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## Insurance Coverage Issues Explored

*Almost every business and individual buys insurance coverage. When it works effectively, for the payment of a relatively small premium, a large company promises to pay any damages awarded or incurred, as well as litigation costs, in the event of certain specific risks occurring.*

Often, in business arrangements, one party obtains the promise of another to provide its insurance coverage. For example, landlords often require tenants to provide liability insurance for accidents arising from the operation of the business conducted by the tenant on the leased premises.

However, if either individuals or businesses are not extremely diligent about the nature of the coverage that they are either obtaining directly or relying on others to obtain, they can find that, when damages are suffered, there is, no coverage for the loss and they may find themselves in substantial economic difficulty by reason of the need to pay for such losses out of pocket.

First, it is important to clearly discuss the nature of the losses which are or are not covered with the insurance broker. A general conversation is not adequate and you should require your insurance agent to write you a letter explaining the exact scope of the coverages provided. Recently, we have been working with a landlord whose tenant did not obtain the coverage that the landlord thought was in place, the policy excluded certain activities in connection with the operation of the tenant's business. A loss occurred from the excluded activity and now the landlord is being sued because the tenant is not financially strong enough to pay the damages. Under the law, a landlord has a non-delegable duty to maintain a safe place for its business invitees and those of its tenants. Therefore, in the absence of insurance, despite the fact that the landlord did not engage in the operational activities, it is likely that the landlord will be held financially responsible for the loss.



In another case we are handling, a homeowner had obtained a standard homeowner's insurance liability policy, but the manner in which the home has been damaged falls within certain specific exclusions in the policy. Therefore, despite being labeled an "all risk" policy, there is only a small likelihood that coverage will be afforded. As a general matter, once an insurer makes an initial showing that the event falls within the terms of the exclusion, the burden shifts to the homeowner to prove an exception to the exclusion.

Another aspect of insurance coverage that requires a high level of diligence is the issue of timely reporting an occurrence to the insurance company. Every cause of action or claim must be brought to court within a limited period of time. In general, insurance contracts reduce the amount of time that would otherwise be applicable.

Even if the statutory time periods are imposed, often conditions exist which are not known to the homeowner or business owner and only become evident in future years. Insurance companies often then argue that the claim arose either when the negligence occurred (continued on page 2)

## NEWS OF THE FIRM

*The GW&S family is growing!! In November Lianne Pinchuk and her husband Ted welcomed their second daughter - Rebecca Rose - into the world. After some months of leave Lianne is back at the firm. In late January Beth Carey and her husband Eric welcomed their first child (some 6 weeks earlier than planned!). Liam Thomas is growing quickly and keeping her parents quite busy. Beth plans to return from maternity leave in July. ■*

*You will hear a new voice the next time you call our office. Jenna Reynolds is our new receptionist and is assisting the firm with many other tasks. She is a recent transplant from Georgia and is enjoying her introduction to the many GWS clients whom she is meeting. Lacey Barrett has been promoted to legal assistant to Jed and David. ■*

### **Our community service efforts continue to grow.**

*The firm gathered as a whole at the Northeast Association of the Blinds Gala honoring one of our clients, Frank Crisafulli, on April 8, 2011, and we served as a sponsor for that organization's fundraising drive conducted as part of the Gala. ■*

*We will, for the second time as a firm, participate in the Run/Walk Against Domestic Violence at the end of April, and we are also supporting efforts in a "Walk for Water" event and golf tournaments for the Regional Food Bank and Rotary International. ■*



## Insurance Coverage *(continued)*

or the hidden damage to the premises was first physically present. The insurance company then argues that even though the insured did not know about the event or the condition, the time period to sue has passed even before the discovery of the problem. Courts are split on whether or not to apply a “discovery” rule with respect to insurance coverage, and the answer often depends on the state, the nature of the problem, and whether or not an insured homeowner or business owner could reasonably have discovered the problem at an earlier time.

