FAILURE TO USE REASONABLE CARE TO MAINTAIN HEAT

With winter approaching, and the risk of loss caused by frozen and burst pipes, we decided to highlight recent as well as older failure to use reasonable care to maintain heat cases from across the country.

MASSACHUSETTS

DELEGATION OF DUTY

In *Chow v. Merrimack Mutual Fire Ins. Co.*, the Appeals Court considered a question raised by an insured's engagement of a caretaker to look after an unoccupied property. 83 Mass. App. Ct. 622, 623 (2013). In *Chow*, the property insurer denied the insured's claim for water damage caused by frozen and burst pipes on the basis that the insured failed to exercise reasonable care to maintain heat in a house which was unoccupied.[1] *Id*. The house served as living quarters for employees employed by the insured's restaurant. *Id*. The loss occurred during a period when the insured instructed a former employee to maintain the thermostats in the house at sixty degrees.[2] *Id*. at 623-24.

The Appeals Court considered whether a trial court's instruction to the jury "to attribute to [the insured] the reasonableness of actions taken on his behalf by *any* person to whom the [insured] delegated responsibility to take care of the property" was proper. *Id*. at 625 (emphasis added). As an initial matter, the Appeals Court noted "that the question whether a party to a contract has satisfied a contractually imposed duty to use reasonable care is tested by reference to ordinary principles of negligence." *Id*. The Appeals Court further noted that the "question whether a principal may be held vicariously liable for the failure of his agent to use reasonable care depends on the nature of the relationship between the principal and the agent. When a master-servant relationship exists between a principal and his agent, the principal may be held liable for the acts of his agent under the doctrine of respondeat superior." *Id*. However, "'[g]enerally speaking, the employer of an independent contractor is not liable for harm caused to another by the independent contractor's negligence, except where the employer retained some control over the manner in which the work was performed.'" *Id*. at 627-28. "'Whether an employer has sufficient control over part of the work of an independent contractor to render him liable . . . is a question of fact for the jury.'" *Id*. at 628. As a separate issue, "if a principal has actual knowledge of the unsuitability of an agent, the principal may be held liable for his own negligence in the selection of an unsuitable agent to take action on his behalf." *Id*.

The Appeals Court held that although the trial court "correctly recognized that the question whether [the insured] used reasonable care to maintain heat in the building turned in part on the extent to which [the former employee's] actions could be imputed to [the insured]," the trial court did not ask the jury to determine whether the relationship between the insured and the former employee was one of master-servant or whether the former employee acted as an independent contractor. *Id*. at 627-28. Additionally, the Appeals Court held that the trial court's instruction improperly "advised the jury to impute to the [insured] any and all negligence by [the former

[1] The applicable property insurance policy excluded coverage for a loss caused by "freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance, or by discharge, leakage or overflow from within the system or appliance caused by freezing . . . while the dwelling is vacant, unoccupied or being constructed unless [the named insured] ha[s] used reasonable care to: (1) maintain heat in the building; or (2) shut off the water supply and drain the system and appliances of water." *Id*. at 624-25.

[2] The house was heated exclusively by means of electric baseboard heaters.

employee] in carrying out the caretaking duties the [insured] assigned to him, without regard to the degree of control the [insured] retained over [the former employee]'s actions on the [insured]'s behalf." *Id*. at 628.

The Appeals Court reversed the judgment, set aside the verdict, and remanded the case to the trial court for further proceedings consistent with the Appeals Court's opinion. *Id*. at 630.

RELIANCE ON ADVICE OF A LICENSED HEATING CONTRACTOR

In *Palmer v. Pawtucket Mut. Ins. Co.*, the Massachusetts Supreme Judicial Court construed a coverage exclusion similar to the one at issue in *Chow*, 83 Mass. App. Ct. 622, and held that the insureds exercised due diligence where they relied on the advice of a licensed heating contractor. 352 Mass. 304, 306 (1967). The insureds owned a summer home in Marshfield, Massachusetts, and they consulted with a licensed heating contractor who advised them that they could turn off the heat in the home and add anti-freeze to the hot water heating system instead of draining the system. *Id*. at 305-306. The insureds implemented this same approach during three prior winters. *Id*. The insureds were last inside the property on February 21, 1963, and they discovered freeze-up conditions when they returned on April 2, 1963. *Id*. During this period of time, a pipe froze and burst causing water damage to the insureds' home. *Id*.

