



Tri-State Defense Lawyers Association

Vermont · New Hampshire · Maine

Fall 2010



Newsletter



A Message From the Chairman!

Dear TDLA Members,

It has been another eventful year for TDLA. As the current chair of the Tri-State Defense Lawyers Association, I would like to thank my predecessor Attorney Christopher Poulin of *Getman, Schulthess & Steere*, Bedford, NH, for his exemplary service as the TDLA chair last year. In that year, the TDLA published our Newsletter with a focus on workers compensation law in each of our states. We held our 3rd annual meeting at the Hilton Garden Inn at Portsmouth, NH on September 11 & 12, 2009. On Friday, September 12, the keynote speaker was Senator David Hastings, of the Maine Senate Judiciary Committee. Senator Hastings provided timely insight into the relationship between the Judiciary and the Executive branches of government and how it relates to funding the state court systems.

On Saturday, September 12, we had educational and entertaining CLE presented by Thomas J. Hurney, Jr., *Jackson Kelly PLLC*, Charleston, WV (Telling Stories: Making Your Client's Case from the Answer to Closing Argument) and an ethics seminar by Peter G. Beeson and Mitchell M. Simon, *Devine Millimet & Branch, P.A.*, Manchester, NH (Client Confidentiality, Candor to the Court and Related Risk Management).

Again, our 3rd Annual Meeting at Portsmouth was a great success with increased attendance due to our TDLA members who helped in the planning and presentations. Special thanks to our Executive Director Peggy Schultz whose attention to detail allowed the meeting to run smoothly for our members.

We hope to build on our success in 2010 and into 2011. This year, again, our Annual Meeting will be held at Portsmouth, NH, on October 8 & 9 with timely and interesting CLE topics. It will also be a celebratory event with a send-off of TDLA member Matt Cairns of *Gallagher, Callahan & Gartell*, Concord, NH, as he ascends to the DRI presidency later that month at the DRI annual meeting in San Diego. Come to our Annual Meeting and join in the celebration. I hope to see you all in October.

Very Truly Yours,

Patricia S. Orr
TDLA Chair
Powell, Orr & Bredice, PLC

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Message from the Maine President Blair Jones

Friedman Gaythwaite Wolf & Leavitt



Greetings! It is a pleasure to be presenting the fall edition of the TDLA newsletter, as well as preparing for the TDLA Annual Meeting. We hope you will enjoy the newsletter, and we also hope you will consider contributing to it in the future. The Newsletter provides timely and helpful information for defense lawyers, and it is written and produced by the membership of the organization. It can't succeed without you, so please send us your articles!

We are looking forward to an excellent Annual Meeting, to be held, once again, in Portsmouth, NH. We have excellent speakers and programs planned, and an entertaining evening for the Friday cocktail reception and dinner. I hope you can all make it and enjoy spending time with your colleagues in the defense field.

Many of you, I am sure, are using, to one degree or another, the social networking devices that have recently exploded on the internet. TDLA has formed a group on LinkedIn, and we hope those of you who use LinkedIn will join the group and get involved in discussions and sharing content. It can be a very effective way to reach out to other members regarding interesting topics quickly, and can also be useful in trying to find experts, getting information about experts or getting feedback on difficult issues that others may have handled, before. Please check us out in the group section of LinkedIn, under Tri-State Defense Lawyers Association.

TDLA offers a tremendous opportunity for involvement for lawyers of all experience levels. We are always looking for ideas for CLE presentations for our annual meetings, and written product for our newsletter and web-site. We are also interested in producing "webinars"; shorter CLE presentations that can be presented over the internet and telephone and can be attended from the comfort of your own office. We hope you will take advantage of these opportunities, and get involved in producing presentations or articles for the newsletters. If you have ideas or want to talk about how to get involved, please give me a call or drop me a note. bjones@fgwl-law.com. 207.761.0900.

Message from the New Hampshire President Christopher Poulin

Getman, Schulthess & Steere, P.A.

Greetings to all New Hampshire TDLA members,

I am drafting this letter Labor Day weekend and cannot believe that our summer is winding down. While this is a depressing thought, my mood quickly improves thinking about TDLA's Annual Meeting which is coming up on October 8 and 9, 2010 at the Hilton Garden Inn in Portsmouth, NH. TDLA's Board of Directors has put together another outstanding program – if I do say so myself.

Friday evening, October 8, should be a blast. Besides the usual cocktail hour and dinner buffet, I am particularly pleased to be serving as the Master of Ceremonies in a "Family Feud" type game show honoring New Hampshire's very own Matt Cairns.

TDLA is proud to be able to roast Matt suitably before he is inaugurated as DRI's President at DRI's annual meeting in San Diego, California (October 20 through October 24, 2010). I am hopeful that we will have a great turnout of New Hampshire defense lawyers to the Friday evening event in order that we can give Matt a proper New Hampshire and TDLA regional send off!

I hope to see you at TDLA's annual meeting. If you have not already registered, please join us and register today.



Message from the DRI Regional Director Brooks Magratten

Pierce Atwood LLP



The Fall is an exciting time for the TDLA and DRI. We meet on October 8th and 9th in Portsmouth for good food, fine wine, exceptional company and cutting edge CLE. Ten days later the larger DRI family gathers in San Diego for the DRI annual meeting. If you have attended a DRI annual meeting in the past, then you know that this is DRI's premier event. Especially for those interested in getting more involved in DRI, the annual meeting is a worthwhile investment of time and money.

The DRI annual meeting also marks the end of my tenure as Northeast Regional Director. Chris Kenney from Massachusetts will take up the reins after the annual meeting. Those of you who know Chris know that he does not lack energy. He is an enthusiastic supporter of DRI and SLDO's in our region. You can count on seeing Chris at future TDLA events.

Finally, a word of thanks to Peggy Schultz, Patricia Orr, Chris Poulin and Blair Jones for their outstanding leadership and service to the TDLA this past year. The TDLA has taken root. I look forward to seeing many years of TDLA growth ahead.

Recent Decisions of Interest from Vermont

By Walter Judge

Downs Rachlin Martin PLLC



Insurance Coverage

Vermont Supreme Court holds that “personal injury” coverage in homeowner’s policy covers defamatory statements by insured where it was unclear from the jury’s verdict in the underlying defamation case whether the statements were made negligently, or with actual knowledge of their falsity or reckless disregard for their truth or falsity. Court further holds that insurer could have intervened in underlying case and asked for special jury interrogatories on whether the defamatory statements were negligent or intentional.

Pharmacists Mut. Ins. Co. v. Myer, Vermont Supreme Court, 2010 VT 10 (Feb. 4, 2010). The policy language covered defamatory statements made negligently, but excluded coverage for such statements if the insured knew or had reason to believe that they were false. In this decision, the Court held that, in the underlying defamation litigation, the insurance company could have possibly avoided coverage by insisting on jury questions that made clear whether the defamatory statements were made negligently or with knowledge of their falsity. The problem with the Court’s decision is its arguable naivete: would any insured allow its insurance company to insist on jury questions in the underlying case that might eliminate coverage? Such conduct would arguably open up the insurance company to claims of bad faith.

Vermont Supreme Court holds that landlord’s liability insurance policy does not cover tenants’ claim for landlord’s breach of implied warranty of habitability.