The lesson here is to not make assumptions about the existence of coverage or the non-existence of an “occurrence” triggering the time within which a claim must be made under the policy. Insist on seeing and having explained any policy of insurance purchased directly or indirectly so that you will know the areas of coverage and the areas of exclusion. Insist that others who are obtaining insurance for you provide not merely a certificate of insurance but also full copies of policies and explanations of coverage that they receive. Finally, inspect and re-inspect properties and, if there is any problem, fully investigate to make sure that it is not a covered event which, while minor at a particular point in time, could grow to become a significant problem for which coverage will be sought but, if not sought immediately, will be deemed to be untimely. ■

## The 2010 Tax Relief Act

*There were many changes to the estate and gift tax provisions of the tax law which were part of the recently enacted 2010 Tax Relief Act.*

As you may recall, because of Congressional inaction the estate tax had expired for 2010 but new income tax basis rules became effective which meant that some beneficiaries could have faced higher income taxes. Also, under the prior law, estate and other transfer taxes were scheduled to rise substantially in 2011. The 2010 Tax Relief Act provides some temporary relief. It reduces estate, gift and generation-skipping transfer (GST) taxes- but only for 2011 and 2012.

It also gives the representatives of estates of decedents who died in 2010 a choice to be taxed under the 2010 rules or the new temporary rules. These estates may affirmatively elect a zero estate tax along with the less favorable modified carryover basis rules that were set to apply for 2010 or, if it does not make this election, it will be taxed under the new temporary rule. The estate’s representative must consider which choice would produce the lowest combined estate and income taxes for the estate and its beneficiaries. This will depend, among other factors, on the decedent’s basis in the assets immediately before death and how soon the estate beneficiaries may sell the assets.

### Lower Rate and Higher Exemption for 2010 and 2011

For estates of individuals dying in 2009, the top estate tax rate was 45% and there was a \$3.5 million exemption. The top rate was scheduled to rise to 55% for estates of individuals dying after 2010, and the exemption was to be decreased to \$1 million. For 2011 and 2012, the 2010 Tax Relief Act reduces the top rate to 35%. It also increases the exemption to \$5 million for 2011 with a further increase for inflation in 2012. But these changes are temporary. After 2012, the top rate is again scheduled to increase back to 55%, and the exemption will decrease to \$1 million. We will have to await further action by Congress to see if this will, in fact, occur.

### Gift Tax Changes

Years ago, the gift tax and the estate tax were unified; they shared a single exemption and were subject to the same rates. A person could utilize the entire exemption towards gifts made during life, leave the exemption to be applied against his or her estate tax after death or apply part of it toward gift taxes and leave the balance to be applied against estate taxes. This was not the case in recent years. For example, in 2009, the estate tax exemption was \$3.5 million and the gift tax exemption was only \$1 million. For gifts made after December 31, 2010, the gift tax and estate tax are reunified and an overall \$5 million exemption applies.

### GST Tax Changes

The GST tax is an additional tax on gifts and bequests to



grandchildren when their parents are still alive. The 2010 Tax Relief Act lowers GST taxes for 2011 and 2012 by increasing the exemption amount from \$1 million to \$5 million (as indexed after 2011) and reducing the rate from 55% to 35%.

**Spouses can share the exemption**

Under the 2010 Tax Relief Act, any exemption that remains unused as of the death of a spouse who dies after December 31, 2010 and before January 1, 2013 is generally available for use by the surviving spouse in addition to his or her own \$5 million exemption for taxable transfers made during life or at death. Under prior law, the exemption of the first spouse to die would be lost if not used. One method that we have used to maximize this exemption was the credit shelter trust. Now, this portability rule may make setting up a trust unnecessary in some cases. But there still may be other reasons to employ credit shelter trusts. For example, a credit shelter trust may protect appreciation occurring between the death of the first spouse and the death of the second spouse from being subject to estate tax. Such a trust also can protect against creditors. Also, under the temporary law, the transferred exemption may be lost if the surviving spouse remarries and is again widowed.

The estate tax relief in the new law is substantial, but it is temporary. Estate planning to reduce taxes remains an important consideration. Even if taxes are not a concern because an estate is below the exemption level, it is important to have a proper estate plan to ensure that the needs of intended beneficiaries are met. ■

**Old Laws Vs. New Technology**

*We all use email on a daily basis, often hundreds of times a day. Yet even though we may use it for business purposes, it is often viewed as a more casual communication than a letter, an agreement or a contract.*

Under New York Law, the Statute of Frauds requires certain contracts (such as one for the purchase of property or long-term employment) to be in writing. It has become the rule in this State that emails may satisfy this writing requirement. See Williamson v. Delsoner, 59 A.D.3d 291 (2009); Stevens v. Publicis S.A., 50 A.D.3d 253 (2008). Even though we may be more casual in how we use email, emails written for the purpose of satisfying a writing requirement must still be clear on their intent to form a contract.

