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Quick Overview of the City of Chicago's New Cooling Ordinance

BY NICKY SONNTAG

In response to the tragic heat-related deaths of three residents of a senior apartment building in Rogers Park on May 14, 2022, the Chicago City Council enacted on June 22, 2022, new cooling and dehumidification requirements for some existing residential occupancies and certain new construction (Cooling Ordinance)[1].

The Cooling Ordinance was effective as of July 1, 2022 and applies to:

- Certain new construction.
- Large residential buildings, which are defined as buildings that have a building height of over 80 feet or have over 100 dwelling or sleeping units.[2]
- Nursing homes, which are facilities

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Haven't Got a C.L.U.E.?

BY PHILIP J. VACCO

I will admit that in my forty some years of practice, I've never experienced a situation where a Buyer has exercised their right to terminate a sales agreement solely on the basis that they have been unable to secure insurance coverage on the dwelling. But the fact of the matter remains that there are several situations in which a Buyer may be ineligible to secure homeowner's coverage which can quickly derail your transaction.

Paragraph 13 of the 7.0 Multi Board Sales agreement at first glance appears to be fairly innocuous:

> "This Contract is contingent upon Buyer obtaining evidence of insurability for an Insurance Service Organization HO-3 or equivalent policy at _standard premium rates_ within ten (10) Business Days after Date of Acceptance. **If Buyer is unable to obtain evidence of insurability and serves Notice with proof of same to Seller within the time specified, this Contract shall be null and void."** (Emphasis added).

But the Buyer's performance is not only contingent upon their ability to secure insurance coverage, but to be able to do so at "standard premium rates", a term that is not defined.

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providing care, including both intermediate care facilities and skilled nursing facilities where any of the persons are incapable of self-preservation.[3]

- Housing for older persons, as defined in the Federal Fair Housing Act (42 U.S.C. § 3607(b)(2)). This housing is provided under any state or federal program designed and operated to assist elderly persons, intended for and solely occupied by persons at least 62 years old, or intended and operated for occupancy by persons at 55 years old, which actually occupy at least 80 percent of the occupied units.[4]
- Licensed living facilities, including:
  - **Adult family care centers.** These centers are dwelling units that are owned or rented for providing room, board, and 24-hour personal care to three or more adults who are age 55 years or older.[5]
  - **Assisted living establishments.** These establishments are homes, buildings, residences, or other places where sleep accommodations are provided for at least three unrelated adults (at least 80 percent of whom are age 55 years or older) and where residential care and services (including health related) are provided (210 ILCS 9/10).[6]
  - **Long-term care facilities.** These facilities are private homes, institutions, buildings, residences, or any other place for the infirm and chronically ill that provide personal care, sheltered care, or nursing for three or more persons (not related to the licensee or owner by blood or marriage) (210 ILCS 45/1-113).[7]
  - **Adult family care homes.** These care homes include free-standing residences for 16 or fewer persons (at least 80 percent of whom are age 55 years or older) who are unrelated to the owners and one manager of the residence and where residential care and services (including health-related) are provided (210 ILCS 9/10).[8]

Cooling System Requirements for Existing Facilities

For large residential buildings, the Cooling Ordinance requires that buildings have permanent cooling and dehumidification equipment capable of maintaining an indoor room temperature of 75°F and 50 percent relative humidity in at least one indoor common area space when the outdoor temperature is 92°F and the mean coincident web bulb temperature is 74°F. Prior to May 1, 2024, portable equipment may be used to satisfy this requirement.[9]

For nursing homes, the Cooling Ordinance requires that nursing homes have permanent cooling and dehumidification equipment capable of maintaining an indoor room temperature of 75°F and 50 percent relative humidity in all habitable spaces, public corridors, and bathrooms when the outdoor temperature is 100°F and the mean coincident wet bulb temperature is 78°F.[10]

For housing for older persons, the Cooling Ordinance requires that the building have permanent cooling and dehumidification equipment capable of maintaining an indoor room temperature of 75°F and 50 percent relative humidity in all indoor common gathering spaces when the outdoor temperature is 92°F and the mean coincident wet bulb temperature is 75°F. Prior to May 1, 2024, portable equipment may be used to satisfy this requirement.[11]

