

IN THIS ISSUE:

- Deal or No Deal?—Page 1
- Cover All Your Bases—Page 1
- Contracts Allocate Risks—Page 2
- Builders Risk Insurance—Page 2
- MnDOT Issues Draft 2012 Standard Specifications—Page 3
- Hammargren & Meyer News—Page 4

Deal or No Deal?

It is not always clear when a buyer's failure to secure financing excuses it from performing a residential purchase agreement

It certainly is not as easy to obtain a home loan as it used to be. This new reality is causing buyers and sellers to pay more attention to the financing addendum present in most standard residential purchase agreements.

The standard financing addendum imposes a deadline by which a buyer must produce a "Written Statement" prepared by their lender expressly stating the following:

The buyers are approved for the loan specified in this Purchase Agreement;
That an appraisal, satisfactory to the lender, has been completed; and
Stating the conditions required by lender to close the loan.

Standard Financing Addendum [lines 22-28]).

If a buyer fails to provide the Written Statement by the applicable deadline, the standard

Purchase Agreement provides as follows:

In the event that such Written Statement was not provided by [the deadline], this Purchase Agreement is canceled. Buyer and Seller shall immediately sign a Cancellation of Purchase Agreement confirming said cancellation and directing all earnest money paid hereunder to be refunded to Buyer.

Standard Financing Addendum [lines 39-41]) (emphasis added).

According to the Minnesota Court of Appeals, "The [financing] condition was placed in the [standard purchase] agreement not only to give the buyers an out if they could not obtain financing but also to give the sellers an out if financing was not guaranteed by [the deadline]." *Hanson*

(Continued on page 3)

Cover All Your Bases

If you own a home, business, or commercial property, when is the last time you actually read and understood your insurance policy? Many owners do not actually read their policies, trusting that their agent is looking out for them and procuring adequate coverages.

Contrary to popular belief and popular advertising, owners facing a loss have an uphill battle when they turn to their agent in disbelief when finding themselves underinsured or uninsured after a loss. In the vast majority of circumstances, insurance agents do not have an obligation to obtain the best or most comprehensive insurance coverage for their cli-

ents and do not need to ensure that a client has all of the coverage he or she may need to provide 100% coverage to repair or replace damaged property or continue business in the event of a loss. Instead, an agent's duty can be limited to following the directives of his client as to what insurance the client wants the

(Continued on page 2)

Cover All Your Bases, cont.

(Continued from page 1)

agent to obtain. Only in exceptional and special circumstances does an insurance agent have a duty to go above-and-beyond and independently obtain all insurance coverage to meet a particular client's needs.

To protect yourself and your financial security as a prop-

erty owner or business owner, educating oneself about the types of insurance coverage available in the marketplace, discussing the different types of insurance policies available with your agent including the monetary limits, and then specifically requesting in writing the type of insurance coverage and monetary limits that you want your agent to obtain for you are good and

prudent steps to take.

Should you find yourself in a situation where you have found that you have experienced a loss only to find that you are not properly insured or have inadequate monetary limits, please contact the firm.

Contracts Allocate Risks

Keep in mind that contracts allocate risks as well as benefits. Those risks can be expensive so identifying and controlling them is important. A recent newsletter article focused on the potential conflict between the customary flow down terms of construction contracts and the purchase orders which subcontractors often use to buy materials and equipment. The Uniform Commercial Code, which generally governs purchase orders, allocates risk differently than the customary flow down contract does. Those risks can be things like goods damaged in transit, long lead times for delivery, or tightly limited warranty for defects in products you already installed. One response should be paying close attention to those differences and negotiating for acceptable alternative terms.

One other response would be for the contractor or subcontractor to consult their insurance agent to investigate how some insurance products like an installation floater or added builders risk coverage might insure over loss-causing risks.

There is no rule that the cost when a risk matures into harm on your contract cannot exceed your contract price. That means net loss to you. That realization should inspire ever closer examination of the risks allocated to you under all your contracts.

Builders Risk Insurance

Builders risk insurance is one of the most complex coverages in a construction risk management program. This type of insurance should be tailored to the needs of a project and generally applies to accidental physical damage (with some exceptions) that occurs during active construction on a construction project. It is intended to provide assurance to the owner, contractors, and sub-contractors on the project, that funds will be available for repairs so that a project can move forward. Coverage generally extends to property under construction, as well as materials, supplies, equipment, machinery, etc. that will become part of the project. The policy generally (subject to the actual policy language) provides coverage for the reasonable cost of repairing the physical damage that occurs during construction, reasonable damages/costs associated with delays in completion (such as loss of gross earnings), and "soft costs" which potentially include legal and accounting fees, advertising and marketing expenses, design professional fees, leasing and commission expenses, realty taxes and ground rents, additional insurance premiums, and project administration expenses.

For further information on builders risk insurance coverage, please contact the firm.

Deal or No Deal?, cont.

(Continued from page 1)

v. Moeller, 376 N.W.2d 220, 225 (Minn.App. 1985); see *Plaisted v. Fuhr*, 367 N.W.2d 541, 545 (Minn.App. 1985) (holding that prospective buyers neither have a duty to make multiple loan applications nor to waive a financing contingency, which is imposed for the benefit of the buyers *and* the sellers).