Vermont Mut. Ins. Co. v. Parsons Hill Partnership, Vermont Supreme Court, 2010 VT 44 (June 4, 2010). In this case, the landlord owned a low-income apartment complex. The landlord was insured by Vermont Mutual under a CGL policy. The landlord had been cited by the Vermont Department of Health beginning in 1983 because the chemical PCE had been detected in the complex’s water system and the water had been assigned “Do Not Drink” status. The landlord never informed the tenants of this (and, for reasons not explained in the VSC opinion, neither did the Vermont Department of Health). One of the tenants learned on her own of the water problem in 1997 and the tenants sued the landlord for breach of habitability. Vermont Mutual provided a defense to the landlord under a reservation of rights, and commenced an action for declaratory judgment seeking a declaration of no coverage. The superior court held that the claims asserted by the tenants fell within the pollution exclusion of the policy. On appeal, the Vermont Supreme Court affirmed, holding that there was no coverage under Coverage Part A of the policy because of the standard pollution exclusion, and that there was no coverage under Part B because the claims the tenants were asserting were not claims for “personal injury” as that term is defined in Part B.

Punitive Damages

Vermont Supreme Court pushes the ever-swinging pendulum of its punitive damages jurisprudence back in favor of defendants. Court admits its precedents on the standards for punitive damages have “not been a model of clarity.” Court holds that reckless conduct alone is insufficient; punitive damages based on recklessness requires evidence that the defendant acted, or failed to act, in conscious and deliberate disregard of a known, substantial, and intolerable risk of harm to the plaintiff, with the knowledge that the acts or omissions were substantially certain to result in the threatened harm.

Fly Fish Vermont, Inc. v. Chapin Hill Estates, Inc., 2010 VT 33, Vermont Supreme Court, April 23, 2010. The case involved adjoining parcels of land. Plaintiffs sued defendants for damages, claiming that construction work associated with a development project on defendants’ property caused siltation to enter and damage the pond on plaintiffs’ property. The trial court awarded \$100,000 in punitive damages, finding that defendants’ disregard of plaintiffs’ property rights was reckless, if not intentional. On appeal, the Vermont Supreme Court agreed that defendants’ conduct in allowing the runoff to flow onto plaintiffs’ property constituted a reckless violation of their construction permit conditions, but that the punitive award could not stand because the conduct was not “outrageously reprehensible.” The Vermont Supreme Court has struggled to articulate a standard for punitive damages that would rationalize the fact-specific results they have reached in various cases where they have affirmed, or vacated, punitive damage awards, and this is the first time the Court has adopted the “outrageously reprehensible” standard. Only time will tell if this new standard will hold past the next major punitive damages decision.

New Hampshire Law Update

By Naomi Getman, Getman, Schulthess & Steere, P.A.

AREAS OF INTEREST: Insurance Coverage

LEGAL IMPACT: When "motor vehicle" is not defined in one portion of the policy but defined in another, the term is susceptible to more than one reasonable interpretation and the term motor vehicle in underinsured motorist provisions includes an all-terrain vehicle (ATV)

CASE CAPTION:

Richard Brickley v. Progressive Northern Insurance Company (Rockingham County Superior Court, 2009-C-389)
(Decided August 19, 2010)

HOLDING:

The term "motor vehicle" contained in the uninsured motorist coverage portion of the plaintiff's family motor vehicle insurance policy was ambiguous and therefore, coverage was required under the policy.

FACTUAL SUMMARY:

In this declaratory judgment proceeding, the defendant, Progressive Northern Insurance Company (Progressive) appealed a superior court order denying its motion for summary judgment and granting partial summary judgment in favor of the plaintiff's Richard Brickley and Richard Brickley as father and next friend of Cory Brickley. The trial Court found that the term "motor vehicle" in the "uninsured motorist coverage" section of the Brickley's family motor vehicle insurance policy was ambiguous and concluded that coverage was required under the policy. The Supreme Court affirmed.

The following are the undisputed facts:

On April 30, 2008, Cory Brickley, a minor, was involved in an accident while operating a 2006 Kymco MXU 250 all-terrain vehicle (ATV). As Cory exited from his parent's driveway on Pingree Hill Road in Auburn, he was struck by a Chevrolet Corvette driven by James Russell, an uninsured motorist. The ATV that Cory was operating was owned by his father, Richard, and designed for use and operation principally off public roads. At the time of the accident, Cory resided with his parents, Richard and Mary Brickley.

Progressive denied the Brickley's claim for coverage under an automobile insurance policy, effective April 30, 2008, issued to Mary Brickley, the named insured. The policy explicitly insures two automobiles, a 2006 Mitsubishi Outlander SE and a 2002 Mercury Grand Marquis LS, and provides five types of coverage described under separate headings. Richard Brickley filed suit seeking a declaratory judgment that Progressive was obligated to provide coverage under Part II of the policy for medical payments and Part III for uninsured motorist coverage.

The Progressive policy sets forth general definitions that are intended to apply throughout the policy. In addition, each section of the policy includes a list of defined terms that are intended to apply throughout that section. Defined terms are printed in boldface type to notify the reader which words have a specific definition. The term "motor vehicle" is not defined in the general definitions section of the policy.

In Part II of the policy, the medical payments coverage section, provides that:

If **you** pay the premium for this coverage, **we** will pay the reasonable expenses incurred for necessary **medical services** received within three years from the date of a **motor vehicle** accident because of **bodily injury**:

1. sustained by an **insured person**; and
2. caused by that **motor vehicle** accident.

Part II of the policy defines "motor vehicle" as "a land motor vehicle designed for use principally on public roads."

Part III of the policy, the uninsured motorist coverage section, provides that:

If **you** pay the premium for this coverage, **we** will pay for damages that an **insured person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** because of **bodily injury**:

Law Update - contd.

sustained by an insured person;
caused by an accident; and
arising out of the ownership, maintenance, or use of an **uninsured motor vehicle**.

Part III of the policy contains several exclusions. If one of the exclusions applies, coverage will not be provided to the insured. The relevant exclusion reads in part:

Coverage under this Part III will not apply:

to **bodily injury** sustained by any person while using or **occupying**:

...

a motor vehicle that is owned by or available for the regular use of **you** or a **relative**. This exclusion does not apply to a **covered auto** that is insured under this Part III . . .

Part III does not provide a definition for the term “motor vehicle.”

Progressive points out that the term “motor vehicle” in Part III is not printed in bold and is thus not a specially defined word. It argues, therefore, that “motor vehicle” should be given its common understanding, which it asserts is “any self-propelled, wheeled conveyance that does not run on rails.” Because this definition would include the ATV at issue, Progressive asserts that the exclusion applies.

Brickley argued that since Progressive chose not to define “motor vehicle” in Part III, the meaning of the term is susceptible of more than one reasonable interpretation, including the definition Progressive itself provided in Part II. That definition would not include the ATV because the ATV is not “designed for use principally on public roads.”

The Court concluded that based upon a more than casual reading of the policy as a whole, one would conclude that the term “motor vehicle” as used in Part III is ambiguous. The Court explained that in electing not to define the term “motor vehicle” in the exclusion in question, but including a definition elsewhere in the policy that is favorable to the insured, “the insured has created an exclusionary clause that is reasonably susceptible to different interpretations”.

Vermont Adopts “Continuous Trigger of Coverage” Method in Environmental Contamination Cases

By Bret P. Powell, Powell Orr & Bredice PLC

I. INTRODUCTION: Beginning in the late 1960s, comprehensive general liability (CGL) policies contained insuring agreements under which the insurer would pay “all sums which the insured shall become legally obligated to pay as damages because of property damage or bodily injury to which this insurance applies, caused by an occurrence.” The policies’ definitions made it clear that the insured would be indemnified only for losses occurring during the policy period.

Many CGL policies also contain an “other insurance” clause, which limits the carrier’s obligations when the insured has “other valid and collectible insurance” available. In environmental contamination cases the damage often occurs over a period of time when multiple occurrence policies are in effect. In this situation, how should the loss be allocated among insurers on the risk?

