NORMAN, HANSON & DETROY, LLC

newsletter

Current developments in Maine law
Fall 2002
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Law Court restricts subrogation actions against tenants

Landlord's insurer may not sue tenant for fire damage

BY AARON BALTES

The U.S. District Court for the District of Maine recently certified this question to the Maine Law Court: "May a residential tenant be liable in subrogation to the insurer of a landlord for damages paid as a result of fire, absent an express agreement to the contrary in a written lease?" In *North River Insurance Co. v. Snyder*, 2002 ME 146, a majority of the Law Court answered in the negative. In so doing, the Maine Law Court adopted the "implied coinsured doctrine," now recognized by the majority of American states.

The case arose out of a fire at an apartment building. Denzil and Candice Snyder rented an apartment, pursuant to a written lease, at the Cortland Apartment Complex in South Portland in 1998. They also independently obtained a "homeowners" insurance policy for coverage of their personal property as well as $300,000 in liability protection. The apartment owner, Cortland Associates, was insured for fire and casualty losses by North River Insurance Company. The Snyders were not listed as a named insured in that contract.

In 1999, a fire at the apartment complex caused significant damage. North River Insurance asserted that the Snyders' babysitter was smoking on their deck and caused the fire by carelessly discarding a cigarette. Cortland recovered approximately $230,000 from their insurer, and North River then filed a subrogation action in federal court against the tenants, charging that the Snyders' negligence caused the fire. The Snyders moved for summary judgment, contending that the insurer's subrogation claim was barred because the Snyders were "co-insureds" under North River's policy provided to Cortland. The federal court recommended the legal question be certified to the Law Court for definitive resolution.

The Law Court first could not agree on whether the matter was proper for certification. Two dissenting justices found it inappropriate for the Court to answer the question where facts relevant to the cause of the fire remained in dispute. The majority concluded that certification was proper, because the facts relevant to deciding whether to adopt the doctrine of implied coinsurer were not disputed, and answering the question would determine the case in at least one alternative.

In addressing the merits of the certified question, the majority of the Court found that the underlying rationale for the implied coinsured doctrine was persuasive. There was no express provision in the written lease executed by Cortland and the Snyders by which the tenant could be held liable in a subrogation claim. In the typical landlord-tenant situation, both landlord and tenant have an insurable interest in the rented premises. However, the landlord usually purchases fire insurance to protect the real property, and is presumed to include the insurance premium in the monthly rent. Because the tenant is effectively paying the landlord's insurance premium, the tenant is considered an "implied coinsured" under the landlord's policy. The doctrine emerged as an equitable rule that reflected the realities of the rental market.

Previously, courts have also observed that the doctrine disfavors economic waste. In the absence of such a rule, there would be a strong incentive for every tenant to carry liability insurance in an amount necessary to compensate for the value of the building occupied by the tenant. In a multi-unit dwelling, there

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would be potentially many policies of insurance purchased for the same insurable interest, which would be wasteful.

The immediate impact of the Law Court's ruling in *Northland v. Snyder* will be to bar any subrogation by a landlord's insurer against a residential tenant, unless there is an explicit lease provision to the contrary. Savvy insurers will request or require their policyholders who are landlords to incorporate a provision in their written leases that the tenant is liable in subrogation for any damage to the apartment.

Attorney Tom Marjerison of NH&D represented Plaintiffs Denzil and Candice Snyder for Concord Group Insurance.

Briefs/Kudos

The Cumberland County Bar Association held its annual picnic, golf and tennis tournaments in August, and NH&D attorneys **BILL LACASSE, JOHN VIELLEUX**, and **LANCE WALKER** won the low gross prize in the golf Team Scramble. The CCBA, with a membership of over 500, was begun in 1929, and is one of the oldest **county** bar associations in the country. It supports a wide range of educational and social functions, with proceeds from its sports competitions benefiting the Cleaves Law Library in Portland.