In a case last fall, Naldi v. Grundberg, 80 A.D.3d 1 (2010), the plaintiff sought to purchase property in Manhattan from the defendant. He sent an offer for \$50 million and received, by email, a counter-offer of \$52 million and a right of first refusal for 30 days. Without sending further emails specifically responding to the \$52 million counter-offer, the plaintiff started doing extensive due diligence. While plaintiff was doing due diligence, he received a contract from defendant with the \$50 million amount, but the contract was silent as to the right of first refusal. Defendant then sold the property to someone else. Plaintiff brought his claim,



alleging that he had a binding and enforceable right of first refusal on the property and should have been able to exercise it to prevent defendant from selling the property to the ultimate buyer. The court found that, although, in general, emails could form the basis of a contract that had to be in writing, the emails in this case failed to show that the parties agreed on the price. The court held that, in Naldi, although an email would satisfy the writing requirement, there was never a meeting of the minds which is necessary to form any contract. The lesson from Naldi is that it is important to be aware of what we put in our emails, both when we intend to make a binding agreement out of our emails and when we want to avoid doing so. ■

**What We're Up To**



*Rob Ganz has successfully resolved two major trials, obtaining for his clients monetary recoveries which they had been seeking for several years. ■*

*Lianne Pinchuk recently was able to prevent a contractor client from being exposed to additional large claims asserted in an untimely manner which threatened to derail the straight forward collection of an amount due under a construction contract. ■*

*Beth Carey successfully defeated a claim in a contested estate matter that defalcation assertions should be dismissed and the matter is now on course to be tried and resolved. ■*

*Conor Brownell successfully concluded a complicated eviction trial in which multiple parties were asserting claims of offset to the rent obligation under which the eviction was sought. ■*

*David Siegfeld is working with a not-for-profit on a cross-border transaction. ■*

*Jed Wolkenbreit has been engaged by NYC-based clients to resolve a variety of thorny tax disputes with the IRS ■*



## Update on the Recent Problems in the Foreclosure Process and Why it Could Lead to a Glut of Sales this Summer

*The current problems with the residential mortgage foreclosure process in New York State and across the country have been well-publicized.*

In October 2010, Bank of America and several other large banks that hold a significant number of the country's residential mortgages halted their foreclosure process to investigate whether bank employees and agents were cutting corners in order to expedite the foreclosure process. This came amid sweeping reform from many states, including New York, which lengthened and further regulated the steps mortgage holders needed to take in order to take a defaulted mortgage from the early stages, through the litigation process and, finally, to a foreclosure sale.

Specifically, federal and state regulators raised concerns that the sheer volume of documents prevented bank officials from reading, verifying or notarizing the documents they were signing. As a result, the practice of "robo-signing" came into being. Essentially, bank officials or third-parties were signing verifications reciting that they had read and reviewed documents that never actually crossed their desks. Additionally, parties were notarizing signatures for document signers that they never witnessed signing.

As a result of these investigations, and to improve public perception that they were willing to take measures to ensure the accuracy of the documents, some institutions like Bank of America and HSBC completely halted their foreclosures. This meant that hundreds of thousands of cases across the country stopped moving forward. In reaction to this concern, many local attorneys who practice in the field have noticed that the court system has begun to more thoroughly scrutinize the bank's documents, which often go unopposed and, therefore, do not have the same checks and balances that other litigation enjoys. Additionally, some courts have even imposed a moratorium of sorts on residential foreclosure cases and are not approving requests for judgments of foreclosure until the "robo-signing" concerns are adequately addressed.

So what does all of this mean for the average investor? No one can say for sure, but it could mean that when the banks lift their self-imposed stoppage, which may happen in the near future, they will begin pushing those cases once again through the court system in attempts to get the properties back. That should result in a glut of foreclosure sales, as the old cases which had been "in the pipeline" combine with the new filings, and proceed to auction in mass numbers. Banks will be busy sending representatives to all counties throughout New York to bid on the properties, and those who flip homes for a living should see a spike in the number of properties available. County Courthouse bulletin boards will once again be filled with foreclosure notices and even those who do not actively seek out foreclosed properties may be enticed by the inevitable foreclosure bargains. ■



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**GW&S**

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