



Tri-State Defense Lawyers Association

Vermont · New Hampshire · Maine

Summer 2011



Newsletter



A Message From the Chairman

Dear TDLA Members,

Almost twenty years ago, when I started practicing law, I interviewed for a job with a public defender's office in a galaxy far, far away from here (Kansas) and said I wanted the job because I wanted to be a trial lawyer. I got the job, and on my first day, which was a Monday, my new boss (who was nothing like Obi-wan Kenobi, but a little like Yoda, around the ears) came into my office, grinning, with a thick file he unceremoniously dropped on my desk and, in the "be careful what you wish for" spirit, said, "you wanted to be a trial lawyer. This case is going to trial on Wednesday. You're up!" He threw me in the deep end, and I thrashed around until I got to the edge of the pool, again.

I eventually moved to civil trial practice, and made my way to Maine, but have always appreciated the experience I gained as a young lawyer, with many opportunities to stand up in a courtroom and make arguments to both judges and juries over the years. I appreciate those experiences even more, now, as those opportunities, especially for young lawyers, seem to be disappearing. The jury trial, especially the civil jury trial, is becoming more and more elusive. It seems our system is now hell bent on doing everything necessary to avoid jury trials, and many clients on both sides are becoming more and more risk averse. In Maine, most state civil cases are required to go through the ADR process, which usually means mediation. The process is successful on a significant number of cases. Many times, even if mediation fails, the trial Judge will encourage, if not insist, that another mediation or settlement conference should be held as trial approaches. In Federal Court, parties are frequently encouraged to participate in a Judicial Settlement Conference before trial to try to get the case resolved. Clients are reminded over and over again throughout the litigation process about the vagaries of a jury trial, and many eventually come to the point where they can no longer stomach the risk, and agree to settle.

There are also fewer opportunities to even make oral arguments to the Court on motions. Most motions in our jurisdiction are resolved on the briefs submitted, without oral argument. This means that there are limited opportunities for trial lawyers to ply their trade; to stand up and persuade someone, a judge or a jury, of their position, and to engage in the art of persuasion in a courtroom.

This means that there are fewer and fewer opportunities for lawyers to develop and hone the skills that define trial lawyers; the ability to make a cogent, compelling argument, to think on your feet and present a case that will sway and persuade the audience. When those relatively rare opportunities do arise, there are fewer and fewer lawyers with the skills to truly present an exemplary piece of advocacy.

The value, then, of organizations like the TDLA, which has a wealth of talent in experienced, capable trial attorneys from three states, cannot be overstated. We have a tremendous opportunity for our members to share their knowledge and abilities with one another and give guidance to those who are learning (and we are all learning), so that when the time comes, we can all be prepared with the tools we need to be successful, not just as lawyers, but as *trial lawyers*. A dying, but proud, breed.

Inside

President Updates

DRI State Rep

Loss of Consortium Claims in Maine

Employment Law

State Law Updates

Workers' Comp Update - VT

Defending Third-Party Claims

President's Message - *contd.*

TDLA is a great opportunity for us to share with one another our experiences, values and strengths. I encourage you to become more involved in the organization, to embrace the collegiality offered by this small group of defense lawyers, and to share your knowledge with your colleagues. Encourage your colleagues to join us, to be involved, and to help pass along the pearls of wisdom that have made them successful, and can help others develop their skills. You can do this by coming to our meetings, our cocktail receptions and events and talking to each other, sharing war stories and information. You can do it by writing a short article for our newsletter. The articles need not be scholarly; they can be as simple as war stories or as complex as a dissertation about the Medicare/Medicaid Secondary Payer Act. An experience that is not shared is an opportunity lost. You can be involved by presenting a program at the annual meeting, or inviting other members to discuss interesting issues in an informal setting. It is your involvement that will make this organization exceptional.

It has been my privilege and honor to serve as the Chair of the TDLA for the past year. We have put together a very informative and interesting Newsletter that I'm sure you'll enjoy. We have a wonderful Annual Meeting planned, with excellent CLE presentations. Matt Cairns, a loyal TDLA member and the current DRI President, will be presenting a CLE on the Medicare/Medicaid Secondary Payer Act. Andy Schulman, a trial attorney from Bedford, NH, will present part 2 of his discussion of 5th Amendment Privileges in Civil Litigation, a continuation of his wildly popular Part I of that topic. Stephen Morrison, a talented speaker and lawyer from Columbia, SC, will give a very entertaining presentation about closing arguments. There will, as always, be a cocktail reception and a dinner on Friday night, providing a great chance to see old friends and make new ones. The meeting is in Portsmouth, NH, again, this year, which has proven to be a terrific venue, with plenty of great restaurants, bars and music in the area for *after* the dinner is over. I hope you'll join us there.

Thank you for the opportunity to serve as Chair. I've enjoyed working with you, and hope to continue meeting more of you over the last few months of my tenure. I'll see you in Portsmouth!

Sincerely,

Blair Jones

Blair A. Jones
TDLA Chair

Message from Vermont's President

Greetings defense practitioners!

I truly hope you all are enjoying this wonderful New England summer. Now that 2011 is over halfway complete, it is a good time to ask yourself what have you accomplished? What are your goals for the remainder of the year? If you are drawing a blank, let TDLA and DRI help. As part of our role as members of the defense bar, we must not only strive ourselves to reach the highest marks of skill and professionalism, but we also must train and encourage those younger or less experienced to take pride in the defense practice. Now is the time to challenge yourself to motivate a younger or less experienced defense attorney to get signed up for and involved in TDLA and DRI. Or challenge yourself. The TDLA and DRI are always offering ways to network, participate, educate and grow in the profession. Here are some simple ways to get involved:

- Sign up for TDLA or DRI, or get an associate or colleague on board.
- Join a DRI substantive or practice area committee in your area of expertise, or an area that interests you.
- Offer to write an article for TDLA or DRI.
- Set up and regularly update your profile on DRI Today and use this new, but quite nifty, tool offered by DRI.
- Report your successes or the successes of those around you in the defense bar to TDLA and DRI for publication.
- Sign up and participate in a DRI webinar.

There are a lot of ways to use your own skills and background as a defense attorney to benefit your colleagues and provide opportunities and incentives to newer lawyers. Your goals for the remainder of 2011 should focus on defining those opportunities for yourself and those around you in the defense bar, and projecting the strength of the defense bar in Vermont, the Northeast, and nationally into the future.

Finally, please do not forget to mark your calendars for two important events for the local and national defense bar. First, is the Annual TDLA Meeting September 16 and 17 in Portsmouth, New Hampshire. Second, is the DRI Annual Meeting October 26 through 30 in Washington, D.C. Both organizations have put together stellar meetings, with CLE and networking opportunities, good entertainment, and, of course, great company that can't be beat. Sign up today for these exciting and educational events. I look forward to seeing you there.



Bonnie Shappy



Tri-State Defense Lawyers Association

5th Annual Meeting

Hilton Garden Inn
Portsmouth, NH
September 16 & 17, 2011

Agenda

Friday, September 16, 2011

- 6:00 p.m.** **Reception**
- 7:00 p.m.** **Dinner**
- 7:45 p.m.** **Welcome and Introductions**
Blair A. Jones, TDLA Chairman
Germani Martemucci Riggle & Hill, LLC, Portland, ME
- 8:30 p.m.** **CLE: Contempt of Court**
(60 mins ethics) **Mark Curriden, Esq.**, Addison, TX
Mark Curriden is an award-winning legal journalist, bestselling author, and frequent lecturer at legal organizations across the country. Educated as a lawyer, Mark is a senior writer for the *ABA Journal*, which is the nation's largest legal publication, and a regular contributor to the *New York Times DealBook* on matters of corporate and business law. He also holds the position of Writer in Residence at the SMU Dedman School of Law in Dallas.