DAVE VERY will be one of two attorneys leading a broad-ranging seminar on insurance coverage law in Maine. Topics will examine first and third party coverages, and include a look into environmental, fire, automobile, homeowners, and professional liability. The areas of bad faith, the Unfair Claims Practices Act and punitive damages will be examined, and the claim litigation process from case evaluation to trial will be covered. The National Business Institute insurance seminar will be held December 6, 2002 in Portland.

TED KIRCHNER, STEVE MORIARTY, BILL LACASSE, AARON BALTES, and staff member **BETH BRANSON** all competed in the Fifth Annual Beach to Beacon 10 kilometer race in early August. More recently, Steve finished the 25th running of the Bar Harbor Half Marathon, as well as the Maine Half Marathon in Portland.

DAN CUMMINGS has been invited by the Massachusetts Credit Union League to conduct all day seminars for all of the credit unions in three New England states. Dan will conduct the seminars on December 3, 4, and 5, on bankruptcy issues and on check collections.

Workers' Compensation Case Manager at NH&D**, JOANNE LEBLANC**, travelled to Paris in early October and met there her three sisters from Maryland. The quartet, arm in arm, for a week enjoyed the unforgettable historic and gourmet sites of Paris. The four sisters have reunited in Maine each year – this year, it was Paree.

ADRIAN KENDALL is continuing to represent German/American interests in Maine in a remarkable variety of ways. He is helping residents in the Town of Houlton to organize a reunion with former German prisoners of war who were held in a camp there during and after World War II. Adrian met recently with Rolf Schnelle, the new Consul General of the German Federal Republic to the New England States. Adrian currently represents two German states, Baden-Wuerttemberg and Rheinland-Pfalz, in the New England region. Fluent in German, Adrian previously worked for two years with the Bonn Bureau of the New York Times.

In his hometown of Cumberland, Maine, Adrian has been appointed vice-chairman of the Board of Adjustment and Appeals.

AARON BALTES participated in the challenging Maine State Triathalon held in Bethel in July.

At the recent Bench and Bar meeting held in Southern Maine, an issue dominating discussions was the court's requirement of the Alternative Dispute Resolution procedure in newly filed civil lawsuits. The mandate went into effect January 1 of this year. Chief Justice Leigh Saufley listened to comments and queries from attorneys about how the ADR regulations are working. She said that the Law Court does not yet have enough statistical evidence on the success of the required ADR procedure – it has been in effect for too short a time – but the Chief Justice has received anecdotal evidence both positive and negative. Bench and Bar meetings for Central and Northern Maine were held in August and September.

BILL LACASSE and his wife Lucy journeyed to the African continent this summer, and enjoyed a wonderful two weeks in Botswana, which is located just north of South Africa.

NORMAN, HANSON & DETROY, LLC
newsletter
is published quarterly to inform you of recent developments in the law, particularly Maine law, and to address current topics of discussion in your daily business. These articles should not be construed as legal advice for a specific case. If you wish a copy of a court decision or statute mentioned in this issue, please e-mail, write or telephone us.

Stephen W. Moriarty, Editor
Rachael Finne, Managing Editor
Beth Branson, Copy Editor

Norman, Hanson & DeTroy, LLC
P.O. Box 4600, Portland, ME 04112
Telephone (207) 774-7000
FAX (207) 775-0806
E-mail address: lstinitiallastname@nhdlaw.com
Website: www.nhdlaw.com

Workers' compensation – Law Court decisions

By Stephen W. Moriarty

Cost of lien recovery

Whenever a third party is liable in damages for death or disability following an occupational injury, §107 gives an employer a lien against the proceeds of the third party settlement or recovery. After proceeds are obtained, the employee must reimburse the employer for benefits paid to date "less the employer's proportionate share of the cost of collection, including reasonable attorney's fees." In addition to a lien for benefits paid to date, the Law Court has recognized that an employer has a continuing lien against net settlement proceeds until the employer's obligation to pay future benefits surpasses the net amount of the third party recovery. *Liberty Mutual Insurance Company v. Weeks*, 404 A.2d 1006 (Me. 1979).