Courts have developed several theories to allocate loss:

A. **Joint and Several Liability:** This theory allows recovery for all damages under any triggered policy, usually the policy in effect at the time contamination is discovered.

B. **Pro-Ration by Years.** Under this approach, also called “time on the risk,” each triggered policy bears a share of the total damages in proportion to the number of years it was on the risk, relative to the total number of years of triggered coverage regardless of policy limits.

C. **Pro-Ration by Years and Limits.** This allocates indemnification among policies based on both the number of years a policy is on the risk as well as that policy’s limits of liability. Each insurer’s exposure is the aggregate coverage during the period in which the loss occurred. Liability is calculated by comparing the insurer’s exposure to the total amount of exposure of all insurers of the triggered policies. This yields a percentage that is then applied to the amount of loss the insured sustained.

D. Pro-Ration by Exposure. Here liability is allocated to each policy period in accordance with the amount of injury or property damage that can be attributed to that specific policy period.

In Vermont, there are reported cases in which the parties and courts might have considered allocation in environmental contamination cases, but the issue appears not to have been raised.

II. THE TOWNS CASE: This issue first arose in the Vermont Supreme Court in Towns v. Northern Security Insurance Company 2008 VT 98. In this case, the insured, Mr. Towns, deposited waste and debris from his waste-hauling business to his residential property for fill and to level a steep embankment. Towns carried on this activity from 1972 to 1987. After he sold the property the new owners contacted the Vermont Attorney General's Office which issued an administrative order in 1996 alleging Towns had, in effect, operated a solid waste facility without certification in violation of 10 V.S.A. sec. 6605 (a)⁴.

Towns sued his homeowner's insurer, Northern Security, seeking coverage for defense and clean-up costs incurred in the environmental action. Northern's coverage was from 1983 to 1987. The trial court adopted the "continuous trigger" theory under which damage from continuous exposure to contaminants during the policy period is an "occurrence" sufficient to trigger coverage.⁵ Based on expert evidence of a continuous leakage of hazardous chemicals during the policy period, the court concluded that the policy had been triggered. The court rejected Towns' request to hold Northern responsible for all defense and indemnification costs, instead applying a pro rata allocation based upon each party's "time on the risk." Towns at para. 5-6. The court determined that Towns was responsible for 75% of defense and indemnity costs based on the time he was self-insured in relation to the period that he owned the property, and Northern was responsible for 25%. Towns. at para. 6.

The Supreme Court looked to the language of the standard occurrence based policy that applies only to bodily injury or property damage which "occurs during the policy period". Towns at para.28 (Emphasis in original). The record showed that the leaching of chemical constituents Towns dumped into the ground continued throughout the time the materials remained in place. Towns at para. 32. The court rejected the "Joint and Several" allocation since it fails to reflect the risks assumed by the insurer. Id. at para. 34. The court also held that the cost of defending such claims should also be allocated in proportion to time on the risk. Id. at para.35. Where the policy holder is self-insured for any period of time on the risk, the policyholder is held responsible for that portion of the total defense and indemnity costs over which he or she chose to assume the risk. Id. at para. 37.

Environmental contamination in Vermont often arises from clean up of discharges from liquid underground storage tanks (USTs). The statute⁶ established the Petroleum Cleanup Fund (PCF) funded by licensing fees and petroleum tank fees.⁷ When a discharge is discovered the Agency of Natural Resources (ANR) is authorized to assess and remediate the soil and ground water and use funds from the PCF for such purposes. The property owner or tank permittee is obligated to pay the first \$10,000, and the PCF pays the remainder to a total of \$1 million.⁸ ANR may seek reimbursement to the PCF pursuant to 10 V.S.A. sec. 1941 (f) when the owner of the tank is in significant violation of his or her permit or rules, or when a required fee has not been paid for the tank from which the release occurred or, to the extent covered, when there is insurance coverage. Id.

The Towns ruling sent a shock wave through ANR. Historically, ANR would "cherry pick" the insurance policy on the risk at the time of discovery of the contamination. Since most sites in Vermont are relatively small, all of the cost of site remediation would be covered by the policy.

III. BRADFORD OIL COMPANY, INC. VS. STONINGTON INSURANCE CO.

A PCF case presented itself as a result of contamination at Rod's Mobil, a retail garage and gasoline station in St. Johnsbury. The defense expert opined that gasoline had been leaking from USTs and the pump island since the 1960's. ANR's expert testified that the period could have been as brief as a few months prior to its discovery in 1997. The UST owner, Bradford Oil Company, Inc., sued its insurer, Stonington Insurance Company which had provided CGL coverage from July 1994 to December 1, 1997. Each policy is occurrence based.

ANR cross claimed against Stonington for reimbursement to the PCF of all sums expended on the site.⁹ Stonington brought a Motion for Partial Summary Judgment on the issue of allocation arguing that under Towns its maximum exposure is limited to a pro rata amount based upon its time on the risk.¹⁰ Stonington also argued that the language in section 1941 (f) permitting recovery when there is insurance coverage "to the extent covered" means that ANR must show the existence of insurance coverage.

ANR responded that Towns should be limited to private insurers since the PCF is mandated to apply to all sites and does not have the ability to negotiate with the tank owner over the scope or price of the coverage it provides. The agency also responded that joint and several liability is mandated by the statutes which impose liability on the owner of a UST.¹¹ ANR further argued that the burden was on Stonington to identify other potentially liable insurers or to identify time periods when Bradford was self-insured.

The Superior Court granted Stonington's motion.¹² Citing Towns, the court focused on the standard occurrence-based policy language in the context of slowly occurring contamination. The court acknowledged that the PCF allows ANR to seek reimbursement directly from the insurer but it does not alter the terms of insurance policies to enlarge the insurer's liability. Whatever coverage exists in the policy is unchanged by the PCF. Section 1941 (f) puts the State, not the insurer, in the shoes of the insured. *Id.* The court, therefore, adopted the "time on the risk" allocation and applied it to PCF cases.

Further, the court rejected ANR's argument that 10 V.S.A. sec.6615 conflicts with Towns' allocation method. Section 6615 allows the State to place the entire clean up burden on the responsible person. However, the court held that the responsible person's joint and several liability does not alter the terms of the landowner's policy. The court also held that the insurer does not have a burden to show coverage by other insurers as a prerequisite to avoid expansion of coverage beyond the policy in effect.

Following this decision, the parties agreed upon a 27 year period of contamination. They entered into a stipulation that Stonington's liability is limited to a 4/27 share of past and future cleanup costs. The court entered final Judgment on the stipulation on August 6, 2010. ANR appealed to the Vermont Supreme Court on August 25, 2010.

IV. CONCLUSION.

The Towns and Bradford Oil cases have great significance in environmental litigation. Many sites become contaminated over a long period of time. Technology is available to determine the time and transport of toxic substances, in particular the constituents of gasoline. This allows for proof of the time during which contamination occurred. Counsel representing an insurer with an occurrence based policy has the tools to demonstrate the period of ongoing contamination.

The Bradford Oil decision further assists the insurer by placing the burden to show insurance coverage on either the insured or ANR. If other insurers cannot be located, the cost of clean up in most cases will shift to ANR because under the PCF once the owner or permittee pays the first \$10,000, it is relieved of further liability to the PCF.¹³

The time-on-the-risk method will affect other situations including actions taken by the state under the Waste Management Act and liability claims by private landowners. Since the PCF is funded by assessments, the cost of owning or operating a potentially hazardous facility could increase as the State shifts the loss of insurance recoveries to businesses or the general population through licensing fees or tax increases.

