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ATTORNEYS AT LAW

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L A W Q U A R T E R L Y

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Upcoming Events

Saturday, September 23, 2021, 9:00AM – 2:30PM Annual New England Community Association Institute Conference & Expo, Marriott Hotel, One Burlington Mall Road, Burlington, MA 01803

Tuesday, November 2, 2021, 10:00 am – 3:30 pm The New England Condominium Expo, Boston Convention Center - 415 Summer St, Boston, MA 02210

Mandated COVID-19 Vaccines – Is this the New Norm?

By: Kimberly A. Alley, Esq.

On August 19, 2021, Massachusetts Governor Charlie Baker issued an executive order requiring all Commonwealth Executive Department employees to provide proof of COVID-19 vaccination on or before October 17, 2021. This policy applies to all employees regardless of whether they work remotely. Employees with medical contraindications and sincerely held religious reasons may obtain an exemption. Those without an exemption will face disciplinary action, including and up to termination.

Likewise, on September 9, 2021, President Biden announced regulations and a federal executive order that mandates vaccinations for employees of private employers with at least 100 employees, healthcare facilities and federal contractors. As part of this directive, the Occupational Safety and Health Administration ("OSHA") has been directed to issue rules governing proof of vaccination or negative test results on at least a weekly basis. The OSHA rule will be implemented on an emergency basis and provide for paid time off for the vaccination and recovery of any illness resulting from vaccination. The Centers for Medicare and Medicaid Services ("CMS") will formulate a similar rule for healthcare facilities that participate in Medicare and Medicaid. Unlike the anticipated OSHA rule, the policy governing healthcare workers is unlikely to allow weekly testing as an alternative to vaccinations. Federal contractors will also be required to provide proof of vaccinations to obtain federal contracts.

The recent executive orders by Governor Baker and President Biden reflect the new norm that is likely to permeate workplaces: mandatory vaccinations. Public health policies have long required vaccinations for children in schools. Similarly, mandating vaccinations in the workplace is rapidly becoming well-accepted. This trend leaves employers who do not meet the criteria for government mandated vaccines asking whether they should require the COVID vaccination.

If an employer chooses to require vaccinations, it can expect legal and governmental support in implementing the policy. In December of 2020, the Equal Employment Opportunity Commission ("EEOC") issued guidelines for mandating vaccinations. The EEOC enforces federal workplace discrimination laws and recognizes that employers are not only entitled, but required, to ensure a safe workplace. For this reason, an employer may prohibit an unvaccinated employee from physically entering the workplace if the individual poses a potential threat to anyone by failing to comply with a vaccine mandate.

The EEOC requirement of providing a safe workplace includes ensuring that "an individual shall not pose a direct threat to the health or safety of individuals in the workplace." For this reason, the EEOC has determined that a vaccination mandate does not violate the Americans with Disabilities Act ("ADA"). A vaccination mandate is unlikely to violate other equal protection laws.

The ADA and Title VII of the Civil Rights Act of 1964 recognize only two exceptions to an inoculation mandate: 1) disability or 2) "sincerely held" religious beliefs. An employee who qualifies for either of these exemptions may request an accommodation. If an accommodation is requested, the employer must determine if the accommodation sought is reasonably possible in achieving the same level of safety as the vaccine without imposing an "undue hardship" on the employer. An undue hardship is one that poses a "significant difficulty or expense". A case-by-case review of each accommodation request will be necessary. An employee who cannot legitimately demonstrate qualification for either of these two exceptions is unlikely to find employment protection under the law. Recent challenges to vaccine mandates have failed in both Texas and the Seventh Circuit Court of Appeals.

Even if a company chooses not to require vaccinations, there are several things it can do to align with vaccination mandates. First, an employer should encourage and facilitate vaccinations for all employees. Employers who do not outright mandate vaccinations are opting to adopt policies that strongly recommend and enable vaccinations. Such policies often provide paid time off for obtaining vaccinations and additional time off if the employee gets sick from the vaccination. Second, employers can educate employees concerning the risks of COVID and benefits of vaccinations. Third, all employers should require unvaccinated employees and customers to wear masks and socially distance within the workplace.

Employees who fail to comply with vaccination policies will ultimately face the choice of employment. Most employment is "at will" meaning that either the employer or employee can terminate the employment for any non-discriminatory reason. An employer has the right to set health and safety working conditions, including a COVID vaccination. As recent cases and the executive orders demonstrate, vaccinations are rapidly becoming the new norm.

The Antithetical Concepts of Condominium Common Areas and Adverse Possession

By: Scott J. Eriksen, Esq.