Total Pending CLE Credits
270 minutes

Saturday, September 17, 2011

- 7:00 a.m.** **Continental Breakfast**
- 8:00 - 8:10 a.m.** **Opening Remarks**
Blair A. Jones, TDLA Chairman
Germani Martemucci Riggle & Hill, LLC, Portland, ME
- 8:10 - 8:25 a.m.** **Business Meeting (all members are to attend)**
- 8:25 - 9:25 a.m.** **CLE: Medicare Secondary Payer Act**
(60 mins.) **R. Matthew Cairns.**, *Gallagher, Callahan & Gartrell, P.C.*, Concord, NH
Matt Cairns represents the interests of individuals, insurers, manufacturers, transportation and other companies in diverse commercial, complex and traditional litigation matters in all state and federal courts and state agencies. Matt also serves as general counsel to several closely held businesses in New Hampshire. In October 2010, Matt began a one-year term as the 2011 president of DRI.
- 9:25 - 10:25 a.m.** **CLE: 5th Amendment Privileges In Civil Litigation , Part II**
(60 mins.) **Andy Schulman**, *Getman, Schulthess & Steere, P.A.*, Bedford, NH
Andy has tried more than 65 cases to New Hampshire juries. He specializes in complex civil and criminal litigation and appeals. Before joining *Getman, Schulthess*, he was a criminal defense lawyer for sixteen years and served as the director of the criminal practice clinic at the Franklin Pierce Law Center. Today, Andy focuses his defense practice on cases involving medium sized and closely held companies.
- 10:25 - 10:40 a.m.** **Break**
- 10:40 - 12:10 p.m.** **CLE: Closing Arguments**
(90 mins.) **Stephen G. Morrison** , *Nelson, Mullins, Riley & Scarborough, LLP*, Columbia, SC
Steve is a partner of Nelson Mullins Riley & Scarborough LLP. He is resident in the Firm's Columbia office where he practices in the areas of technology law and litigation, business liability, product liability, and securities litigation. Mr. Morrison received a Bachelor of Business Administration from the University of Michigan in 1971, a Juris Doctor from the University of South Carolina in 1975, and he completed the Advanced Management Program at the Harvard Graduate School of Business in 1997. He is admitted to practice before the Supreme Court of the United States, the U.S. Court of Appeals for the Fourth, Fifth, and Eleventh Circuits, and the U.S. District Court for the Districts of South Carolina, Eastern Michigan, Southern Ohio, Southern West Virginia, Eastern Pennsylvania, and Southern Alabama.

Tri State Defense Lawyers Association (TDLA)

2011 5th TDLA Annual Meeting

September 16 & 17, 2011

Hilton Garden Inn

Portsmouth, NH

Registration Form

(Print)

Name: _____

Firm: _____

Address: _____

City/State/Zip _____

Phone: _____ Email: _____

Spouse/Guest Name: _____

Check states for which you wish to receive CLE credit: ME___ NH___ VT___

State Bar Number: ME_____ NH_____ VT_____

Meeting Registration Fees: Registration fee includes reception, dinner and CLE program and handout. No breakouts.

Member: \$180 _____

Non-Member Attorney: \$240 _____

Spouse/Guest: \$ 60 _____

Total of Check_____

Please make check payable to TDLA and mail with registration form to:

**Mark Filler
P. O. Box 4177
Portland, ME 04101-0377**

A block of rooms has been reserved at the Hilton Garden Inn under the name of TDLA at the rate of \$219+ taxes.

Parking is \$12 per night.

Reservations can be made by calling the Hilton at 603-431-1499. Their website is:

<http://hiltongardeninn.com>

For more information, please contact:

Peggy Schultz, Executive Director, TDLA

304-344-1611 or email at www.tristatedefenselawyers.org.

Will It Go Round In Circles: The Status of Loss of Consortium Claims in Maine

By Brett Leland, Friedman Gaythwaite Wolf & Leavitt, Portland, Maine



Prior to the Law Court's decision in *Brown v. Crown Equipment Corp.*, 2008 ME 186, 960 A.2d 1188, there was no question that Maine recognized loss of consortium as a separate and independent statutory claim. Nor was there any question that a loss of consortium claim survived a release of claims by the injured spouse. However, broad language in *Brown* characterizing loss of consortium claims as derivative and overruling prior decisions to the extent they held otherwise called into question the status of such claims. Indeed, Justice Cole of the Maine Superior Court concluded in *Steele v. Botticello* that *Brown* changed the law in Maine and that a release by the injured spouse now barred a loss of consortium claim. 2010 WL 3218034 (Me. Sup. Ct. Aug. 4, 2010). The Law Court's decision in *Steele* has just been released. 2011 ME 72, --- A.3d ---. The Law Court vacated and has, arguably, come full circle.

The bottom line for defense practitioners is that loss of consortium claims may be subject to common law and statutory defenses to the claims of the injured spouse, but are not subject to the injured spouse's contractual release defense.

Prelude to *Brown*

Pre-*Brown*, the Law Court repeatedly held that loss of consortium is a separate and independent claim. In *Dionne v. Libbey-Owens Ford Co.*, the Court held that loss of consortium damages are not subject to a workers' compensation lien of an injured spouse's employer. 621 A.2d 414, 417-18 (Me. 1993). Rather, the Court concluded that the statutory right to loss of consortium damages is "separate and apart" from the injured spouse's right to bring an action against the party responsible for the injuries or, if the spouse does not proceed, the right of the employer to bring such an action, and is thus not subject to an employer's lien. *Id.*

In *Hardy v. St. Clair*, the Law Court held that a husband's pre-release of liability did not bar his wife's separate loss of consortium claim. 1999 ME 142, ¶ 12, 739 A.2d 368, 372. The Court reasoned, "Although derivative in the sense that both causes of action arise from the same set of facts, the injured spouse's claim is based on the common law of negligence while the claim of the other spouse is based on statutory law. Each claim is independent of the other and the pre- or post-injury release of one spouse's claim does not bar the other spouse's claim." *Id.* The Court left open the question "whether a loss of consortium claim may be subject to traditional common law or statutory defenses to the claims of the injured spouse." *Id.* ¶ 12, n.6, 739 A.2d at 372 n.6.

The Law Court reemphasized the separate and independent nature of a loss of consortium claim in *Parent v. Eastern Maine Medical Center*. 2005 ME 112, 884 A.2d 93. In *Parent*, the Court rejected an argument that a loss of consortium claim must be joined with the injured spouse's claim. *Id.* ¶¶ 14-16, 884 A.2d at 96. The Court instructed, "[M]aine's loss of consortium statute provides an individual with a wholly separate and independent right of recovery. . . . [It] contains no statutory requirement of joinder, unlike other provisions of the Maine Revised Statutes. . . . Given the Legislature's explicit grant of the right to bring a loss of consortium action in one's own name, and absent any evidence of legislative intent to require the mandatory joinder of loss of consortium claims, we decline to impose such a requirement pursuant to our judicial authority." *Id.* ¶¶ 14, 16, 884 A.2d at 96.

Brown Begets Uncertainty

In *Brown*, one of the issues before the Law Court was how to apply a comparative negligence offset to wrongful death damages awarded for loss of consortium. 2008 ME 186, ¶¶ 19-28, 960 A.2d at 1194-96. The Court noted, "In order to fully address the question, we must determine whether a consortium claim is a derivative or an independent claim." *Id.* ¶ 23. The Court acknowledged that it had "previously treated loss of consortium claims as independent claims." *Id.* (citing *Parent* and *Hardy*). Without any elaboration, however, the Court broadly proclaimed:

After further consideration, we conclude that loss of consortium claims necessarily arise from the same negligent act as the underlying tort claims and are therefore subject to the same rules and limitations. Accordingly, we hold that a loss of consortium claim is a derivative claim, and to the extent our prior decisions have held otherwise, we overrule those decisions.

Id.

Given that cases such as *Parent* and *Hardy* had concluded that loss of consortium claims were separate and independent claims, and not derivative, *Brown* could reasonably be read as a disavowal and reversal of those cases.

