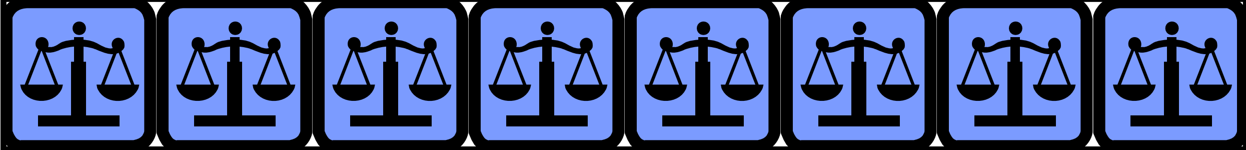
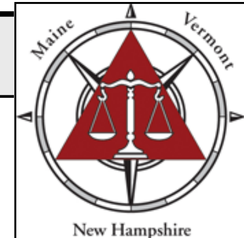


# Tri-State Defense Lawyers Association

***Vermont · New Hampshire · Maine***



# Newsletter

**Winter 2009**

## Ringing in the New Year with TDLA!

*Chris Poulin, NH President*
*TDLA Chair*

Dear TDLA Members

Happy New Year!

I am honored to introduce myself as the new Chair of the Tri State Defense Lawyers Association. I would like to thank my predecessor, Attorney Phil Coffin of Lambert Coffin Portland, Maine, for his exemplary service as TDLA Chair for the past two years. While I have huge shoes to fill, I look forward to building upon Phil's success.

TDLA held its second annual meeting at the Hilton Garden in Portsmouth, NH on September 19 and 20, 2008. On Friday, September 19, the Honorable Joseph N. LaPlante – United States District Court, District of New Hampshire was our keynote speaker. Judge LaPlante gave a very insightful and interesting speech regarding his first year on the bench as a newly appointed federal judge.

On Saturday morning, September 20, we had a great CLE program featuring Attorney Ritchie Berger of Dinse, Knapp & McAndrew of Burlington, VT (Preparing for and Deposing Adverse Expert Witnesses); Timothy P. Schimberg, Esquire of Fowler, Schimberg & Flanagan, Denver, CO (Lawyers Helping Lawyers: The Interface Between Lawyer Mental Health and Professional Conduct) and a panel discussion on paid v. billed medical expenses presented by Walter Judge of Downs Rachlin and Martin, Burlington, VT; Alicia Curtis of Lambert Coffin, Portland, ME and me.

Overall, our second annual meeting was well attended and a great success. My thanks to all TDLA

## Inside

Lawyers Assistance

TDLA Social Events

WC Law

Mediation Prep

State Updates

Lack of Marketability

Increasing Your Stock Value

*TDLA Chair Letter—contd.*

speakers and members who helped to make this possible, with a special thank you to our Executive Director, Peggy Schultz.

Our third annual meeting is scheduled to take place at the Hilton Garden Inn, Portsmouth, NH, on September 18 and 19, 2009. Please save these dates on your calendar.

Our TDLA goal for 2009 is to continue to spread the word about our great organization! Let's encourage our colleagues to join TDLA! Maine, New Hampshire and Vermont plan to schedule TDLA receptions in our respective States this winter in an effort to increase our visibility in the legal community and to promote membership. Be on the lookout for a TDLA State reception near you!

Best wishes to you all for a healthy and successful new year!

*TDLA Chair*

*Christopher J. Poulin*

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*Blair A. Jones*
*Maine President*

I am honored to have been appointed as the Maine President of the Tri-state Defense Lawyers Association. I am looking forward to working with our Chair, Chris Poulin, and Vermont President, Patricia Orr and having a productive year.

We hope you enjoy this issue of the TDLA Newsletter. It is filled with informative, helpful information that should be of assistance to you in your practice. Many thanks to Beth Stouder for serving as editor and her hard work in putting this issue together.

