



Limiting Snow Plowing Liability

Thomas Brothers, CSP, ARM, Technical Consultant

October 2015

Our risk control service is advisory only. We assume no responsibility for management or control of customer safety activities nor for implementation of recommended corrective measures. This presentation is based on information supplied by the customer and observations of conditions and practices at the time of the visit. We have not tried to identify all hazards. We do not warrant that requirements of any federal, state, or local law, regulation or ordinance have or have not been met. This report does not create coverage. Only your policy or contract provides coverage subject to its terms, conditions, and exclusions.



Anyone Hiring?



“Of course
I’m
insured...”

Objectives...

- Reinforce benefits of “Certification”
- Refresh on what’s critical to successfully preventing and defending lawsuits/claims
- Remind that it’s not whether insurance will pay, but rather how much!
- Highlight the benefits of written snow plowing contracts and review common risk management interests
- Demonstrate the importance of collaborative business partnerships to preventing and defending lawsuits/claims.

Content Notice

We strongly advise the use of legal counsel to ensure that your actions meet the requirements applicable to your business. Nothing in these materials should be construed or referred to as legal advice. The illustrations, instructions, and principles contained in the material are general in scope and, to the best of our knowledge, current at the time of publication. No attempt has been made since publication to update or interpret any referenced codes, standards, regulations, or case law references.

The Incident



Are the Client and hired Contractor liable?
Will the Client's or hired Contractor's
insurance pay?



Are the Client and hired Contractor liable? NH Law Changes the Game...

508:22 Liability Limited for Winter Maintenance.

- If “Certified Applicator” oversight
- Protects all likely defendants (Owner, PM, Contractor)
- Even given “notice” of a hazard
- Limited to third party suits arising solely from snow and ice accumulation
- Absent gross negligence or reckless disregard of the hazard
- Assumed to be adhering “best practices”... “In the absence of proof to the contrary”
- Must maintain written record of winter maintenance practices

Is NH 508:22 working?

- Anyone aware of lawsuits testing NH 508:22? Outcome?
- Is NH 508:22 deterring lawsuits/claims?
- Are Claims Adjusters using NH 508:22 to deny claims/negotiate settlements?
- Do Plaintiffs continue to prevail against Snow Plowing Contractors and their Clients lacking “Certification”?

“In the absence of proof to the contrary”?

- Third party slips/falls and is injured.
- File lawsuit alleging negligence.
- Your insurance carrier files “[motion for summary judgment](#)” to have the case dismissed citing NH 508:22
- Plaintiff produces this picture for the court of conditions at the time of the incident
- How likely is the court to find a “question of fact” remains as to whether “published” best practices” were adhered?



Critical to Prevailing with Motion for Summary Judgment (MSJ)

508:22 Recordkeeping Requirements:

- Description of winter maintenance practices
- Type and rate of application for de-icing materials
- Date of treatment
- Weather conditions for each event requiring de-icing

Critical to Prevailing with Motion for Summary Judgment (MSJ)

Additional best practices:

- Document “Inspections”
- Document Date **and Time** of treatment
- Clarity in contracts with owners/property managers:
 - Exactly who is responsible to do what, where, when and how.
 - Who/What “triggers” winter maintenance activities, including inspection
- A photo is worth a thousand words – document performance.
- Retain records of performance for at least 4 years (SOL+1)

It's not whether Insurance will pay, but who's insurance and how much...

- Owner/Contractor typically liable for damages “caused in whole or part”
- Commercial General Liability (CGL) Policy normally responds:
 - **Three coverage parts**
 - Cov A – Bodily injury and property damage
 - Cov B – Personal and advertising injury
 - Cov C – Medical payments
 - **Cov A:** 
 - Obligation to “defend” allegations of liability
 - Sub-limit typically \$1MM/occurrence
 - **Cov C:** 
 - Optional, “good faith”, no-fault coverage for medical expenses ONLY
 - Sub-limits vary, typically \$5-10k/occurrence

Do we fight or seek settlement? A cost/benefit decision...

We give this in good faith to avoid costly lawsuits...

Will there be insurance coverage? For which party?

Post-storm, post-plowing, parking lot slip and fall claim.

- Property Owner, Manager or Tenant
 - CGL Policy (Coverage A and C)?
- Snow Plowing Contractor
 - CGL (Coverage A and C)?
 - Business Auto policy?

Insureds should check with their agent/broker and legal counsel to confirm they have appropriate coverage.

Is A Contract Necessary for Your Snow Plowing Relationship?



- Complexity of terms justify the need
 - Services: Who, what, where, when, how
 - Terms of payment
 - Risk Management: What's the plan when an incident happens?
- Is the Contractor's "Service Proposal/Quote" a contract?
- Assert a contract or rely on Contractor's service proposal/quote?
 - Does not matter which party asserts.
 - It's all about the terms!
 - Who is accountable to perform how?
- Subject **ALL** contracts to legal review!

