

REPORT FROM COUNSEL

SPRING 2009 ISSUE

REAL ESTATE ROUNDUP

No-Show Mover Must Make Mortgage Payments

A family hired a moving company to pack up their belongings in their home and move them to a new house in another state. The mover packed up everything, but failed to come back for the loading and moving. This was more than merely inconvenient, because the family's sale of their old house was contingent upon delivery of a vacant house. When the purchasers arrived to find a house full of packed boxes, the sale fell through.

The family sued the moving company for breach of contract and negligence. Their attorney wrote to the mover demanding reimbursement for lost profits when the family had to regroup and find a new buyer, and for the additional mortgage payments, utilities, and taxes they had to pay during that time. The letter stated that it was not possible to give an exact dollar amount on the damages until the home was actually sold to a new buyer.

Under a federal law known as the Carmack Amendment and accompanying regulations, a carrier must issue a receipt or bill of lading, under which it may be liable for loss or injury to property if the claimant makes a timely claim for the payment of a specified or "determinable" amount of money. The Amendment preempts any state law claims such as the family had alleged in their lawsuit.

The mover argued without success that the family could not recover the mortgage payments and other forms of damages under the Carmack Amendment because the letter from the family's attorney, lacking a dollar amount for the claimed damages, had not sought a "determinable" sum of money. A federal court ruled that valid claims against a carrier are "determinable," not because they include some dollar amount, but because they provide enough information about the nature and extent of the carrier's liability to allow the carrier to understand its potential exposure to liability. The attorney's letter satisfied that requirement. Although a valid claim against a carrier will often include an estimate of the shipper's damages along with enough factual information to inform the carrier of the basis for the claim, a dollar amount is not an absolute requirement under the Carmack Amendment.

Economic Loss Rule Bars Misrepresentation Claim

Where parties have entered into a contractual relationship and damage occurs occasioning merely economic losses, the economic loss rule bars the complaining party from asserting tort remedies and limits that person to the contract remedies that were bargained for and agreed upon. Economic losses are distinguished from physical harm or damage to property other than the defective property itself. The rationale for the rule is that parties to a contract should resolve disputes emanating from that contractual relationship under the legal remedy that is most appropriate and most in keeping with their expectations when they signed the contract.

After a couple purchased a home, they discovered that the home had some leaks in its roof, despite what they said were assurances given both verbally and in disclosure forms that the sellers had never had a problem with the roof. When the new owners experienced water damage to interior ceilings, walls, and flooring due to the leaky roof, they sued the sellers for negligent misrepresentation. That theory ran aground on the economic loss rule, notwithstanding an argument against its application. The buyers argued to no avail that the rule should not apply because the claim was not for damage to the leaky roof itself, but to the resulting damage inside the home.

The court declined to split up the house, figuratively speaking, for purposes of the economic loss rule. As the court put it, the buyers purchased a finished home from the sellers, not a collection of component parts. Both the roof and the other damaged parts of the house were under the umbrella of the sales contract. Accordingly, any assurances that had been given by the sellers had to be examined and evaluated through the agreement, not on tort principles.

Religious Icon Removed from Condo

A condominium association adopted a rule forbidding the placement of any signs or symbols on doors or in hallways outside condominium units. When a Jewish resident placed a religious symbol on the doorpost of her unit, the association had it removed without her consent. The resident sued the association under the federal Fair Housing Act (FHA), claiming religious discrimination, since she maintained that her religion required that she place the symbol outside the entrance to her residence.

The tenant's claim under the FHA failed. That statute does prohibit discrimination based on religion, but, in contrast to disability discrimination, it does not require a "reasonable accommodation" of religious beliefs and practices. The challenged association rule did not target any particular religion, but instead was a religiously neutral, exception-free regulation adopted for reasons unrelated to religion. Under pertinent precedents of the United States Supreme Court, that neutrality made the rule valid as nondiscriminatory and consistent with preserving the constitutional right to exercise one's religion freely. Under similar reasoning, the rule also withstood the challenge brought under the FHA.