These decisions rest solidly on the language of the insurance policy and enforcement of its provisions. This approach implements the expectations of both insured and insurer. This is fundamental to underwriting insurance policies and the price the consumer pays for coverage.

1 T. Jones and J. Hurwitz, An Introduction to Insurance Allocation Issues in Multiple-Trigger Cases, 10 Vill. Ent. L.J. 25 (1999) Op. Cit.

2 Id.

3 For example, in State of Vermont v. CNA Ins. Cos., 172 Vt. 318 (2001) contamination occurred at a state prison between 1954 and 1958. In 1995 the subsequent property owner brought an action asking that the state Agency of Natural Resources share the cost of site testing and clean up. The insurer provided coverage during 1963-1972. The Court's opinion does not discuss how costs would be allocated between the State and the insurer or how costs attributed to property damage between 1958 and 1963 would be allocated. In Agency of Natural Resources v. U.S. Fire Ins. Co., 173 Vt. 302 (2001) contamination was discovered in 1993. The insured sued its insurer in 1994. The opinion does not state when the policy was in effect and does not address any issues of allocation for periods pre-dating 1993.

4 10 V.S.A. Section 6605 is in chapter 159 which provides for, inter alia, regulation of landfills.

5 "Continuous trigger" is identical to "Pro-Ration by Years."

6 10 V.S.A. chapter 59.

7 10 V.S.A. sec. 1941 (a).

8 10 V.S.A. sec.1941 (b).

9 As of March 1, 2010 ANR had expended \$304,911.33.

10 Stonington is represented by Powell, Orr & Bredice, PLC.

11 10 V.S.A sec. 6615 (c) provides that any person who has released hazardous material or is in any way responsible for any hazardous materials which the agency has removed or is removing "...shall be strictly liable, jointly and severally, without regard to fault for all cleanup, removal and remedial costs..."

12 Bradford Oil Company, Inc. v. Stonington Ins. Co., et al, No. 636-10-6 Wncv, (Vt. Super. Ct. Jan. 21, 2010), Teachout, J.

Maine DRI Update

By Phil Coffin, DRI State Representative, *Lambert Coffin*

It has been a busy year for DRI, both nationally and regionally. As the Maine State DRI Representative, I have been making calls to convince non-renewing DRI members to stay enrolled and active. With the current economic woes, many firms and lawyers have cut back on expenses, including memberships in professional organizations. This is exactly the wrong thing to do. DRI and TDLA both provide valuable information and resources to its members and can add value to your practice. For example, the expert witness database is an excellent way to find out about an expert named by a plaintiff, and you are more likely to get solid information on experts and other case issues from a colleague in DRI or TDLA. If you are thinking of giving up your membership please reconsider and give me a call to discuss.



I also would like to encourage all of you to attend the 2010 DRI Annual Meeting in San Diego, October 20-24. Our own Matt Cairns is the incoming President of DRI and we should all try to be there to support him. I look forward to seeing you in San Diego.

Massachusetts' Highest Court - Actual Medical Bills Admissible, But Range of Accepted Payments Also Admissible

By Patricia Orr, *Powell, Orr & Bredice, PLC*

On July 20, 2010, the Massachusetts Supreme Judicial Court weighed in on the bills charged versus bills paid debate. *Law v. Griffith*, 457 Mass. 349, ___ N.E.2d ___, 2010 WL 2803893. The plaintiff was injured in a car accident and sued the driver of the other car for negligence. The trial court granted the defendant's pre-trial motion to exclude the plaintiff's actual medical bills (totaling \$112,269) and only admit the amount that was actually paid (\$16,387) into evidence. The jury awarded the plaintiff a total of \$48,500 in damages. Plaintiff appealed. The Appellate Court ruled that the trial judge erred in precluding the actual bills incurred and ordered a new trial on damages. The Supreme Judicial Court granted the defendant's request for further appellate review.

The Supreme Judicial Court focused on Mass. Gen. L. c.233, §79G which provides that itemized bills relating to medical, dental, hospital services, *etc.*, "shall be admissible as evidence of the fair and reasonable charge for such services or the necessity of such services or treatments." The statute is not ambiguous. Therefore, the trial court erred in precluding the actual medical bills from evidence.

The Court next addressed the admissibility of the amount actually paid for the medical services rendered. The collateral source rule generally provides that the plaintiff's award cannot be reduced when outside sources pay for a plaintiff's injury. But the court had to reconcile the second provision of §79G that allows any party to introduce testimony (from an agent of the medical provider) for any purpose to rebut the contents of the bills introduced. Four of the justices would allow testimony of the range of payments that would be accepted as payment in full for the services charged on the admitted bills, thus keeping the identity of the third-party payer from the jury.

The three concurring justices agreed that the actual bills are admissible as directed by the statute, but split from the majority on the collateral source issue. The funding of medical treatment has significantly changed since the enactment of §79G in 1958. Large disparities exist between the amounts billed by medical providers and the amount those providers are willing to accept as full payment from various insurers. According to the concurring opinion, medical bills have ceased to be a reliable measure of the reasonable value of medical services provided. As such, the collateral source rule "has become an anachronism when applied to the valuation of medical services." The concurring justices opined that the collateral source rule is a judicial creation that should be revised or eliminated by the judicial branch. These justices would allow the amounts paid for medical services to be admissible without any limitation under the collateral source rule.

The decision has limited application in our states, except that the amount paid (or the range) is admissible despite the collateral source rule. Further, jury instructions will need to be modified to be consistent with this opinion.

Does the Vermont Consumer Fraud Act Apply to Insurance Contracts?*

By Susan Manley, Hayes & Windish

In 1981 insurance did not fall within the scope of Vermont's Consumer Fraud Act, 9 V.S.A. § 2451 et. seq., thereby precluding claims related to insurance contracts. Our Supreme Court held that "[i]nsurance cannot legitimately be labelled [sic] either goods or services as the Legislature has defined those terms" thereby declining to extend the Act to insurance contracts. *Wilder v. Aetna Life & Casualty Ins. Co.*, 433 A.2d 309, 310 (Vt. 1981). At the time of *Wilder*, "goods" and "services" were defined separately under the Act.

In 1985, the Legislature combined the definition of goods and services to "include any objects, wares, goods, commodities, work, labor, intangibles, courses of instruction or training, securities, bonds, debentures, stocks, real estate, or other property or services of any kind." Despite this broadening of the definition of goods and services, *Wilder* has not been overruled. In 2004 the Supreme Court declined to reach the issue of whether the Act now extends to insurance. *Greene v. Stevens Gas Service*, 858 A.2d 238 (Vt. 2004). In *Greene*, the Attorney General's amicus brief supported extending application of the Act to insurance contracts. As a result "[w]hether the Vermont Consumer Fraud Act applies to the insurance industry [remains] an open question." *R.L. Vallee, Inc. v. American International Specialty Lines Ins. Co.*, 431 F.Supp.2d 428, 442 (2006).