For licensed living facilities, the Cooling Ordinance requires that these facilities have permanent cooling and dehumidification equipment capable of maintaining an indoor room temperature of 75°F and 50 percent relative humidity in all habitable spaces, public corridors, and bathrooms when the outdoor temperature is 100°F. The temperature and humidity levels must be

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monitored on a regular basis for all living quarters, dining areas, bathrooms, common rooms, and hallways.[12]

For all of existing buildings addressed in the Cooling Ordinance, the cooling and dehumidification equipment must be either independent of the heating system or capable of switching from heating to cooling within one hour. When the heat index exceeds 80°F, the cooling and dehumidification equipment must be operated so that it is safe for occupants. If the cooling and dehumidification equipment is not available in each dwelling unit and sleeping unit, then a common area cooling and dehumidification room must be accessible to every resident of the building.[13]

Cooling System Requirements for New Construction

Permanent cooling and dehumidification equipment or systems are required for all indoor spaces intended for human occupancy applicable to new Chicago construction classified for educational, institutional, or residential occupancy. These classifications include apartment buildings, condominiums, cooperatives, senior facilities, schools, and institutional day care centers. These facilities must be capable of maintaining an indoor room temperature of 75°F and 50 percent relative humidity.[14]

More revisions are expected to the Cooling Ordinance to provide further clarification about these requirements.■

1. Chicago Municipal Code § 14B-12-1203. This is where the temperature control provisions of the Chicago Building Code exist.
2. Chicago Municipal Code § 14X-8-803.4.
3. Chicago Municipal Code §§ 14B-2-202; 14X-2-202.
4. Chicago Municipal Code §§ 14X-2-202.
5. Chicago Municipal Code § 4-6-080(a).
6. Chicago Municipal Code § 4-6-090(a).
7. Chicago Municipal Code § 4-6-100(a).
8. Chicago Municipal Code § 4-6-110(a).
9. Chicago Municipal Code § 14X-8-803.4.
10. Chicago Municipal Code § 14X-8-803.2.
11. Chicago Municipal Code § 14X-8-803.3.
12. Chicago Municipal Code §§ 4-6-080(e)(4); 4-6-080(e)(3); 4-6-100(e)(3); 4-6-110(e)(3).
13. Chicago Municipal Code §§ 14X-8-803.5 and 14X-8-803.6.
14. Chicago Municipal Code §§ 14B-12-1203.2.1 and 14B-12-1203.2.2, which reference occupancy classification E (educational), I-1, I-2, 1-3, I-4 (institutional), R-1, R-2, R-3, R-4, and R-5 (residential). The Cooling Ordinance added the dehumidification requirement to the existing ordinance for classifications I-1, I-2, I-4, and R-4 when the outdoor temperature is 100°F and added new classifications E, I-3, R-1, R-2, R-3, and R-5 when the outdoor temperature is 92°F.

Haven't Got a C.L.U.E.?

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Because of its potential to totally disrupt the transaction, the drafters of the 7.0 contract sought to limit the Buyer's ability to exercise this option to ten business days after the date of acceptance, however, it is common practice for a buyer's attorney to request that this contingency be extended to match the date that controls the financing contingency; presumably since securing insurance is a condition of the loan approval. However, to understand the importance of this contingency, as well as the risks associated with extending it, one must look into the factors that can cause a Buyer to be deemed ineligible for coverage. While some pertain to the Buyer, the fact is that many factors have to do with the property itself.

It should come as no surprise, that insurance companies stay in business and make a profit by selling a product (insurance coverage) that they plan on not having to pay a claim on. To accomplish this they examine a variety of factors to determine the probability that a particular individual may be likely to file a claim and based their decision on those findings. Among the factors considered are:

Credit-based insurance scores

This score is based in part on the buyer's credit rating, with lower scores equating to higher risks, and higher premium costs. Scores can range between 200 and 997. A score over 770 is deemed favorable while scores under 500 are deemed poor.

Individuals with lower scores viewed as more likely to file a claim and thus cost the insurance company more. This can lead to higher premium prices.