Because an employer is statutorily responsible for its proportionate share of attorney's fees to obtain the third party recovery, the amount of reimbursement for benefits paid to date is typically 2/3 of the total paid, assuming a standard 1/3 contingent fee agreement. However, the full extent of an employer's obligation to pay costs of recovery for net or surplus settlement proceeds has never been clearly understood. In ***McKeeman v. Cianbro Corp.***, 2002 ME 144 (August 27, 2002), the Court resolved what it termed "an issue of first impression." In *McKeeman*, an employee died following a work-related accident and his widow and son began to receive death benefits pursuant to §215, under which benefits are payable for 500 weeks from the date of death. A civil action was brought against a third party and a settlement was reached for a sum substantially in excess of benefits paid to date. At the time of settlement, 272 weeks of entitlement remained under §215, and the net amount of the settlement was sufficient to relieve the employer from its future compensation obligation.

The employer intervened in the civil action and asserted its §107 lien. The widow was ordered to pay the employer an amount equal to 2/3 of the workers' compensation benefits paid to date. The judgment was silent as to the employer's responsibility for costs of collection of the surplus proceeds. The widow appealed and argued that the Superior Court had incorrectly calculated the employer's proportionate share of the costs of recovery.

Because §107 contains no indication of legislative intent with regard to paying fees to recover net proceeds, the Court examined in detail the full scope of the statutory lien. When net proceeds are recovered, an employer's obligation to pay workers' compensation benefits is, at a minimum, suspended until the credit can be taken. In some cases, as with the capped death benefit entitlement, the net proceeds may be large enough to eliminate any future obligation to pay compensation benefits entirely. In light of the benefit which falls to an employer, the Court reasoned that an employer "also has a duty to pay the corresponding proportionate share of attorney's fees for the present value of the entire benefit it received." Therefore, the Court held that an employer's proportionate share of fees must be calculated "with reference both to past benefits paid and future liability relieved."

However, the Court failed to elaborate on the concept of "proportionate" costs of recovery. The Court did not suggest that 1/3 of the total settlement should automatically be deemed to be an employer's proportionate share, and instead held that the Superior Court must arrive at the proper ratio between the total benefit amount received by the employer as against the total settlement received by the widow. The matter was remanded to the Superior Court to determine the employer's proportionate share of costs based on benefits paid to the date of settlement, and the value of future liability excused.

Severance pay

Section 221 provides that benefits may be coordinated to offset payments made by an employer "under a self-insurance plan, a wage continuation plan or a disability insurance policy." In ***Daley v. Spinnaker Industries, Inc.,*** 2002 ME 134 (August 15, 2002) an injured employee was terminated and thereafter received 22.5 weeks of severance pay. In litigation before the Board, the employee was awarded ongoing benefits for partial incapacity, but the employer was given an offset for the severance pay benefits. Although the Court had held in *Gendreau v. Tri-Community Recycling*, 1998 ME 19, 705 A.2d 1106 that sick leave benefits constituted a "wage continuation plan" for purposes of §221, in *Daley* the Court held that the same assumption could not be made with regard to a severance package.

Instead, the Court held that the burden was on the employer to show that the essential purpose and character of the severance benefits was for wage replacement during a period of incapacity following an occupational injury. The mere fact that the payments were characterized as "severance pay" was not enough to qualify the payments as a "wage continuation plan," and the Court held that the employer failed to establish that the severance payments were intended as wage replacement and were not paid for some other purpose. The

Board's decision was vacated, and the matter was remanded with instructions to re-calculate the amount of compensation owed without an offset for severance pay.

Varying rates partial

In *Daley* the employee had secured a new position following his termination and worked regular hours and earned a fixed amount of income per week. His earnings were less than pre-injury, and the Board ordered ongoing payment of benefits for partial at varying rates. The Court granted the employer's petition for appellate review.

The Court noted that under a varying rates order, partial benefits must be calculated on a week by week basis to reflect the differential between pre-injury and post-injury earnings. However, citing *Lagasse v. Hannaford Brothers*, 497 A.2d 1112 (Me. 1985), the Court held that varying rates should only be ordered where determining a fixed level of partial would be particularly inappropriate or difficult. The Court cautioned the Board that "varying rates awards should be the exception, not the rule, and...fixed rate benefits should be the standard practice in workers' compensation cases." Finding no basis in the evidence for varying rates, the matter was remanded to the Board with instructions to determine a fixed partial benefit award.

