

Jim's Perspective...

Roof Hail Damage to Residential Property Assignment of Claim to Roofing Contractor

Recently, the Nebraska Court of Appeals issued an opinion about the validity of a contract between a homeowner who's roof sustained hail damage and a roofing contractor who agreed to act as the advocate for the homeowner to negotiate with the claims adjuster the total amount of loss payable under the insured's homeowners insurance policy. The case is titled, Versatile Roofing LLC v. Horacek (*Versatile*). This opinion was not designated for permanent publication, so it does not have the same legal value or impact as a published opinion, but it can still be cited if it has persuasive value on a material legal issue and there has been no other published Nebraska Court of Appeals opinion, or other court opinion, that would serve as well as the unpublished opinion. [Nebraska Court Rules of Appellate Practice, Section 2-102 (E)]

Tim Horacek incurred hail damage to the roof of his house caused by a windstorm. Horacek requested that his insurance company, MutualAid eXchange Insurance (MAX), pay for the entire roof replacement. [I have never heard of this company. I researched this a little bit, and learned it was formed in 2001 and headquartered in Overland Park, Kansas. Recently, it was declared insolvent by a Kansas District Court.] MAX determined that the roof was not a total loss, and it offered to replace only half of the roof. Horacek requested proposals from different contractors to repair the half of the roof that MAX agreed to pay. But rather than provide the requested bid, Versatile proposed to act as the advocate for Horacek to get MAX to agree that the roof damage was a total loss. It was Versatile's contractual duty to persuade MAX to agree that the roof was a total loss. This contract also included a clause that provided that Horacek could cancel the contract, assuming work had not begun, prior to midnight of the third business day after the date the contract was executed by the parties. Horacek did not cancel the contract. About a week after the contract had been signed, another hail storm hit the Horacek home. MAX then determined that the roof was now a total loss. Versatile submitted a second contract to Horacek that again provided that Versatile would handle repair of the roof and act as the advocate for Horacek in the same way as provided in the first contract. Horacek rejected this proposal and hired another contractor to replace the roof.

Versatile filed suit in a Nebraska District Court asserting that since Horacek did not cancel the original contract within the third business day after the date of the contract, Horacek owed liquidated damages to Versatile, pursuant to the contract, in the amount of 30% of the full contract amount which resulted in a payment owed to Versatile in the amount of \$10,564.32.

The trial court granted Horacek's motion for summary judgment. Versatile appealed, and the case was assigned to the Nebraska Court of Appeals. In affirming the decision of the District Court, the Court of Appeals relied on a legal publication related to legal contracts. The Restatement (Second) of Contracts, Section 265 states:

Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of

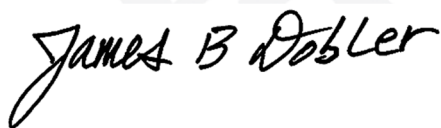
which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstance indicated the contrary. [This provision is referred to as the “frustration of purpose” doctrine]

In the *Versatile* case, the purpose of the first contract was to persuade MAX to determine that the claim under dispute in the contract with Versatile was a total loss. The Court noted that this section of the Restatement of Contracts is useful or needed in contract law because Section 265 deals with the problem that arises when a change in circumstances makes one party’s performance pursuant to a contract virtually worthless to the other party.

The Court found the “frustration of purpose” doctrine applied to the Horacek/Versatile contract. Versatile was retained by Horacek, and pursuant to the contract, Versatile was to advocate for Horacek and get MAX to change its coverage position on the scope of the damage to the roof, and agree that the entire roof needed replacement, as a result of the first windstorm. However Versatile failed to succeed in convincing MAX that the damage caused by the first windstorm resulted in a total loss to the roof. After the second windstorm, the purpose of Versatile’s and Horacek’s contract became frustrated in that there was no longer a need to advocate for MAX to change its position governing the extent of the damage from the first windstorm. MAX was now going to pay for the total loss of the roof. The Court further explained:

Following the subsequent hailstorm, with the original purpose for which Horacek retained Versatile now frustrated, Versatile could no longer satisfy the condition for which the contract was made. With the condition no longer satisfiable, the contract became void by its own terms. Because Versatile failed to convince MAX that the roof was a total loss, Horacek’s contractual condition to pay Versatile never arose.

The assignment of property loss claims to contractors continues to occur. The *Versatile* case is a good legal concept (“frustration of purpose” doctrine) to keep in mind as your clients deal with contractors to repair property loss caused by perils covered by an insurance policy. The *Versatile* case makes sense to me.



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