertainable at the time the contract was entered into.

Coldwell Banker was also unsuccessful in its defense against Moncure's *G.L.c. 93A* claim. The Court stated that Coldwell Banker's attempt, in filing an adversarial action, to obtain the very funds it was entrusted to hold as escrow agent were unethical and unscrupulous. By filing the action, Coldwell Banker sought to satisfy a debt owed, by Plain Road to Coldwell Banker, by seeking to obtain the funds it held as escrow agent. By doing so, Coldwell Banker placed its own interests ahead of its fiduciary duty to Moncure, thus acting unethically and unscrupulously, thereby violating *G.L.c. 93*. The case indicated a subsequent hearing would be held to determine Moncure's damages as a result of Coldwell Banker's violation.

The New Homestead Law

By: Fredrick J. Dunn, Esq.

With a purpose toward clarifying M.G.L. c. 188, the new Homestead Law (2010 Mass. Acts Chapter 395) will go into effect on March 16, 2011. The legislature's revisions to the statute will expand the scope of homesteads in certain areas and shall serve to do away with some of the prior version's somewhat antiquated provisions in others. This article shall serve to highlight the most significant portions of the new Homestead Law.

Within the decisive case with respect to the law of homesteads, *Atlantic Savings Bank v. Metropolitan Bank and Trust Co.*, 400 N.E.2d 1290, (1980), the Court indicated that a mortgage executed by a homeowner and his spouse was superior to a previously recorded Declaration of Homestead. While this decision has not been altered by the new statute,

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the statute does change prior practice in that the mortgage no longer needs to contain subordination language and a spouse which does not appear on title no longer needs to execute the new mortgage in order subordinate the homestead to said mortgage. In addition, a lender is prohibited from requiring a release of a homestead prior to recording a mortgage.

The new statute will now also provide for an automatic homestead without declaration by the owner of real property. There will be an automatic $125,000.00 of protection for a new owner, and said owner's family, without any additional action necessary to obtain said protection. While this is a significant difference from the old statute, it is important to note that such automatic protection is far less than the amount of protection that may be provided by an owner's declared homestead.

Should an owner wish to obtain a greater amount of protection from the automatic homestead as referenced above, the new statute shall provide $500,000.00 protection upon the recording of a written Declaration of Homestead. What is important is that the written Declaration must be made separately from a deed and must identify a non-title spouse. Further, should the homestead be declared at the time an owner is single, and then subsequently marries, the homestead shall provide protection to the new spouse, with said protection retroactive to the date of the original filing. In another noteworthy difference from the old statute, the new Homestead Law may now be declared in cases in which the property is owned by a trust, provided that the Declaration is executed by the trustee(s) and identifies the beneficiaries of the trust. The new statute also allows for each co-tenant, joint owner, or tenant by the entirety to declare their own individual homestead.

The new Homestead Law also seeks to prevent inadvertent terminations and provides for the requirements to terminate a homestead. Significant to the new statute is the intent of the party or parties. In order to terminate a homestead, a deed to a non-family member must be signed by the owner and a non titled spouse. A release may also be signed by said owner and non-owner spouse. Also, the abandonment of the property by the owner, the owner's spouse, and the owner's family shall also serve to terminate a homestead. Where a trust is involved, a deed or release signed by the trustee, or a release or the abandonment by the beneficiary named in the Declaration of Homestead shall serve to terminate the homestead.

While indicating the specific means in which a homestead shall be terminated, the new statute also provides protection from termination in connection with certain conveyances. According to the new statute, deeds between two spouses or co-owners who individually, or jointly, hold a homestead shall not affect the homestead. Deeds between a trustee and a beneficiary, and a deed between a life tenant and a remainderman shall also not result in a termination of the homestead.

The new statute will bring about a larger responsibility for conveyancing attorneys. Under the new statute, the closing attorney shall be responsible for providing the purchaser with a notice of the right to declare a homestead. The notice must discuss the differences between the automatic and declared homestead protections and should further expound on the enhanced benefits of the declared homestead protections. In addition, said notice should be executed by the purchaser at the time of the closing to acknowledge receipt of the same.

With the new revisions and clarifications of the Homestead Law, many have inquired as to the validity of those homesteads currently in existence. The new statute specifically addresses said homesteads. Any validly declared existing homestead shall remain in force and effect. Any failure to comply with the provisions of the new statute shall not invalidate the same.

All (delinquency) Is Not Lost in New Hampshire

By: Gary M. Daddario, Esq.

The economic crisis and the poorly performing markets have brought delinquencies to the forefront of association business in condominiums throughout the country. This includes those in New Hampshire. Having been required to operate without a "super" lien (more on that subject below), New Hampshire condominiums have become accustomed to less success in the collection realm. However, collection of delinquent condominium assessments is possible in the Granite State. Associations need not accept unit owners that wish to "live free". In fact, there are several options available under the New Hampshire Condominium Act.