1. Criminal Convictions
If an inured is deemed irresponsible or untrustworthy, this can also lead to higher premium rates. Thus, any criminal history, especially ones that involve the destruction of property or crimes such as arson, can result in the denial of coverage.
2. Lapsed Coverage
A person who allows their insurance to lapse (whether intentionally or not) can find themselves being denied future coverage or at the very least having their premiums raised.
3. History of Claims
Falling under the umbrella of "Fool me once, shame on you. Fool me twice, shame on me", insurance companies become reluctant to issue insurance coverage to individuals who have a history of filing claims. It's important to bear in mind that it is not simply the number of claims that may be filed, but the type of claim as well. A Buyer that has had claims filed as the result of a dog bite may raise red flags with the insurer.
4. Working From Home
Buyers who have a business they operate out of their home, especially if that business requires customers to enter such as a hair salon, can result in the denial of homeowner's coverage.
5. Part-Time Occupancy
Likewise, homes which are left vacant for extended periods of time are more susceptible to vandalize or break-ins, thus can lead to higher coverage rates

While these items can for the most part be managed by the Buyer, one item which plays a major role in the insurability of a property that the Buyer has absolutely no control over, is the property's claim history. Adverse to taking on what may be viewed as an unacceptable risk, insurance carriers can be reluctant to insure a property that has a history of excessive claims. In other words, the home itself may simply be deemed too high of a risk to insure.

So, whether we are representing the Buyer or Seller, how can we as real estate professionals effectively manage these risks for our clients and avoid experiencing the unpleasantness of learning just one week

before the closing that securing insurance is an issue? Well in actuality the answer is fairly straight forward.

If I'm representing the seller, the first thing that comes to mind is to steer clear of the Buyer's Attorney's request to extend the time period provided in paragraph 13. It will cost the Buyer little if anything to comply with the terms of the 7.0 contract and determine whether or not they can secure in homeowner's insurance at "standard premium rates" within the ten (10) business day period set out in the contract. The Buyer should be instructed by their counsel to immediately contact their insurance carrier. Their insurance agent can obtain their insurance score and check the address of the property to immediately ascertain whether there are any eligibility issues with either the borrower or the property.

I've seen some Buyer's attorneys request that the Seller disclose what insurance claims, if any, they have made during the last several years of their ownership as a means of determining whether they may be dealing with a troublesome property. [I request this not to determine whether the property has insurability problems, but to attempt to verify any coverage damage has been repaired.] You can even request that the seller provide a C.L.U.E Report.[1] Insurers compile information about the property owner to create what is known as a Comprehensive Loss Underwriting Exchange (CLUE) Report. It contains seven years' worth of information about the Seller and any insurance claims that have made during that time frame. This report provides dates of claims, insurance company(ies) involved, the type of policy, whether loss was related to a named catastrophe (hurricane, etc.), location of the loss (on or off property), the amount paid and cause of the loss.

The bottom line is that you want to determine as soon as possible whether there is any insurability issue with either the Buyer or the subject property. This can mean educating the buyer's counsel on the importance of having their client comply with Paragraph 13 of the sales agreement and applying for insurance at the time the contract is entered into and not treating it as part of the financing contingency.■

1. Reports for a primary residence can be ordered immediately on the internet from Lexisnexis at: https://personalreports.lexisnexis.com/fact_act_claims_bundle/landing.jsp.

Opening a Pandora's Box for Illinois Land Trust Practice (*Corcoran v. Rotheimer*)

BY DONALD HYUN KIOLBASSA

In Greek Mythology, Pandora's Box is a story of a young lady charged with a special jar, which she was not to open. Pandora's curiosity got the better of her and she opened the jar. Pandora did not realize that locked in the jar was sicknesses, death, and unspecified evils. When she opened the jar and realized the contents, she immediately attempted to close the jar, but it was too late. Pandora released sickness, death, and evil.

One of the morals of the story is to illustrate unforeseen problems.

Similarly, the decision made by the Illinois Appellate Court in, *Corcoran v. Rotheimer*, 2022 IL App (1st) 201374, may present unforeseen problems for Illinois real estate attorneys.

Illinois land trust practice has a rich and colorful history. As a side bar, I strongly recommend that you read the Illinois Institute for Continuing Legal Education's (IICLE) *Kenoe on Land Trusts*.