That is exactly how the trial court in *Steele* read *Brown*. The trial court rejected the plaintiff's argument that *Brown* was nothing more than an affirmative answer to the question reserved in *Hardy* whether a loss of consortium claim may be subject to traditional common law or statutory defenses to the claims of the injured spouse. 2010 WL 3218034. According to the trial court's order granting the defendants' motion for summary judgment, that interpretation "ignores the Law Court's sweeping language and express disavowal of *Parent* and *Hardy*'s reasoning." *Id.* The order states, "The court cannot ignore or wish-away the Law Court's bold language. It expressly overruled prior case law and reversed its past holdings. While the Court had noted in the past that 'the terms 'derivative' and 'independent' are imprecise and may be misleading,' the court used those terms throughout *Hardy*

Message from the New Hampshire President

Greetings to New Hampshire defense counsel. I have had the pleasure of serving as New Hampshire's representative to DRI for the past two-and-a-half years and as my term in that role winds to a close later this year, my time on the TDLA Board as New Hampshire President begins in earnest. I am excited to be able to focus my attentions on the local defense bar and look forward to serving in this role as New Hampshire President. If any fellow New Hampshire practitioners have any suggestions, comments, or concerns about TDLA, please let me hear from you – I can always be reached at 603.629.4575 or at amordecai@wiggin-nourie.com and I would love to know how you think TDLA is doing and what more you think the organization could do to help you in your practice.



As difficult (and sad) as it is to believe, summer is again flying by, but the good news is that the impending change in season means another TDLA annual meeting will soon be upon us. The TDLA board has been working hard to put together another stellar meeting and I am pleased that Portsmouth, New Hampshire will again be the location for the meeting on September 16 and 17. Details about the meeting will be reaching you soon and I encourage everyone – especially New Hampshire members – to attend. For all of us, Portsmouth is just a short drive away and this year's meeting promises to be a good one.

Thanks to everyone who turned out for the TDLA spring reception for New Hampshire members held at my firm, Wiggin & Nourie, P.A. in Manchester this past May. The event was very well attended and nearly thirty TDLA members and interested non-members gathered for drinks, food, and an opportunity to catch up with colleagues in the defense bar. Though we had previously billed the event as a "mid-winter social" and held it in March, it looks as though a spring date might be more popular. If you enjoyed the May event and have a preference as to whether future social events be held in spring rather than winter, please let me know so that we can plan accordingly for next year's gathering.

Adam Mordecai

Will It Go Round In Circles: - *contd.*

to explain its detailed analyses and conclusions. The Court then used those same terms when reversing itself in *Brown*. The Court's deliberate use of those terms and its explicit use of the word 'overrule' make it very unlikely that the Court was merely addressing the question reserved in footnote six of *Hardy*. . . . A natural reading of *Brown* indicates that the Court would decide *Parent* and *Hardy* differently today, and that a release of claims signed by an injured spouse can bar the other spouse's subsequent loss of consortium claim." *Id.*

The Law Court Closes The Circle

As noted above, the Law Court vacated the trial court's order in *Steele*. The Court harmonized its decisions in *Brown*, *Hardy*, and *Parent* as follows:

Notwithstanding the imprecision of [the terms 'independent' and 'derivative'], our decision in *Brown* clearly overruled *Hardy* and *Parent* to the extent that those decisions' characterization of a loss of consortium claim as wholly independent, and not derivative, meant that a loss of consortium claim is not subject to the same rules, limitations, and defenses as the underlying tort claim. In effect, *Brown* answered affirmatively the question left open in *Hardy* as to whether a loss of consortium claim may be subject to traditional common law or statutory defenses to the claims of the injured spouse. *Brown*, however, did not undermine or alter *Hardy's* and *Parent's* shared premise that a loss of consortium claim may be brought separately from the underlying tort claim and, in that respect, is more accurately described as capable of being asserted independently. Read together, *Brown*, *Hardy*, and *Parent* instruct that a loss of consortium claim and its underlying claim may be separately pursued even though the spouse's loss of consortium injury derives from the other spouse's bodily injury, both claims arise from the same set of facts, and both claims are subject to the same defenses. Because the two actions may be brought separately, they may also be settled separately, and the release of one claim does not necessarily preclude the other.

2011 ME 72, ¶ 17, --- A.3d at ---.

The end result is that, by characterizing *Brown* as an answer to the question left open in *Hardy*, the Court has closed the circle. The Court has clarified that *Hardy* and *Parent* remain good law. Loss of consortium claims may be subject to common law and statutory defenses to the claims of the injured spouse, but are not subject to the injured spouse's contractual release defense.

EMPLOYMENT LAW: PITFALLS AND RISKS CAUSED BY SOCIAL MEDIA

BY CONSTANCE TRYON PELL, *Ryan, Smith & Carbine, Ltd*, Rutland, Vermont

Constance Tryon Pell is an attorney with the Rutland law firm of Ryan, Smith & Carbine, Ltd. Her practice focuses extensively on civil litigation and trials, primarily in insurance, ski area liability, Landlord-Tenant, professional malpractice and employment related matters with an emphasis on issues affecting business and employment law. Constance received her B.S. degree from University of Vermont and her J.D. degree from Widener University School of Law. Ms. Pell is a member of the Rutland County and Vermont Bar Associations as well as the American Inns of Court Joan Loring Wing Chapter.

Constance Tryon Pell has lectured on various labor and employment law topics in the past several years including: employment discrimination; preparing and defending wrongful termination and harassment cases; avoiding wrongful discharge claims; investigating claims in the workplace; social media policies; and, trial tactics and advocacy.



Employers can't ignore the negative & positive legal effects arising from social media. Career and social websites connect people at work and play far beyond what was possible just a few years ago. Rather than ignore this dynamic growth of interpersonal connections, employers must adapt to these changes and use them to their advantage or at least mitigate the potential risks being spread by their employees, clients and related contacts.

Often co-workers "friend" each other, clients, opposing counsel and others on Facebook or are linked through sites like LinkedIn or Twitter. Discussions that were usually held over happy hour or the water cooler have now been exponentially expanded through texting or use of a web site. An employer should use these avenues of communication to promote social interactions among employees, clients and potential clients while being careful to promote the positive and avoid any negative results.

Consider a business where many employees socialize on a site with one another. If supervisory employees interact with lower-grade employees through these seemingly secure sites the results could be calamitous, positively or negatively. Supervisors often forget that their comments, even outside the business, can have serious legal ramifications. The effect of having a supervisor as a "friend" may convince employees that management is aware of comments and items they post, or they may think that they can get away with something they shouldn't. It is easy for people to lose site of the fact that anything they post on-line immediately enters the public domain and is not private or confidential. If colleagues are connected they may have a subtle reminder that they should behave appropriately on-line, or they may assume they can say things they wouldn't ordinarily say to a supervisor. Employers should train their supervisors and employees of the legal consequences of on-line communications.

Employers should treat information that they obtain as they would, had it been revealed elsewhere anywhere other than on-line or in a protected relationship. Document all findings and keep current records on how the information obtained was handled.

Remind employees to be careful how they use social media. If access to social media is not strictly forbidden remind employees that the equipment they are provided with is owned by the employer. It is important that the employer convey their policy clearly to remove any reasonable expectation of privacy from the employee who is using company equipment. Remind employees that if they have listed the employer as their employer on any internet site that their actions reflect on the business as well. It is also wise to remind employees that only reasonable use of social media in the work place is tolerated. It is the modern day coffee break. Policies should be developed explaining the "confidentiality" of the internet and possible monitoring of emails in line with current case law, NLRB rulings, and within the parameters of the applicable law.

Employers need also be aware of current trends with smartphones. Not only can employees access a variety of social media sites with their phones but there are also apps out there that relate to employment matters. Recently the Department of Labor released an app which they posted on their website that allows employees to track hours worked. This is an incentive for employers to be sure that they are up to date on their record keeping policies. Although the app is not without faults in that nothing is stopping the employee from manipulating the actual hours worked, employers need to be aware that this app is out there and be sure they have the mechanisms in place to rebut any claims that they did not keep track of time correctly.