Pursuant to R.S.A. 356-B:46 III, the Association should file a lien for unpaid assessments within six months of the time the assessment(s) became due. So, in order to protect the debt on an ongoing basis, the Association may file liens at six-month intervals if the failure to pay continues.

To the extent that the Association files a Writ and obtains Judgment from the Court, continued action may be taken on that Judgment. Ultimately, pursuant to applicable provisions of R.S.A. 529, the Association may conduct a Sherriff's Sale to foreclose upon the delinquent unit owner. It should be noted that there is a one-year right of redemption relative to a Sherriff's Sale.

If the unit owner rents the unit, the Association may pursue Attachment of Rents in accord with R.S.A. 356-B:46-a. If the Association is able to collect rent monies from a tenant, the same may be used to satisfy the delinquent unit owner's financial obligations to the Association.

Yet another option is presented by R.S.A. 356-B:46 IX. Pursuant to this provision, an Association may terminate common privileges and services of the delinquent unit owner/unit. Utilizing this powerful provision, an Association could require a delinquent owner to pay his/her account current in order to gain access to the pool or clubhouse or to receive landscaping or other common services. One fairly recent New Hampshire case upheld the Association's ability to terminate use of the unit's driveway via placement of a jersey barrier. An Association's termination of services often provides strong motivation for a unit owner to make arrangements regarding payment of the delinquent assessments.

Now, bringing this writing full circle, New Hampshire's version of a "super" lien law went into effect in January 2011. Although it applies prospectively (i.e. to future mortgages), in time this statutory provision will allow New Hampshire condominiums to protect more of their delinquent assessments. Look for more on this topic in separate articles.

Caveat-this writing is not intended to provide legal advice on a specific case and Associations should consult legal counsel for specific advice or performance of collection activity.

Keeping the Wheels of Justice Turning

By: Gary M. Daddario, Esq.

As the "accounts receivables" for condominiums have grown, so has the urgency for results relative to collection actions commenced by associations. Perkins & Anctil, P.C. ("P&A") strives to provide exceptional service in all facets of our work, including condominium collection matters. To this end, our Collection Team

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has continually grown during these difficult times, with the additions of both new people (attorneys and paralegals) as well as new technology (new computers and custom-designed software for managing cases).

In addition to the efforts that P&A undertakes in-house, collection case progress can benefit from cooperation between legal counsel and property management and/or the condominium board. For instance, it is sometimes necessary for legal counsel to obtain a decision from the decision-making authority. This may be necessitated by submission of a payment plan proposal, the proposition of a question about a special assessment, the provision of alleged proof of payment or the receipt of a dispute regarding fines and the like. In such instances, prompt response from the decision-making authority will allow the case to progress more efficiently.

Sometimes, either unit owners, banks/lenders or opposing counsel may attempt to "attack" the validity of the collection by questioning the authority/identity of the Board or seeking documentation verifying the budget and the passage of a special assessment or condo fee increase. Again, to the extent that legal counsel for the Association can provide the requested information, the case will progress more efficiently. Such scenarios highlight both the need for cooperation between attorney and client and the underlying need for condominiums to maintain proper business records and to record items like Certificates of Election with the Registry of Deeds.

Often (in fact so often that it may appear to be a nuisance for the client) legal counsel for a condominium will request an up-to-date ledger for an account. When ledgers are requested, it is because they are necessary either for an attachment to an outgoing correspondence or for calculating the balance for a breakdown or payoff in anticipation of payment. In such instances, the sooner the ledger reaches legal counsel, the sooner notices can be issued and, possibly, payment obtained.

When ledgers display a "balance forward", legal counsel will request documentation relative to that balance forward amount. This is not an effort to further tax the client. Rather, documenting the "balance forward" is necessary to comply with debt collection law and to avoid potential liability. Similarly, when unit owners file bankruptcy, legal counsel will seek "pre-petition" and "post-petition" ledgers and ask that assessments be properly allocated to each. Again, the intent is not to create an additional burden for the client. Rather, such accounting is necessary to comply with bankruptcy court procedures and to avoid possible sanctions from the court.

Open communication is another essential element for collection success. Although condominiums have an attachment of rent remedy under the statute, legal counsel will likely not be aware that a unit is rented unless informed. Sometimes, despite language in the collection notices instructing otherwise, delinquent owners will send payments directly to the condominium or property management. It is imperative that such payments be reported to legal counsel immediately. Any delay could result in further collection action which would be unwarranted. Such action would present another potential liability. Increasingly, unit owners seem to have multiple addresses. Such addresses represent vital information of which legal counsel will not be aware unless informed.

In sum, legal counsel, property management and/or condominium boards may work cooperatively by being responsive to each other and sharing relevant information in a timely fashion. When cooperation is achieved, the success of the collections process is increased and we can all play our part in keeping the wheels of justice turning.

About Our Law Firm

Perkins & Anctil, P.C. is one of the foremost firms concentrating in all facets of real estate law, including condominium law; condominium conversions; developer and lender representation; representation before town and municipal boards; landlord/tenant matters; and real estate litigation (978)496-2000. www.perkinslawpc.com

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