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LEGAL Dimensions

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Investigating Claims Arising Out of Slip and Falls on Public Sidewalks

Claims professionals have suffered more than most residents of the Northeast during this historically harsh winter of 2013-2014. The supply of claims and lawsuits arising out of slip and fall accidents will last far beyond winter's end.

This article will address legal and investigation issues that will arise out of slip and fall accidents that occur on public sidewalks that abut business establishments. These cases present unique challenges in determining whether the insured business had a duty of care to clear the snow and ice off of the sidewalks, and whether there could be any liability arising out of any breach of that duty.

Slip and falls on city sidewalks covered with snow and/or ice are inevitable, and business establishments may face liability even if they do not own the sidewalks. In Massachusetts, plaintiffs can sue the city as the owner of the sidewalk as a result of a slip and fall on snow and/or ice, but only if the snow and/or ice is accompanied by some other defect that would make the sidewalk dangerous. Even assuming a plaintiff is able to present such a case, the city's exposure is capped at $5,000 pursuant to M.G.L. c. 84, §15. Thus, there is significantly less incentive for a party to sue a municipality than a business establishment that might have some responsibility for the condition of the sidewalk.

At common law, a duty to remove snow and ice existed if the defendant owned the subject premises. Because businesses do not own public sidewalks, there is no duty under common law to remove the snow and ice. Nevertheless, it is important for businesses that abut city sidewalks to recognize that they could potentially face liability even though they do not own the public sidewalk.

For example, private ownership of the sidewalk may in fact exist if there is a separate agreement or contract with the municipality. In the City of Boston, for example, business establishments may enter into an agreement with the city to obtain "area ways" along abutting sidewalks. Area ways afford the expansion of commercial property outward and underneath the abutting sidewalk in exchange for the business assuming maintenance of that particular area. As a result of any such agreement, business establishments would in fact own the designated area way, and any injuries occurring on that portion of the sidewalk could be the responsibility of the abutting property owner. As a result, business establishments should confirm whether there are any contracts or agreements which impose any such maintenance obligation, as any such agreement could establish a duty to remove snow and ice on the applicable portion of the sidewalk.

A duty of care to remove snow and ice on abutting sidewalks could also theoretically exist based upon a statute, regulation, or ordinance. However, in Massachusetts, snow and ice removal ordinances and statutes cannot create a private right of action. See Gamere, 19 Mass.App.Ct. 359, 361-62 (1985)(Boston city ordinance); **Sigel v. Flatley**, 61 Mass.App.Ct. 1108 (2004) (state sanitary code). In Gamere, a plaintiff brought suit against various entities, including an abutting landowner, regarding a slip and fall on snow and ice located on a public sidewalk. The plaintiff sought to introduce a relevant snow and ice removal ordinance as evidence of negligence against the abutting property owner. The court refused to admit the ordinance.

On appeal, the Massachusetts Supreme Judicial Court upheld the ruling, explaining that "ordinances which require householders to remove snow and ice from sidewalks are for the benefit of the community at large, and not for persons who fall as a result of snow and ice." The court acknowledged that the policy behind this rule was to keep public ways in a reasonably safe condition for travelers, and this was the responsibility of cities and towns which could not be delegated to others. The Gamere case is extremely important for businesses or property owners with regard to abutting sidewalks, as it established that the local city ordinance did not impose a duty to general members of the public with regard to snow or ice on city sidewalks.

Businesses can also expect plaintiffs to claim that an establishment which removed snow and ice in the past had assumed a duty of care to the public with regard to snow and ice removal. However, plaintiffs must prove that that the undertaking was *voluntary* and beyond what would be ordinarily required under the circumstances. See **Freeman v. Digital Equipment Corporation**, 1995 WL 808927, *1 (Mass.Super.)(holding that a higher duty of care ordinarily required in

snow and ice situations could not be imposed simply because the landlord always attempted to remove all of the snow and ice in various pathways). The mere fact that snow and ice had been removed in the past, "without more, is not enough to give rise to a legal obligation." Sigel, 61 Mass.App. Ct. at 1108. Thus, if an establishment removes snow and ice on a public sidewalk pursuant to local ordinances/regulations, it cannot be said that it was a voluntary act which imposed upon the defendant a duty that did not otherwise exist.