Even though at the time of the loss, the insureds had turned off the heat and not drained the pipes, the Court held that the insureds exercised due diligence with respect to maintaining heat. *Id*. at 306-07. According to the Court, it was reasonable for the insureds to rely on the advice of a licensed heater contractor that the use of anti-freeze would require no heat in the house. *Id*. The Court also noted that the contractor told the insureds that his approach was the "accepted method practiced in the community." *Id*. at 307.

DOES THE "DISCOVERY RULE" APPLY TO THE TWO-YEAR STATUTE OF LIMITATIONS SET FORTH UNDER MASS. GEN. LAWS CH. 175, § 99?

In *Nurse v. Omega U.S. Ins., Inc.*, the Appeals Court considered whether the so-called "discovery rule" applies to toll the two-year statute of limitations set forth in Mass. Gen. Laws ch. 175, § 99.[3] 38 N.E. 3d 759, 759 (2015). The case arose from the insurer's denial of coverage for water damage to the insured's multi-unit residence caused by a frozen and burst pipe. *Id*. The insured filed an action for declaratory judgment and breach of contract against his insurer. The trial court granted the insurer summary judgment on the basis that the insured's complaint was barred by the two-year statute of limitations. *Id*. The insured appealed. *Id*.

As background, the insured's property was vacant in December of 2009 except for ongoing construction work in a third-floor unit, which required that the plumbing supplying water to that unit remain active. *Id*. at 760. On December 19, 2009, records show that the average rate of water usage at

[3] The applicable property insurance policy incorporated the two-year statute of limitations as a policy provision.

the property increased from 15 cubic feet of water every 6 hours to 260 cubic feet of water every 6 hours. *Id*. This rate of water usage continued at the property until December 28, 2009, when the local water and sewer commission notified the insured concerning the increased rate of water usage. *Id*. On December 28, the insured visited the property and discovered substantial water damage to the building. *Id*. The insured traced the damage to a leak under a sink in the third-floor unit. *Id*. The insurer denied the insured's claim on January 14, 2011, following a year-long investigation. *Id*. The insured filed his complaint against the insurer on December 28, 2011. *Id*.

The Appeals Court held that the discovery rule does not apply to claims governed by Mass. Gen. Laws ch. 175, § 99. *Id*. at 764. The Appeals Court stated that the phrase "loss occurred" in the statute is unambiguous and "denotes the time at which the damage to the property happens." *Id*. Because the parties did not dispute that the water damage occurred on December 19, 2009, the Appeals Court upheld the trial court's ruling that the statute of limitations began to run on this date and not the date the insured discovered the damage. *Id*.

CONNECTICUT

WHAT DOES "USED REASONABLE CARE TO MAINTAIN HEAT" MEAN?

In *McCartney v. Pawtucket Mut. Ins. Co*., the trial court considered whether the plaintiff-insured "'used reasonable care to . . . maintain heat in [her] building . . ..'" 1994 WL 723056, at * 2 (Conn. Super. Ct. Dec. 23, 1994).[4] For the purpose of deciding this issue, the trial court considered the following facts: The plaintiff-insured, who was in her mid-eighties, owned a two-family house. *Id*. at *1. The insured resided with her sister in one unit and rented the other. *Id*. In April or May of 1991, the insured decided to sell the house and engaged a real estate agent. A buyer signed a contract of sale. *Id*. In anticipation of the closing, the insured and her sister moved out of the house in August of 1991 and the tenants vacated by October 15, 1991. *Id*. The insured set the house's thermostat in the house at fifty-five degrees. *Id*. She also cancelled her automatic fuel delivery contract in May of 1991. *Id*. The closing did not take place because the buyers could not obtain a mortgage. *Id*. In November of 1991, the insured's son checked the volume of fuel oil in the house's oil tanks and confirmed that the tanks remained full. *Id*. In December of 1991, the insured contacted her real estate agent on two occasions and asked the real estate agent to check the supply of oil. *Id*. The real estate agent declined on both occasions. *Id*. The insured also requested that her former oil company check the amount of oil, but the company was unable to gain access to the house and check the tanks. *Id*. By January of 1992, the fuel storage tanks ran out of oil. *Id*. In January of 1992, the insured mailed house keys to her former neighbor. *Id*. On January 23, 1992, a neighbor entered the house and discovered the water loss. *Id*.