However, Vermont's lower courts have weighed in on the issue. In *Fish v. Allstate Ins. Co.*, No. S0056-03 CnC (June 11, 2003) the trial court denied a motion to dismiss the insurance related consumer fraud claim stating that since the legislature broadened the definition of "goods and services," insurance now fell within the Act's scope, thus *Wilder* was no longer dispositive. In *Bertelson v. Union Mutual Fire Ins. Co.*, No. 834-04 CnC (Nov. 22, 2004) the trial judge allowed plaintiffs to include a consumer fraud claim under 9 V.S.A. §§ 2451-2463 agreeing with the *Fish* court and other jurisdictions applying consumer fraud statutes to insurance transactions. The trial judge also noted that the § 2451a (d) (5) definition of home solicitation sales specifically excluded insurance from the Act, thus indicating the Legislature's intent to include insurance under the "goods and services" definition. The judge reasoned that "[i]f the legislature did not intend § 2451a (b) to include insurance, it would not have made the effort to exempt insurance from home solicitation sales of goods or services." *Id.* Conversely, the trial court held in *Pharmacists Mutual Ins. Co. v. Cooper*, No. 78-4-06 Lecv (Nov. 15, 2007) that *Wilder* was still good law. The judge cited the "in commerce" language of *Wilder* as dispositive to his holding rather than the revised definition of "goods or services" relied on by the *Fish* and *Bertelson* courts. Recently, the Supreme Court noted the *Pharmacists v. Cooper* decision in passing; however that particular issue was not on appeal. *Pharmacists Mutual Ins. Co. v. Myer*, 993 A.2d 413, 416-17 (Vt. 2010). Thus, plaintiffs will argue that *Fish* and *Bertelson* represent the current law, while defendants will argue that *Wilder* remains binding precedent.



* New Hampshire and Maine exempt insurance from the scope of their respective consumer protection statutes. See N.H. Rev. Stat. § 358-A:3; *Metayer v. PFL Life Ins. Co.*, 1999 WL 33117063 (D. Me.) (construing M.R.S.A. § 208(1) to exempt insurance from its purview).

BIO:

Susan Manley joined Hayes & Windish located in Woodstock, Vermont in 2008 and focuses her practice on worker's compensation and insurance defense. Prior to joining Hayes & Windish, Ms. Manley clerked at McNeil, Leddy & Sheahan in Burlington and also worked in the contracts group at General Dynamics. While in school, Ms. Manley served as a Note Editor of the Vermont Law Review and was a member of the Moot Court Advisory Board.

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Maine Law Update

By Brett Leland, *Friedman Gaythwaite Wolf & Leavitt*



In the first three quarters of 2010, there have been several important developments in Maine law relevant to defense lawyers. This review is not exhaustive, but is meant to highlight some of the most significant developments.

Major changes have been made to the Maine Rules of Evidence regarding admissibility of evidence of conduct or statements made in settlement negotiations or at mediation. All attorneys practicing in Maine should be familiar with the revised Rule 408, which now provides:

(a) Settlement Discussions. Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromise or attempting to compromise a claim is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations or in mediation is also not admissible on any substantive issue in dispute between the parties or to impeach a witness through a prior inconsistent statement or contradiction.

(b) Mediation. Evidence of conduct or statements by any party or mediator at a mediation session undertaken to comply with any statute, court rule, or administrative agency rule or in which the parties have been referred to mediation by a court, administrative agency, or arbitrator or in which the parties and mediator have agreed in writing or electronically to mediate with an expectation of confidentiality, is not admissible for any purpose other than to prove fraud, duress, or other cause to invalidate the mediation result in the proceeding with respect to which the mediation was held or in any other proceeding between the parties to the mediation that involves the subject matter of the mediation.

The Advisory Committee Note to the December 2009 amendment instructs that, under revised Rule 408(a), “statements and conduct in settlement negotiations that are rendered inadmissible on any substantive issue between the parties may not be used to impeach a witness through prior inconsistent statement or contradiction. Such statements or conduct would not necessarily be inadmissible when offered for some other purpose.” Revised Rule 408(b) “is designed to encourage parties to speak openly and freely in mediation by assuring them that their statements will not be usable against them in the case being mediated or in any other case between the same parties with the same subject matter. On the other hand, revised Rule 408(b) does not render statements in mediation inadmissible in proceedings involving third parties, such as criminal proceedings, or even in proceedings between the mediating parties that do not involve the subject matter of the mediation. Nor does it insulate statements in mediation from civil discovery.” *Id.* See also ME. R. EVID. 514 (a new rule creating a limited privilege for mediators).

The Law Court’s decision in *Maine v. Tracy*, 2010 ME 27, although a criminal case, contains an informative and helpful discussion about the concepts of confidentiality, privilege, and admissibility, which, according to the Court, “sometimes generate confusion.” *Id.* ¶¶ 14-27. Note, for instance, that Rule 408 may make evidence inadmissible but does not make it privileged. *Id.* ¶ 18.

Changes have also recently been made to other rules, including, ME. R. CIV. P. 4, 55(b)(4), 76C(a), 80B(e), 80C(f), 80K(k), 88, 91(f), 108(d), 112.

The Law Court has also issued several significant decisions in 2010.

In *Beal v. Allstate Ins. Co.*, 2010 ME 20, the Law Court addressed several interesting questions involving the interplay of arbitrations, settlement agreements, and underinsured motorist (UIM) coverage. In an issue of first impression, the Law Court held that a final, but judicially unconfirmed, arbitration award can be sufficiently analogous to a final judgment for the purposes of collateral estoppel. The Court adopted RESTATEMENT (SECOND) OF JUDGMENTS §§ 84(1), (3)(b), which provide that “‘a valid and final award by arbitration has the same effects under the rules of res judicata . . . as a judgment of a court’ unless the ‘procedure leading to the award lacked the elements of adjudicatory procedure prescribed in § 83(2).” *Id.* ¶ 14. The “essential elements of adjudicatory procedure” prescribed in § 83(2) include: (1) adequate notice, (2) the right to present evidence and legal argument and to rebut opposing evidence and argument, (3) a formulation of issues of law or fact to apply rules to specified parties concerning a specified transaction, (4) the rendition of a final decision, and (5) any other procedural elements as may be necessary to constitute the proceeding as a sufficient means of conclusively determining the matter in question.”

Id. ¶ 13. The arbitration between the plaintiff and the tortfeasor satisfied these criteria and was thus analogous to a final judgment. *Id.* ¶ 15. Having ruled that the judicially unconfirmed arbitration award could be preclusive, the Court affirmed the finding that Allstate, which was both the plaintiff's UIM insurer and the tortfeasor's insurer, was collaterally estopped from relitigating the arbitrator's determination of the plaintiff's damages. *Id.* ¶¶ 17-24. The Court found that Allstate was in privity with the tortfeasor because, "whether providing UIM coverage for [the plaintiff] or providing a defense for [the tortfeasor], Allstate's goal would be to minimize the arbitrator's determination of [the plaintiff's] total damages"; that the tortfeasor had a full and fair opportunity to litigate the use of damages; and that Allstate had failed to demonstrate that collateral estoppel would result in prejudice. *Id.* The Court further held that the insured's settlement with the tortfeasor for the tortfeasor's policy limits did not cut off her right to seek UIM coverage. The Court held, "when an insured settles with an underinsured tortfeasor for the limits of the tortfeasor's liability insurance, the insured will remain 'legally entitled to recover' damages from the tortfeasor for the purposes of claiming UIM benefits pursuant to 24-A M.R.S. § 2902 if the injured party's damages exceed the tortfeasor's policy limits, and either (1) the UIM carrier consented to the settlement, or (2) there is no prejudice to the UIM carrier's subrogation rights resulting from its lack of consent to the settlement." *Id.* ¶ 35. The Court noted that there may be no prejudice where the tortfeasor has limited or unreachable resources, such that a UIM insurer's right to recovery through subrogation would not be realistically available. *Id.* ¶ 39.

