TRANSACTIONS AND TRIALS

BERMAN AND SABLE NEWSLETTER

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Not to worry! Contrary to the masthead on this issue, we at Berman and Sable are Y2K compliant. Are you? We purposely changed the masthead just to get the reader's attention. We're sure you didn't even notice; much like the whole Y2K "ho-hum."

Undoubtedly, the most frequently asked question has been "Do you remember wondering where you'd be on New Year's Eve in the year 2000?" The answer is now known. Statistically, the most common answer was "At Home!"

Y2K is Here!

A review of the "Y2K Act" and how it will change the focus of litigation.

By Alena C. Gfeller

Are you aware that in October, 1999 the "Y2K Act" became a law? Well, it was passed by Congress, signed into law by the President and is codified at 15 U. S.C. §6601, *et seq.*, so I guess we can believe it. This article is being written not just to inform you of the existence of the Y2K Act, but to also inform our readers of how this Act is likely to affect you and your business with respect to litigation. Specifically, this article will focus on §6603 of the Act which relates to foreclosing mortgages and §6606 which is the "prelitigation notice" section of the Act.

Y2K legislation was enacted to address the issue of the litigation which is expected to arise out of Year 2000 (i.e. Y2K) computer failures. Moreover, just to make things interesting, the Act applies to any "Y2K action" brought after January 1, 1999.[1] The ultimate result of the Act is that anyone who experiences a Y2K problem/failure, will be required to follow the express provisions of the Act to pursue legal recourse.

One of the most interesting features of the Y2K Act relates to foreclosing mortgages! Yes, you read correctly, foreclosures are going to be affected by the "millennium bug." Specifically, the issue of foreclosing residential mortgages appears in §6603(h) of the Act. Section 6603(h), which is interestingly entitled "Consumer Protection from Y2K Failure", was drafted to address the issue of the inability of mortgage lenders/servicers to properly process mortgage payments in light of a Y2K failure. Basically, in light of this provision of the Y2K Act the ability to foreclose on a residential mortgage might be subject to an evidentiary issue requiring proof that all payments have been accurately and timely processed and are not the subject of a Y2K computer failure. This foreclosure provision restricts the ability, for a limited time, to commence a foreclosure on a residential mortgage if, in fact, a Y2K failure has occurred to equipment which processes mortgage payments.

Another interesting feature of the Y2K Act is the very specific notice provisions which must be complied with prior to commencing an action based upon a Y2K failure. Section 6606 of the Act applies solely to "prelitigation notice" and §6606(a) requires a prospective plaintiff to send written notice by certified mail to each prospective defendant prior to the initiation of any legal action.

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The §6606(a) notice must contain a detailed and factual recitation of the Y2K failure issue including: the alleged defect; the harm or loss suffered; how the problem should be remedied; the basis for such remedy, and the name, title, address and telephone number *[What? The Act doesn't require an e-mail address?]* of a person with authority to negotiate a settlement. This §6606(a) notice is a jurisdictional prerequisite to commencing litigation. Without this notice, your Y2K Action will be subject to a Motion to Dismiss or a Motion for Stay pending exhaustion of your Y2K Act requirements.

Moreover, if you or your company is the unlucky recipient of a Y2K Act §6606(a) notice, there is a mandatory obligation to respond. One cannot simply admit or deny the allegations. Instead, §6606(c) sets forth the details required in the response and limits the response time to 30 days. The §6606(c) response requires a return written statement detailing receipt of the §6606(a) notice and a description of the actions taken or to be taken, if any, to address the problem. In addition, the §6606(c) response also requires a statement as to whether there is a willingness to engage in alternative dispute resolution (ADR) to resolve the Y2K issues.

The foreclosure provision and notice requirements are just a few of the issues which "jumped" off the newly printed pages of the Act. As of yet, there have been no major Court decisions interpreting the Y2K Act, however, like every other litigation issue - give it time.

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[1] The term "Y2K Action" refers, in short, to any civil action commenced in any Federal or State court which relates to an actual or potential Y2K failure. *See*, 15 U.S.C. §6602(1)(A).

Answers to Last Issues Definitions

Return Date: The date which starts the running of appearance and pleading deadlines in a lawsuit.

Law Day: The date by which a lienholder on real estate must redeem the property in foreclosure.

Res Ipsa Loquiter; A term in tort litigation. (Literally, "The thing speaks for itself.")

De Minimis Non Curat Lex: Insignificant in the law. (Literally, "The law does not concern itself with trifles.")

Escheat: A legal forfeiture, usually to the government.

Estoppel: A claim or defense in litigation usually brought about by a reasonable expectation or reliance.