Reference Note: Managing Risk in Snow Plowing Relationships, RC 5620



Managing Risk in Snow Plowing Relationships
Risk Control from Liberty Mutual Insurance



Preparing for snowfall every year means careful planning to help control the hazards associated with winter precipitation. Property Owners and Managers (POMs) making those preparations will be taking various precautions to help effectively protect their customers. Snow Plowing Contractors (SPCs) who provide snow removal services are getting their equipment and supplies ready to deploy when the cold weather arrives. It is important that each party (POMs and SPCs) fully understand their responsibilities so that public protection is optimized.

The following are some common situations that often generate losses, disputes, and conflicts:

- Third party slips and falls on ice or snow
- Plows damaging curbs or lawns
- Ice treatment chemicals deteriorating cement walkways or damaging interior floor finishes and carpeting
- Plow trucks striking parked vehicles or the occasional motor vehicle crash

Relationships with SPCs vary considerably, but generally, when there is a third party lawsuit filed, often both the POM and their hired SPC are named as defendants. Sorting out which entity may bear the liability and responsibility for paying for the loss requires a clear understanding of accountabilities, both legal and contractual. It is in the best interest of all parties to work collaboratively to clarify accountabilities before a third party liability incident occurs.

Define Expectations in a Written Agreement

Ultimately, the focus of a service agreement is to arrive at mutually acceptable terms that assign liability and responsibility appropriately, often based on the extent each party can control that risk. A service agreement may be prepared by either party. A service proposal from the SPC, once signed by both parties, is typically construed as a service agreement. The written agreement then becomes a legally binding contract of performances. Complex terms in a service agreement should be understood and then reviewed by legal counsel well versed in premises liability law, contract law, and insurance coverage. Include your insurance agent in the review process for insights on insurance coverage.

Tips for Snow Plowing Service Agreements

Clearly Define Service Triggers

Generally, there are three common types of snow plowing service arrangements that offer varying degrees of risk transfer:

1. "Continuous service" arrangements: These often place responsibilities on the SPC to take on some roles of the POM. The SPC is often obligated to perform regular premise inspections (i.e. "ice watch") and provide whatever services are required for safety of the premises. Continuous service arrangements favor the POM by placing more control and the associated liability on the SPC. This level of service tends to be utilized by POMs with very limited or no on-site maintenance capabilities.

Liberty Mutual
INSURANCE

RC 5620

This reference is designed to help explain some common risk management concerns that arise in snow plowing relationships.

Common Risk Management Interests in Snow Plowing Contracts

- Service triggers (i.e. Continuous, snow accumulation, will call, etc.)
- Scope of services (who, what, where, when, how)
- Service area map
- Pre and post-season inspections
- Marking of sensitive or unusual property features
- Coordination and timing of service performance
- Documentation of service requests, complaints and performance
- Snow logs
- Vehicle and operator resources and safety
- Hazard notification and response
- Property damage or bodily injury incident notification
- Contingency planning and sub-tier contracting
- Professional certifications
- **Risk transfer and insurance**

Risk Transfer and Insurance



- Position in relationship often dictates preferences for terms.
 - Hirer v. Contractor
- Is the Contractor at the mercy of the Hirer?
- Remember: Each party needs the other! Don't be afraid to negotiate terms
 - Partnership earns compromise!
- Strive to protect each other from unnecessary hardship or unfair liability burden

Risk Transfer and Insurance



- Both parties should seek input from their Legal Counsel and Insurance Agent in crafting and negotiating terms
- Demand fair, clear and unambiguous terms
- Align loss financing with the party in the best position to manage the risk
 - Bear accountability for your own contribution to negligence and vicarious liability imposed on others
 - Weigh implications of limiting indemnification demands to available insurance.

Risk Transfer and Insurance



- Appropriate Insurance Coverages and Limits
- Coverage for snow plowing operations?
 - Consider requiring ISO CG 22 92 Snow Plowing Operations Endorsement or equivalent
- Contractual demands sufficient to trigger blanket insurance provisions?
 - e.g., additional insured status, waiver of subrogation, etc.

Risk Transfer and Insurance



- What about reciprocal indemnification, additional insured and waiver of subrogation demands?
 - Seek advice from Legal Counsel
- Did involved parties actually evidence demanded protections are afforded?
 - Collect, review and retain Certificates of Insurance (COIs), etc.
 - Consider demanding critical policy endorsements (e.g., Additional Insured endorsements, etc.)
 - Consider reserving the right to demand actual copies of the full insurance policy

Next Steps

- Review learnings with your Legal Counsel and Insurance Agent
- Consider these learnings relative to contract specifications; regardless of your position in the relationship
- Assess effectiveness of your recordkeeping practices for winter maintenance activities
- Pull your weight in helping business partners prevent and defend third party premises liability incidents
 - Confirm the Snow Plowing Contractor truly has coverage for snow plowing operations
 - Once notified of an incident, collect and preserve evidence that'll support a Motion for Summary Judgment for dismissal based on 508:22
 - Remember: We're all on the same team!

Questions/Comments???

- Thank you!!!