In another case involving UIM coverage, *Tibbetts v. Dairyland Ins. Co.*, 2010 ME 61, the Law Court clarified the allocation of offset in UIM cases. The Court adopted what it called a "gap approach." *Id.* ¶ 16. "In the first step, . . . the court . . . asks what amount the injured party would recover if the tortfeasor were insured to the amount of the injured party's [UIM] coverage. If damages are less than the total policy limits, . . . the injured party [recovers] his damages in full. If damages exceed the total limits, he [recovers] that total limit. After determining this recovery amount, the court then subtracts the amounts already paid by the tortfeasor or by insurers in settlement[.] In the second step, allocating responsibility to pay, the court first assigns payment to the [UIM] insurers who contracted to be primary insurers, and then, if there is excess, to the excess [UIM] insurers. Therefore the insurers who contracted for greater [UIM] liability as the primary [UIM] insurers have the first obligation to pay." *Id.* ¶¶ 18-19. This decision is important because, to the extent that language in prior decisions suggests that the offset is subtracted from the limits of the primary UIM policy ("the liability approach"), those earlier decisions are overruled. *Id.* ¶ 20.

In *Rainey v. Langen*, 2010 ME 56, the Law Court, in another case of first impression, addressed the circumstances in which a franchisor may be held vicariously liable for the negligent acts of an employee of its franchisee. The case arose out of a motor vehicle accident involving a delivery person for a local Domino's Pizza. *Id.* ¶ 2. The Court stated that principles applied in distinguishing between employees and independent contractors, the most important of which is the right to control, apply with equal force in the franchisor-franchisee context. *Id.* ¶¶ 15-16. In evaluating the requisite level of control, the Court emphasized that there is a distinction between control over a franchisee's day-to-day operations and controls designed primarily to insure uniformity and standardization of products and services. *Id.* ¶ 16. The Court added that, at its core, the franchise system involves the licensing of intellectual property, and thus the franchisor-franchisee relationship is heavily influenced by rules of trademark law. *Id.* ¶ 17. That being said, the Court declined to adopt a modified version of the control test embraced in some other jurisdictions. *Id.* ¶¶ 20-22. Rather, the Court concluded that the traditional approach strikes an appropriate balance: "The traditional test allows a franchisor to regulate the uniformity and the standardization of products and services without risking the imposition of vicarious liability. If a franchisor takes further measures to reserve control over a franchisee's performance of its day-to-day operations, however, the franchisor is no longer merely protecting its mark, and imposing vicarious liability may be appropriate." *Id.* ¶ 22. The Court affirmed entry of summary judgment in favor of the franchisor Domino's Pizza, finding that, "although [its] quality requirements and minimum operational standards are numerous, these controls fall short of reserving control over the performance of [the franchisee's] day-to-day operations. *Id.* ¶¶ 25-28.

Decisions about the proper interpretation of the Maine Tort Claims Act often fracture the Court, and there have been two split decisions in 2010. *Estate of Fortier v. City of Lewiston*, 2010 ME 50, arose out of a plane crash in which three Lewiston High School students participating in an Air Force Junior ROTC program were killed. *Id.* ¶ 1. At issue in that case was whether the City of Lewiston's payment for the students' seats on the plane constituted use of the aircraft within the meaning of the MTCA. *Id.* ¶ 14. The provision at issue, 14 M.R.S. § 8104-A, provides that a governmental entity is liable for its negligent acts or omissions in its ownership, maintenance, or use of, *inter alia*, motor vehicles, aircraft, watercraft, snowmobiles, and other machinery or equipment. The Court noted that the "ownership" and "maintenance" categories require positive control by the governmental entity involved. *Id.* ¶ 12. The Court reasoned, "It would make little sense for the Legislature to specify two categories of potential liability requiring actual control of equipment by a governmental entity and then make the 'use' category so expansive as to include virtually any direct or indirect employment of motor vehicles, aircraft, watercraft, snowmobiles, or other equipment implicated by the statute, regardless of whether the governmental entity has any control over how the equipment is maintained or operated." *Id.* ¶ 13. Therefore, the Court interpreted the "use" exception to immunity as applying only where a governmental entity has some measure of direct control over the equipment. *Id.* ¶ 15. A vigorous dissent accused the majority of improperly equating "use" with "ownership and maintenance," and protested that the decision extends the cloak of immunity to virtually every instance in which the government contracts with third parties for services that involve use of vehicles, machinery, or other equipment. *Id.* ¶¶ 18, 25.

Maine Update - contd.

In *Searle v. Town of Bucksport*, 2010 ME 89, the Law Court addressed whether removable bleachers at a town's high school football field were an "appurtenance," so as to fall within the MTCA's exception to governmental immunity for "negligent acts or omissions in the construction, operation or maintenance of any public building or the appurtenances to any public building." *Id.* ¶¶ 1, 9. The Court held that the proper test in determining whether an object is an appurtenance is to determine whether it is a fixture. *Id.* ¶ 15. Applying that test, the Court found that the bleachers were not an appurtenance. *Id.* ¶¶ 15-23. The dissent faulted the majority for equating the definition of appurtenance with that of fixture and thereby improperly limiting the scope of liability prescribed by the Legislature. *Id.* ¶ 40. The majority and dissent also differed over the breadth of immunity conferred by the MTCA for public outdoor recreation facilities. *Id.* ¶¶ 24-26, 45-48.

There have also been a couple of cases clarifying procedural issues that may be of interest to defense lawyers. In *Town of Poland v. T & M Mortgage Solutions, Inc.*, 2010 ME 2, the Law Court reviewed the rules regarding modification of attachment and attachment on trustee process. The Court held that, absent agreement of the parties, real property cannot be substituted for an account that has been attached on trustee process. *Id.* ¶¶ 12-13. In that case, the Town had procured an attachment on trustee process of a bank account of the defendant. *Id.* ¶ 3. Upon motion, the trial court permitted the defendant to substitute an attachment of real property for the attachment on trustee process of its bank account. *Id.* ¶¶ 3-4. The Law Court vacated the order. *Id.* ¶¶ 12-13. The Court noted that ME. R. CIV. P. 4B(j) authorizes a court to modify an attachment by "limit[ing] the attachment to particular goods or credits" and "dissolv[ing] the prior attachments as to all other goods and credits." *Id.* ¶ 8. Thus, the Court concluded that, "when attached through trustee process, liquid assets may only be released upon substitution of a similar species of property, that is, goods, credits, cash, or bond." *Id.* The Court stated its holding is consistent with the "common-sense notion that when potential judgments can be secured by attachments to liquid assets, real property—with its inherent difficulties in valuation and potential problems with quick salability—is not a substitute for liquid assets." *Id.* ¶ 11.

In *Richter v. Ercolini*, 2010 ME 38, the Law Court clarified under what circumstances a defaulted party must file a Rule 60 (b) motion as a prerequisite to obtaining appellate review: "[A] defaulted party who has appeared and opposed a Rule 55(b) motion seeking a default judgment need not file a Rule 60(b) motion to preserve for appellate review the grounds the party presented in opposition to the Rule 55(b) motion. Once a default judgment has been entered, however, a party who has not previously appeared cannot obtain direct appellate review of the court's exercise of discretion in entering a default judgment and must instead pursue Rule 60(b) relief before the trial court." *Id.* ¶ 12.

Finally, take heart defense counsel, in *Reardon v. Larkin*, 2010 ME 86, the parties stipulated to liability and argued only damages to the jury, and the jury awarded no damages. *Id.* ¶ 1. The plaintiff appealed, arguing that the jury could not have rationally returned a verdict of no damages when liability was stipulated and evidence related to injuries and medical bills was uncontroverted. *Id.* ¶ 13. The Law Court disagreed, stating, "The jury could have been, and apparently was, unpersuaded by [the plaintiff's] evidence—even to the extent that it was uncontroverted." *Id.* ¶ 16.