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FIVE STEPS FOR PROTECTING YOUR INSURANCE COVERAGE

By Robert J. Caffrey

Our clients spend significant sums every year to protect themselves from potential lawsuits by buying insurance. Appropriate insurance coverage provides protection for awards and settlements, as well as litigation costs incurred in defending a lawsuit. Given the significant economic exposure created by litigation, the loss or denial of insurance coverage can be catastrophic.

Despite the importance of insurance coverage, many clients lack any formal process for dealing with losses that might trigger coverage. The following are five simple steps that should be followed when, and if, a potential claim arises. They are not meant to be all-inclusive. They are, however, a good starting point for developing procedures to protect this valuable asset.

1. Notify your carriers of ANY notice of ANY claim promptly – Some people believe that it is only upon the receipt of suit papers that the obligation to notify an insurance carrier arises. Unfortunately, this misunderstanding can create significant coverage problems. Most insurance policies require insureds to notify carriers when they first have "knowledge" of an "occurrence" or "claim".

Generally, these terms are defined in the policy. They impose broad obligations and are not limited exclusively to the service of a complaint on the insured. A letter from either an attorney or a potential claimant, is usually sufficient to trigger the notice requirement.

Failure to provide timely notice can prejudice the insured's rights under the policy. In some cases the insured will have to prove that the late notice did not compromise the insurer's ability to defend the claim. If another state's law governs the interpretation of the insurance contract, however (such as New York), the failure to provide timely notice will serve to absolutely eliminate insurance coverage. Thus, the consequences of untimely notice can be severe. The simple rule of thumb is, when in doubt, send it to the carrier!

2. Notify all your carriers – Insurance policy interpretation is more of an art form than a science. Carriers spend hundreds of thousands of dollars each year to have attorneys analyze coverage issues and decide whether or not claims presented by insureds are covered or require a defense. If this level of expertise is required by the insurance carrier, it is unwise for an insured to limit notification to a single insurance carrier under the assumption that this carrier's policy is the only policy where coverage is triggered by the claim.

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The simple fact is that a single claim or lawsuit can trigger a number of different insurance policies. This ultimately will depend upon the language contained in the policies, grants of coverage, exclusions and endorsements.

A claim can also trigger the policies of different insurers. In some cases, a claim can even trigger policies which were issued in different years by the same insurer. Claims arising in one year, might trigger coverage under a policy that was issued one, two or three years prior.

Never assume that a claim is not covered. Always err on the side of notifying all your carriers.

3. "If it isn't written down, it didn't happen" – Institutions such as insurance companies operate on paper. Given this fact, verbal communication with your carrier is often not enough.

Phone messages are lost. People forget (or selectively remember) conversations. The only way to protect yourself against the vagaries of dealing with a large bureaucracy is to write everything down. You need to create a paper trail proving that you complied with your obligations under the policy.

Reduce all communications to writing. Follow up phone conversations with a letter. Send letters by certified or registered mail so you have proof of receipt.

Keep copies of all your letters. Most importantly, follow up on letters if you haven't received a response. It is often a good idea to set a self-executing deadline in the letter. Advise the individual you are dealing with that if you do not hear from that person within a certain number of days, you will contact him or her by phone.

Although this may sound burdensome, it also is a good idea to follow up phone conversations with a letter. This guarantees that the conversation is memorialized, and that a record exists supporting your version of the conversation.

Most insurance carriers have programs that automatically set claims handling into motion when they receive certain "notice" documents. If those documents are not received, however, the process won't begin. Protect yourself by leaving nothing to chance.

4. Don't accept an initial denial of coverage or reservation of rights without consulting an attorney – The individual initially reviewing your claim may not have significant insurance coverage experience. The legal significance of the language contained in insurance policies is often subject to more than one meaning.

As a general rule, if the allegations of a complaint could even "possibly" trigger coverage, the insurer is obligated to defend. The company's obligations are very broad! Under Connecticut law, if an insurance company fails to defend and it is determined that there is coverage, the company waives its ability to challenge coverage. The carrier has to pay uncovered claims, as well as covered ones.

Simply put, don't take "no" for an answer. A lawsuit is one of the most significant events in your life or the life of your business. The person initially reviewing your claim may be a freshly minted claims examiner who graduated from college three or four years ago. If you have any doubts about coverage, get legal assistance immediately.

If you have some question about coverage, get your lawyer involved before you send your notice to the carrier.

5. Be proactive – The old adage that "an ounce of prevention is worth a pound of cure" is sound advice in the area of insurance coverage. Many businesses paying thousands of dollars a year in policy premiums don't review their insurance coverages annually. One of the best ways to prevent uninsured losses is to review all your insurance policies every year. That way, you have some idea of what the policies potentially do, and do not, cover.

