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Sara E. Neff

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The court disagreed with Tussy-Garber's contention that AIDS can easily be avoided and called her arguments "overly simplistic." The court noted that infection may occur in utero, through prophylactic failure, through partners who "dissemble" and through tainted blood. The court stated that precedent disfavors recovery of emotional distress damages in connection with actions alleging economic damages. In contrast, precedent favors recovery in cases, such as medical malpractice, which involve personal injury. The court defined the question to be determined: What is "the threshold for a personal injury which, under *Potter*, would sustain parasitic damages for emotional distress."

Court creates new standard for recovery

In conclusion, the court denied summary adjudication, stating that the lower court did not use the correct legal standard when it applied the area of physical risk or physical impact test to Tussy-Garber's situation. The court held that a plaintiff must sustain a detrimental bodily change to recover parasitic damages for emotional distress. Therefore, the court granted Macy's motion barring Tussy-Garber from recovery for emotional distress damages.

Real estate seller wins battle over financing condition

by Sara E. Neff

Real estate buyers and sellers must now expressly contract the extension of financing conditions in real estate agreements. The Massachusetts Court of Appeals recently rejected the notion that financing conditions in property sales contracts implicitly extend proportionally with renegotiated closing dates in *Churgin v. Hobbie*, 655 N.E.2d 1280 (Mass. App. Ct. 1995). In an action between a buyer and a seller arising from a real estate contract, the appellate court reversed a trial court's judgment in favor of the buyer and concluded that the extension of the closing date under agreement did not extend the deadline for exercising a mortgage financing condition and that the buyer's failure to give the seller timely notice of an inability to obtain financing was not an act of

bad faith or unfair practice.

Overconfident buyer failed to exercise option

On July 8, 1991, the seller, Dr. Churgin, entered into an agreement with a fellow veterinarian, Dr. Hobbie, to sell the commercial property she maintained in Wenham, Massachusetts for \$375,000. The back page of the agreement included two extension forms following the signature blocks: one for an "Extension for Financing" and another for an "Extension for Performance." In the sale agreement, Dr. Hobbie conditioned his performance on obtaining a mortgage loan of \$300,000 "on or before 45 days of closing." The real estate agreement, which made time of the essence, set a closing date of

January 8, 1992. In order to exercise the financing option and reclaim a \$46,875 deposit, Dr. Hobbie was obliged to notify Dr. Churgin on or before 45 days from the closing date that he was unable to obtain the requisite financing. As a result, November 24, 1991, was established as the cutoff date for exercising the financing option.

Dr. Hobbie felt confident that his net worth and "track record" would enable him to secure financing. As a result, he neither applied for mortgage financing by the option deadline of November 24, 1991, nor exercised his right to withdraw from the agreement via the financing option. After receiving a letter dated December 10, 1991, which expressed Dr. Churgin's desire to close on the agreed upon date, Dr. Hobbie began discussions with a potential

bank lender only to discover that the bank would require a site assessment of the sale property for hazardous or toxic pollutants. Although aware that the property had once been used as a gas station, Dr. Hobbie had not considered any implications that might arise from this fact.

In a letter dated January 2, 1992, Dr. Hobbie indicated the requisite hazardous substance inspection might take several months to complete, and, as a result, he would not be able to perform on the contract date of January 8. Dr. Hobbie requested an extension until such time as financing arrangements could be completed and noted he would notify her as soon as he secured a projected date for the closing. On January 7, 1992, both sides prepared an extension document using the forms on the original purchase and sale agreement, establishing March 8, 1992, as the new performance date. The new agreement struck the financing extension provision.

Approximately a week later, Dr. Hobbie's environmental consultant informed him that automobile parts might be buried on the site. In a letter dated January 22, 1992, Dr. Hobbie gave Dr. Churgin notice that he was unable to secure financing and that he would like to have his deposit returned. At the time of the letter, Dr. Hobbie's mortgage application was still under

review; however, it was subsequently rejected on March 5, 1992, due to the likelihood of site contamination. Dr. Churgin declined to authorize the escrowee, her attorney, to return the deposit.