If you take those two words at everyday meaning, the term is an apt description of theft or a hostile takeover. Of course, most of us understand them as a legal term of art describing a way to essentially take the property of others. When I first learned about adverse possession, I found the concept simultaneously fascinating and off-putting. It offended my sensibilities that if one were to act obnoxiously enough for a sufficiently long period of time in their use of another's property, one could establish a legitimate claim of right over that property. (On the other hand, I was also intrigued about how I could go about staking an aggressive claim in the world as a then untitled individual).

The concept of adverse possession is not so simple as petty theft, of course. One could fill volumes with scholarly discussions on it, but a basic overview will suffice for this article. Essentially, adverse possession is a way of "acquiring title to real property by possession for a statutory period under certain conditions" *Black's Law Dictionary, Seventh Edition*. In Massachusetts, those conditions require one to actually possess land in an "***open, notorious, exclusive*** and ***adverse***" fashion for twenty years. The import of each of these elements – open, notorious, exclusive and adverse – is nuanced as well, but they more or less mean what they sound like: you must unabashedly use another's land, without permission, for a long time to have a claim.

Over my years of practice, my understanding of this doctrine has developed, and I appreciate the circumstances where it makes sense to afford those who put property to productive use rights in that property. Still, I admit that even now I tend to have a knee-jerk negative reaction when faced with questions of adverse possession. Perhaps that, and my role as a community association advisor, is why I found the recent Land Court decision in Pisano v. Thunberg, 2021 Mass. LCR LEXIS 83, 29 LCR 284, 2021 WL 2656937, reaffirming.

Pisano is a case of "first impression" – which means it dealt with an issue that had never previously been addressed by the Massachusetts Land Court – and an interesting one for condominium practitioners like me. Mssrs. Pisano and Nader (the plaintiffs), the owners of a unit at a condominium in Provincetown, Massachusetts, brought the case claiming that they had adversely possessed a portion of the condominium's common area.

Let's stop there for a second. When I started reading this case, my first thought as a "condominium lawyer" was: "How could unit owners possibly believe they have a claim to adversely possess common areas?" This notion was so contrary to my sense of condominium law, it seemed outrageous. My initial thought was that if the plaintiffs were correct, this could open the proverbial floodgates of claims from those who had, without permission of their associations, annexed or staked claim over common areas. This was noteworthy to me as the facts of this case present a fairly common scenario that I frequently see in my own practice: unit owners extending their decks/patios/landscaped areas, etc. into the common areas without express authorization.

In Pisano, when the plaintiffs purchased their unit at the condominium, the prior owners informed them that the deck appurtenant to the unit extended into the common areas (and had for at least ten years prior). The Land Court accepted as true the plaintiffs' contention that, from the time of their purchase, they had "continuously used, maintained, improved, and landscaped the deck, visible to the other Unit Owners" and that this use has been exclusive. The Land Court also accepted that the plaintiffs "extended their use and enjoyment of common areas in ways that are unpermitted and forbidden by the Condominium Master Deed and Trust, including … extending their use of common area storage beyond the parameters of their permitted use." Thus, the plaintiffs argued they could demonstrate that they had legally expanded their unit where they had satisfied all of the elements of an adverse possession claim – open, notorious, exclusive, adverse use for more than 20 years (tacking on the prior owner's similar use).

The condominium trust argued that even if the plaintiffs could "support a claim of adverse possession factually, 'the ownership in a condominium community defeats" the adverse possession claim. The trust reasoned that "common areas must, as a matter of law, remain undivided under G.L. c. 183A, §5." The plaintiffs countered that the condominium statute (M.G.L. c. 183A), does not explicitly bar claims for adverse possession, and, therefore, "[u]nless and until the Legislature enacts a statute barring adverse possession to common areas" they could acquire title in that fashion. This set the stage for the Land Court to determine "whether condominium unit owners may obtain title by adverse possession over common areas of a condominium, adding that area to their unit, or whether such a claim is barred by c. 183A."

Fortunately (in my opinion), the Land Court set this right. The court found that while the condominium statute did "not explicitly bar adverse possession claims over common areas by unit owners, that [did] not end the inquiry. The court must look at the language of the statute to determine if the Legislature intended that unit owners be barred from obtaining title to common areas by adverse possession." Judge Foster noted that, by law, each unit owner in a condominium is entitled to an undivided interest in the common areas and facilities as set forth in the master deed and that the statute made it clear that such interest may "*not be altered without the consent of all unit owners whose percentage of the undivided interest is materially affected, expressed in an amendment to the master deed duly recorded…*" The Court interpreted the provisions of the statute, read together, to provide for "a scheme of common ownership of common areas that is antithetical to adverse possession by one of the unit owners." (Yes! Antithetical indeed).