We have implemented some changes to our newsletter editorial process, as well, and hope this will make future issues both easier to put together and even more informative and helpful to our members. The editor position will be held by a member of TDLA for two newsletter issues, and then, that editor will be responsible for finding a replacement editor. Ideally, we would like to rotate the position through the three states. Since Beth is from Maine, she will endeavor to find a replacement from Vermont or New Hampshire. When the next editor is finished, he/she will try to find someone from the third state.

We have also created new positions for the newsletter, three assistant editor positions that will be held for one year. There will be an assistant editor from each state, and the position will be responsible for assisting the editor by helping to find authors and getting material together for their respective states. We hope this new structure will help make the process easier for everyone.

*Maine President's column -contd.*

Involvement in the newsletter is an excellent way to become more involved in the organization, and we hope that many of you will consider serving as newsletter assistant editor and/or editor.

I am looking forward to working with and meeting all of you. I would welcome hearing from any of you about your thoughts about TDLA, or just to get acquainted. Please feel free to contact me any time on 207.761.0900 or by email at bjones@fgwl-law.com.

*Happy New Year!*

*Blair A. Jones*

## TDLA Member to Serve on Judicial Nominating Board

In a contested election, Vermont TDLA member Walter Judge was elected by his fellow members of the Vermont Bar Association to the Vermont Judicial Nominating Board. The Judicial Nominating Board is a statutory body in Vermont that screens, reviews, and nominates candidates to fill judicial vacancies in the state. The Board consists of: a) attorney members elected by members of the Bar (such as Walter), b) members of the public appointed by the Governor, and c) members of the Legislature appointed by the House and Senate leaders.

## *Save the Date!*

***Tri State Defense Lawyers Association***

**Annual Meeting**

**Hilton Gardens Inn**

**Portsmouth, NH**

**September 18 & 19, 2009**

www.hiltongardeninn.hilton.com

603-431-1499

# LAWYERS ASSISTANCE PROGRAMS
# MAINE, NEW HAMPSHIRE AND VERMONT

*By Elizabeth G. Stouder*, Richardson, Whitman, Large and Badger, Portland, Maine

Following up on Tim Schimberg's talk at the Fall TDLA meeting, everyone should be aware that every state has an assistance program for lawyers and judges. These programs are designed as a resource to help lawyers, judges and their families with a variety of problems, including substance abuse, addiction, mental health and emotional problems.

Maine, New Hampshire and Vermont each have active programs. Each program provides confidential information, advice and help to those who seek it. The goals of the programs are to:

Confidentially address issues of lawyer or judge impairment from the effects of chemical dependency, addiction, mental health, age related and other problems that may impair the ability to practice;

Protect the interests of clients and the general public;

Provide assistance to determine appropriate help, including support services from the executive directors and volunteers, support groups and referrals to counseling, therapy and rehabilitation services.

Reach out to, and educate, the bench and the bar to the causes of, and remedies for, impairments.

In each of the three states, an executive director runs the program and there are a number of volunteers who have been trained and are ready to talk with anyone who calls and help find the appropriate assistance. Each of the programs has a confidential telephone number for concerned individuals to call.

Individuals should not hesitate to contact these programs. Please call if would like information, if you have concerns about yourself or any lawyer or judge or if you simply need someone to talk to someone. The inquiries will be handled confidentially and promptly. The director of each program will understand if you have concerns about someone else and would prefer that your name not be used in any follow up.

**<u>Contact Information for Maine, New Hampshire and Vermont</u>**

**MAINE ASSISTANCE PROGRAM FOR LAWYERS AND JUDGES (MAP)**

**Helpline: 800-530-4627**

Bill Nugent, Director
P.O. Box 4811, Portland, ME. 04112 maineasstprog@verizon.net

*Note that after 1/31/09, the e-mail address will change to maineasstprog@myfairpoint.net*

*Lawyers Assistance Programs—contd.*

**NEW HAMPSHIRE LAWYERS ASSISTANCE PROGRAM (NHLAP)**

**Helpline: 603-545-8967**
**877-224-6060**

Cecile B. Hartigan, Executive Director,
26 S. Main Street, #261. Concord, NH 03301 info@lapnh.org