The Written Statement requirement is seemingly non-ambiguous. Unless a buyer provides the Written Statement by the applicable deadline, the express terms of the Purchase Agreement state that the agreement is automatically canceled and the parties are directed to memorialize such cancellation. Indeed, several cases indicate that a seller is unable to resurrect a purchase agreement after the financing contingency is unmet.

If such a condition precedent is neither performed [nor] excused within the time that is required, such failure now makes it impossible for a breach of contract to occur. . . . Therefore, the contractual duty must be regarded as discharged.

Hanson, 376 N.W.2d at 226 (quotation omitted); see *Jones v. Amoco Oil Co.*, 483 N.W.2d 718, 724 (Minn.App. 1992), *review denied* (Minn. May 15, 1992) (holding that purchase agreement was “nullified by its own terms” because the “financing contingency was never met”); see *Nat’l City Bank v. St. Paul Fire & Marine Ins. Co.*, 447 N.W.2d 171, 176 (Minn. 1989)

(noting that a “condition precedent” is “any fact or event, subsequent to the making of a contract, which must exist or occur before a duty of immediate performance arises under the contract”).

If a seller fails to recognize the automatic cancellation, a buyer may unilaterally serve notice of a Declaratory Cancellation, which conclusively cancels a purchase agreement unless, within 15 days of being served with the notice, the seller obtains a court order suspending such cancellation. See Minn. Stat. § 559.217, subd. 6; Minn. Stat. § 559.211, subd. 1.

Despite the seemingly insurmountable burden facing a would-be seller who is served with a Declaratory Cancellation after a buyer fails to obtain financing, there may be a glimmer of hope for a seller to preserve its purchase agreement.

The financing addendum notes that a buyer must use its “best efforts” to obtain the requisite Written Statement. See Standard Financing Addendum [lines 13-14]). At least one court has held, moreover, that a buyer has an “affirmative duty” to satisfy a financing contingency in good faith. *Hoffman v. Nygaard*, 393 N.W.2d 695, 696 (Minn.App. 1986) (citing *Plaisted*, 367 N.W.2d at 545).

If you are a party to a purchase agreement that includes such a financing condition, you should contact Hammargren & Meyer to discuss the nuances of the requisite Written Statement and how it may impact your contractual rights and obligations.

MnDOT Issues Draft 2012 Standard Specifications

The Minnesota Department of Transportation (“MnDOT”) has issued its Draft 2012 Standard Specifications for Construction for review. These draft specs are open for public comment until Friday, January 6, 2012, and can be reviewed at the following Internet link: <http://www.dot.state.mn.us/pre-letting/spec/2012/2012index.html>.

Comments will be accepted electronically as described in MnDOT’s website. Since the changes are significant, any contractor that works with MnDOT is encouraged to review MnDOT’s draft and consider commenting on any provision that raises a concern.

Please feel free to contact Dave Hammargren, Paul Meyer or Patrick Lee-O’Halloran with any questions about the draft specs or MnDOT’s review of comments.

Hammargren & Meyer News

Adina Bergstrom of H&M attended the 31st Annual International Risk Management Institute (IRMI) Construction Risk Conference from November 13 through November 17, 2011 in San Diego, California.

~~~

H&M's Brenda M. Sauro and Adina Bergstrom, recently obtained an order allowing their client to amend its complaint to seek additional damages against its insurer for its bad faith claims handling practices in adjusting a storm loss at an apartment complex.

The rather newly enacted Minn. Stat. § 604.18, subd. 2 allows an insured to recover specified damages, costs, and attorney's fees if the insured can show the "absence of a reasonable basis for denying the benefits of the insurance policy" and that the insurer "knew" or acted in "reckless disre-

gard" of the lack of a reasonable basis. *Constr. Sys., Inc. v. Gen. Cas. Co. of Wisconsin*, No. 09-3697, 2011 WL 3625066, at \*10 (D. Minn. Aug. 17, 2011); see *Davis v. Grinnell Mut. Reinsurance Co.*, No. 09-2563, 2010 WL 5464915, at \*3 (D. Minn. Dec. 30, 2010). In order to bring such a claim, the aggrieved insured must convince a judge that there is sufficient evidence to amend their complaint to assert it. The hard-fought order in favor of H&M's client is unique because such orders have not been routinely granted yet in Minnesota.

For more information about bad faith or insurance practice in general, please contact the firm.

~~~

The Minnesota Supreme Court has granted review of the Minnesota Court of Appeals decision in favor of H&M's client in the *Engineering & Construction Innovations, Inc. v. L.H. Bolduc Co., Inc. et. al.* case. The Associated General Contractors of Minnesota and the Minnesota Utilities Contractors Association have applied to the Court to participate as *Amici Curiae*. Property Casualty Insurance Association of America, American Insurance Association, and American Subcontractors Association of Minnesota were previously granted *Amici* status by the Court. Stay tuned for further developments.



HAMMARGREN
& MEYER, P.A.

www.hammarlaw.com

952-844-9033

The information contained herein is by necessity general and broad in scope. Legal problems and issues are always act specific and fact dependent. Always consult a competent construction attorney to address your specific issues and problems.

© Copyright 2011