Finally, if there is a contract whereby a business agrees to remove snow and ice a plaintiff could argue that a party assumed a duty of care. However, that is not necessarily the case, as the mere existence of a contractual duty to remove snow and ice does not create a tort duty. See **Ruiz v. Cincotta**, 13 Mass.L.Rptr. 373 (2001); Anderson v. Fox Hill Village Homeowners Corp., 424 Mass. 365 (1997). In order to prove that a tort duty exists under a snow and ice removal contract, the plaintiff must demonstrate that the contract: (1) intended to benefit the plaintiff and (2) was performed in a manner that materially breached the terms and conditions of the agreement. See Ruiz, 13 Mass.L.Rptr. at 373.

Proving each of these elements can be problematic for a plaintiff. A plaintiff must prove that the contract reflects a "clear and definite" intention to benefit him and cannot simply allege that he is an intended third party beneficiary. Thus, even if the plaintiff is deemed to benefit from the contract, but was not an intended beneficiary by the contracting parties, the plaintiff would not be owed a duty of care due to the mere existence of the contract. Ruiz, 13 Mass.L.Rptr. at 373.

Even if the plaintiff is a third party beneficiary, the plaintiff must further prove that the contract was materially breached. In Ruiz, no material breach was found when a snow removal company failed to remove snow and ice prior to the plaintiff's slip and fall on black ice and the defendant was awarded summary judgment. Id.; See also **Hunt v. Centre Park II Condominium Association**, 1997 WL 33787121 (Mass.Super.) (holding that a condominium association's failure to remove snow and ice pursuant to its by-laws was not an actionable tort). The existence of a contract to remove snow and ice has the potential for creating a duty of care, but it clearly does not automatically trigger a tort duty to every person who walks along a public sidewalk.

Claims professionals should keep all of these considerations in mind when determining whether their insured business owners were negligent when they failed to grab a shovel and clear an abutting sidewalk. The investigation should confirm whether the insured has any potential ownership in their abutting sidewalk and identify the exact location, if applicable, in order to take necessary precautions. Businesses should also be careful to avoid entering into any contracts to remove snow and ice which might subject them to potential tort liability. ■

Lloyd's Reports Profit for 2013

LONDON — Lloyd's, the world's largest specialist insurance and reinsurance market, recently announced a profit of $5.3 billion for 2013, an improvement over the profit of $4.5 billion in 2012.

Gross written premium income increased to a new high of $40.7 billion, with a combined ratio of 86.8% and a pre-tax return on capital of 16.2%, the company reported. The combined ratio was a 4.3 percentage improvement over the previous year.

Lloyd's said its capital position further strengthened with net resources of $35 billion. Ratings held steady at A+ with Standard & Poor's and Fitch, and A with A.M. Best. All three ratings agencies have Lloyd's on positive outlook, the market said.

The better results were attributed to the fact that 2013 was a "benign year" for insured catastrophes, with major claims to Lloyd's totaling $1,362 million. Lloyd's reported that total net incurred claims were $14.9 billion in 2013, down from $16.1 billion the previous year. United Kingdom flooding claims from 2013 are not expected to result in significant exposure for Lloyd's.

Lloyd's new chief executive officer Inga Beale said, "Disciplined underwriting and a benign year for major catastrophes have enabled us to outperform our peers and post this outstanding profit of $5.3 billion. From this base, the Lloyd's market has a great opportunity to expand in the underinsured, high growth economies around the world."

Beale added, "We have started to build the foundations for this growth, as set out in our long term strategy 'Vision 2025', through close engagement with the market. We will continue to support our expert underwriters, through efficient operations, to attract capital and talent from these high growth economies."

John Nelson, chairman of Lloyd's, said, "These are outstanding results for Lloyd's and are a tribute to the talent and professionalism in the Lloyd's market. Whilst we saw few catastrophe claims in 2013, continued low interest rates saw reduced investment income and high levels of capital continuing to flow into the market which put pressure on prices."

He added, "These conditions look set to persist. I therefore expect increased competitive pressure on the market to remain in 2014. This underlines the need for continued underwriting discipline as we seek to maintain and reinforce our position as the global center for specialist insurance and reinsurance."

Lloyd's reported capital and reserves of $35 billion and total resources of Lloyd's and its members at $98.70 billion. The market reported premium growth of 1.6% in 2013 and prior-year reserve releases of $2,615 million. ■