Pre-judgment interest

When benefits are paid "pursuant to an award," §205(6) requires payment of prejudgment interest at the rate of 10%. Chapter 8, §7 of the WCB Rules further requires payment of interest even where there is no express language directing the employer to pay. The Law Court recently consolidated two separate cases on appeal to define the circumstances under which interest payments must be made. In ***Jasch v. The Anchorage Inn,*** 2002 ME 106 (July 2, 2002), the first case involved benefits paid pursuant to a consent decree that was silent on the issue of prejudgment interest. In the second case, benefits were paid pursuant to an agreement reached at mediation that also did not address payment of interest. The Court ruled that interest must be paid in both instances.

Holding that "employees are entitled to prejudgment interest pursuant to §205(6) as a matter of law," the Court held that a consent decree is an "award" of benefits under that section. The Court also rejected an argument that the Board had exceeded its rule-making authority by requiring payment of interest without express language, and held that an agreement reached at mediation must also be considered an "award" for purposes of interest entitlement. Accordingly, prejudgment interest is due whenever benefits are paid pursuant to an order of the Board, a consent decree, or a mediation agreement.

It does not appear that the *Jasch* decision would entitle an employee to interest when benefits are paid pursuant to a MOP. The critical distinction is that a MOP reflects an employer's unilateral decision to pay benefits, and probably cannot be construed as a decision of a Hearing Officer or a mediator within the meaning of the WCB rules.

New Maine Laws /Court Changes

The close of the 120th Maine Legislature found few new laws in place for the year 2002 that were relevant to tort, insurance and business law. No significant legislation was passed affecting these areas. The Maine Supreme Judicial Court, however, made some changes to the rules of procedure that will affect the practice of law.

The appeal period for civil actions shortened

The Law Court amended the Rules of Appellate Procedure and adopted a uniform 21-day time limit for filing civil and criminal appeals. The previous appeal period for civil cases was 30 days. The rationale for the rule change was that it would be less confusing for litigants if the appeals period for civil and criminal cases were uniform, and it would be easier to calculate the appeal deadline if the time period were divisible by seven. The amendment took effect January 1, 2002.

Admission of business records made easier

Effective July 1, 2002, business records necessary in a court action do not have to be authenticated by testimony of the custodian of the records. Instead, a change to the Rules of Evidence allows the custodian to lay the proper foundation for business records by certifying before trial that the records were:

- made at or near the time of occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
- were kept in the course of the regularly conducted activity; and
- were made by the regularly conducted activity as a regular practice.

The rule change should make the presentation flow more smoothly and reduce the length of trials.

Maine/New Hampshire/Vermont Bar Admission Reciprocity?

A proposal to institute reciprocity among the Maine, New Hampshire and Vermont bar is finally coming to a head. The New Hampshire Supreme Court is considering adoption of a reciprocity rule admitting attorneys to practice from states that, in turn, admit New Hampshire attorneys to their bars. A hearing has been held, and public comment period on the proposal ended September 30th. The Vermont Supreme Court is considering a parallel proposal. The Maine Law Court, it is anticipated, will consider such a proposal in the next year.

Aaron Baltes

Two recent Law Court decisions

By David P. Very

Does property damages suit bar subsequent personal injury action?

In June of 1994, Zagonyi Tungate and William Gardner, Jr. were involved in an automobile accident. Gardner was insured by Allstate Insurance Company. Tungate rented a car while hers was in repair and submitted the bill for her rental car directly to Allstate. The insurer disputed the amount of the expenses and refused to pay. In November 1994, Tungate brought suit for the rental costs in small claims court, naming Allstate as defendant. Gardner was not included as a party in the rental costs action. Allstate appeared before the Court and defended the suit. After the hearing, Tungate was awarded a final judgment for her rental expenses plus costs.