Employers need to stay on top of technology relating to social media and apps. One way of doing this is also to become part of the social media that is available. Companies can not only have another avenue of advertising by promoting themselves on-line but could also impress potential clients that they are current in using electronic means to communicate. That said, employers must also be careful in how they react to any information they obtain relative to an employee that occurs off the clock. Employers should beware of taking any actions because of a post that involves behavior they disapprove of but that is not unlawful and has occurred after the work day.

In summary, there is no stopping the developments with social media sites and telephone apps. Employers need to stay on top of technology and be aware of laws that use of this technology can effect such as: the Electronic Privacy Communications Act, EPCA (18 U.S.C. §§ 2510 et seq.); the Stored Communications Act, SCA (18 U.S.C. §§ 2701 et seq.); Invasion of Privacy; Family Medical Leave Act, FMLA; and disability, retaliation, Whistleblower claims and current NLRB decisions. No matter what policy an employer adopts, employers need to be certain they convey the policy to employees clearly. You can't break a rule until you know what it is, or should know what it is.

VERMONT WORKERS' COMPENSATION UPDATE

By: Wesley M. Lawrence, *Ellis Boxer & Blake*, Springfield, Vermont



Mr. Lawrence is an attorney with Ellis Boxer & Blake in Springfield, Vermont. Wesley earned a Bachelor's degree in Biological Sciences from the University of Delaware, and his J.D. from Vermont Law School, where he served as the director of the Law School's National Trial Team.

Wesley handles a wide range of trial and appellate matters before the Vermont Department of Labor, the Vermont Superior Courts, the Vermont Supreme Court and the United States District Court, District of Vermont. He is admitted to practice law in Vermont in New Hampshire, and is a member of the Vermont and New Hampshire Bar Associations and the Vermont Claims Association.

The Vermont Workers' Compensation Act and Rules undergo frequent changes. The past year was no exception.

Beginning last June, a Carrier's burden of proof to terminate ongoing benefits, including temporary total disability and medical, has changed as has the hourly rate that Claimants may recover in attorney's fees if they prevail. As of May 2011, there is also a new rule on "pre-authorization" for proposed medical procedures.

When a Carrier seeks to discontinue benefits in Vermont, it files a "Form 27" or, more formally, a "Employer's Notice of Intention to Discontinue Payments." A Department of Labor Specialist, an informal level adjudicator, reviews the evidence that the Carrier provides in support of the Form 27, such an IME report, to determine whether discontinuing benefits is appropriate. For all injuries prior to June 2010, a Carrier met its burden by providing "reasonable support" for the discontinuance. This was not necessarily a tough burden to meet as this burden was construed to require the Specialist to look to the Carrier to produce evidence that conceivably could support a finding against compensability.

The applicable statute for all injuries from June 2010 forward, 21 V.S.A. §643(a) now reads, with changes in boldface:

*"If after review of all of the evidence in the file the commissioner finds that a **preponderance of all the evidence in the file** does not reasonably support the proposed discontinuance, the commissioner shall order that payments continue . . ."*

Although the amended statute's language purports to increase the Carrier's burden to a "preponderance" standard, it is quite confusing as the "reasonable support" language remains, but is now intertwined with a preponderance standard. A reasonable interpretation of this language, on its face, could create a presumption in favor of the proposed discontinuance, which can be only overcome by a "preponderance of the evidence" supplied by the Claimant.

Also, Carriers are now required to submit substantial additional documentation with all Form 27s, including all relevant evidence which is contrary to the proposed discontinuance. The amended statute requires that:

". . . All relevant evidence including evidence that does not reasonably support discontinuance in the possession of the employer not already filed, shall be filed with the notice."

This change is a codification of an existing rule, Vermont Workers' Compensation Rule 3.14, that mandates an ongoing duty to disclose all relevant information to the other party. Notably, however, the amended statute does not explicitly require the Claimant to submit all relevant evidence that is contrary to his position when opposing a Form 27. The best practice, however burdensome, in light of this amendment is to attach all medical records on file regarding the Claimant to a Form 27.

The amended statute also mandates that a Form 27 include "a verification that the employer offered vocational rehabilitation screening and services as required under this chapter" in cases where the employee has been out of work for 90 days. This means that a Claimant cannot have his TTD terminated without being offered the opportunity to pursue VR services first.

As of June 15, 2010, under Vermont Workers' Compensation Rule 10, prevailing Claimants received greater than a 60% hourly raise from \$90.00 per hour to \$145.00 per hour to compensate them for their attorney's fees. The Commissioner has determined that this amendment applies even to claims involving injuries that occurred prior to the amendment's effective date, but only for the attorney's work performed after June 15, 2010. The Department has rejected Carriers' arguments that only Claimants injured after June 15, 2010 qualify for the higher hourly rate. This policy has not been reviewed by the Supreme Court which has routinely ruled that changes that increase (or decrease) benefits owed to a Claimant may only apply to claims where the date of injury occurs after the effective date of the statute.

Vermont Workers' Compensation Update - *contd.*

Additional changes to the Vermont Workers' Compensation Act were signed into law on May 26, 2011 as part of "Act 50," the most significant two are discussed below:

First, Vermont now has a medical "preauthorization" law. Previously, a Carrier was not required to preauthorize medical procedures. Under 21 V.S.A. §640b, a new statute, a Carrier will have 14 days from receipt of a request for preauthorization to take one of four actions:

- The Carrier can authorize the procedure,
- The Carrier can deny the procedure on grounds that the entire claim is denied (this would only be a viable option if the carrier was not under an interim order to adjust the claim). This provision protects Carriers where the denial is based on non-medical grounds, such as credibility, intoxication, failure to use safety equipment or lack of an employer/employee relationship in addition to the defense of lack of a causal connection between the Claimant's work and their claimed injury.
- The Carrier can deny the proposed procedure based on "a preponderance of the credible medical evidence specifically addressing the proposed treatment" confirming that the proposed procedure is unreasonable or unnecessary, or
- The Carrier can schedule an Independent Medical Examination. If the Carrier elects to have an IME, it has 45 days from the date that preauthorization is sought to make a decision on whether to approve or deny the proposed treatment. A 10-day extension of this deadline may be granted upon timely request. It appears that the Carrier must notify the Claimant and the Department of the scheduled IME within 14 days of receipt of the request for pre-authorization.

If the Carrier takes no action at all within the 14-day deadline, the Department may treat the request for pre-authorization as "approved" or the Claimant can move for an interim order. The Department also has the authority to issue interim order at any stage of this process to pay for the proposed treatment if "the evidence shows that the treatment is reasonable, necessary, and related to the work injury."

Second, Vocational Rehabilitation Counselors, under 21 V.S.A. 641§(c), are required to afford claims professionals an opportunity to participate in plan development, specifically written invitation to participate in plan development, including the time and place of the initial meeting, rather than receiving a completed plan after the fact to review. If the Carrier does not object to the proposed within 21 days after submission, the VR plan is "deemed valid."

Message from New Hampshire's DRI State Rep



DRI continues to play an active role within the defense bar, both on a national level and here at home in New Hampshire. Though organizations across the country have been facing declining membership, DRI continues to hold strong and has been attracting new members who recognize that active participation in organizations like DRI and TDLA provides networking opportunities, can lead to new business prospects, and gives the practitioner a wealth of professional assets from which to draw. If you have not already, you might want to take the time to review the information DRI has compiled on compliance with the Medicare Secondary Payer Act (available at <http://www.dri.org/open/mstf.aspx>) as an example of the resources that DRI provides to its members.

DRI has also devoted tremendous time and effort to bringing much needed attention to the present dangers facing the judiciary, both here in New Hampshire and across the country. A new white paper from DRI – *Without Fear or Favor in 2011* – addresses topics ranging from the courts' dramatically and dangerously reduced budgets to the perils of judicial elections and is well worth a read. *Without Fear or Favor* is available on DRI's website (www.dri.org) and can be downloaded as a PDF or even as an e-book for your Kindle, Nook, or iPad.

