

JANUARY IS A GOOD TIME TO REVIEW YOUR SNOW VENDOR CONTRACT

To state the obvious, snow falls in Colorado during the winter. When it snows, snow needs to be plowed at your community. This means every community contracts with a snow vendor. Unfortunately, over the years, many of our clients have gotten into disputes with snow plowing vendors. To minimize these disputes, or avoid them altogether, you should carefully and methodically evaluate your snow plowing and removal situation. To assist you, we share all of the insights we have learned from handling snow removal vendor disputes over the last twenty plus years. Hopefully, this will allow you to fully evaluate your snow removal situation and make sure that your snow vendor contract minimizes the potential for disputes, and puts you in the strongest position possible if a dispute should arise.

The components of a snow vendor contract are plowing, moving, removal, shoveling, and providing ice melt or similar products. Each of these components should be evaluated separately. Areas of almost every multifamily community will need to be plowed. The key to plowing is equipment and time. What equipment does the vendor use to plow? Is the equipment the most efficient equipment to plow snow? How long should it take the vendor to plow the property? If you know these answers, then the contract should be drafted to specify what equipment will be used to plow snow at your community. However, most contracts we have reviewed simply leave this up to the snow vendor. For example, most contracts simply list snow removal components (plowing, moving/removal, shoveling, and ice melt) and the corresponding rate that vendor charges for these components. The contract leaves it up to the snow vendor, at their discretion, as to how these components are deployed. This leaves the door wide open for overcharges.

For example, a skid steer (front loader) should generally only be used for moving or removing snow. Skid steer equipment is normally billed at the highest rate. Thus, you don't want your vendor plowing your property with a skid steer when they should be using a plow. Similarly, if there is no need to move or remove snow from your property, your snow vendor shouldn't be charging you for any skid steer time. Obviously, if there is a blizzard the need to move or remove snow may change. However, the contract should address this issue (in the event X services or equipment are needed, vendor agrees to provide them, but only after written authorization).

Another component ripe for overcharges is shoveling because it generally involves the most man-hours. Some communities have their vendor shovel, while others do not. If your community does not allow vendor shoveling, make sure it is clear. If your vendor shovels, make sure it is done in the most efficient manner. Why pay 30 man hours for shoveling, when an ATV with a blade could do it in 30 minutes? Similar to the use of skid steers, occasionally you may need your snow vendor to shovel. But again, if the event arises, it should only be pursuant to written authorization. Requiring written authorization when the normal specifications of a snow vendor contract are exceeded is critical. Many of the snow vendor disputes we handle are billing disputes based on alleged verbal authorizations (the proverbial he said, she said dispute). The vendor claims they were told to do something, and the onsite team says they were not.

Ice melt charges can add up fast if you are not paying attention. Most snow contracts simply specify what the vendor is charging you for bag of ice melt, e.g. \$3 per pound. In addition to how much you are being charged for ice melt, the contract should also specify where the vendor is authorized to put it down, and how many square feet X pounds of ice melt covers. A 50-pound bag of ice melt is rated between 1,750 to 3,500 square feet; depending on how heavily it is applied. If your snow contract doesn't clearly specify where the vendor is to put down ice melt and how much it covers, you have no way to hold the snow vendor accountable. Specifically, you have no way to know if you are incurring extra ice melt costs for areas you don't want it applied (say the parking lot), are charged for more ice melt than was applied, or whether the vendor put any ice melt down at all. The vendor could generate any figures. At \$3 per pound, if the vendor's ice melt poundage is inflated by 2000 pounds over the course of the season, that is an extra \$6,000!

Snow vendor contracts should also have clear triggers and limits. For example, vendor only plows upon the accumulation of 2" of snow, and only once every 24 hours. Depending on your community layout, triggers and limits should be applied to other snow removal components. For example, vendor only shovels the sidewalks if accumulation exceeds 6", but not to exceed X man hours.

Many disputes result from vendor invoicing practices that hide overcharges. Vendor invoices should be specific to a single storm, and if the storm lasts more than a day or snow removal services are provided on consecutive days, the invoices should be broken down by day and itemized by snow removal component. Based on our analysis of vendor invoices, it is too easy to hide overcharges when an invoice is for a period of days, or a multiple day snow event.

You can't monitor triggers, limits, time, and costs without knowing how much it snowed. While fairly reliable information for snowfall is available on the internet, it is not as good as community-specific data. Because snowfall can vary widely in different parts of a city for any given storm, you need to have an accurate historical record of snowfall at your community to avoid vendor disputes and accurately monitor your vendor. Your contract should require your vendor to record snowfall amounts on your property at an agreed upon location or locations. These amounts should be listed on invoicing. Further, your onsite maintenance team should record and maintain a snow log as well to verify vendor measurements. Over time, you should have a clear idea of how much you should and will be charged for any level of snowfall.

Your snow vendor contract should attempt to disarm the snow vendor's nuclear weapon. The snow vendor's nuclear weapon is the mechanics' lien. Many snow vendor disputes that we have been involved in go like this. The snow vendor overcharges your community. The community refuses to pay. Rather than file a lawsuit against the community to collect, the snow vendor files a mechanics' lien against the property for unpaid snow removal charges, and then just sits back and waits. The snow vendor knows at some point the community is going to have to deal with the mechanics' lien because it clouds title to the apartment community.