In April 2000, Tungate brought a personal injury lawsuit in Superior Court against Gardner, Allstate's insured. Gardner filed a motion for summary judgment, arguing that because of the prior small claims judgment against Allstate, Tungate was precluded from bringing a personal injury suit against him. The Superior Court agreed with Allstate and granted the motion on the grounds of res judicata.

On appeal, in ***Tungate v. Gardner,*** 2002 ME 85 (May 29, 2002), the Law Court observed that res judicata is a judicial doctrine that ensures that the same matter is not litigated more than once. The doctrine may be invoked to bar relitigation of a dispute only if three elements are satisfied: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been, litigated in the first action.

It was clear, the Court stated, that from a reading of the two complaints, the named plaintiff was the same but the named defendants were different. However, a party includes all persons who, though not nominally parties, but being directly interested in the subject matter, have a right to make a defense, or to control the proceedings, and to appeal from the judgment of the court. The right also includes the right to adduce testimony and cross examine the witnesses offered by the other side. Thus, the Court stated that it would look beyond the parties of record to the real parties in interest.

The Court noted that while Tungate brought her small claims action directly against Allstate to recover rental expenses, the proper defendant to that suit was Gardner. The Court reiterated that it is proscribed practice in Maine to bring a direct action against an insurance company in a negligence case prior to final judgment against the insured. Allstate was not obligated by its policy to answer and defend the small claims suit, the Court stated, and could have sought its dismissal. The Court found that Allstate's decision not to do so did not transform Gardner into a party.

While it concluded that Gardner was not a party to the previous small claims suit, the Court observed that the first element of the res judicata analysis is still satisfied if Gardner was in privity with Allstate for purposes of the suit. Privity is created when two or more persons have a mutual or successive relationship to the same rights of property. The Court noted that when Gardner is sued for damages covered by the policy, Allstate is ultimately responsible for any judgment against him within the policy limits. In such situations, Allstate and Gardner share a mutuality of interest and, consequently, are in privity with each other.

The Court determined, however, that when Tungate brought her small claims suit directly against Allstate to recover damages, Gardner had no direct interest tied to Allstate's success. Because Gardner did not have a stake in the outcome of the small claims suit, the Court could not say that he was in privity with Allstate for purposes of that suit, as opposed to the subsequent personal injury suit. The Law Court therefore vacated the grant of summary judgment to Allstate on the grounds that Gardner failed to establish the first element needed to invoke the doctrine of res judicata. The Court did not reach the remaining two elements of the analysis.

Liability for diminution of value in addition to auto repair cost

In an issue near and dear to the heart of any adjuster who has handled an automobile damage claim, the Law Court, for the first time, addressed the question of coverage for diminution of value. Does a policy provision that limits the insurer's liability to costs of repairing the vehicle include payment for diminution in value? In the matter of ***Hall v. Acadia Insurance Co.,*** 2002 ME 110 (July 9, 2002), the Law Court concluded that the insurer is not liable for the vehicle's diminution in value in addition to the repair costs. The Acadia policy included coverage for damage caused by collision, with the following provision for limitation of liability:

A. Our limit of liability for loss will be the lesser of the:

1. Actual cash value of the stolen or damaged property; or

2. Amount necessary to repair or replace the property.

The Halls argued that Section A(2) of this provision was ambiguous because the "amount necessary to repair or replace" may reasonably be construed to include payment not only for physical repair work, but also for diminished value. Such a payment is a "repair" because it supplies that which is lost, namely the value of the car. They argued that the policy equates the amount necessary to

repair their car with the amount necessary to replace the car, and that the amount necessary to replace the property definitely refers to the value of the vehicle before repairs were necessary. An ordinary person would expect the automobile insurance to compensate for any loss of value resulting from an accident, the Halls concluded.

Acadia responded that the provision was unambiguous and that an ordinary insured would expect the insurance company to compensate for the cost of the repairs made to the vehicle or the cost of replacing the vehicle, but not both.