Historically, land trusts were a quick and dirty estate planning solution for a person trying to pass real estate and avoid probate (i.e. you set up a trust which you are able to set a contingent beneficiary in case you pass).

Today land trusts provide an expanded value proposition. Not only can you transfer property to descendants and avoid probate, but the privacy value is huge in today's technology world. With technology companies accumulating our data for targeted marketing, it is nice knowing that there are tools out there to protect us. When you purchase real estate in a land trust, the deed recorded at the County Recorder of Deeds (County Clerk in Cook County) does not show your name. It shows the name of the land trust in the grantee section. This provides some privacy.

However, the real estate lawyer should exercise caution in land trust practice as there are many pitfalls. For example, an anchor distinction of Illinois land trusts vs. conventional trusts is the way the courts categorize the property.

In an Illinois land trust, the trustee holds both the legal and equitable title to the property.[1] The beneficiary's interest in the real property changes to a personal property interest in the trust.[2]

This distinction makes lenders shiver in fear when working with land trusts.

Corcoran v. Rotheimer, decided, on 6/9/2022, just added another layer of complexity. The facts are simple enough. The decedent "Filip" purchase real property in a land trust. Per the terms of the land trust, the decedent retained the original beneficial interest, and upon his death, that interest passed to two of his children. It is important to note that this original designation was lodged with the land trustee, and that the terms of the land trust required that assignments be lodged with the land trustee.

On the side, Filip created a limited liability company (LLC) whose sole member was his revocable grantor trust. Please note that the revocable trust included a third child not named in the original beneficiary designation, who was not only a beneficiary, but the successor trustee. Filip's intent was to transfer his beneficial interest to this LLC. Filip created a document to transfer his interest to the LLC, but it was never lodged with the land trust company.

It is also worth noting that Filip got a loan on the property, which granted the lender the right to approve future assignments.

A successor land trustee put him on notice that the assignment was never lodged. Filip pursued the assignment, but refused to pay the $10,000 lender assignment fee. Filip passed away without ever lodging the assignment with the land trust company.

Immediately following Filip's death, litigation ensued by the original beneficiaries and the LLC.

The original beneficiaries had two arguments supporting their position that they were entitled to the proceeds. First, the assignment to the LLC was never lodged with the land trust company. Second, the lender never approved the assignment (i.e., Filip never paid the $10,000 fee).

The LLC filed a declaratory action that despite not being lodged with the land trustee the assignments to the LLC were valid. The trial court agreed with the LLC and found in favor of the LLC. The Illinois Appellate Court followed prior case law and the plain language of the trust. The court found that failing to lodge the assignment with the land trust company does not make the assignment void between the assignor and assignee but instead makes it void as to subsequent assignees or purchasers.

As to the second argument that the lender never approved the assignment, the court concluded that this right was that of the lender, not the beneficiaries. The beneficiaries did not have standing to enforce this provision. The lender accepted the payoff and was removed.

The Illinois Appellate Court affirmed the trial court's decision and concluded that failure to lodge the assignment did not void the transfer.

The Illinois Appellate Court probably reached the right decision here. The facts appear to illustrate that the court was enforcing the intent of the original property owner. However, this decision opens up some issues. If you are a real estate attorney involved in a closing with a land trust as a seller, you need to keep this in the back of your mind. You cannot blindly rely on the land trust company to provide you with instructions. There may be an assignment out there of which they do not yet have knowledge.

In this case, the seller's closing attorney had the parties come forward prior to disbursement to file a declaratory judgment to let the courts decide. Who would be liable here if the proceeds would have been distributed?

At a minimum, this reminds us that we need to talk to our clients to confirm that they do not know of any outstanding litigation. Maybe have the parties receiving the proceeds sign a personal undertaking or hold harmless that there are no unrecorded assignments.

In the end, I believe the court came to the correct conclusion in this case, but I fear they may have opened a Pandora's Box to the real estate attorney handling closings where the land trust is the seller. ■

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1. *Campbell v. Campbell*, 2017 IL App (3d) 160619, ¶ 17.
2. *Financial Freedom Acquisition, LLC v. Standard Bank & Tr. Co.*, 2015 IL 117950, ¶ 33.

