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HOUSE BILL 5230:

Restricting your Community Association's Freedom to Contract

By Kevin Hirzel, Esq.

On January 21, 2016, Rep. Ken Yonker introduced House Bill 5230.[1] House Bill 5230 was introduced to prevent property owners from contracting to be indemnified by snow plow operators. The Community Association Institute is opposed to House Bill 5230, as it in the best interest of community associations to include contractual indemnification provisions in their vendor contracts.

What does it mean to indemnify, defend or hold harmless?

House Bill 5230 would prohibit a community association from entering into a contract with a snow plow operator that "purports to indemnify, defend, or hold harmless, or that has the effect of indemnifying, defending, or holding harmless, the promisee from or against liability for loss or damage resulting from the negligence or omissions of the promisor." What does it mean to "indemnify, defend and hold harmless"?

The term "indemnify" means to "restore the victim of a loss, in whole or in part, by payment, repair, or replacement." In short, if a community association were to be sued if a snow plow operator caused property damage, an indemnification clause could be used to require the snow plow contractor to reimburse the community association for any judgment that was entered against the community association arising out of the snow plow operator's conduct.

The term "hold harmless" means to "absolve (another party) from any responsibility for damage or other liability arising from the transaction." If a community association were to be sued for failing to salt the sidewalks in a timely manner, then as between the association and the snow plow operator, the hold harmless clause could be used to bar the snow plow contractor from asserting a claim against the community association arising out of this event.

Finally, the term "defend" could be used to impose a responsibility on a snow plow contractor to pay for attorney's fees and other costs of defense associated with any claim that was asserted against a community association that arises out of the activities of a snow plow contractor.

Accordingly, the inclusion of clauses that would "indemnify, defend or hold harmless" a community association are considered essential contractual provisions that allow for community associations to protect themselves from the negligent acts of others, in this case snow plow contractors.

Who is a promisor and promisee?

House Bill 5230 uses the terms "promisor" and "promisee," which are legal terms that are not commonly used in modern legal opinions. Simply put, a promisor makes a promise to a promisee which the promisee may enforce against the promisor. In a particular contract, the identity of the "promisor" and "promisee" depends on who made the promise that is at issue. It may also depend on whether the contract is a bilateral contract or a unilateral contract. The Restatement (First) of Contracts § 12 (1932) defines a unilateral and a bilateral contract as follows:

> **A unilateral contract is one in which no promisor receives a promise as consideration for his promise. A bilateral contract is one in which there are mutual promises between two parties to the contract; each party being both a promisor and a promisee.**

In a unilateral contract there may only be one promisor, and there would most likely not be any disagreement over which party

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is the promisor and which is the promisee. By way of example, if a community association told a snow plow contractor that it would pay it $100 if showed up to plow the snow, a unilateral contract would be formed. The contract is unilateral as the snowplow contractor did not have an obligation to perform, but if it decided to perform the services, it would create a contract through its performance and the association would have an obligation to pay. In this type of situation, a community association would be the "promisor" and the snow plow contractor would be the "promisee." However, most community associations enter into bilateral contracts with snow plow contractors. In a bilateral contract, the same party may be both a promisor and a promisee, depending on the promise being examined. In that circumstance, determining which party is affected by House Bill 5230 depends on who made the promise at issue. Under a bilateral contract, the snowplow contractor promises to show up under specified circumstances, performance is not optional if the defined circumstances exist, and the community association promises to pay, depending on the terms of payment. Accordingly, under a bilateral contractor, both the community association and the snowplow contractor are "promisors" and "promisees." The community association would be the "promisee" with respect to the snow plow contractor's promise to provide snow plow services and the "promisor" with respect to payment for such services. The snow plow contractor would be the "promisor" with respect to providing snow plow

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services and the "promisee" with respect to receiving payment.

If a court were to determine that a community association was a "promisee" with respect to a promise that created potential liability for the community association, House Bill 5230 could be used to preclude a community association from being indemnified, held harmless or defended by a snow plow contractor for the negligent acts of that snow plow contractor. Under this interpretation, community associations would potentially be held responsible and be forced to incur attorney's fees and costs that resulted from a snow plow contractor's conduct.

In contrast, if a court were to determine that the community association was a "promisor," House Bill 5230 could be used to prohibit a community association from seeking to be indemnified, held harmless or defended in a situation where the community association was negligent. In most lawsuits, a Plaintiff seeks to hold the community association and snow plow contractor jointly responsible. If a court determined that there was shared fault, House Bill 5230 may prohibit a community association from being contractually indemnified by the snow plow contractor. Accordingly, under either interpretation, House Bill 5230 is bad for community associations. If you would like to oppose House Bill 5230, you can contact your legislator through the following website:

http://cqrcengage.com/advocacycenter/app/onestep-write-a-letter?3&engagementId=161953 ■

Kevin Hirzel is a Partner at Cummings, McClorey, Davis & Acho, P.L.C. and leads the Community Association Practice Group. He frequently represents Builders, Community Associations, Condominium Associations, Cooperatives, Co-Owners, Developers, Homeowner Associations, Investors, Property Owners and Property Managers throughout the State of Michigan. Cummings, McClorey, Davis & Acho, P.L.C. has Michigan offices in Clinton Township, Grand Rapids, Livonia and Traverse City. Mr. Hirzel can be contacted at (734) 261-2400 or khirzel@cmda-law.com. Please view The Michigan Community Association Law Blog at http://micondolaw.com for additional resources on Michigan Community Association Law.

Footnote:

1. THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. (1) A provision, clause, covenant, or agreement contained in, collateral to, or affecting a snowplow and deicing services contract that purports to indemnify, defend, or hold harmless, or that has the effect of indemnifying, defending, or holding harmless, the promisee from or against liability for loss or damage resulting from the negligence or omissions of the promisor is against the public policy of this state and is void and unenforceable.

(2) As used in this act:

(a) "Promisee" means the promisee and any agents, employees, servants, or independent contractors who are directly responsible to the promisee.

(b) "Snowplow and deicing services contract" means a contract, agreement, or understanding that covers any of the following:

(i) Plowing, shoveling, or other removing of snow or other mixed precipitation from a surface.

(ii) Deicing services.

(iii) A service incidental to activity described in subparagraph (i) or (ii), including, but not limited to, driving or otherwise moving snowplow and deicing equipment and materials.

Enacting section 1. This act takes effect 90 days after the date it is enacted into law.