The Law Court acknowledged that jurisdictions that have considered this issue have split on the question of whether insurers, under policies that limit liability to the amount necessary to repair the vehicle, are also liable for losses associated with its diminished value. The Court found that the operative term at issue is "repair." Using Webster's Dictionary, the Law Court found that repair means "to restore to sound condition after damage or injury." The act of repairing an object, the Court stated, typically focuses upon restoring the object's function and purpose, and not upon returning the object to its earlier worth or value.

The Court found that the limits of Acadia's liability are expressed in a concrete and direct manner: pay the lesser of either the actual cash value of the vehicle at the time of the loss or the amount necessary to repair or replace the property. The Court held that the necessary costs of a repair is fairly understood to mean the amount that will be required to fix the car, not, in addition, the difference between the amounts a hypothetical willing and able buyer might pay to purchase the vehicle in its pre-accident condition versus its post-repair condition.

The Law Court concluded that the policy's use of the term "repair" is unambiguous, and that Acadia's liability for a loss under the policy extends only to the loss that can be repaired as that term is commonly understood. Because diminution in value is a loss that cannot be repaired, an ordinary person would reasonably conclude that a claim for diminished value is not covered by the policy.

Steps to insure business network security and customer policy

Headaches for business managers go hand in hand with an unintentional breach of customer privacy. The new federal laws about customer privacy create a stronger need to ensure confidentiality of records, particularly in consumer transactions. Keeping computer networks secure also goes hand in hand with more visible transactions, such as an insurance company sharing information with third parties regarding its insured. Here are a few suggestions for maintaining network security that businesses have found worthy.

Post warnings on the company computers to notify users that they are entering a proprietary network, that they need authorization to enter, and that they may be monitored while using it. Warnings may help deter network misuse by employees, and may also help disarm employee claims that they expected privacy in any conduct of their affairs using company property.

Maintain password security by cautioning employees that their passwords should not be written down or left in plain view anywhere. Just as leaving the key to your front door under the mat invites unwelcome intrusion and damage, an easy-to-find password could invite inestimable harm. For the forgetful employee, the password should not be left on her or his voicemail, unless it is secure. Passwords allowing access to sensitive information should be changed quarterly. Encourage employees to choose passwords that use a combination of letters and numbers.

Stay one step ahead by deleting or changing old passwords as soon as an employee leaves the company. By taking prompt action, unauthorized entry to your network can be avoided, along with potential financial loss or damage to the company.

Keep a regular inventory of computer equipment, checking the modems and removing any unauthorized connections. Unauthorized modems linked to the company network can allow users to bypass security measures such as firewall technology, and present an unnecessary risk.

Do backups for important data at least once a week. In case of security breaches or unexpected technical happenings, backups will prevent loss of valuable information and employee time.

Keep up with security education. Employees should be trained regularly on security issues and company policies. Remind them never to give out sensitive information on e-mail or over the telephone. Network users should be trained to recognize suspicious activity on the system and report it immediately.

Adrian P. Kendall

The expanding defense of waiver of subrogation

By James D. Poliquin

The question of waiver of subrogation arises when an insurer pays a property loss and then seeks recovery from an allegedly responsible party. Is the insurer allowed to subrogate against that responsible party? In many situations that party has some relationship to the insured covered by the policy from the carrier responding to the loss.

Express waivers of subrogation have appeared in contracts for decades. The waivers work together with insurance policy provisions which allocate responsibility among the parties to contract to purchase one or another type of insurance. Waiver of subrogation was an overlooked defense even in the days when its application required an express contractual waiver. Due to the courts' recognition of implied co-insured status and implied waivers of subrogation, the availability of this defense has grown exponentially in recent years. The August 27, 2002 decision in ***North River Insurance Co. v. Snyder,*** 2002 ME 146, is the most recent example.

The specifics of the relationship between the policyholder and the alleged responsible party is the key to evaluating the application of the waiver of subrogation defense. Some cases are clear cut. For example, a contract between an owner and a construction contractor may call for the owner to buy builders risk insurance, and the contract expressly waives subrogation.

The express scope of the waiver may vary from contract to contract, but at a minimum usually includes the property that is the subject of the contract. Waiver of subrogation in this instance is simply a matter of straightforward contract construction, as illustrated in *Willis Realty Associates v. Cimino Construction*, 623 A.2d 1287 (Me. 1993).