Can a Wire Transfer Be Recalled After It Is Accepted?

BY MICHAEL WEISSMAN

In a case involving Article 4A of the Uniform Commercial Code, decided by the United States District Court for the Eastern District of Virginia on September 23, 2021 (2021 U.S. Dist. Lexis 182726, 2021 WL 4341111), the court was called upon to decide when an accepted payment order may be cancelled. The factual background was a bit complex, so it is set forth in chronological order as follows.

1. March 20,2020: Messrs. A and B contact the California Department of General Services about supplying N95 masks even though they had no previous experience with medical supplies.
2. March 23, 2020: Messrs. A and B form a limited liability company in the State of Delaware. They also open an account for the LLC at a small bank where they advise the officers the account would receive domestic and foreign wire transfers totaling $100,000,00 per month and would be directed to wire out an average of $25,000,00 per month. They were provided with wire transfer instructions for the account.
3. March 25, 2020: The DGS issues a purchase order to the LLC for a total of 100 million N95 masks for a total purchase price of $609,161,000, with 75% being prepaid. The purchase order included a provision that DGS could "terminate performance of work under this Contract for its

convenience ... if [DGS] determines that a termination is in the State's best interest". The California purchase order included a delivery date of April 3, 2020.

4. March 25,2020: Messrs. A and B send a message to DGS at 11:46 p.m. that includes a list of delivery dates for the 100 million masks indicating that the first million would be delivered on April 2, 2020, and the entire shipment would be in California no later than April 24, 2020. At that point the DGS officials did not know the LLC had been organized only two days earlier, was not qualified to transact business in California, had never delivered any masks to customers, and had opened its bank account only one day earlier.
5. March 25, 2020, at 3:30 p.m.: Mr. A tells small bank that California is sending a wire transfer to the LLC account for $450 million. At 6:15, small bank officer asks Mr. A what the purpose of the incoming wire transfer was for. Mr. A replied it was the purchase of 100 million masks. In response to a question, Mr. A stated he did not know how long the incoming wired funds would remain in the account. Small bank officer advises senior bank management who says so large a wire transfer could not be held entirely at small bank but would have to spread over various accounts. Senior management stated it was "unbelievable "a two- day old business could receive a $450 million contract from the State of California.
6. March 25, 2020: Small bank senior management advise Mr. A by telephone that a $450 million deposit will not be covered by FDIC insurance and that it would have to be placed in "sweep" accounts at several institutions.
7. March 25, 2020, at 6:17 p.m.: Senior management of small bank asks Mr. A to identify the recipient of funds to be wired out of the account. They are told XYZ Company.
8. When searched for on the internet, WXZ, the recipient, turned out to a cutlery company. Small bank's senior management becomes more suspicious.
9. March 26, 2020, at 11:21 a.m.: California originates a wire transfer for $456,888,600 for the benefit of the LLC through the state's California bank, Big bank. The transaction triggered a warning to the Big bank's Fraud Payments Control Team that looks out for suspicious transactions. The team ask DGS to confirm the transaction and it did so. Receipt of the wire transfer occurred at 11:55 a.m. at small bank and at 11:57 small bank's personnel advise Mr. A that $456,888,600 had been received for the benefit of the LLC.
10. March 26,2020, at 12:07 p.m.: Concerned about the transaction, small bank management places a hold on the funds. Big bank's Team asks small bank if it knew the beneficiary of the funds and what their ultimate disposition would be, saying Big bank had concerns about whether the transaction was bona fide. Small bank management said it had its own concerns and put a hold the funds.
11. March 26,2020 at 12:44 p.m.: Big bank's Team questions small bank management, asking if the LLC is a new account or a well-established business.
12. March 26,2020, at 12:51 p.m.: An employee of DGS calls small bank in response to a message left on DGS's voicemail, confirming that the wire transfer was legitimate.
13. March 26,2020 at 12:55 p.m.: Small bank managers asked Big bank for documentation to support that the funds were transferred properly. DGS replied in the affirmative and refers the managers to an official in the California State Treasurer's Office.
14. March 26, 2020, at 1:19 a.m.: Officials of Treasurer's office called small bank and were told that the LLC's account had just been opened the previous day and that the funds had not been credited to the bank account of the LLC at that time.
15. March 26,2020 at 1:34 p.m.: Managers of small bank ask the Big bank Team whether a recall could be issued for the wired funds small bank was holding. The answer was that Big bank felt comfortable because small bank was holding the funds.
16. March 26, 2020, at (approx.) 1:39 p.m. Big bank advises small bank that Big bank is recalling the funds. Small bank asks for an official communication from Big bank requesting a recall of the funds.
17. March 26, 2020, at 1:55 a.m.: Small bank advises Mr. A that it had received an official notice from Big bank to return the wired funds and that he should resolve the matter with the State of California.
18. March 26,2020, at 2:05 p.m. Big Bn sent a message to small bank officially asking for a return of the funds. The recall corresponded to a 2:00 p.m. from the California State Treasurer's office that Big bank recall the funds because the Treasurer was not satisfied with DGS's due diligence.
19. March 26, 2020, at 2:30 p.m. Mr. A visits with small bank's senior managers, apologizes for the transaction and states that he does not object to the return of the funds.
20. March 26,2020 at 3:21 p.m. Small bank returns the funds to Big bank. The funds are credited to the account of the State of California at 4:02 p.m. The litigation followed.