New Hampshire Law Update

By Jill DeMello, *Getman, Schulthess & Steere, P.A.*

AREAS OF INTEREST: Indemnification

LEGAL IMPACT: 1) An agreement to indemnify another party against claims "growing out of" the indemnitor's use of premises is broad, will impose an indemnity obligation as long as the causal connection between the injury and the indemnitor's use is more than tenuous, and will be construed independently of other provisions in the contract; and 2) An indemnitor's rejection of an indemnitee's offer to defend will result in a requirement that the indemnitor indemnify the indemnitee, but only if the indemnitee establishes its potential liability to the claimant

CASE CAPTION:

One Beacon Insurance, LLC v. M&M Pizza, No. 2009-533
(Decided August 19, 2010)

FACTUAL SUMMARY:

M&M owns and operates a Dominoes Pizza franchise in a strip mall owned by One Beacon's insured, Centercorp Retail Properties, Inc. In November of 2002, an employee of M&M was injured when he slipped and fell behind the leased premises after returning from making a pizza delivery. M&M required its employees to park behind the building during the store's busy hours.

The lease between M&M and Centercorp required Centercorp to maintain the common areas, including snow and ice removal. M&M leased only the interior space. However, the lease contained insurance provisions which required M&M to maintain comprehensive liability insurance on the leased premises, and also contained an indemnity clause which required M&M to indemnify Centercorp for "liability and damages, costs and expenses ... growing out of the condition, maintenance repair, alteration, use, occupation or operation of the premises."

New Hampshire - contd.

The employee filed suit against Centercorp and the case was scheduled for mediation. One Beacon invited M&M to participate in the mediation, but M&M declined to do so. One Beacon settled the employee's claim against Centercorp for \$185,000 and then brought an indemnity action against M&M. The parties filed cross motions for summary judgment, and the trial court granted judgment in favor of One Beacon, ruling that: 1) the lease required M&M to indemnify Centercorp; and 2) since Centercorp extended an offer to M&M to participate in the mediation and it refused to do so, M&M was required to indemnify Centercorp and One Beacon for the full amount paid in settlement.

M&M appealed.

HOLDING:

Affirmed in part, reversed in part, and remanded.

First, the Court affirmed the trial court's decision with respect to the applicability of the indemnity provisions in the lease. The Court noted that the term "growing out of" is synonymous with "arising out of". In order for an accident to "grow out of" M&M's use, occupation or operation of the premises and, therefore, to fall within the indemnity clause, M&M's operations need not have been the proximate cause of the accident, but the causal connection between the two must be "more than tenuous". In other words, "some causal nexus must link [the] ongoing operations and the injuries."

The Court held that the required causal nexus did in fact exist because at the time of his accident the employee was returning from making a pizza delivery, had parked where his employer required him to park, and was returning to the store in order to continue delivering pizzas. The Court held that the lease provisions requiring Centercorp to maintain the common areas did not affect the applicability of the "broad and unambiguous" indemnity provisions.

Next, the Court considered the effect of M&M's refusal to participate in the mediation after One Beacon invited it to do so. It explained that an indemnitee's unilateral acts of settlement, even though reasonable and undertaken in good faith, are not binding on the indemnitor absent notice to the indemnitor and an opportunity to defend. If the indemnitee invites the indemnitor to either approve the settlement or defend and the indemnitor declines to do so, the indemnitee must still show its "potential liability" to the plaintiff in order to support its claim against the indemnitor, since an indemnity obligation applies only to payments made under a legal compulsion. If the indemnitee fails to extend an offer to participate to the indemnitor, the indemnitee has the burden of showing its actual liability to the plaintiff. These principles apply whether the indemnity obligation is based on an express agreement to indemnify or an implied duty to indemnify.

The Court agreed with the trial court's finding that One Beacon's letter to M&M with the offer to participate in the mediation gave M&M sufficient notice and an opportunity to defend the lawsuit. However, the Court held that the trial court erred when it concluded that M&M was therefore required to indemnify One Beacon for the full amount it paid without first requiring One Beacon to demonstrate Centercorp's potential liability to the injured employee. Thus, the Court remanded the case to the trial court for a determination as to Centercorp's potential liability to the employee.

New Hampshire DRI Update

By Adam Mordecai, DRI State Representative, Wiggin and Nourie

DRI continues to play an active role within the defense bar, both on a national level and here at home in New Hampshire. While declining membership has been a problem in these difficult economic times, DRI continues to hold strong and has been attracting new members who recognize that now, more than ever, participation in organizations like DRI and TDLA can have a tremendous impact on one's professional development. DRI has welcomed a number of new members from New Hampshire over the past year and those members have, hopefully, seen the benefit of membership in DRI. From the annual social gathering held in the late winter or early spring (held at the firm of Getman, Schulthess & Steere in Bedford this year) to access to DRI's online resources (www.dri.org) and extensive networking community, membership in DRI provides something of benefit to each of its members.

Recent efforts have focused on encouraging people to attend DRI's Annual Meeting, scheduled to take place this year in San Diego from October 20-24. A special emphasis has been placed on recruiting attendees from New Hampshire given that one of our own, Matt Cairns of Gallagher, Callahan & Gartrell in Concord, will be installed as President of DRI at the meeting in San Diego.

We are hoping for a strong turnout at this year's Annual Meeting from New England and from New Hampshire in particular. If you have not yet considered attending the meeting, I urge you to do so – information about the meeting can be found at DRI's website, www.dri.org, or by contacting me at 603.629.4575 or at amordecai@wiggin-nourie.com. I hope to see you all in San Diego in October!



Mediation Presentations: Know Your Audience

By Blair Jones, Friedman Gaythwaite Wolf & Leavitt

Mediation is becoming more and more prevalent in litigation, with many, if not most, jurisdictions now requiring some form of Alternative Dispute Resolution (ADR) for civil cases. Although this can mean arbitration or early neutral case evaluation, it usually takes the form of mediation. The mediation is normally conducted by a neutral attorney or judge, frequently one chosen by agreement between the parties. Even if it is not required, many parties are voluntarily engaging in mediation in an effort to settle their case before trial. In order to give your client the best opportunity to settle the case favorably at mediation, you must set the stage appropriately, and then, develop a presentation tailored to give your client the maximum return on the mediation investment.

KNOW YOUR AUDIENCE

In any situation where you are planning to make a presentation, it is essential that you know your audience. The frame of reference of the audience will affect how they will respond to your message, and, therefore, it affects the way you choose to send your message. This is true whether you are preparing for an oral argument to the Court, a jury trial, or any other presentation.

Planning an effective mediation requires you to consider your audience, as well. You will likely have at least two audiences in a basic, two party case; the mediator and the opposing party. You may have even more audiences if it is a multi-party case. There may be multiple plaintiffs, multiple defendants, or both. You may be adverse to only the plaintiff or plaintiffs, or you may have cross-claims against co-defendants. Even if you have no cross claims against co-defendants, you may be trying to shift blame to the other defendant(s). These factors will affect how you design your approach, and should be carefully considered when developing your theme.

Plaintiffs

It is imperative, if you are truly interested in settling your case as favorably as possible, that you understand who the plaintiff is and what her goals are in the suit. Convincing someone to accept a settlement is only partly about making them believe there is too much risk of loss to turn down an offer. Certainly, this is an important factor. We are all governed, to some extent, by fear. If we are afraid enough of something, we will avoid it. Therefore, your presentation should be designed to engender a real appreciation by the plaintiff of the risks involved in jury trials, and with her case, in particular. She should be made to understand that no one can predict, with certainty, what a jury will do, and there is a good possibility that she could lose her case at trial, and recover nothing.

