MASSACHUSETTS
# LAWYERS WEEKLY
masslawyersweekly.com

Volume 45
Issue No. 14
$9.00 per copy
April 4, 2016

## IMPORTANT OPINIONS OF THE WEEK

### Criminal — Booking

Routine booking questions about employment do not amount to interrogation and thus need not be preceded by Miranda warnings, the 1st U.S. Circuit Court of Appeals says.

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### Arbitration — Reinstatement

An arbitrator did not exceed her authority when she ordered a terminated employee reinstated without loss of pay or other rights, even though she found that he had engaged in conduct amounting to sexual harassment, the Appeals Court rules.

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### Employment — Handbook

A terminated employee could not base her breach of contract claim on a personnel handbook, as no person in her position would reasonably believe that the handbook "endowed her with contractual rights to anything more secure than at-will employment," a Superior Court judge decides.

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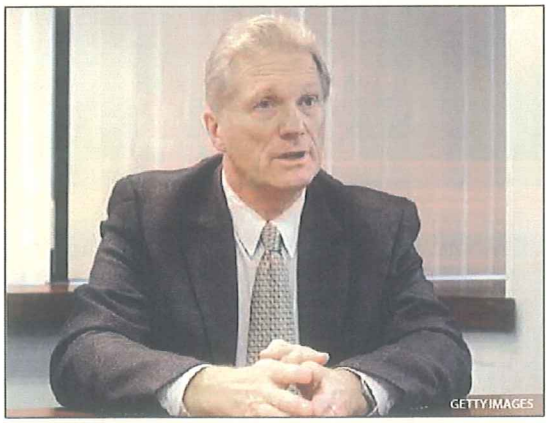
## INSIDE THIS ISSUE



# Feud between Maine judge, author migrates south




Judge Robert M.A. Nadeau, who is representing himself, says the defendant's 'outrageous' actions 'are of the type that must be discouraged from occurring in the future.'

## Defamation trial slated to start in Essex County

By Kris Olson
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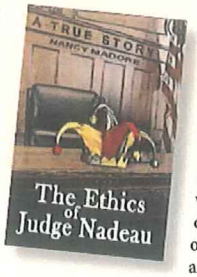
Even as he continues to fight a recommendation that he be placed on unpaid suspension for the remainder of his term, an embattled Maine Probate Court judge is moving forward with a Massachusetts lawsuit against a longtime nemesis, alleging defamation, invasion of privacy, and interference with advantageous relationships.




If everything Nancy Madore, author of the self-published book, "The Ethics of Judge Nadeau: A True Story," has written is indeed true, the Amesbury woman may have nothing to worry about.

Madore says she has actually drawn some comfort from Judge Robert M.A. Nadeau's posture through the preliminary stages of the case, which she interprets as a concession that most of her account is indeed factual.

Nadeau has tried — thus far unsuccessfully — to limit the trial to two aspects of Madore's book. But as to those two elements, Nadeau, who is representing himself, is out for blood.

In asking for punitive damages on all counts, Nadeau writes in court filings that Madore's actions "were extreme, outrageous and intolerable, and are of the type that must be discouraged from occurring in the future."

The case is set for a final trial conference on April 7. Barring what would seem to be

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# Housing Court expansion plan gaining political momentum

By Sheri Qualters
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annual cost of the proposal would be more than double the earmarked sum, reaching up

# Condo owners not barred from suing owner who set fire

## Trust agreement said insurance must have subrogation waiver

By Eric T. Berkman
Lawyers Weekly Correspondent

Unit owners in a condominium complex could sue a fellow unit owner for starting a fire despite provisions in the trust agreement stating that the owners were responsible for insuring their property and that any insurance they obtained had to waive subrogation against other unit owners, a Superior Court judge has ruled.

The defendant argued that the trust agreement's insurance resolution meant that the plaintiffs had each agreed individually to insure their unit and that the agreement, read in tandem with the subrogation waiver requirement, meant that the other unit owners had waived their right to sue him even if they did not purchase insurance.

Judge Dennis J. Curran disagreed.

"There is no basis to conclude that the requirement to waive subrogation if insurance is procured necessarily precludes unit owners from suing each other if individual losses are incurred, but not covered by insurance," Curran wrote, granting summary judgment for the plaintiffs. "No language in the Insurance Resolution, the condominium trust agreement, or in G.L.c. 183A (the Massachusetts law governing condominium arrangements) indicates otherwise."

MLW The full text of the ruling in *Koch, et al. v. Siracusa, et al.* can be ordered at masslawyersweekly.com.

BAE
Co-counsel for plaintiffs

The judge did, however, grant summary judgment for the defendant on emotional distress claims brought by some of the plaintiffs.

The six-page decision is *Koch, et al. v. Siracusa, et al.*, Lawyers Weekly No. 12-017-16. The full text of the ruling can be ordered at masslawyersweekly.com.