On June 12, 2020 , the LLC sues small against bank claiming violations of Article 4A of the UCC (sections 4A -404(a) and 4A-204(a)). On October 13, 2020, small bank sues Big bank for indemnification of its litigation expenses. Each party files a motion for summary judgment. The result was a ruling against the LLC on its claim against small bank and in favor of small bank on its claim against Big bank. The LLC's claims against small bank

were based upon an alleged violation of section 4A-404(a) that occurred when small bank returned the wired funds to Big bank. Section 4A-404(a) states, that "if a beneficiary's bank accepts a payment order, the bank is obliged to pay the amount of the order to the beneficiary of the order". The court said there was no question whether the funds in question had been accepted because they had been credited to the account of the LLC. Despite that, small bank argued that although the payment was accepted, it was not liable to the LLC for having returned the funds because Big bank had cancelled the payment. In making that contention, small bank relied on section 4A-211(e) that states: "A cancelled payment order cannot be accepted". It also provides that a cancellation order can trump an acceptance only if the cancellation is "effective."

Section 4A-211(e) states that a cancellation of a payment order is effective only if the order was issued to implement an unauthorized payment, or, because of a mistake by the sender, the payment order, (i) is a duplicate of a prior order, (ii) directs payment to a beneficiary not entitled to payment, or (iii) directs payment of too great an amount. Finding none of the foregoing was present, the court said small bank could not nullify its obligation to the LLC because Big bank's effort at cancellation was not effective.

Alternatively, small bank argued the entire wire transfer was clearly in error because "California originated the funds transfer only as a result of having been misled about the [LLC's] bona fides as a PPE supplier." The court made short work of that argument saying, "[Small bank] cannot rely upon problems with the underlying transaction to escape its obligation to its customer under the banking regulations." But then the court said that despite small bank's violation of the banking regulations, judgment would be in favor of small bank because, '[the LLC] cannot establish that it sustained any damages from that return . . . . The UCC does not provide for, and [the LLC] has not claimed, statutory damages for a violation of [section]4A-404(a)." Moreover, said the court, even if the funds had been released to the LLC, there was ample evidence in the record that the LLC could not have fulfilled its contract with the State of California.

The remaining issue was whether Big bank had to indemnify small bank for fees and expenses small bank had incurred in the litigation. Applying section 4A-211(f), the court ruled that it did because that provision applies when "a sender has no right to cancel a payment order after its is accepted by the receiving bank." Finding no evidence of an agreement between the two banks overriding that rule, the court entered judgment in favor of small bank on its indemnification claim against Big bank.

What's the point? The rules of section 4A of the UCC operate independently of the contractual arrangements that give rise to the origination, implementation and possible cancellation of a payment order. Section 4A emphasizes finality so that financial transactions can be executed with the expectation that the sender and recipient of a wire transfer will abide by their respective obligations.■

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