In a number of situations, you also may be added as an insured on someone else's policy. A typical example is the addition of a landlord as an additional insured under the tenant's policy, or a general contractor is added as an additional insured on a subcontractor's primary policy.

Most commercial general liability policies also have provisions which require the insurer to provide indemnity payments (both litigation expenses and any settlement or award) if the insured executed an indemnification agreement with another party. Again, simply because you are not the named insured does not mean that there is not insurance coverage available to you.

These additional policies not only create additional coverage, but also issues of which insurance policy must pay first. It is important to consider all of the insurance which might provide coverage, not just those policies purchased by you. An annual review gives you a clearer idea of what coverages are available and which policies may have to respond.

Finally, the time to find out that you need to purchase more insurance, or adjust the coverage you have, is before a claim arises. Annual insurance coverage analysis is like preventive medicine. The cure rate is much higher when you catch something early. Catching something late can prove deadly.

BERMAN AND SABLE NEWS!!!

Welcome to the Firm: David Levesque, Esq. joined our litigation department in Hartford and Andrew Sherriff, Jr., Esq. joined our transaction group in New Haven. Now, GET TO WORK!

Congratulations: Jim Oliver and Sylvia Ho welcomed a bouncing baby girl, Grace Anne, on December 28, 1999.

ONE "BIG MAC" AND A FRANCHISE TO GO!

By James W. Oliver

When America was a young republic it was said that a squirrel could jump from treetop to treetop from the Atlantic Ocean to the Mississippi River without touching the ground. Today, Joe-six-pack can drive from the Atlantic coast to the Pacific coast on a fine diet of fast food never leaving his car – bathroom breaks excepted. Thank you – McDonalds, Burger King and Wendy's.

This bit of progress was made possible by car crazy Americans and franchise laws. Why should you care about franchise laws? First, creating a franchise is as easy as falling in love with a '57 Chevy. Second, franchises aren't just about hamburgers anymore. Recently, the Supreme Court of Connecticut clarified the meaning and effect of Connecticut's Franchise Act (Conn. Gen. Stat. § 42-113e, et. seq.) in a decision known as Hartford Electric Supply Company v. Allen-Bradley Company, Inc., 250 Conn. 334 (1999). It is fair to say that the Court's ruling gives the franchise statute a liberal and expansive reading.

PURPOSE OF THE STATUTE - Connecticut's franchise act is remedial in nature and is designed to prevent franchisors from unfairly exerting economic leverage over franchisees. By way of example, if you invested your hard-earned money in a "Wimpy Burger franchise" and spent years building up the business, the franchisor is prohibited from terminating the franchise agreement for **no cause** and then reselling your territory to another franchisee. Franchisees are typically dependent upon the franchisor for merchandise, marketing and information and lack equal bargaining power. Connecticut's franchise act grants basic protections to franchisees.

WHAT QUALIFIES AS A FRANCHISE? Any oral or written agreement or arrangement in which (1) a franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor and (2) the operation of the franchisee's' business pursuant to such plan or system is substantially associated with the franchisor's trademark or logo. In short, it is not just about hamburgers anymore. The sale of any goods or service could, under the right circumstances, qualify as a franchise.

HOW TO CREATE A FRANCHISE? No magic words such as "franchise" are needed. No written contract is required. Instead, the Court will examine the relationship between the parties and the established course of dealing between the parties.

In particular, the Court will examine the level of control asserted by the alleged franchisor over the franchisee. Did the franchisor have a contractual right to substantially prescribe the franchisee's marketing plan? Did the franchisor possess some power to influence pricing of the products or services? Did the franchisor possess some control over hiring, retention or training of the franchisee's personnel? Did the franchisor possess some control over matters such as inventory, or have the ability to audit or review the franchisee's books? These are just some of the factors the Court will examine. There is no bright line test or standard set of factors relied upon by the Court. Each case must be evaluated on its unique fact pattern.

DISTRIBUTOR OR FRANCHISEE? Beware of what you wish for – it may come true. The more power, control or influence that a company seeks to assert over its distributors the more likely that the relationship will be deemed a franchise relationship. In the Hartford Electric decision, the defendant sought to terminate a longstanding distributorship with Hartford Electric. The trial court and later the Connecticut Supreme Court ruled that the defendant had exercised so much control over Hartford Electric that the franchise act was triggered. The defendant was barred from termination of the relationship and was found to have violated the Connecticut Unfair Trade Practices Act.

CONCLUSION – Be aware, be very aware, of what may or may not constitute a franchise under this new interpretation of the Connecticut Franchise Act. If it looks and smells like a Big Mac, the court is likely to