### Making it mandatory

Plaintiffs' counsel David Bae of Boston said he found it surprising that anyone would think the insurance language in the condominium trust documents would exclude individual unit owners like his clients from bringing individual claims "because [the language] specifically precludes by nature only insurance companies."

He also said the decision simply reiterates

## ALSO INSIDE



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A movement to expand the Housing Court statewide has been gaining political traction, but whether the plan will receive the long-term funding it needs to make it a reality is a question mark.

The governor's fiscal 2017 budget proposal earmarks $1 million for the court's expansion, which calls for its jurisdiction to be widened with the addition of a sixth division and its bench increased from 10 to 15 judges.

While supporters are pleased with the language in Gov. Charlie Baker's budget, which authorizes the Housing Court's structural changes through a so-called outside section, Trial Court officials estimate that the to $2.4 million.

"The $1 million will allow us to ramp up over a period of time," Housing Court Chief Justice Timothy F. Sullivan said. "We don't expect it will happen overnight. We'll have to grow into our new roles."

Meanwhile, House and Senate bills are pending that seek a larger statewide court as well, providing access to those who currently do not fall within the court's jurisdiction — about one-third of the state's population.

The budget and legislative proposals call for adding a Metro South Division that would encompass all of Norfolk

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He also said the decision simply reiterates common law stating that you cannot read language into a contract.

"This should be instructional to anyone who's attempting to avoid litigation based on waiver-of-subrogation language in any type of contract," he said "They can't read into these policies. ... There's no way you can interpret [the provision at issue in the case] as saying, 'These individuals can't bring suit against another property owner for a loss they incurred.' It's totally applicable to insurance companies."

Ellen A. Shapiro, a Dedham attorney who practices condominium law, said the ruling illustrates how important it is for

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# Condo owners not barred from suing owner who set fire

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condo associations that wish to prevent litigation between unit owners to make insurance language in their governing documents mandatory.

Here, Shapiro said, the insurance provision was easily read as suggesting, but not requiring, that unit owners purchase insurance. But had it been mandatory, there perhaps would have been a different outcome, she said.

"The defendant could have had a better argument under those circumstances," Shapiro said. "He could have argued that he relied on having the peace of mind of other unit owners getting insurance and waiving subrogation. He could say, 'Now I'm getting hurt because you're suing me for a risk that you should have covered. That's dirty pool.'"

Thomas O. Moriarty, a Braintree litigator who represents condominium owners and associations, agreed, adding that, for counsel, few provisions in a condo association's governing documents require closer attention than the one involving insurance.

"These provisions are completely meaningless unless there's a catastrophe," he said. "But there are all kinds of traps for the unwary with respect to insurance provisions, and an association often doesn't realize there's a problem with the documents until after the event."

Moriarty also noted that while Curran never directly stated that his decision hinged on the lack of an express obligation for unit owners to purchase insurance, it is obvious in the conclusion the judge drew that his analysis would not have been the same if it had been mandatory.

In fact, he pointed to *Pacific Indemnity Company v. Deming*, a U.S. District Court decision issued in October, in which Judge Leo T. Sorokin enforced a subrogation waiver against a condo owner's insurer that had paid the owner's claim for water damage caused by an upstairs neighbor's overflowing bathtub. In that case, the insurance provision expressly required unit owners to carry insurance and to do so with a subrogation waiver. Sorokin ruled that the waiver barred the insurer from proceeding not only against other unit owners, but also against a unit owner's tenant, who had caused the flood.

"You can't really say for sure how Curran would have interpreted *Siracusa* if the facts were different, but as I read *Siracusa*, there's a good chance that if the insurance language was mandatory, you wouldn't have this holding," he said.

Shapiro, meanwhile, said the decision sends another important message: that the waiver of subrogation will not apply to a claim for which there was no coverage.

"Even if you've procured insurance, that doesn't mean the waiver of subrogation goes across the board," she said. "If it's an uninsured loss, it's an uninsured loss and the waiver won't apply. It can only cover that which the policy covers."

### Koch, et al. v. Siracusa, et al.

**THE ISSUE** Could unit owners in a condominium complex sue a fellow unit owner directly for starting a fire that caused serious damage even though provisions in the trust agreement stated that unit owners were responsible for insuring their property and that any insurance they obtained had to waive subrogation against other unit owners?

**DECISION** Yes (Suffolk Superior Court)

**LAWYERS** Anthony M. Campo and David Bae, of Boyle, Shaughnessy & Campo, Boston; and Michael Stefanilo Jr. of Brody, Hardoon, Perkins & Kesten, Boston (plaintiffs)
George R. Suslak and Christopher M. Mountain, of Suslak & Mountain, Peabody; Michael P. Giunta of LeClairRyan, Boston; and Joseph H. Caffrey and John Phillip Graceffa, of Morrison Mahoney, Boston (defense)

"There are all kinds of traps for the unwary with respect to insurance provisions, and an association often doesn't realize there's a problem with the documents until after the event."