A reminder that, although her attorney may feel strongly about their chances at trial, you feel just as strongly about the defensibility of the case. The reality will probably be somewhere in between. Going to trial is like going to “Vegas, baby. Vegas.” Notwithstanding the important role fear of risk plays in settlement negotiations, in mediation, it should not be the sole focus of the presentation. If you spend your time arguing to the plaintiff about what a lousy case she has, or how your defense will destroy her case at trial, you will likely instill defensiveness and animosity toward you and your client. Consider that the plaintiff’s counsel has likely discussed the relative strengths and weaknesses in the case with his client, and that the mediator, if he or she is good at his/her job, will also spend time talking about risk and the relative merits of the case. Encourage them to talk about the risks. The plaintiff will be far more receptive to them telling her about the risks than she will be to you.

Instead, consider focusing on finding a way to meet the goals of the plaintiff in a reasonable manner, if that is possible. Develop an atmosphere of cooperation in the mediation. Encourage the plaintiff to think of this as an opportunity to work together to solve her problem, as well as resolve the risks faced by your own client. If plaintiff believes you are genuinely trying to find a way to resolve the problems for both parties, she is more likely to be open to suggestions for compromise, in a spirit of cooperation.

You cannot hope to find a way to satisfy the plaintiff’s needs enough to convince her to settle if you do not know exactly what they are. It may be that you make a generous offer, monetarily, but that it still does not satisfy the plaintiff because it does nothing to change the underlying problem that caused the accident. For example, if a plaintiff believes that a trucking company provides inadequate training for its drivers that caused the accident that injured her, she might be determined to influence the company to change its training program. These crusader plaintiffs often cannot be satisfied by money, alone. The plaintiff may want proof of some remedial measures to prevent future accidents. Sometimes, a plaintiff will want to hear something as simple as an apology, or an acknowledgement of fault, in addition to whatever other compensation that may be involved.

Frequently, the plaintiff will have long term care needs that must be met for a settlement to occur. Your client may not be willing to pay the large lump sum demand of the plaintiff, but would be willing to entertain a structured settlement that, although it offers less money than plaintiff demands, will be sufficient to meet her needs. Often, you can, for example, find ways to demonstrate to the plaintiff that her needs can be met with less money than she thinks with an effective presentation and careful evaluation of available services and their costs. You should be prepared to address those issues when you sit across the table from the plaintiff.

Audience - contd.

Many plaintiffs are often very hostile toward the Defendant(s), and (mistakenly) believe, that the Defendants are callous, cold-hearted people who are intent on looking out for their own interests, regardless of who gets hurt along the way. The plaintiff may feel that she is just someone who got in the way and that the Defendants feel the plaintiff is just costing them money. The plaintiff may think that the Defendants do not even care that plaintiff got hurt.

A successful mediation or settlement negotiation will address this issue, and you should take steps to humanize your client. Let plaintiff know that the company consists of individuals (some of whom should be with you, of course) who all have their own human emotions, desires and concerns. Convince the plaintiff that the Defendants are not cold hearted and unsympathetic. Demonstrate that your clients are people, too, who feel very badly that they were involved in injuring anyone, regardless of who is "legally" at fault.

Changing the plaintiff's perception of your clients in this way can do a great deal to change the tenor of the mediation. Go further by explaining to the plaintiff that the point of the mediation is to work together, for the only time in the litigation, for a resolution that will help the plaintiff address her needs, and the atmosphere can become more cooperative, and less hostile.

Preparing for mediation cannot simply be about how much money you can put on the table. The money is important, of course, and the plaintiff should be reminded that the money being offered at the mediation is real money, with no risks. In order to be effective, however, you have to understand the people involved, and learn to find creative ways to meet their needs in order to convince them to accept a settlement.

The Mediator

You will have a great deal of influence over who you use for a mediator in most jurisdictions. Most areas require that both parties agree on the mediator. This choice should be given careful deliberation. Your choice will be affected by a number of things, including what kind of case you have, the basis of your defense, the strength of your defense, the reputation and style of opposing counsel, the reasonableness and/or sophistication of the plaintiff and the personality of your own client or representative, to name a few.

Knowing the plaintiff can be very helpful in your decision about who your mediator should be. Is the plaintiff someone who is relatively reasonable, and just needs to be guided to the right settlement? Does plaintiff's counsel seem to have good control over her? Is plaintiff completely unreasonable, with unrealistic expectations about the value of her claim? These are a few of the considerations that may steer you toward a mediator who might appear more like a grandmother, who can make everyone comfortable and offer reasoned guidance, or toward a no nonsense, stern, perhaps even somewhat overbearing type who will disabuse plaintiff of her unrealistic expectations in a hurry.

The opposing attorney may influence your choice of a mediator. Is the other attorney experienced? If not, you may want a strong personality to help guide him or her in a proper evaluation of the case. If so, you may want someone with a great deal of experience that you can be sure the other attorney will respect and not ignore. You certainly want someone that will have effective communication with opposing counsel, and who may be able to influence their position, if appropriate.

Consider the strengths and weaknesses of your case. Do you have strong liability defenses? Is there no liability defense, and the issues will all be about damages? You will want to find a mediator you think will be receptive to the arguments you will be making, and the themes you want to advance. The goal is to make the mediator an advocate for your positions to the greatest extent possible.

Make sure you find a mediator who is strong enough to push the negotiations forward. It does no one any good, and simply wastes time and money to have a mediator that simply goes from one party to the other with the latest offer or demand without giving meaningful in-put to the negotiations. Choose someone who will spend enough time preparing to have a knowledgeable impression of the case, and can offer realistic evaluations of the respective positions of the parties.

Once you have chosen your mediator, you can begin tailoring your presentation to appeal to him or her. Again, your goal should be to bring the mediator to a point of view that makes them an advocate for your positions. Develop your presentation to highlight the strengths and weaknesses of your case in a way that will appeal to the mediator. Keep in mind that your presentation for the mediator may be before or after you have already made a presentation to the plaintiff, and without the plaintiff present, so it can be different, with a different focus.

You should be prepared to make a presentation to the mediator outside the presence of the plaintiff. In this presentation, you need not worry about alienating the plaintiff, so you can speak frankly about the strengths and weaknesses of your respective cases. You should present a very strong case, if you can, to the mediator, for why you will be successful at trial. It is important, too, to address perceived weaknesses in your case.

Audience - contd.

You must explain why they will not be as significant as the plaintiff believes, or hopes. Your goal should be to have the mediator become your advocate, and argue for you to the plaintiff that the risk to her is very high, and that the offer being made by your client is reasonable, under the circumstances. Remember to try to identify the mediator's frame of reference in devising your arguments. If you know of particular biases the mediator has, you should address those, and use them if they are helpful, or neutralize them if they are not. Armed with sufficient information, the mediator can become a formidable ally in the settlement process.

Conclusion

As with any good presentation, it is imperative that you identify your audience in order to craft an effective mediation presentation. You should assess the needs and desires of the plaintiff, and seek to appeal to them, rather than try to impose your perspective on her. You should evaluate your mediator, and devise arguments that will appeal to her and bring her into your camp, so that her efforts work in concert with yours. Understanding who will be listening to you will give you the best chance of putting together an effective mediation presentation.



Advance Registration Extended to Tuesday, September 28!

The **advance registration deadline to save \$200** off the regular registration fee of \$895 for members and \$995 for non-members **has been extended to Tuesday, September 28**. This is your last chance to ensure your name is listed on the advance registration list distributed at the Annual Meeting. DRI must receive your registration on or before September 28, 2010. Registrations received after September 28 will be processed on-site.

Don't miss this opportunity to experience outstanding educational programming and earn 11.5 hours of CLE while catching up with old friends and colleagues at one of the many social networking events that DRI has planned in San Diego.

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