**LAWYERS CONCERNED FOR LAWYERS, INC (VERMONT)**

**Helpline: (1-800-525-9109 (rings at Boston LCL )**

John B. Webber, Esq., Director
P.O. Box 6014, Rutland, VT 05702-6-14 (802-236-5468 )

## TDLA Expert Witness Search

**Are you using the TDLA online Expert Witness Search? Just go to the website at www.tristatedefenselawyers.org, click on the Expert Witness Search icon, complete the form and submit.**

**Responses will come directly to you.**

***In conjunction with the***

**Tri State Defense Lawyers Association**

***cordially invites you to attend a cocktail reception***

***in Friedman Gaythwaite Wolf & Leavitt's office at***

***6 City Center***

***Portland, ME***

***Thursday, February 5, 2009***

***4:30—7:00 p.m.***

# Update on Workers' Compensation Law

*By* Bonnie B. Shappy, *Hayes & Windish*, Vermont

There have been a lot of changes and prospective changes in Vermont Workers' Compensation law in the past year. Notably, the State Legislature passed S.345, the purpose of which is touted to be lowering the cost of workers' compensation insurance. The Amendment should be read in its entirety, but there are a few changes relevant to defense counsel highlighted below.

The only edition of the AMA Guides to be used in all permanency evaluations until further notice is the Fifth Edition, not the most recent edition. 21 V.S.A. § 648(b). The Vermont Department of Labor will not recognize the recently published Sixth Edition. Instead, the commissioner, in consultation with the Department of Labor advisory council, must adopt a rule prior to the use of any edition subsequent to the Fifth.

Vermont's average weekly wage calculation now utilizes 26 weeks preceding the injury, rather than 12. 21 V.S.A. §650(a). The Amendment revises the cost of living adjustment to permit the adjustment only in situations where a claimant has received temporary total disability benefits for 26 weeks preceding the July 1 date. 21 V.S.A. §650(d).

While mediations currently commonly occur, the Amendment introduces a specific mediation provision which asserts the "commissioner shall require" mediation in certain disputes. A referral will be made after a request for a formal hearing has been filed, if appropriate. 21 V.S.A.§ 663a. The Department is in the process of formulating rules to assess the guidelines for instituting this provision. According to the proposed Rule, absent specific commissioner (or designee) approval, no disputed claim shall be heard at formal hearing until the parties have made "good faith efforts at mediation". 27.3100. The Rules outline the process the parties must follow to be excused from mediation, though the decision lies with the commissioner or designee. Rule 27.3400. The commissioner shall publish a list of the approved mediators, which may include attorneys, adjusters, former department employees, licensed physicians and others, if such individuals demonstrate familiarity with Vermont Workers' Compensation Law. Rule 27.4000. The employer/insurer shall be present with settlement authority, but need not be the person with full, final settlement authority, if that person participates via telephone.

The Amendment introduces a provision permitting a claimant's attorney to seek attorney's fees at the informal level, in response to a denial. 21 V.S.A. §678(d).

Finally, the employer must review claims in which temporary total disability benefits continue for more than 104 weeks. 21 V.S.A. § 642a . Within thirty days of the 104 week demarcation the employer/insurer must submit a medical report from a physician that evaluates the medical status, expected duration of the disability, and when, or if, the claimant is going to be expected to return to work. This provision is not meant to prohibit or foreclose other evaluations during the claim, but is meant to keep tabs on open ended claims with ongoing indemnity benefits.

## ADR CONSIDERATIONS AND PREPARING FOR THE MEDIATION

*By Charles P. Bauer*, Esquire, Gallagher, Callahan & Gartrell, P.C., Concord, NH

***"Mistakes even experienced trial lawyers make in ADR mediations"***

- Know that *risk analysis* is the name of the game.
- Know that *multi-party mediations* are usually more complex and delicate that 2 party mediations.