Another category of cases involves contracts that do not mention waiver of subrogation at all, but do contain provisions requiring one of the parties to purchase insurance. The Law Court in *Acadia Insurance Co. v. Buck Construction Co.*, 2000 ME 154, 756 A.2d 515, held that a contract provision requiring one party to buy property insurance created an implied waiver of subrogation which prevented the insurer from seeking reimbursement from the contracting party responsible for the loss. The Court reasoned that it makes no sense to interpret an insurance purchase requirement in a contract in a way that does not give some benefit to the other contracting parties. What would be the point in putting such a provision in the contract if the insurance was not also beneficial to the party who was not obligated to buy it? In *Buck Construction*, the Court made clear that waivers of subrogation are favored because they prevent a waste of resources such as the purchase of multiple insurance policies. Such waivers also minimize litigation.

In *North River Ins. Co. v. Snyder*, the Law Court took the analysis a step further, holding that a landlord's property insurer could not subrogate against a residential tenant without an express agreement to the contrary in the written lease. The *Snyder* case was not controlled by *Buck Construction* because the lease in Snyder did not require the landlord to purchase property insurance on the entire structure. In short, the implied waiver of subrogation did not spring from a contractual requirement to buy insurance, but from the relationship of the parties standing alone. If the landlord had not purchased insurance, nothing would have prevented the landlord from recovering from the tenant the damages the tenant caused. The landlord's voluntary purchase of insurance, however, created a status of implied co-insured with the tenant, which led to an implied waiver of subrogation.

Interestingly, the Court in *Snyder* held that the implied waiver of subrogation applies only if the lease agreement between tenant and landlord expressly states that the tenant is liable in subrogation for damage to the apartment complex. Significantly, the lease in the Snyder case provided that if the landlord suffers any loss because of anything done by the

NH&D 2002

The Fall Forum and client party

November 15

Portland Regency Hotel
20 Milk Street

The sixth annual Fall Forum for the clients of Norman, Hanson & DeTroy will be held Friday, November 15 at the Portland Regency Hotel.

The Forum will be followed by the firm's annual client party at the hotel, and we cordially invite all interested clients to join us. Please look in the mail for your invitation containing topic announcements. Meantime, please mark your calendars.

We hope to see you there!

The Fall Forum
1:30 – 4:00 PM
Client party
4:00 – 7:00 PM

The Portland Regency Hotel
20 Milk Street

tenant, the "Tenant must promptly provide full reimbursement to the Landlord." Apparently the majority of justices found this not to be a sufficiently explicit statement to override the implied waiver of subrogation. Two dissenting justices found this language unambiguous on the question of the tenant's responsibility for damages.

Although several courts in other jurisdictions have applied the principle of implied waiver to commercial leases, the Law Court specifically reserved ruling on whether the ruling in *Snyder* will apply in the commercial context.

In evaluating a claim with a potential waiver of subrogation issue, consider these general principles:

- An express provision in the contract waiving subrogation is enforceable, and will be interpreted liberally in favor of the waiver;
- A contract provision obligating one party to procure property insurance establishes an implied waiver of subrogation for the benefit of the other party;
- The landlord's carrier cannot subrogate against residential tenants unless the lease expressly provides for a right of subrogation;
- The ruling in *Snyder* creates an implied waiver of subrogation only if insurance in fact exists and the carrier responds to a loss;
- If a party were obligated to purchase insurance and failed to do so, that party cannot bring a claim against the other party to the extent there would have been a waiver of subrogation had the required insurance been purchased.

In leases of an entire premise to a single tenant rather than multiple tenants, it remains unclear to what extent the implied waiver of subrogation applies.

The lesson here is that defense of any claim that is in whole or in part a subrogation matter should include a careful assessment of the defense of waiver of subrogation. If no subrogated insurer is involved because the claimant neglected to obtain the coverage that the contract required, that breach may be a defense to the claim.

Norman, Hanson & DeTroy, LLC
415 Congress Street
P.O. Box 4600
Portland, Maine 04112

Return service requested

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