In considering these facts for the purpose of determining whether the insured used reasonable care to maintain heat in her

[4] The plaintiff-insured commenced a breach of contract action against her insurer after it denied a homeowners insurance policy claim for losses she sustained when water pipes in a house she owned and had vacated the previous year froze and burst causing water damage throughout her house. The policy contained the following provision: "'We insure against risks of direct loss to property described in Coverages A and B only if that loss is a physical loss to property; however, we do not insure loss . . . caused by . . . freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance caused by freezing. This exclusion applies only while the dwelling is vacant, unoccupied or being constructed unless you have used reasonable care to (1) maintain heat in the building; or (2) shut off the water supply and drain the system and appliances of water. . ..'" *Id*. at *2.

house, the court stated "[w]hile the application of the term 'reasonable care' to specific factual circumstances may at times be difficult, the meaning of that term is not ambiguous. It is well established. 'The duty to use 'reasonable care' . . . is the care which the ordinary prudent person under the circumstances would exercise.'" *Id*. at *2. "'Reasonable care is care proportionate to the nature of the instrumentalities involved and the circumstances ordinarily attending. It is always to be proportionate to the hazards reasonably to be apprehended.'" *Id*. The trial court also noted that the standard of reasonable care is an objective standard and not subjective. *Id*. at *3.

The court found that the insured did not use reasonable care to maintain heat in her vacant and unoccupied house after November of 1991. The trial court took judicial notice concerning the climate of the state in December and January and freezing temperatures during these months. *Id*. at *3. The court stated that the insured had a duty to check or have others check the volume of oil in the storage tanks after her son's examination in November of 1991 and before January 23, 1992. *Id*. The insured's duty of reasonable care required her to maintain oil in the storage tanks during the months of December and January. *Id*.

MAINE

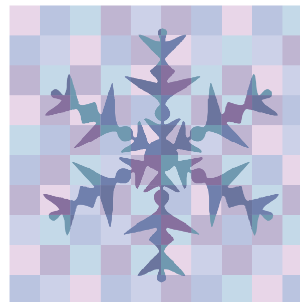
WHAT IS REASONABLE CARE?

In *Maranan v. Allstate Ins. Co*., the insured left her house unoccupied during the winter of 2002-2003 because of health problems. 2007 WL 7120014 (Sup. Ct. Me. Aug. 20, 2007). The insured set the thermostats for heat at the optimal setting. *Id*. The insured also relied on a carpenter to check on her house when he was in the area, but she did not pay him. *Id*. The insured did not arrange an automatic fuel oil delivery. *Id*. Additionally, the furnace had a history of not working. *Id*. The trial court granted the insurer's motion for summary judgment and held that the insured "did not use reasonable care to maintain heat in the house . . .." *Id*. The court stated that the insured "failed to have automatic fuel delivery, allowed the fuel tank to run dry between oil deliveries, failed to have the furnace serviced properly to ensure it was in good working order, and failed to arrange for regular visits to the house to ensure the heat was working." *Id*. The court also stated that the "furnace had a history of shutting down[,] [s]imply filling the tank with oil after it ran dry did not ensure that the oil would flow and the furnace would work[,] and [s]etting thermostats at the optimal setting is irrelevant if the furnace stops working." *Id*.

In *Williams v. Allstate Ins. Co*., the insureds owned a summer home that was unoccupied in the winter months. 2009 WL 2703662 (Sup. Ct. Me. June 25, 2009). The insureds did not occupy the residence between September of 2006 and April 12, 2007, when the insureds discovered that water pipes inside the residence had frozen and ruptured releasing water into the house. *Id*. The insureds maintained heat during the winter months and installed a "Winter Watchman," a device that illuminates a red light if the temperature in the residence drops to a certain level, in a window visible to the street. *Id*. The insureds also had an informal agreement with two contractors, who would check the residence's window to see if the Winter Watchman indicated that the temperature was too low. *Id*. The insureds also had oil delivered to the property. *Id*. Between October of 2006 and February of 2007, the insureds' heating oil supplier delivered oil as follows: 14 gallons on October 19; 8.9 gallons on December 27, 2006; and 4.4 gallons on February 21, 2007. *Id*. The oil delivery company placed a hand written note on the December 27 invoice advising the insureds of his concern that the heating system was not burning fuel oil. *Id*. The insured took no action in response to

the note. *Id*. After the water loss, a contractor repaired the furnace. *Id*. The trial court denied the insurer's motion for summary judgment and held that as a result of the conflicted factual record it was unable to conclude as a matter of law that the insureds failed to exercise reasonable care to maintain heat in the house. *Id*.