Recent efforts have focused on encouraging people to attend DRI's Annual Meeting, scheduled to take place this year in Washington, D.C. from October 26-30. A number of exciting speakers – including President Bill Clinton, Supreme Court Justice Antonin Scalia, author Bryan Garner (co-author, with Justice Scalia, of *Making Your Case: The Art of Persuading Judges*), and John Pistole, Administrator of the TSA – and ample opportunity to load up on CLE credits will make this short trip down to the nation's capital worth your time. Given the close proximity of New Hampshire to this year's Annual Meeting location, we are hoping for a strong turnout 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. This meeting also presents an opportunity for us to thank Matt Cairns of Gallagher, Callahan & Gartrell in Concord, current President of DRI, for his year of service to DRI.

I hope to see you all in Washington in October!

Adam Mordecai

New Hampshire Law Update

Please feel free to contact Steve Schulthess, Getman, Schutlhess & Steere, Bedford, NH at (603) 634-4300, extension 702 with any questions about these recent cases.

AREAS OF INTEREST: Automobile Insurance Coverage

LEGAL IMPACT: A garage owner's policy was construed to provide primary liability coverage to the operator of a vehicle loaned to him while his vehicle was being repaired. The Court held that the vehicle was being used for purposes that were "necessary or incidental to garage operations" and, therefore, a policy endorsement limiting coverage to the financial responsibility limit did not apply. The Court compared the "other insurance" provisions of the garage owner's policy with those of the operator's personal auto policy, and held that the personal auto policy provided excess coverage after exhaustion of the garage owner's policy. The Court also upheld the trial court's ruling requiring the two insurers to share defense costs on a pro rata basis, noting that the plain error rule did not require reversal since the issue was undecided in New Hampshire

CASE CAPTION

Progressive Northern Insurance Co. v. Argonaut Insurance Co., No. 2010-370
(Decided April 26, 2011)

FACTUAL SUMMARY:

Craig Kelly left his car for service at Tom's Auto Sales, a garage owned and operated by his parents, and was loaned a vehicle to use free of charge while his car was being serviced. While operating the loaned vehicle Kelly was involved in a motor vehicle accident. The occupants of the other vehicle brought a lawsuit against Kelly. At the time of the accident, Kelly had a personal automobile insurance policy with Progressive with liability limits of \$100,000 per person

Tom's had a garage insurance policy with Argonaut with liability limits of \$25,000 and \$750,000, depending upon the circumstances. The Argonaut policy contained an endorsement which limited the policy's coverage to the financial responsibility law limit of \$25,000 when the covered auto is: (1) owned by the named insured; (2) used by a driver not listed on the schedule; (3) used "for purposes that are not necessary or incidental to garage operations"; and (4) used by a driver who has the "right to frequent use" of the covered auto. Argonaut determined that Kelly's use of the vehicle was personal and he was not a scheduled driver and, therefore, the endorsement applied and it would only provide a defense under the \$25,000 limit. It took the position that Progressive's coverage was primary.

Progressive filed suite against Argonaut claiming that Argonaut was obligated to defend and indemnify Kelly under \$750,000 limit. Both insurers moved for summary judgment.

The trial court ruled that Argonaut was obligated to provide primary coverage up to \$750,000 and that Progressive's coverage was excess. The court also ruled that Progressive must pay a pro rata share of defense costs.

HOLDING:

Affirmed:

The Court first addressed Argonaut's position that the endorsement applied to limit its coverage to \$25,000. Since the parties agreed that the first two elements of the Argonaut endorsement were met because Kelly was using a covered auto owned by the named insured and he was not a driver listed on the schedule, only the third and fourth elements were in dispute.

The third element required a determination as to whether Kelly was using the auto for purposes that were necessary or incidental to garage operations at the time of the accident. The policy defined "garage operations" as including "the ownership, maintenance or use of the 'autos' indicated in Section I of this Coverage Form as covered 'autos.'" "Garage operations" also includes "all operations necessary or incidental to a garage business." The Court rejected Progressive's interpretation of the definition as encompassing all use of the covered autos since that construction would render the endorsement a nullity. Instead, it adopted Argonaut's construction that "garage operations" include the use of a covered auto for "operations that are necessary or incidental to a garage business" but still concluded that Kelly's use of the loaner fell within the definition of "garage operations". Since the vehicle was being loaned by Tom's to Kelly while his car was being repaired at the garage, his use was incidental to Tom's business. Thus, the third element of the endorsement was not satisfied and consideration of the fourth "right to frequent use" element was not necessary.

New Hampshire Law Update - Automobile Coverage - *contd.*

The Court then addressed Argonaut's argument that the two insurers should contribute to any settlement or judgment on a pro rata basis. The Argonaut policy's "other insurance" provisions stated that it provides primary insurance "[f]or any covered 'auto' you own". It also provided that "[w]hen this Coverage Form and any other Coverage Form or policy covers on the same basis, either excess or primary, we will pay only our share". The Progressive "other insurance" clause provides that "any insurance we provide for a ...vehicle, other than a covered vehicle...will be excess over any other collectible insurance." The Court concluded that since the vehicle involved in the accident was owned by Argonaut's insured, its coverage applied on a *primary* basis in accordance with its "other insurance" provisions and *not* on the same basis as the Progressive policy, which provided *excess* coverage for any vehicle not a covered vehicle. Thus, Argonaut's coverage was primary and Progressive's coverage was excess.

Next, the Court rejected Argonaut's argument that the cost of defense should be shared equally between the two insurers instead of on a pro rata basis as determined by the trial court, noting that the issue was not subsumed in the coverage issue and concluding that Argonaut waived this argument by failing to raise it in the notice of appeal.

Finally, the Court held that the defense cost issue would not be considered under the plain error rule. In order for the plain error rule to apply, the error must be "plain", "must affect substantial rights" and "must seriously affect the fairness, integrity or public reputation of judicial proceedings". An error is "plain" if it "was or should have been obvious in the sense that the governing law was clearly settled to the contrary." Since the Court had never before addressed the issue of allocation of defense costs between a primary and excess insurer, and the trial court relied upon authority from other jurisdictions in reaching its decision to require a pro rata sharing, the law in this jurisdiction was not settled and the plain error rule did not apply.

Note: *The material contained herein has been abridged from laws, court decisions, and administrative ruling and does not constitute legal advice or legal opinions on specific facts. Readers should consult legal counsel to determine how laws apply to specific situations. This work may be reproduced provided this entire notice is enclosed.*

Homeowners Insurance Coverage New Hampshire Law Update - *contd.*

LEGAL IMPACT: A homeowner's policy was construed to require the insurer to provide a defense to its insured in a civil lawsuit involving claims for negligent infliction of emotional distress and conspiracy to commit false imprisonment arising from a murder that took place at his residence.

CASE CAPTION:

Northern Security Insurance Co. v. Connors, No. 2010-152
(Decided March 31, 2011)

FACTUAL SUMMARY:

Northern Security brought a declaratory judgment action against its insured, Michael Connors, seeking a determination that it had no obligation to defend him under his homeowner's insurance policy against a civil action arising out of the murder of Jack Reid. The underlying writ alleged that five of Connors' co-defendants, including John Brooks, conspired to trap, torture and kill Reid because they believed he had stolen property from Brooks. They lured Reid to Connors' house where they murdered him.

The plaintiffs alleged that prior to the murder Brooks had informed Connors that he would be sending him a package and that if anyone asked about it to tell them it contained steak knives. Brooks then sent a package containing a stun gun, hand cuffs and pepper spray to Connors' house. The plaintiffs also alleged that Brooks asked Connors if he and the other defendants could use Connors' property. The writ did not allege that Connors knew of the actual contents of the package, agreed to let Brooks use his property, or knew of the plot to kill Reid. The plaintiffs admitted that Reid was not present during the murder and they did not claim that Connors intended to harm Reid. The claims against Connors were for civil conspiracy, wrongful death, intentional infliction of emotional distress and negligent infliction of emotional distress.