— Thomas O. Moriarty, Braintree

#### Catastrophic damage

On Feb. 1, 2014, a seven-alarm fire caused catastrophic damage to a seven-story condo complex in Boston.

The blaze allegedly started when defendant Anthony Siracusa, who owned a condo in the building, left a smoldering marijuana-filled glass pipe next to an open window, newspaper clippings and cloth couch.

The plaintiffs in the case were the owners of all the other units in the complex.

The plaintiffs were apparently bound by the trust agreement, which included an "insurance resolution" stating that each unit owner was "solely responsible" for obtaining insurance coverage to insure their units, personal effects and contents, unit improvements, and coverage for the condo trust's deductible.

The provision also said unit owners were responsible for insuring for liability and any other coverage they might desire.

An additional provision in the trust agreement stated that any insurance obtained by unit owners must waive the right of subrogation against other unit owners.

The record is unclear whether the plaintiffs obtained coverage as the insurance resolution suggested, if not outright required, they do.

In any event, the plaintiffs brought negligence claims against Siracusa, seeking compensation for their respected losses, including damages for emotional distress.

Siracusa responded by moving for summary judgment.

#### 'Strongly encouraged'

Addressing the defendant's motion, Curran noted that the "essence of [his] argument" was that the plaintiffs — as unit owners — either had to or were strongly encouraged to buy insurance to cover personal property damage, and that such insurance, had the plaintiffs obtained it, would have waived subrogation rights against other unit owners like himself.

"Mr. Siracusa is correct to the extent that a plain reading of the Insurance Resolution is a message to all unit owners that if they do not insure their personal property and other individual losses related to their own unit, they do so at their own peril," Curran said. "However, this interpretation does not foreclose the plaintiffs' claims as a matter of law."

Though the plaintiffs took a risk by not obtaining insurance, they still have the right to pursue compensation directly from the defendant for financial losses that his alleged negligence caused, the judge said.

Reiterating that point, Curran stated that there was "no basis" for concluding that a requirement to waive subrogation if insurance is purchased necessarily precludes an owner from suing another owner if uncovered losses are incurred. No language in any of the condo association's governing documents or in Massachusetts condominium law suggests otherwise, he noted.

"The defendant likewise cannot point to any Massachusetts appellate decision that disallows condominium unit owners from suing each other in the particular circumstances presented here," Curran said. "For this reason, Mr. Siracusa has not shown an entitlement to relief as a matter of law."

At the same time, Curran granted summary judgment for Siracusa on the plaintiffs' emotional distress claims, finding a lack of any evidentiary basis to support such claims. MLW

# THIS WEEK'S DECISIONS

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## DEPARTMENT OF INDUSTRIAL ACCIDENTS

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reimbursement from the workers' compensation insurer. *Harlow v. Johansen*, 19 Workers' Comp. Rep. 39 (2005).' However, he then proceeds to make the erroneous finding that '[t]he Employee will not receive any benefit of a favorable decision as to a claim for reimbursement.' ... To the contrary, an outstanding lien and the contmedical expenses. ...

"We therefore reverse the order of dismissal due to lack of standing, and recommit for further findings consistent with this decision. The insurer is to pay the employee's counsel a fee of $1,618.19 pursuant to §13A(6)."

*In Re: Dominguez, Ann (Lawyers Weekly No. 25-032-15) (5 pages) (Fabricant, A.L.J.) (DIA) James N. Ellis Sr., on brief, for the employee; Rickie T. Weiner, at hearing, for the employee; Christopher L. Maclachlan, on brief, for the insurer; Thomas F. Finn, at hearing, for the insurer (Board No. 045935-05) (Dec. 8, 2015).*

permit request must be deemed constructively granted under G.L.c. 43D.

#### 'Heavy penalty'

"In this first-impression appeal under M.G.L.c. 43D, the Commonwealth's expedited permitting statute, Corliss Landing Condominium Trust (Corliss), the owner of a commercial/industrial condominium in the Town of North Attleborough, Massachusetts (the Condominium property), and two condominium unit owners, challenge a permit for a planned business development in an abutting 'priority development site' along Santoro Drive that was deemed to have been constructively granted to respon

the constructive permit allows the work that JC proposed within the priority development site and along and within the private right-of-way section of the street, but does not include permit conditions the planning board might have included if it had taken final action on the permit application within the statutory180-day period for doing so, although the work remains subject to the requirements of Chapter 43D for priority site development, and to the requirements and conditions recited by the local zoning bylaws for a planned business development.

"I also determine that the constructive permit does not include, or preclude, work