Appellate court rejects trial court's interpretation of unexpressed intentions

Dr. Churgin brought an interpleader action to the trial court,

In rejecting the logic of the trial judge, the appellate court stated that the "parties have so clearly expressed themselves in their documentation that a court should not undertake to be wiser than the parties."

which ruled in favor of Dr. Hobbie. The trial court reasoned Dr. Hobbie must have intended to extend the financing condition because knew of the possibility a hazardous waste question developed. Thus, he understood a more favorable resolution was essential to obtaining mortgage financing. The trial court also concluded Dr. Churgin's attorney knew Dr. Hobbie wanted additional time to meet the financing condition and such knowledge

imputed to the seller he was acting as her agent.

On appeal, the court rejected the trial judge's interpretation of Dr. Hobbie's "unexpressed intentions." The appellate court noted that by the time Dr. Hobbie first raised the prospect of the need for an extension in his letter of January 2, 1992, the time for exercising the financing option extension already expired. If "a new financing condition were to be introduced, it is reasonable to expect that this would be expressly requested and expressly incorporated in the documentation of extension." However, the court concluded the opposite occurred when Dr. Hobbie asked only "for an extension until such time as financing arrangements [could be] completed," not so a commitment might be obtained. The court concluded that Dr. Hobbie's specific written repair requests were not the language of a buyer who believed the transaction to still

be conditional.

In rejecting the logic of the trial judge, the appellate court stated that the "parties have so clearly expressed themselves in their documentation that a court should not undertake to be wiser than the parties." To do so would have the effect of turning the financing condition here into an open-ended option for the buyer and of removing the unilateral leverage the seller must have as compensation for

removing the property from the real estate market. However, the court noted that it is still the prerogative of the parties to establish a new financing condition or to extend a financing condition. Nevertheless, such amendments or extensions should be "express and not left to implication from extension of the date of performance of the contract."

Buyer didn't act in bad faith or participate in unfair practice

In ruling against Dr. Hobbie, however, the appellate court found that he had not acted in bad faith. The court dismissed an unfair practice claim against Dr. Hobbie, arguing that he was "untutored in the perils of the modern real estate transaction, and unaware of the potential difficulties that might arise from even the possibility of toxic pollution" on the property. "Ineptitude there may have been; bad faith and unfair practice there was not. Not every unlawful act is automati-

cally an unfair (or deceptive) one under M.G.L.A. 93A §1."

This ruling reinforces a well-grounded legal principle that consumers in the real estate market would be wise to heed: Assumption is the mother of all mishaps, and the home of true security in is found the written document.

Allstate prevails in suit over exclusionary clauses for uninsured motorist coverage

by Aaron R. Pettit

In *Luechtefeld v. Allstate Ins. Co.*, 656 N.E.2d 1058 (Ill. 1995), the Supreme Court of Illinois held that an exclusionary clause denying uninsured-motorist coverage for vehicles owned by the insured, when such vehicles have uninsured-motorist coverage under another insurance policy, did not violate public policy.

On December 10, 1990, the plaintiff, Harry Luechtefeld ("the plaintiff"), suffered personal injuries when the motorcycle he was driving was struck by an uninsured motorist. The motorcycle was insured under a policy issued by Pekin Insurance Company ("Pekin"), which provided uninsured motorist coverage with limits of \$20,000 per person. The plaintiff was also the named insured in a policy issued by Allstate Insurance Company ("Allstate") to cover three automobiles the plaintiff owned. Since the plaintiff's damages exceeded the \$20,000 limit on the Pekin policy, the plaintiff filed a claim with Allstate, claiming that his injuries were covered under the uninsured-motorist provisions of the Allstate policy.

Allstate denied the claim, citing an exclusionary clause in the policy excluding uninsured-motorist coverage for vehicles the insured owned which had uninsured-motorist coverage under another policy. Allstate argued that this clause clearly excluded coverage for the plaintiff's motorcycle accident because the Perkin policy covered the motorcycle.

The plaintiff then brought a declaratory judgment action in the circuit court of St. Clair County, seeking a determination of his rights under the Allstate policy. He claimed the exclusionary clause was ambiguous and should therefore be construed against Allstate. In addition, he asserted that the clause should be unenforceable because it violated public policy. The trial court granted Allstate's motion for summary judgment, finding that the policy unambiguously excluded the plaintiff's claim. The appellate court reversed, finding that the exclusion was invalid for public policy reasons the clause was unambiguous.

The Illinois Supreme Court first rejected the