WEBSITE TERMS OF USE

The terms for using websites, often taking the form of legalese to which many users pay little attention, are more important than they are interesting to read. The terms restrict how the public can use a website to obtain information, purchase goods and services, or take part in web-based social networking. Largely because of the federal Computer Fraud and Abuse Act (CFAA), the terms of use can now be used offensively either by prosecutors charging individuals with wrongdoing emanating from a violation of the terms, or by website owners themselves seeking civil remedies for legal injuries to them from what amounts to a breach of contract.

The growing and evolving body of court decisions concerning terms of use and the CFAA should prompt owners of websites to adopt and regularly review the terms for using their sites, giving special attention to the following considerations:

- * Instead of using just any boilerplate legal language, the terms of use should be tailored to fit the particular risks posed to the business and users of the site;
- * The terms of use must be easily seen and understood to have their intended effect. This means that they should be conspicuous on the site and written so as to clearly indicate conduct that is and is not authorized. There may be no one fail-safe approach, but one court has said that there is adequate communication of the terms of use if the terms can be accessed from all pages on the site;
- * Website owners may want to make explicit the agreement to abide by the terms of use by including "clickwrap" or "browsewrap" agreements that make consent to the terms a condition of using the site. If the user clicks on "I accept," but then violates the terms of use, this essentially nails down the fact, which may be pivotal in later criminal or civil court cases, that the user lacked the necessary authorization for his actions. For example, in a recent criminal case in which a university student secured access to a university computer site and stole Social Security numbers and other confidential data, the prosecution was aided by the fact that the student had signed an "acceptable use" computer policy that prohibited the very actions which led to the criminal charges;
- * Putting the terms of use in place is one thing, but then monitoring compliance and notifying users of suspected or confirmed violations result in enhanced protection. In the case of the university student who was improperly gathering sensitive personal information, the university had on three occasions detected that the student's computer was performing unauthorized and suspicious functions, and had informed him of its discoveries. When the student nonetheless continued to scan and infiltrate computers without authorization, adding to his database of stolen information, his fate in the ensuing criminal case was sealed.

EMPLOYERS AND JOB REFERENCES

Whether an employer-employee relationship ends on good terms or with acrimony, a common final act--the employee's request for a reference for a new job--is increasingly leading to litigation.

From the former employer's standpoint, it can be a case of damned if you do and damned if you don't. A candid, negative response to the request can invite a suit by the former employee. A glowing recommendation that omits some serious shortcomings in the employee's performance, or that declines to say anything about the employee except perhaps dates of employment, could result in litigation brought by the new employer, who would have preferred to be warned about a subpar employee. The prevalence of such disputes only figures to increase in the current economic downturn.

The growing dilemma is such that some employers are telling their employees from the outset that they will get no job reference--good, bad, or indifferent--when they leave. Under such a policy, inquiring prospective employers would get only the employment equivalent of "name, rank, and serial number." Other employers are willing to give a reference, but only after they have in their files documents in which an employee consents to having prospective employers find out all there is to know, and waiving their right to sue over anything that is said in the reference.

The good news for businesses is that their exposure to liability to disgruntled former employees who requested references is constrained in most states by statute. These laws generally provide immunity to the givers of references, so long as their actions were not motivated by malice. Of course, former employees, perhaps hurting while in between jobs and inclined to blame former employers for their predicament, are quick to argue that a negative response to a reference request was malicious.

In one such case, a nurse sued her former supervisor for defamation when the supervisor responded to a request for a job reference by stating on a form, without elaboration, that the nurse had "unacceptable work practice habits." A court ruled that the statement came within a statutory privilege or immunity for former employers' communications to prospective employers concerning former employees, because it was information provided about a former employee's work performance at the request of both the former employee and a placement agency.

Although the nurse made the general argument that the immunity was lost because the statement about her was made with malice, she was unable to back up that contention with factual evidence of ill will or spitefulness directed toward her. She argued, to no avail, that if the former employer considered her work habits to be acceptable enough not to fire her, then it was reasonable to infer that the later negative inference must have been motivated by malice.

HARASSMENT POLICY VIOLATES FREE SPEECH

When a male graduate student pursuing a degree in military history was inclined to speak his mind in classroom discussions about women in combat and women in the military more generally, he felt inhibited by the university's broadly worded policy on sexual harassment.