- Know the *type of mediator* that would be best suited for the mediation - consider knowledge, skill, personality and setting.
- Have all decision-makers *in the mediation rooms*, including insurance representatives, company representatives, significant others, etc., ~ not on cell phones.
- Know who the *decision-makers* are for the other side; be prepared to provide them with needed information / documentation during the mediation to settle the case.
- Communicate with opposing counsel *before* mediation to determine what, if any, information / documentation is needed for each side to resolve the case at mediation.
- Know the *style and personality* of opposing counsel, decision-makers and clients; tailor your mediation presentation accordingly.
- Know the *up-to-date status* of the demand and offer *before* entering the mediation.
- Know the *tax implications* of your mediation settlement; or have someone available *during* the mediation to answer tax questions.
- Know - and have a handle on - all *lien issues* before and during the mediation.
- Don't set a "bottom line" *before* the mediation.
- *Participate in pre-mediation telephone conferences* with the mediator.
- File *confidential mediation statements* to the mediator only prior to the mediation.
- Analyze, outline, draft and *submit effective mediation statements* with appropriate attachments to the mediator and parties.
- Know *what motivates the decision makers* in both rooms.
- *Listen and learn* the other parties' points during the joint and private sessions and respond appropriately.
- Do not throw "*gasoline on the fire"* during the opening joint session.

- Know the *law, facts, jurisdiction, judges and procedures* relevant to your case.
- Know that ~ sometimes ~ there are "*elephants in the room*."
- Know that there are "*signals, rhythms and flow*" to mediations.
- Be creative and "*think outside the box*" before and during the mediation.
- Bring *new information* to the mediation and use it at appropriate times during the mediation.
- *Bring all persuasive documents* to the mediation – "don't leave home without it."
- *Have your client talk* during the joint mediation session.
- *Anticipate "ups and downs"* during the negotiation process; be prepared to work through negotiation problems.
- Be prepared to stay in the mediation longer than you expect - *have patience and endurance* - be prepared to work through road blocks and obstacles.
- Be prepared to complete and execute a *Memorandum of Understanding* (*MOU*) or Settlement Agreement and Release at the end of the mediation

## Message From Your DRI Regional Director

*Brooks McGratten, DRI Regional Director*

The TDLA is a growing and important part of DRI's Northeast Region. Winter receptions scheduled for February 5th (Portland), March 4th (Concord) and March 6th (Burlington) are evidence of the TDLA's increasing momentum. Please plan to attend these receptions and get the word out to your associates and colleagues about the many benefits of being active in the DRI – TDLA community.

My thanks especially to Mary Ann Dempsey and Carrie Legus who recently completed three years of outstanding service as state representatives of New Hampshire and Vermont, respectively. Mary Ann and Carrie have been replaced by Adam Mordecai (New Hampshire) and Greg Weimer (Vermont). Mary Ann and Carrie leave big shoes to fill, but I know Adam and Greg are up to the task. Adam and Greg will be joining other DRI state representatives in New Orleans in March for training, networking and fun.

My thanks also to those who helped plan and attended the Northeast Region's first ever social reception held in conjunction with DRI's annual meeting last October. The reception was held at Pat O'Brien's on Bourbon Street, very well catered and provided a wonderful opportunity for those in the Northeast to catch up with old and new friends.

## Maine Update

*By: Elissa A. Tisdahl,* Friedman, Gaythwaite, Wolf & Leavitt

In the last three quarters of 2008 there have been several important legal developments in the state of Maine relevant to defense lawyers. This review is not exhaustive, but is meant to highlight several recent developments that shape the practice of law for defense lawyers in the state of Maine.

There have been several amendments to the Maine Rules of Civil Procedure over the last year. In accordance with 2008 Me. Rules 08, M.R.Civ.P. 7(b)(1) has added a new subparagraph (C) which creates filing fees for various substantive motions. This includes fees for motions for summary judgment and motions to dismiss for failure to state a claim. The Court Fees Schedule provides the specific amount required for the substantive motions. Also, there have been amendments to M.R.Civ.P. 16, 26, 33, 34 and 37 by 2008 Me. Rules 12 which address discovery of electronically stored documents as well as other information.