The Northern Security homeowner's policy provided coverage for claims seeking damages for bodily injury caused by an "occurrence." The policy defined "occurrence" as an accident which results in bodily injury. The policy contained an exclusion for bodily injury that is expected or intended by the insured (intentional acts exclusion) or that arises out of "physical or mental abuse" (physical abuse exclusion). The policy also included an Enhancement Amendment which expanded "bodily injury" to include "personal injury." The policy defined "personal injury" as including false arrest, detention or imprisonment and provided that the intentional acts and physical abuse exclusions do not apply to "personal injury".

Continued on page 14

Defending Third-Party Claims in Construction Cases: A Quick Escape?

By Maureen M. Sturtevant, *Lambert Coffin*, Portland, Maine



It used to take a village to raise a barn, and although construction has thankfully become more efficient over the centuries, by necessity a multitude of contractors, subcontractors, architects, and material suppliers are still required on most construction sites. As a result, when the construction goes south, there are often a number of parties at which to point fingers and with whom to share responsibility. Accordingly, third-party claims for contribution and indemnification are widespread in construction cases—the general idea being that more defendants equal more money to put in the pot for the plaintiff. A recent decision by Justice Joyce Wheeler in the Maine Superior Court, however, may offer grounds for quick escape routes from this typical pot o’ money practice.

In an unpublished decision, Justice Wheeler dismissed the third-party defendant, the manufacturer of house wrap, from a home construction case because all direct claims against the manufacturer were barred by the statute of limitations, and all claims for contribution or indemnification failed as a matter of law. (*LeClaire v. Winding Brook Associates*, No. CV-10-124 (Me. Super. Ct. published March 28, 2011)). In this case, the homeowners sued the general contractor with claims of negligence and breach of warranty. The general contractor then sued the manufacturer as a third-party defendant with claims of contribution and indemnification, and in turn, the homeowners moved to amend their complaint to assert direct claims of negligence and breach of warranty against the third-party defendant manufacturer. The manufacturer moved to dismiss all claims against it.

Justice Wheeler quickly dismissed the homeowner’s direct claims, finding the 4 year statute of limitations barred the breach of warranty claim, and the economic loss doctrine barred the homeowner’s claim of negligence. In dismissing the third-party claim of contribution, however, she employed a more novel approach. Justice Wheeler found that where the homeowner plaintiffs could only recover from the general contractor under warranty theory, the general contractor could not claim contribution, a tort-based doctrine, against the manufacturer. Specifically, Justice Wheeler found: “This court concludes a contribution claim may not be based on a breach of warranty claim.” (*LeClaire v. Winding Brook Associates*, No. CV-10-124, at p. 9 (Me. Super. Ct. published March 28, 2011)). This application of the economic loss doctrine has powerful implications. By prohibiting the plaintiffs from making tort claims, as Justice Wheeler found, the economic loss doctrine also implicitly limited claims for contribution.

A quick review of the economic loss doctrine is helpful to illustrate further. The economic loss doctrine prohibits a purchaser of a house from recovering for damage to the house caused by defects in the house except under a warranty theory. *Oceanside at Pine Point Condominium Owners Ass’n v. Peachtree Doors, Inc.*, 659 A.2d 267, 271 (Me. 1995). More specifically, the Maine Law Court explained the economic loss doctrine does not permit “tort recovery for a defective product’s damage to itself.” *Id.* at 270. Construction lawsuits fall squarely within this doctrine because any separate components of the construction, such as windows or house wrap, are integrated into the product purchased by the plaintiff—the complete house. *Id.* at 271. Accordingly, any damage to the house caused by alleged defects in individual components is damage to the product itself and is only recoverable under a breach-of-warranty theory.

Although the Law Court has not expressly adopted the position that the economic loss doctrine also prohibits claims for contribution arising out of construction lawsuits, Justice Wheeler’s decision is well-supported by Maine case law. For example, in a legal malpractice action, the Law Court implicitly recognized that contribution claims must arise from tort liability in affirming the dismissal of a contribution claim. Specifically, the Law Court found no error “in the court’s conclusion that the Johansons’s contribution claim fails because Dunnington and the Johansons were not joint tortfeasors.” *Johanson v. Dunnington*, 2001 ME 169, ¶ 10, 785 A.2d 1244, 1247. The majority of courts agree. *Autozone, Inc. v. Glidden Co.*, 737 F.Supp.2d 936, 947 (W.D. Tenn. 2010) (recognizing majority view holds that suits “in tort [] exclude contribution suits based on breach of contract”). The argument that contribution claims cannot arise from warranty liability, therefore, is well-supported by law recognizing that contribution claims are exclusively are tort-based.

This argument can also apply with equal force to claims of indemnification. Under Maine law, there are three sets of circumstances giving rise to the right of indemnification: “(1) indemnity may be agreed to expressly; (2) a contractual right of indemnification may be implied from the nature of the relationship between the parties; or (3) a tort-based right to indemnity may be found when there is a great disparity in the fault of the parties.” *Emery v. Hussey Seating Co.*, 1997 ME 162, ¶ 10, 697 A.2d 1284, 1287; *Araujo v. Woods Hole, Martha’s Vineyard, Etc.*, 693 F.2d 1, 2 (1st Cir. 1982). Where general contractors frequently do not have express contractual agreements with their subcontractors, any claim for indemnification is often grounded in tort, and is precluded for the same reasons that prevent contributions claims. Although within the context of Massachusetts law, the District of Maine agrees. *Leasetec Corp. v. Inhabitants of the County of Cumberland*, 896 F.Supp. 35, 39 (D. Me. 1995). The district court found that where claims for contribution and indemnification could only arise between tortfeasors under Massachusetts law, the defendant .

Third Party Claims - *contd.*

consequently was precluded from asserting either such claim when only breach of warranty claims were alleged by the underlying plaintiff. *Id.* (“The absence of any tort-based theory of indemnification is also fatal to the County’s claim for contribution since by statute, recovery of contribution is only permitted among joint tortfeasors.”). Accordingly, to the extent claims for indemnification are tort-based, the same strategy for defeating contribution claims may be employed where the underlying liability is limited by the economic loss doctrine to breach-of-warranty claims.

As with any lawsuit, this strategy is subject to a variety of potential counterarguments. For example, the plaintiff homeowners or general contractor can argue that the economic loss doctrine does not apply to services allegedly done in a negligent manner. Compare *Pendleton Yacht Yard, Inc. v. Smith*, 2003 WL 21714927 *4 (Me. Super. Ct. March 24, 2003) (rejecting argument that Maine Law Court would more likely than not apply the economic loss doctrine to service contracts) with *Maine-ly Marine Sales & Service, Inc. v. Worrey*, 2006 WL 1668039 *2 (Me. Super. Ct. April 10, 2006) (“In the court’s view, [the economic loss] doctrine is applicable to service contracts, such as the winterization contract in this case, as well as to purchases of allegedly defective goods.”). Additionally, a special relationship between the general contractor and third-party defendant may exist so as to allow a contractual right of indemnification to be implied. As always, the specific facts and circumstances of each case should guide counsel. Still, even considering the potential limits of this strategy, an early motion to dismiss or summary judgment may create sufficient leverage to tee up a quick, and hopefully economical, resolution for our third-party defendant clients.

New Hampshire Update—Insurance Coverage - *contd. from page 11*

Northern Security denied coverage, claiming that Connors’ conduct did not constitute an “occurrence” and that the acts were excluded by the physical abuse exclusion. Both parties filed motions for summary judgment, and the trial court ruled in favor of Connors based on its determination that: 1) negligent infliction of emotional distress and conspiracy to commit false imprisonment were acts covered by the policy; and 2) the covered acts were not inextricably intertwined with the non-covered acts.