Specifically, the issue will have to be addressed either when the community is sold or refinanced. Under Colorado law, a mechanics' lien expires six months after filed if the snow vendor has not commenced a lawsuit. However, the reality is that the title company, lender, or

buyer involved in the sale or refinance of the property do not care. They will insist that the lien be resolved even if it is long past the six months.

You can file a lawsuit against the snow vendor to get the lien removed if it has been more than six months. However, you will incur substantial legal costs to do this. Further, when the issue comes up, the buyer or lender isn't going to wait months or even a year for the lawsuit to be resolved. The snow vendor (like other vendors) counts on these realities. Thus, a snow vendor can file a mechanics' lien, sit back and do nothing, knowing that someday you will have to address the outstanding invoices, and probably will pay them because you need it cleared up now and don't want to spend the time and incur the attorneys' fees necessary to have the lien removed.

While there is no Colorado case law specifically addressing the right of a snow vendor to lien a property for snow removal services, both cases from other states and the Colorado Mechanics' Lien Statute support the conclusion that a snow removal vendor does not have a right to file a mechanics' lien against an apartment community for unpaid snow removal services. Under the Colorado statute, a person is eligible to file a mechanics' lien against your property if they have supplied equipment, materials, machinery, tools, or labor to be used in the construction, alteration, or repair of any structure, or who makes an improvement upon the land itself. Snow removal vendors do not construct, alter, or repair your property, nor do they improve your property. The intent of the statute is that people who make land more valuable by adding something to it or improve it should get paid, i.e. have a right to lien the property.

Again, there are no Colorado cases on point. However, a Connecticut court agreed. The Court found the snow vendor's argument that snow removal is a "repair" of a building or its appurtenance unconvincing. Repair means "to restore by replacing a part or putting together what is torn or broken: to fix." The word "appurtenance" has been defined as relating to a wing or addition to a building. Clearly, according to the commonly accepted definition of the word "repair," a winter snowfall does not break anything and removing snow is not "repairing" a building or its appurtenances. Nor is providing snow removal services the equivalent of making an "improvement" under the statute. An "improvement" is any valuable addition to the property, amounting to more than mere repairs, costing labor and capital, and intended to enhance its value. In short, providing snow removal services may be essential to the use of property during the harsh winter months, but the providing of such services does not add to the intrinsic value of the land and amounts to neither a "repair" nor an "improvement" under the mechanics' lien statute.

Based on the law, your snow vendor contract should provide that the snow vendor has no right to file a lien against your community. For example, "Snow Vendor agrees that in the performance of this contract that they will not supply equipment, materials, machinery, tools, or labor to be used in the construction, alteration, or repair of any structure on the apartment community, nor will they make any improvement upon the land on which the apartment community is located. Accordingly, Snow Vendor agrees that Snow Vendor has no right to file a mechanics' lien against the apartment community under any circumstances."

While this contract language should deter most snow vendors from filing a mechanics' lien against a community, some snow vendors will still file liens because they will argue that the contract cannot take away their right to file a lien against your property under the Colorado Mechanics' Lien Statute. Whether this is correct is too lengthy of a discussion to resolve here. Regardless, specific "no lien" contract language will put you in a much stronger position if you snow vendor liens your property.

You can also deter the snow vendor from filing a lien against your community by upping the ante further. To do this, your snow vendor contract should require the snow vendor to indemnify the community if they file a lien in breach of the contract. "If Snow Vendor files or records any lien against the property for unpaid contractual amounts in breach of this contract, Snow Vendor shall indemnify Owner, for all expenses, costs, and damages, including reasonable attorneys' fees incurred by Owner, in having any lien removed, including having a court determine the validity of Snow Vendor's lien."

You should also remember that the 2018 Snow Removal Service Liability Limitation Act was passed by the Colorado General Assembly last year. This Act prevents certain contractual provisions between (Snow) Service Providers (the vendor) and (Snow) Service Receiver (the community). In the past, many snow removal vendor contracts contained indemnity language shifting liability for the negligent acts of one party onto the other party. This Act prevents such contractual clauses. This means both the snow vendor and the community are liable for their own negligence and cannot contractually shift this liability onto the other party. Two examples illustrate. A tenant slips and falls because the vendor failed to put down ice melt. A snow vendor's plow pickup truck crashes into a tenant's car because it hits a huge pothole that the community failed to tell the vendor about. In both cases, the Act prohibits the negligent party from shifting liability to the other party.

A well-drafted snow vendor contract goes a long way in avoiding snow vendor disputes. However, you can't draft an appropriate snow vendor contract unless you know your snow removal needs and the logistics of how snow should be efficiently handled at your property. Any client that manages multiple communities attempts to streamline operational issues including snow vendor contracts or vendor contracts in general. However, attempting to use a one size fits all snow vendor contract at multiple properties could be a mistake because of the difference in community layouts and therefore snow removal needs. One contract may work, but we wouldn't reach that conclusion until each community's snow removal needs and logistics were individually evaluated. If you save \$5,000 per community on a ten-community portfolio by having individual contracts or a standard contract with a community-specific addendum, obviously it is worth the time and effort. Finally, don't forget to play weatherman and record snowfalls. If you don't have good records of snowfalls, you can't verify your snow vendor's performance or hold them accountable.