In *McGuire v. Allstate Ins. Co*., the named insured died and her house remained unoccupied from the date of her death on September 6, 2006, until January 3, 2007, when someone discovered a burst pipe in the house. 2009 WL 6038638 (Sup. Ct. Me. July 6, 2009). As of the date of the insured's death, she had an account with a fuel oil supplier for automatic delivery. *Id*. After the insured's death, the representative of her estate paid the oil company for a delivery of oil made prior to the insured's death and notified the oil company of the new address on the account. *Id*. However, without notice, the oil company removed the account from automatic delivery, and unilaterally closed the account in December of 2006. *Id*. An empty oil tank caused a lack of heat in the house and the pipes to burst. *Id*. The trial court denied the insurer's motion for summary judgment and held that a genuine issue of fact existed as to whether the insured exercised reasonable care in maintaining heat in the house. *Id*.



PENNSYLVANIA

DOES A "LEGAL REPRESENTATIVE" OF AN ESTATE OWE A DUTY TO USE REASONABLE CARE TO MAINTAIN HEAT?

In *Lombardi* v. Allstate Ins. Co., the United States District Court for the Western District of Pennsylvania considered whether a legal representative of an estate must comply with the obligation under a homeowners insurance policy to use reasonable care to maintain heat. 2011 WL 294506, at *1 (W.D.Pa., 2011).

In July of 2007, Nancy Morocco, who owned a house in Pittsburgh, Pennsylvania, died. *Id*. at *1. Ms. Morocco's brother, Anthony Lombardi, was appointed Administrator of the Estate. *Id*. On December 24, 2007, Mr. Lombardi discovered a water loss at Ms. Morocco's house. *Id*. Mr. Lombardi made a claim under the homeowners policy and the homeowners insurer denied the claim on the basis that Mr. Lombardi failed to use reasonable care to maintain heat in a vacant or unoccupied house. *Id*. at *1, *5. The insurer contended that a frozen and burst water pipe caused the loss. *Id*. at *5. Although Mr. Lombardi disputed the insurer's contention concerning the cause of the loss, he contended that, because he was not the "named insured" under the homeowners policy, he was not obligated to comply with the obligations imposed under the following exclusion which removed from coverage losses caused by: "14. Freezing of plumbing, fire protective sprinkler systems, heating or air conditioning systems, or household appliances, or discharge, leakage or overflow from within the systems or appliances caused by freezing, while the building structure is vacant, unoccupied or being constructed unless you have used reasonable care to: (a) maintain heat in the building structure; or (b) shut off the water supply and drain the system and appliances." *Id*. at *3. Mr. Lombardi contended that these obligations applied only to the named insured and insured's resident spouse.[5] *Id*.

[5] Mr. Lombardi relied on the policy's definitions of "you" and "your" which stated "'you' or 'your' - means the person named on the Policy Declarations as the insured and that person's resident spouse." *Id*. at *3. He argued he, as a legal representative of the estate, did not meet

Mr. Lombardi also contended that legal representative is a separate category of person not defined by the policy. *Id*. at *4.

The court disagreed with Mr. Lombardi. *Id*. The court stated a legal representative is equivalent to "you" as defined by the policy *Id*. The court stated that Mr. Lombardi "does not assert a claim in his own right; he asserts one only in his capacity as the Administrator of the insured's estate." *Id*. The court also stated that there "is no meaningful distinction between Nancy Morocco and the Estate of Nancy Morocco. Upon the death of the insured, the named insured on the Policy becomes the Estate of Nancy Morocco. Because the Estate is incapable of acting on its own, it must act – or fail to act – through its administrator – here, Anthony Lombardi." *Id*. Accordingly, the court held the exclusion applicable to Mr. Lombardi as the estate's legal representative. *Id*. at *5.

the definition of "you" or "your." *Id*. He also argued that he did not fit the definition of "insured person" because he was not a relative residing in the insured's household or a dependent person in her care. *Id*. The policy defined "insured person" as "you and if a resident of your household: a) Any relative; and b) Any dependent person in your care." *Id*.