Northern Security appealed, arguing that: 1) the claim for civil conspiracy to commit false imprisonment did not trigger coverage under the personal injury endorsement for false imprisonment claims; 2) the civil conspiracy claims involved non-covered intentional conduct and did not fall within the policy’s definition of “occurrence”; 3) any false imprisonment claim was not covered because it was inextricably intertwined with the intentional plan to commit murder; and 4) the damages were for wrongful death and were not covered. Connors argued that the policy was ambiguous because the personal injury endorsement purported to cover claims for the intentional tort of false imprisonment while the underlying policy excluded coverage for intentional torts and, therefore, the policy should be construed in favor of coverage.

HOLDING:

Affirmed.

The Court held that even though the writ did not specifically allege a claim of false imprisonment, the policy covered claims based on civil conspiracy to commit false imprisonment under the personal injury endorsement, which did not contain an intentional acts exclusion. A reasonable insured would expect that if false imprisonment claims were covered, conspiracy to commit false imprisonment would likewise be covered.

The Court also rejected Northern Security’s argument that the intentional nature of a conspiracy tort precluded coverage because the policy’s intentional acts exclusion did not apply to personal injury claims. Furthermore, to the extent that the definition of “occurrence” as an “accident” created an ambiguity when applied to personal injury offenses, that ambiguity must be construed in favor of coverage.

Next, the Court considered Northern Security’s position that coverage was excluded because the alleged conspiracy to falsely imprison Reid and the claim for negligent infliction of emotional distress were “inextricably linked” to the murder, for which there was no coverage under the policy. Relying on *State Farm Inc. Co. v. Bruns*, 156 N.H. 708 (2008), the Court noted that it must look to “the overall intentional plan of the insured to determine coverage.” It must compare the policy language with the *facts* as pled, rather than the writ’s conclusory allegations, in order to determine whether the policy affords coverage. The Court found that the facts pled with respect to Connors’ conduct did not support the argument that his conduct was inextricably intertwined with the murder conspiracy. There existed a genuine dispute as to the interconnectedness of the claims and any doubts must be resolved in favor of the insured. This dispute was sufficient to give rise to a duty to defend the civil conspiracy and negligent infliction of emotional distress claims.

Finally, the Court declined to address Northern Security’s argument that since the damages all arose out of the murder, which was not covered by the policy, the claims were not covered under the principle that “where the alleged damages resulting from a claim arise entirely out of an act that would not be covered, the claim is likewise excluded.” The Court ruled that because this argument was not presented at the trial court level it could not be raised on appeal. The argument that the negligent infliction of emotional distress claims were barred by the physical abuse exclusion was also not properly preserved and, therefore, not addressed by the Court.

Vermont Law Update

By Walter E. Judge, Jr., *Downs Rachlin Martin PLLC*, Burlington, Vermont

Richard N. Bland
Vermont Mutual Ins. Co.

Vermont Superior Court Decides A Number Of Issues Of First Impression In Vermont Insurance And Practice Law

Northern Security Ins. Co. v. Pratt, Washington Superior Court, No. 838-11-10 Wncv (May 19, 2011)
(Crawford, J.)

Although it is a superior court decision, Pratt is one of the more significant insurance coverage and practice decisions in Vermont in the last 20 years. It is well-reasoned and covers a number of important issues, some of which are of first impression: what are the respective rights and duties of the insurer and the insured when the insurer offers to defend the insured conditioned upon a reservation of rights; whether an insured forfeits defense or coverage by refusing to sign a non-waiver agreement; whether the insurer has the right to select independent defense counsel for the insured; and whether the insurer is required to reimburse the insured for attorneys fees incurred before the defense was tendered to the insurer.

In sum, Judge Crawford ruled that there was a conflict because the insured and insurer disagreed on coverage of an underlying action against the insureds. The insureds wanted the insurer to retain their attorney to continue to defend them, but the insurer wouldn't do that because, among other reasons, that attorney had already taken an adverse position to the insurer in advocating for the insureds on coverage. Judge Crawford held that the insurer had a duty in this case to defend the insureds, but was free to hire an independent attorney of its own choosing – not the attorney preferred by the insureds. He noted that an insurer is generally not responsible for pre-tender defense costs, but declined to decide on summary judgment whether the insurer had to pay for any defense work that the insureds' attorney may have done after the insureds requested the insurer to defend them but while the parties still disagreed on the terms of the defense arrangement.

The Tri-Partite Relationship Among Insurer, Insured, And Assigned Defense Counsel/Conflicts Of Interest/Rule Against Insurer Participating In Underlying Case To Influence Coverage Issues

An understanding of Vermont insurance law and procedure, as well as insurance practice issues left undecided by the Vermont Supreme Court, prior to Pratt, is critical to an appreciation of the decision's significance.

Vermont recognized the concept of waiver and estoppel of coverage by an insurer at least as far back as 1933. In Beatty v. Employers Liability Assur. Corp., 106 Vt. 25, the insured motorist was sued for injuries caused to his passenger (his mother) during an automobile trip. The policy contained an exclusion for driving passengers for hire, and it was undisputed that the insured's mother had paid the insured for the gas and oil for the trip. The insurer wrote to the insured (through counsel hired to defend the insured) alleging that the accident was not covered because of the exclusion, but agreeing to defend the suit if the insured signed a non-waiver agreement. The insured responded by disputing the applicability of the exclusion, and refused to sign the non-waiver agreement. Nevertheless, and with no further communications between the insurer and its insured, the insurer defended the insured at trial. When a judgment was rendered for the insured's mother, the insurer refused to pay, relying on the exclusion. In the insured's suit against the insurer, the Vermont Supreme Court held that, because it proceeded to defend the insured despite his refusal to sign the non-waiver agreement, the insurer was estopped from denying coverage, and was therefore responsible for the judgment against the insured.

The concept of first-party bad faith by an insurer under Vermont law was recognized at least as far back as 1938. In Johnson v. Hardware Mut. Cas. Co., 109 Vt. 481, 1 A.2d 817, the Vermont Supreme Court affirmed a bad faith judgment by the insured against the insurer. The Court stated, "[w]hen the company accepted the premium charged for the policy, it impliedly undertook to use this control and management for the mutual benefit of the parties to the contract. Their relations became mutually fiduciary; and each owed the other the duty of the utmost good faith in their dealings together." A few years later, the Court fleshed out that principle by holding that an insurer was liable for a third-party judgment obtained against the driver of its insured's vehicle where the insurer knew about the case pending against the driver, but did nothing. In Mancini v. Thomas, 113 Vt. 322, 34 A.2d 105 (1943), the injured party obtained a judgment against the driver of the insured's vehicle. The insurer had not defended the driver in the underlying suit on the grounds that the driver was not an insured. Afterwards, the insurer refused to pay the judgment, and suggested that the driver had lacked incentive to vigorously contest the underlying suit. The Vermont Supreme Court held that, where the insurer believed there was no coverage for the driver, it had options other than merely letting the underlying case against the driver go to verdict. Exercising none of its options, the insurer could not later disclaim any obligation to indemnify the driver.