*Richter v. Vermont Mutual Insurance* involved a motor vehicle collision where the plaintiff collected from the defendant driver's insurance policy and was also seeking to collect under her own insurance policy by pursuing an under-insured motorist claim. 2008 Me. Super LEXIS 130, *1-2 (2008). Maine law permits an insured injured party to recover from her own insurer. *Id.* at *2-3. The injured party's insurer stands in the place of the original defendant driver for the personal injury claims. *Id.* Therefore, as an element of the injured party's under-insured motorist claim against her own insurer, she must prove negligence on the part of the driver. *Id*

The decision in *Camp Takajo, Inc. v. SimplexGrinnell, L.P.* addresses the distinct meanings of "prejudice" in the context of discovery sanctions under Rule 37 as opposed to when a document can be excluded pursuant to Me. R. Evid. 403. 2008 ME 153, ¶16. Plaintiff served a request for production of documents which in part asked for the contract between the parties. *Id.* at ¶¶2-10. After producing various documents, the defendant realized that it had not produced the second side of a two-sided contract document, ultimately, producing the complete two-sided document three weeks before discovery closed. *Id.* While declining to impose sanctions for what it deemed a timely discovery response, the trial court excluded the document at trial under Rule 403. *Id.* at ¶10. The Law Court found that this two-sided document had been improperly excluded from trial in the context of Me. R. Evid. 403. *Id.* at ¶14-15. This document was not unfairly prejudicial because it did not encourage the jury to decide the case on an improper basis. *Id.* "[I]t is the specific nature of the evidence that informs the trial court when it balances the relevance against the potential unfair prejudice of that evidence pursuant to Rule 403." *Id.* at ¶ 15. In contrast, prejudice [pursuant to M.R. Civ. P. 37(b)] addresses the "opposing party's ability to fairly respond to evidence that has been, or will be, advanced by another party." *Id.* ¶ 13. The Law Court found that the plaintiff had time to alter the trial strategy after the production of this document and that plaintiff had not been unfairly prejudiced in its ability to prepare for trial. *Id.* ¶¶2-10. Therefore, the document was not to be excluded as a discovery sanction. *Id.* at ¶¶12-13. The court emphasized the difference between unfair prejudice in the context of a discovery sanction and unfair prejudice in the context of Me. R. Evid. 403.

The question of first impression before the Law Court in *Amica Mut Ins. Co. v. Estate of Pecci* was whether a wrongful death action could be maintained if the sole beneficiary of the action was the party whose negligence was the sole proximate cause of the decedent's death in accordance with 18-A M.R.S. § 2-804(a). 2008 ME 93 at ¶5. In this case, the sole beneficiary was the decedent's surviving spouse and the decedent's personal representative was her daughter. *Id.* at ¶¶2-3. 18-A M.R.S.A § 2-804 does not prohibit the estate from bringing the action which was for the surviving spouse's benefit, even though the surviving spouse was the sole tortfeasor. *Id.* at ¶9. However, the court found that the comparative negligence statute under 14 M.R.S.A. § 156 barred the spouse from any recovery where the parties had stipulated that the surviving spouse's negligence was the sole proximate cause of the accident. *Id.* at ¶¶ 8-10. If the surviving spouse renounced his share of the estate, the estate's wrongful death action could have been maintained for the benefit of the decedent's heirs. *Id.* at ¶¶ 10-11.

