The Fine Print

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"ALWAYS READ THE FINE PRINT"

WHAT HAPPENS IF YOUR INSURANCE COMPANY SAYS NO?

By LEE S. HARRIS

Over the past 24 years I have counseled clients on their options when insurance companies say no. Insurance is a major expense item for many clients, especially in connection with real estate portfolios and estate plans. The shock of being turned down by the carrier after having paid significant insurance premiums is often quite painful. This letter is part of a continuing dialogue with clients and friends of G3MH on their rights under different types of insurance policies.

Most property policies are standard form policies drafted by an industry group. Property insurance policies come in two basic flavors, "specified peril", where each peril must be listed to be covered, and "all risk", which covers "all risks" with many "exclusions". The typical broad all risk homeowners policy form is called the HO3. In addition to the HO3 form, several of the largest companies have their own proprietary policy form. Although it may appear from reading the covering language that most losses are covered, when you read the exclusions it may appear that there is no coverage for any loss! The California Supreme Court made this very observation in *State Farm Fire and Casualty v. Von Der Lieth*, 2 Cal.Rptr.2d 183(1991).

The most common reason that property insurers refuse to pay a loss is due to a claim that an exclusion applies. Just because the insurance company says there is an applicable exclusion doesn't make it so. A factual dispute may well exist about what caused the loss. When there are two causes to a loss and one is covered and the other is not, courts will look to the most important cause, the so called "moving efficient proximate cause" of the loss to determine whether or not there is coverage. An example of this type of dispute would be when a mudslide occurs the winter after a major fire has denuded the hillside. Was the loss due to mudslide (excluded under the earth movement exclusion) or was it due to the fire that caused the vegetation to be removed and the soil to become vulnerable? Another typical situation is where a foundation sinks and cracks the building. Is this settlement and earth movement (excluded losses) or is it due to a burst drainage or other pipe with resultant collapse (with coverage applying)? It is important to make sure the investigation uncovers the true cause or causes to the loss. It is just as important to carefully examine the claimed exclusion. Carriers frequently misapply (to their benefit) exclusions.

Insurance carriers don't always reject a loss immediately or in its entirety. Frequently the process is delayed by incessant and repeated requests for additional information. Many times property owners will attempt to work with the carrier until they finally throw up their hands in frustration. For every owner that seeks a lawyer out of such frustration, many more merely give up and take whatever they are given. Delay by an owner making a decision on what to do after a claim is rejected works to the advantage of the insurance company. Many property insurance policies contain a special "statute of limitation" deadline for filing suit that shortens the normal four-year period that applies to breach of written contract to as little as one year. Although the special shortened period may be extended if the carrier is still considering the claim, to be on the safe side, it is best to get a written agreement "tolling" the statute of limitations if the time period is close to expiring.

Significant property losses are stressful and disorienting. Dealing with a property insurance rejection at the same time can overload anyone. Calling someone who is independent,

experienced and objective in this time of difficulty helps level the playing field. Adequate insurance combined with knowledge of your rights are important tools in putting the pieces back together.

About the Author

Lee S. Harris merged his practice with Goldstein, Gellman, Melbostad, Gibson & Harris, LLP, in 1996, from Cartwright, Bokelman, Borowsky, Moore, Harris, Alexander & Gruen, Inc., where he served as managing partner. Mr. Harris received his undergraduate degree with honors from Harvard and his law degree from the University of San Francisco in 1977, where he received the American Jurisprudence Award for Evidence. Mr. Harris has been trial counsel in a wide variety of civil cases. He has authored articles and lectured on insurance coverage, jury selection, personal injury, property damage and business litigation. He has served as a member of the faculty of the Stanford Law School Trial Advocacy Skills Program, Hastings College of Advocacy and the University of San Francisco School of Law Intensive Advocacy Program. He is a past president of the University of San Francisco School of Law Alumni Association, and served as chair of the Association of Trial Lawyers of America, Insurance Section. He is also a past president of the City of Alameda Planning Board. Mr. Harris is available at 415-621-5600 ext. 236, or via email at LHarris@g3mh.com, to advise you with respect to problems you are having with an insurance claim or company.