In pertinent part, the policy stated that "all forms of sexual harassment are prohibited, including . . . expressive, visual, or physical conduct of a sexual or gender-motivated nature, when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work, educational performance, or status; or such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment." The student sued the university to prohibit the enforcement of the policy on the ground that it had a chilling effect on the exercise of his right to free speech.

A federal appeals court sided with the graduate student. The sexual harassment policy's prohibition of expressive conduct of a "gender-motivated nature" that had the purpose or effect of either unreasonably interfering with other individuals or creating an intimidating, hostile, or offensive environment was unconstitutionally overbroad under the First Amendment. It impermissibly swept within its reach speech that should not be subjected to restrictive regulation.

Regarding the "gender-motivated" characteristic of speech, the court wondered: "Whose gender must serve as the motivation, the speaker's or the listener's? And does it matter? Additionally, we must be aware that 'gender,' to some people, is a fluid concept. Even if we narrow the term 'gender-motivated' to 'because of one's sex,' we are far from certain that this limitation still does not encompass expression on a broad range of social issues."

The term "gender-motivated" also necessarily required an inquiry into the motivation of the speaker, so that the policy punished not only speech that actually caused disruption, but also speech that merely intended to do so. To protect core forms of speech, there should have been a requirement in the policy that the conduct at issue objectively and subjectively create a hostile environment. A school must show that, before prohibiting it, targeted speech is so severe or pervasive that it will actually cause material disruption, and the university's policy was fatally deficient for not having such a requirement.

It was important to the court's decision that the challenged harassment policy was that of a university, as opposed to an elementary school or a high school. It is well recognized that, in the words of United States Supreme Court decisions, "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,'" and "[t]he First Amendment guarantees wide freedom in matters of adult public

discourse."

Discussion by adult students in a college classroom should not be restricted, while certain speech which cannot be prohibited to adults may be prohibited to public elementary and high school students. This is particularly true when considering that public elementary and high school administrators have the unique responsibility to act in the place of parents, a disciplinary and protective role not shared by their counterparts in colleges and universities. Thus, in the case of the plaintiff graduate student, the court kept in mind that the university's administrators were granted less leeway in regulating student speech than are administrators responsible for younger and more vulnerable students.

ESTATE PLANNING: A GIFT OF DEBT

If you inherit property, of course you should be grateful and count your blessings. Still, consider the possibility that the gift may come with a big string attached--a debt linked to the property, such as is particularly common with real estate or a car. In that event, the question arises as to whether the debt must be satisfied from the particular asset or from the decedent's estate more generally. How this question is answered can cause a big swing in the respective gift amounts for beneficiaries of an estate.

Historically, the law presumed that the debt was *not* to be paid from the property that was connected to it. The reasoning was that a true gift should not come laden with such a burden. Over time, as taking on debt became commonplace, this thinking changed and statutes flipped the conventional assumption. Increasingly, these laws start from the premise that the property left to someone includes the debt on the property, unless the decedent in his or her will clearly indicated a different intent. That is where careful estate planning, with professional guidance, comes in.

It is best to leave no doubt for the ordinary lay reader of a will. A general directive in the will to pay all debts of the testator is too nebulous. Instead, if the intent is not to keep the asset joined to the debt, language something like this should be used in a will: "If [the specific asset] is subject to a mortgage, security interest, or other lien, I direct that my executor pay the debt from other property of my estate which is not given to a specific person or entity."

This scenario was played out recently in a case in which a farmer left to his (favored?) son three different farms, each of which was encumbered by debt. To his other son he left the residue of the estate. When the father died, the executor used part of the estate proceeds to pay off the loans to the farms, so that the first son would receive them debt-free. Not surprisingly, the second son, whose inheritance was thereby diminished, brought the matter to court.

The second son prevailed, forcing payment of the debts for the farms to come from the farms themselves. The father's will directed in a general way that debts were to be paid from the estate. However, under the relevant state statute, that was not a sufficiently explicit indication of intent to satisfy the debts on the farms from the residuary estate. In other words, the will had not clearly shown an intent that the first son was to receive the farms debt-free. As a result, the first son got the three farms, but he, not the second son, also got the responsibility for paying off the attached encumbrances, which totaled almost a quarter of a million dollars.