The *DeCambra v. Carson* decision involves a negligence claim and an analysis of when a special relationship exists between parties such that a party has a special duty of care to the other party. 2008 ME 127 ¶¶7-12. This case was brought by a mother who was the personal representative of the estate of her son. *Id.* ¶2. The facts of this case show that soon after the girlfriend's ex-boyfriend attempted suicide, the ex-boyfriend shot and killed the son as well as himself. *Id.* ¶¶ 5-6. Suit was brought against the son's girlfriend and the girlfriend's mother. *Id.* Before this incident the ex-boyfriend had resided with the defendants in their home, but defendants had no knowledge of suspicious activity prior to this incident on the part of the ex-boyfriend. *Id.* ¶5. The court refused to extend the decision in *Fortin v. The Roman Catholic Bishop of Portland* regarding special relationships. *Id.* at ¶¶ 12-13 citing to 2005 ME 57 at ¶ 39, 871 A.2d 1208, 1217-1218. "A fiduciary duty will be found to exist where 'the law will recognize both the disparate positions of the parties and a reasonable basis for the placement of trust and confidence in the superior party in the context of specific events at issue.'" *Id.* ¶ 13 (citations omitted). The court states that "disparate positions" means that one party must be superior to the other for a special duty of care to arise. *Id.*

There have also been important developments within the District Court of Maine. A recent decision involving a class action addresses how a reservation of rights should be carried out as litigation proceeds to protect the reservation of rights. In *Am. Nat'l Fire Ins. Co. v. York County,* Plaintiff insurer sued Defendant County to recover deductibles from the county under a law enforcement liability insurance policy. 2008 U.S. Dist. LEXIS 84315 (D. Me. Oct. 20, 2008). Arrestees had brought a class action suit against the county for allegedly improper strip search practices. *Id.* at 6-7. The policy between the insurer and the county stated that coverage was subject to a $5,000 *per claim* deductible. *Id.* at 2 *(*emphasis added*).* Both parties disputed whether the deductible applied to the entire class or to each individual claim. *Id.* at 20. Early on in the case, the insurer issued a reservation of rights letter. *Id.* at 8. Litigation then proceeded and the insurer failed to re-assert their rights regarding the deductible provision before the case settled. *Id.* at 27-28. The court held that the county established there was an accord and satisfaction between the county and the insurer because while the settlement

*Maine Update - contd.*

was being finalized, the insurer did not seek any clarification as to how the deductible would be reimbursed or reassert its reservation of rights. *Id.* at 24-26. It was also considered unreasonable for the insurer to "gamble" without explicitly disclosing its position to the insured. *Id.* Additionally, the county established the affirmative defense of estoppel was applicable because it was unreasonable for the insurer to not explicitly reserve its rights when it offered a contribution to the settlement, and the county justifiably and detrimentally relied on the insurer's misleading offer. *Id.* at 31-33. This case suggests that a reservation of rights letter that was sent in response to a claim may not be enough to enforce a reservation of rights once the parties litigate and settle those claims.

In its opinion in a patent lawsuit captioned *Baychar, Inc. v. Salomon/North Am., Inc.,* the court discussed the application of 35 U.S.C.S. § 285. 2008 U.S. Dist. LEXIS 89665, *4-5. 35 U.S.C.S. § 285 provides that reasonable attorney fees can be awarded in exceptional cases to the prevailing party. Exceptional cases include litigation misconduct, vexatious, unjustified or otherwise bad faith litigation and a frivolous lawsuit. *Id.* at 5. Negligent conduct alone does not establish that a case is exceptional. *Id.* at 12 (citations omitted). "Section 285 requires clear and convincing evidence of 'studied ignorance.'" *Id.* (citations omitted). This case provides assistance in defining when a case will be considered "exceptional" to permit awarding reasonable attorney fees to the prevailing party.


**Powell Orr Bredice PLC**

**and**

**Downs Rachlin Martin PLLC**

*In conjunction with the*

**Tri State Defense Lawyers Association**

*cordially invites you*

*to attend a cocktail reception*

*in DRM's Burlington office at*

*199 Main Street*

*Burlington, VT*

*Friday, March 6, 2009*

*4:00 p.m.*

# RECENT DEVELOPMENTS OF INTEREST IN VERMONT TORT AND INSURANCE LAW

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

## CONSUMER PROTECTION/UNFAIR TRADE LAW

**Vermont Supreme Court holds that car dealer's alleged failure to disclose at time of transaction that value of leased trade-in vehicle may be worth less than as originally quoted, because of excess mileage, may be consumer fraud violation.**