WHAT'S GOING ON WITH CONDOS?

By DAVID R. GELLMAN

Condominium conversion in San Francisco is a thorny proposition. Subdivision of a multi-unit building into individually titled condominium units has long been a desirable goal for many San Francisco residential property owners, particularly since the passage of a state law ("Costa-Hawkins") exempting most single-family residences (including most condos) from local rent control limits on annual rent increases. Owners typically experience a significant boost in the market value of their property upon condominium conversion. This is largely a result of supply and demand; for more than a decade the City has limited the number of condo conversions to a maximum of 200 units per year. Annual lotteries are held to determine which buildings qualify for conversion, and while all entries eventually win (odds to win have historically been less than 10% for the first entry, increasing to 100% by the fourth entry), eligibility requirements are strict. Only certain owner-occupied buildings may convert, tenants in possession during conversion acquire special rights, and conversions of buildings of more than six residential units are prohibited.

The defeat of last year's Proposition N, which would have severely curtailed, or even eliminated condo conversions, was promptly followed by the passage by the San Francisco Board of Supervisors of the so-called "McGoldrick" ordinance, over Mayor Brown's veto. The new law changed many rules for condo conversion, creating new possibilities for some properties, but raising significant obstacles for most others. In an effort to bolster tenant rights, the new law requires *renter participation* in all condo conversions of 3-6 unit buildings. Under "McGoldrick," 3-6 unit buildings with uncooperative tenants, or with no tenants at all, are permanently banned from condo conversion.

Portions of the new law were immediately challenged by a suit brought by The Small Property Owners of San Francisco and others. While it may be several months before the courts give us a decision, the immediate effect of the suit is to suspend some of the provisions of the "McGoldrick" law, including certain lottery bypass and shortcut programs for 3-6 unit buildings

which were scheduled to take effect next February. The City is currently selling lottery tickets for the 2002 lottery (January 18, 2002 is the last day to purchase a ticket; cost is $150/building), 3-4 unit buildings in which at least ***one*** unit has been owner-occupied for three years, and 5-6 unit buildings in which at least ***three*** units have been owner-occupied for three years, are eligible to enter the 2002 lottery. However, the question of what tenant participation will be required for various sized buildings remains, for now, unanswered.

What has already changed are the rules for 2 unit buildings. Formerly, only those 2 unit buildings in which ***both*** units had been owner-occupied for one year were eligible for condo conversion, bypassing the lottery entirely. Now, 2 unit buildings in which only ***one*** unit has been owner-occupied for one year are immediately eligible to start the condo conversion process. Further, tenants residing in a 2 unit building during the conversion do *not* acquire the special rights granted to tenants occupying 3-6 unit properties undergoing condo conversion.

What's ahead? Whatever the final court decision on "McGoldrick," we predict continued efforts to curtail condominium conversion in San Francisco. If you own and occupy a 2-6 unit property eligible under the current rules, now would be an excellent time to consider a condo conversion, particularly for 2 unit buildings which bypass the annual lottery. Further information about condo conversion is available on our web site at www.g3mh.com, or from our office by fax or mail. Please feel free to call to discuss the costs and benefits of condo conversion in your particular situation.

About the Author

David R. Gellman began his San Francisco law practice as a sole practitioner in 1982. Mr. Gellman holds a B.A. in economics, anthropology and psychology from Northwestern University (1975), and obtained his law degree from Boston University Law School in 1978. He is a member of the Bars of the states of Wisconsin and California, and is admitted to practice before the United States District Court, Northern District. Mr. Gellman focuses on transactional matters such as condominium conversion, commercial leasing, tenancies-in-common, business formation and operation, real property transactions, like-kind exchanges and estate planning. He also supervises the firm's landlord/tenant litigation and rent control practice. Mr. Gellman is available at 415-621-5600 ext. 229, or via email at DGellman@g3mh.com, to discuss your real estate and estate planning concerns.

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