NEW JERSEY

WHETHER AN INSURED USES REASONABLE CARE TO MAINTAIN HEAT IS AN OBJECTIVE STANDARD

In *Dooley v. Scottsdale Ins. Co.*, the United States District Court for the District of New Jersey considered, in part, whether it should apply an objective or subjective standard to the terms "'reasonable care' to 'maintain heat'" contained in a surplus lines homeowners policy. 2015 WL 685811, at *6 (D.N.J., 2015).

The plaintiff-insureds owned a two-story vacation home in Ocean City, New Jersey. *Id*. at *1. The insureds stayed in the home between December 11 – 12, 2010, and planned to return on December 31, 2010. *Id*. Upon returning to the house on December 31, 2010, the insureds discovered that water had discharged from a second floor bathroom where several pipes had frozen and burst. *Id*. The insureds made a claim under their homeowners policy. The policy excluded coverage "caused by: . . . [f]reezing of a plumbing, heating, air condition or automatic fire protective sprinkler system or of a household appliance, or by discharge, leakage or overflow from within the system or appliance caused by freezing." *Id*. at *2. This exclusion did not apply if the named insured used "reasonable care to: (a) [m]aintain heat in the building; or (b) [s]hut off the water supply and drain all systems and appliances of water." *Id*. The insurer's investigation identified utility records showing that the insureds used 125 kWhs of electricity from November 16, 2010, to December 16, 2010. *Id*. at *3. The insurer contended that 125 kWhs of electricity was "'very low usage' during the billing period . . . [and] 'indicates that the heat [in the house] was entirely off after the [insureds] departed [the house] on December 12.'" *Id*. The insureds testified at depositions that they turned all thermostats in the house to low and closed all interior and exterior plumbing with the exception of the main valve, before departing on December 12, 2010. *Id*. The insureds also testified that they completed the same routine each time they left the house during the prior winter months and the pipes had never frozen. *Id*. The insurer denied the insureds' claim based on the evidence concerning electrical usage in the house. *Id*. The insureds filed suit against the insurer. *Id*.

The insurer moved for summary judgment on the plaintiff-insureds' complaint. In part, the insureds argued that the court should deny the summary judgment motion on the basis that: (1) the terms "'reasonable care' to 'maintain heat'" are ambiguous because

they are not defined in the policy; and (2) there is a genuine dispute of material fact whether the insureds took reasonable care to maintain heat in their house. *Id*. at *4, *6. The insureds asked the court to apply a subjective standard to the terms "'reasonable care' to 'maintain heat.'" *Id*. at *6. The insureds contended that "an insured person took 'reasonable care' to 'maintain heat' if his actions were reasonable in his own mind." *Id*. On the other hand, the insurer contended that the terms are unambiguous and should be given their plain and ordinary meaning. *Id*. The insurer also contended that the court should determine "whether an insured . . . acted reasonably based on the outcome of that [insured]'s acts, not by the acts themselves." *Id*. at *7.

The court rejected the policy interpretations argued by the insurer and insureds, except for agreeing with the insurer that the terms "'reasonable care' to 'maintain heat'" are unambiguous. *Id*. at *6. The Court construed the "terms, taken together, by their ordinary meaning: an insured individual would not be excluded from coverage for losses caused by freezing if he took objectively reasonable steps, i.e. steps an ordinary person in his position would have taken, to ensure that the temperature in his home remained above freezing." *Id*. The court stated that the insureds' "subjective understanding of 'reasonable care' to 'maintain heat' is unworkable [and] [f]orcing [the insurer] to provide coverage whenever an insured person thought he did enough, whether or not that belief was objectively reasonable, would vitiate the exclusionary provision." *Id*. at *7. The Court also stated "when evaluating the objective reasonableness of an individual's behavior, one must look at how an ordinary reasonable person would have acted *at that time* [and] [d]etermining whether an individual exercised 'reasonable care' by the result, rather than by the person's actions, would not be a reasonable reading of the policy." *Id*. Applying this standard to the factual record, the court denied the insurer's motion for summary judgment on the issue of whether the insured used reasonable care to maintain heat and held that "a reasonable jury could find that [the insureds] took 'reasonable care' to 'maintain heat' and their losses should have been covered under their policy." *Id*. at *8.