Approximately 30 years later, the Court recognized (in dicta) that where an insurer has coverage defenses, but defends its insured in the underlying action, there may be a conflict, such as where the insurer may try to shift the verdict to a portent of no coverage. See Orleans Vill. v. Union Mut. Fire Ins. Co., 133 Vt. 217, 335 A.2d 315 (1975). In Myers v. Ambassador Ins. Co., 146 Vt. 552, 508 A.2d 689 (1986), the Court fleshed out the conflict notion further. It reversed a trial court judgment for the insurer in a bad faith action by the insured. It held that the insurer, when it is defending its insured, is faced with a conflict when an injured



Vermont Law Update - *contd.*

makes a demand against the insured for settlement within the policy limits. It recognized that the insurer's fiduciary obligation to act in good faith when defending a claim against its insured obligates it to take insured's interests into account. Going further, the Vermont federal court held in R.L. Vallee v. American Intern. Specialty Lines Ins. Co., 431 F.Supp.2d 428 (2006), a bad faith action against an insurer by the insured's assignee, that the duty to defend is broader than the duty to indemnify; that as long as there is a possibility that the claims asserted fall within the scope of the policy, the insurer must defend; and that once an insurer's duty to defend is triggered, the insurer must defend the entire suit, including any claims that might not be covered by the insurance policy.¹

More recently, the Vermont Supreme Court decided Pharmacists Mut. Ins. Co. v. Meyer, 2010 VT 10 (Feb. 4, 2010). In Pharmacists, the Court held that the "personal injury" coverage in a homeowner's policy covered defamatory statements by the 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. In so holding, the Court made the remarkable pronouncement that the insurer should have intervened in underlying case and asked for special jury interrogatories on whether the defamatory statements were negligent or intentional. To many insurance attorneys, this statement came as a bolt out of the blue: the Vermont Supreme Court had never previously suggested that an insurance company could intervene in the underlying lawsuit against its insured to seek a no-coverage determination. In fact, previous Vermont precedent, while never addressing this intervention issue squarely, had certainly suggested the opposite – i.e., that a request to intervene by the insurer would constitute bad faith. Furthermore, would any insured not oppose its insurance company's effort to submit jury questions in the underlying case that might eliminate coverage?

Thus, while the Vermont Supreme Court has long since recognized the potential for conflict between the insurer and the insured and the concept of fiduciary duties owed between them, it has never addressed the issues of whether an insured forfeits a defense or coverage by refusing to sign a non-waiver agreement; whether the insurer has the unfettered right to select independent defense counsel of its own choosing; and whether the insurer is required to reimburse the insured for pre-tender defense costs.

The Pratt Decision

Pratt is a seminal decision in the development of Vermont insurance law and practice.

Facts. The Pratts owned a lot in a residential development in Richmond, Vermont, but lived elsewhere. (There is a dispute over whether the lot was "vacant" or "improved," and this decision expressly does not resolve that dispute). Erosion from the Pratts' lot allegedly harmed the homeowners' association's stormwater control system. The association alleged that the Pratts refused to stop the erosion, prevent future erosion, or pay for the clean-up. The association paid for the clean-up and assessed the Pratts \$7,166.60 pursuant to the bylaws of the association. The Pratts refused to pay the assessment. The association then imposed a lien against the lot. The Pratts hired an attorney and filed a lawsuit to remove the lien. The association then counterclaimed in the lawsuit to enforce the lien, and asserted negligence and nuisance claims against the Pratts. The coverage dispute centers around the association's counterclaims against the Pratts.

The Pratts notified their homeowners insurer ("insurer") of the counterclaims against them. The insurer offered to provide a defense conditioned upon a reservation of rights, and asked the Pratts to sign a non-waiver agreement. The Pratts refused to sign the agreement unless the insurer agreed to hire, as their defense counsel, the lawyer they had already retained to represent them against the association. The insurer refused to do that because the Pratts' attorney had already taken a position against the insurer in the coverage dispute. The insurer offered to hire a separate attorney to defend the Pratts in the suit with the association. The Pratts refused, and never signed the non-waiver agreement. Accordingly, the insurer never hired an attorney to defend them.

Issues and decisions. The insurer initiated a declaratory judgment action against the Pratts and moved for summary judgment. The first issue was whether the lot in the development was "vacant." If it was vacant, it was covered by the insurance policy. Judge Crawford declined to decide this issue on summary judgment because of disputed issues of fact.

Judge Crawford also declined to decide as a matter of law whether the policy covered the assessment that the association had imposed against the Pratts.

The next issue was whether the Pratts forfeited coverage under the policy by refusing to sign the non-waiver agreement. **This is an issue of first impression in Vermont.** Judge Crawford noted that the Pratts do have an obligation to cooperate with the insurer. But he found that this obligation did not require them to sign the non-waiver agreement as a condition of obtaining coverage. He noted that the insurer must make the decision to provide coverage – based upon its assessment of whether the claims against the insureds fall within the policy – regardless of whether the insureds sign a non-waiver agreement. **Thus, the Pratts did not forfeit their right to coverage by refusing to sign the non-waiver agreement.**

The next issue – **also an issue of first impression in Vermont** – is which party – the insurer or the insureds (the Pratts) – had the right to choose counsel to defend the Pratts. Judge Crawford noted that where there is a conflict between the insurer and the insured, the jurisdictions are all over the map on the issue of which party gets to select defense counsel for the insured. He found that for several reasons of sound litigation policy, and based on specific policy language, it makes sense to allow the insurer to select the attorney. Moreover, he found that in this case the attorney preferred by the insureds was someone who was already opposed to the

¹There is an exception if the insurer can show that there is no possible way that a particular claim is covered. Garneau v. Curtis & Bedell, Inc., 158 Vt. 363 (1992).

²Judge Crawford noted that the policy states that the insurer will "provide a defense at our expense by counsel of our choice."

Vermont Law Update - *contd.*

insurer and that forcing the insurer to hire this attorney would unfairly tip the scale all the way in the insureds' favor on the coverage issues. Further, Judge Crawford found that an attorney's primary ethical obligation is to his client – the insureds – even if he is paid by the insurer. He found that there is no indication of a problem in Vermont with attorneys paid by insurers being disloyal to the insureds. Thus, he held that **the insurer, and not the insureds, has the right to select the defense counsel for the insureds, even where, as in this case, there is a conflict between the parties.**

The last issue was whether the insurer had to reimburse the Pratts' for all the fees their attorney had incurred in defending against the association's counterclaims. The insurer sought summary judgment that it did not have any obligation to pay these fees. **Again, this is another issue of first impression in Vermont.** Judge Crawford found that the general rule is that an insurer is not responsible for defense costs incurred prior to demand for a defense. But he stated that the Pratts might have incurred defense costs during the period in which they and their insurer were skirmishing over the terms of coverage and that, if they did, such costs might be reimbursable. However, he stated that he did not have enough information to determine on summary judgment whether the Pratts' had incurred any defense costs during this period, and whether or not they had unreasonably rejected the insurer's offer of a defense before incurring such costs. Thus, he denied summary judgment to the insurer on this issue pending a final determination on the merits. However, the decision implies that an insured who refuses to accept defense counsel assigned by the insurer will not be entitled to recovery of attorney's fees from that point forward until such a defense is accepted.

Conclusion

Thus, Judge Crawford's decision plows entirely new ground on many insurance coverage and practice issues that had yet to be addressed by the Vermont Supreme Court. In Pratt, Judge Crawford decided that: a) the an insured does not necessarily forfeit coverage by refusing to sign a non-waiver agreement; and b) the insurer, and not the insured, has the right to select defense counsel for the insured when the insurer offers the insured a defense under a reservation of rights.

DRI Annual Meeting

Washington, D.C.

October 26 - 30, 2011

Marriott Wardman Park

2010-2011 TDLA Officers

Blair Jones, TDLA Chair & Maine President

Christopher Poulin, Immediate NH Past President

Philip Coffin, Immediate Maine Past President

Bonnie Shappy, Vermont President

Adam Mordecai, New Hampshire President

Patricia Orr, Immediate Vermont Past President &

Elizabeth Hurley, New Hampshire Vice President

TDLA Chair

DRI Officers

Christopher Kenney, DRI Regional Director

Phil Coffin, DRI ME State Representative

Adam Mordecai, DRI NH State Representative

Greg Weimer, DRI VT State Representative

Publisher: Peggy L. Schultz

This newsletter is a publication produced by the TDLA for the use of attorneys in Maine, New Hampshire and Vermont. Articles should not be re-printed without the permission of the authors. The TDLA welcomes submissions, announcements and recommendations for its next newsletter. Please contact us at:

**Tri-State Defense Lawyers Association ■ 304-344-1611 ■ www.tristatedefenselawyers.org
Peggy L. Schultz, Executive Director**