In what I hope proves to be immutable precedent (as it neatly squares with my understanding of condominium law in this state), the Land Court ruled that "to allow a single unit owner to take title to common area by adverse possession would allow that unit owner to expand their unit into the common area without the consent of all unit owners. While adverse possession is just that —adverse— the statutorily provided-for scheme to which unit owners submit when they voluntarily buy into the condominium arrangement of property rights necessarily means some forms of ownership, i.e. ownership by adverse possession over common areas, will not be allowed."

In other words, condominium owners can forget expanding their units by hostile takeover. Those looking to expand decks, patios or similar elements into the common areas should coordinate with their governing boards to do so in compliance with the governing documents and M.G.L. c. 183A.

Does Business Interruption Insurance Cover Losses Due to COVID-19? Three Federal Circuits Have Answered.

By: David R. Chenelle, Esq.

Ever since the onset of the COVID-19 pandemic, the world as we knew it changed, slowed-down or even stopped in some instances. Individuals quarantined themselves for weeks and months at a time while businesses struggled to survive. Over the past 20 months many business owners have closed or reduced their hours or scope of operations in an attempt to survive the pandemic storm. While struggling businesses continued to limp along, they also filed claims for lost income against their Commercial Business Insurance with an expectation that the insurance company would pay the claim. Unfortunately, this has not been the reality.

For years business owners have faithfully paid their yearly premiums for business interruption insurance to cover them if such an event as the pandemic occurred. Afterall the purpose of this insurance is to protect businesses from lost revenue as the result of a disaster or emergency. As with all policies, the detail is in the contract itself, which the courts have found to turn on the phrase "direct physical loss of or damage to property" which appears to be the trigger in business interruption insurance. The courts have also noted that if the emergence of a worldwide pandemic is not a

specifically listed event, then the policy would not pay out. While there have been more than 335 decisions favoring both sides of the claims, there have been three favorable decisions to the insurance companies at the federal appeals courts level.

This is the scenario that played out in three of the Federal Circuit Courts of Appeals, most recently in the 6th Circuit in the case of *Santo's Italian Café LLC v. Acuity Insurance Co.*, No.21-3068 (6th Cir. Sept. 22, 2021). In each of those decisions, the plaintiffs were service providers, generally from the food service industry. While the pandemic caused significant decreases in customer traffic, it was the government-imposed restrictions and required closings that, in effect, forced the in-person traffic in all but essential businesses to stop.

Like all restaurants, Santo's Italian Café ("Santo's) experienced a significant reduction in its revenue. Having carried business insurance for years it filed a claim for its lost revenue believing that a worldwide pandemic would qualify. Santo's contended that COVID-19 and the related government-imposed restrictions on in-person dining was a "direct physical loss of or damage to property" because it was unable to fully use its restaurant. The 6th Circuit Court came to a different conclusion.

The court stated that "[w]hether one sticks with the terms themselves (a 'direct physical loss of' property) or a thesaurus-rich paraphrase of them (an 'immediate' 'tangible' 'deprivation' of property), the conclusion is the same. The policy does not cover this loss." The Court also noted that Santo's was not physically destroyed, nor was the owner "tangibly or concretely deprived of" the restaurant. Because the pandemic didn't physically change the restaurant such as a fire or water damage would, "governmental orders did not create a direct physical loss of or damage to property", and because the court found that business interruption insurance relies on physical damage, Santo's claim of lost revenue was not covered.

The Court cited two other appellate courts that had previously decided this issue, *Oral Surgeons, P.C. v. Cincinnati Ins. Co. 2 F.4th 1141 (8th Cir. 2021)* and *Gilreath Fam. & Cosm. Dentistry, Inc. v. Cincinnati Ins. Co.*, No. 21-11046, 2021 WL 3870697 (11th Cir. 2021). In those decisions, the courts found other policy terms, such as the "period of restoration," and the "traditional uses of commercial property insurance" to support their denial of coverage. When interpreting the "period of restoration" language, the courts determined that any covered 'direct physical loss of or damage to' property could be remedied by repairing, rebuilding, or replacing the property or relocating the business." This was not the case with Santo's. It did not need one of these physical remedies or repairs, but rather an end to the governmental on-premise dining ban.

In its decision, the Circuit stated that standard commercial property insurance does "not cover losses indirectly caused by a virus that injuries people, not property" and that its decision would likely "leave a hard reality about insurance" coverage, namely that it is "not a general safety net for all damages" and that courts must abide by the insurance contracts between parties. For coverage to have been available, the policy should have had a specific rider that covered such an event.

CAI Awards Banquet
Hats off to all winners!

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