MINNESOTA

AN INSURED'S UTTER FAILURE TO USE REASONABLE CARE TO MAINTAIN HEAT

In *Elkin v. State Farm Ins. Co.*, the insureds moved from Rochester, Minnesota, to New York City in early 2010. 2013 WL 3340126, at *1 (D.Minn., 2013). The insureds had not sold their house by the time they moved. *Id*. On March 9, 2010, the Minnesota gas utility notified the insureds that their gas bill was past due and the gas to their house would be shut off on March 24, 2010. *Id*. The insureds had not notified the gas utility of their new mailing address and the gas utility mailed the notice to their Minnesota address. *Id*. The insureds stated that they called the gas utility on March 8, 2010, and arranged a payment plan. *Id*. The gas utility had no record of this call. *Id*. The gas utility shut off the gas to the insureds' house on March 24, 2010. *Id*. The gas utility placed a lock on the gas meter. *Id*. The gas utility also placed door tags on the front and back doors concerning the gas shut-off. *Id*. In October of 2010, the insureds' realtor called the insureds and informed them that their house was cold. *Id*. at *2. The insureds did not act. *Id*. The realtor e-mailed the insureds in November of 2010 and urged them to check on the heat in their house because there appeared to be no heat. *Id*. The realtor also suggested that the insureds engage a caretaker to keep an eye on their house. *Id*. Instead, the insureds asked a neighbor to check the water level in the house's boiler. *Id*. The neighbor reported the water level as okay. *Id*. The gas utility continued to send monthly bills to the insureds reflecting no gas usage and charged only a nominal

service fee. *Id*. On Saturday, November 27, 2010, the realtor contacted the insureds and informed them that there was no heat in the house. *Id*. On the same day, the neighbor observed the lock on the gas meter. *Id*. In response, the neighbor contacted the gas utility and learned that it had turned off the gas in March of 2010. *Id*. The insureds attempted to contact the gas utility the same day by calling the emergency number to report gas leaks. *Id*. The insureds claim that the gas utility informed them that they would have to wait until Monday to have the gas reconnected. *Id*. The insureds also called the toll-free number for the gas utility which would have allowed them to speak with someone concerning reconnection of her gas. *Id*. However, the insureds disconnected the call without reaching the customer service representative. *Id*. The insureds did not call the gas utility until Tuesday, November 30. *Id*. During the call, the gas utility informed the insureds that it turned off the gas for non-payment. *Id*. The insureds scheduled the gas to be reconnected on December 2, the first available service appointment. *Id*. On December 1, 2010, the realtor's assistant visited the house and discovered that pipes had frozen and burst causing significant damage to the house. *Id*. at *3. The insureds made a claim under their homeowners policy. *Id*. The insurer denied the claim and the insureds filed a lawsuit against the insurer. *Id*.

The insurer moved for summary judgment on the insureds' complaint. *Id*. The homeowners policy provided that, "if the home is "vacant, unoccupied or being constructed," State Farm will not pay for any damage "caused by . . . freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system, or of a household appliance, or by discharge, leakage or overflow from within the system or appliance caused by freezing" unless the insured "used reasonable care to maintain heat in the building" or has "shut off the water supply and drain[ed] the system and appliances of water." *Id*. at *4. The insurer contended that the insureds failed to use reasonable care to maintain heat in their house. *Id*.

The court held that "[t]he evidence in this case compels the conclusion that the [insureds] did not use reasonable care to maintain the heat in the house. They ignored warnings from [the gas utility], they ignored bills showing no gas usage, and they did not respond with any urgency when their realtor told them in October that the house was very cold. The [insureds] attempt to blame their failures on others, but it was their responsibility under the policy to ensure that the home was heated. They utterly failed to do this." *Id*. at *5.

SLOANE AND WALSH LLP
ATTORNEYS AT LAW
THREE CENTER PLAZA
BOSTON, MA 02108
T: 617-523-6010
F: 617-227-0927
WWW.SLOANEWALSH.COM

RHODE ISLAND OFFICE
652 GEO. WASHINGTON HWY, SUITE 302
LINCOLN, RI 02865
T: 401-490-9987

CONNECTICUT OFFICE
100 PEARL STREET, 14TH FLOOR
HARTFORD, CT 06103
T: 860-249-7058

NEW HAMPSHIRE OFFICE
1 TARA BOULEVARD, SUITE 200
NASHUA, NH 03062
T: 603-324-7134

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