Inkel Pride Chevrolet-Pontiac, Inc. (2006-220), 2008 VT 6, Vermont Supreme Court, January 18, 2008. Plaintiff consumers had a leased vehicle that they wanted to trade in for a new vehicle. They contacted a car dealer and were given a trade-in figure for their current vehicle. The plaintiffs then purchased a new vehicle from the dealer based on a total price that included the specific trade-in figure they had been quoted. The dealer later found out that the amount the plaintiffs owed on their leased trade-in was significantly higher because of excess mileage on it, and demanded additional money from the purchasers. Language in the purchase contract allowed the dealer to change the terms of the deal if the trade-in value turned out to be erroneous. The purchasers refused to pay additional money and sued the dealer for consumer fraud. The trial court granted summary judgment to the dealer and order the plaintiffs to pay additional money based on the dealer's mistake. On appeal, the Vermont Supreme Court reversed the summary judgment and remanded the case. It held that summary judgment was inappropriate for the dealer because the trier of fact could find that the dealer's actions constituted consumer fraud, despite its claim of mistake.

## INSURANCE COVERAGE

**Vermont Supreme Court holds that an accident victim's insurance carrier, which has paid med-pay benefits to its insured, can pursue the tortfeasor's carrier in subrogation even though tortfeasor's carrier settled with the victim.**

Utica Natl. Ins. Co. v. Cyr, 2007 VT 134A (Jan. 24, 2008) (Entry Order decision). The court held that the tortfeasor's insurance company, after settling with the victim, was indeed on the hook for the victim's insurance carrier's subrogation lien. The victim's carrier (Utica National) had made $5,000 in medical payments to its insured. The tortfeasor's carrier then settled with the victim. The settlement agreement made reference to Utica's lien, but the victim did not pay it. Utica did not know about the settlement or consent to it. Utica then brought a collection action against the tortfeasor's carrier to collect on the lien. The trial court granted summary judgment to Utica and the Vermont Supreme Court affirmed, citing the sanctity of the principle of subrogation under Vermont law. What the Vermont Supreme Court decision does not explicitly say is whether the settlement agreement between the victim and the tortfeasor's carrier contained an indemnity/hold harmless clause in favor of the tortfeasor's carrier with respect to Utica's lien claim, but it would appear that such a clause may not have been present.

**Vermont Supreme Court holds that roofing subcontractor's error in installing the wrong roof shingles did not constitute "property damage" and was not covered under the construction contractor's CGL policy.**

Down Under Masonry, Inc. v. Peerless Ins. Co., 2008 VT 46 (Apr. 11, 2008) (Entry Order decision). The court held, inter alia, that a subcontractor's installation of the wrong type of shingles on a garage did not constitute "property damage" under the insured contractor's commercial general liability policy, which defined "property damage" as "[p]hysical injury to tangible property" or the "[l]oss of use of tangible property that is not physically injured." After noting that it was undisputed that the installed shingles were inferior in quality and different in color from those specified by the homeowner, the court reasoned that there was no "physical injury" or "loss of use" in this case, nonetheless, because there was nothing in

the record to suggest a physical defect in the shingle material used or in the manner in which the shingles were installed, or that the homeowners were unable to use the garage as a result of the inferior shingles.

**In a significant decision, the Vermont Supreme Court adopts "Continuous Trigger" theory of coverage for environmental coverage claims. Court finds coverage for property owner despite "Business Pursuits" and "Owned Property" exclusions. Court apportions remediation costs between insured and insured based on "Time on the Risk."**

Towns v. Northern Security Ins. Co., 2008 VT 98 (Aug 1, 2008). The insured/former property owner operated a waste-hauling business. He deposited some of the contaminated waste that he collected from his customers onto his own residential property as “fill.” He was eventually ordered by the state to remove the fill and remediate the property. He went after several of his insurance companies, including Northern Security, which covered the property from 1983 to 1987. Northern security moved to dismiss on the grounds of the policies’ “business pursuits” and “owned property” exclusions. After several interim legal rulings in this long-running case, the trial court eventually granted summary judgment to Northern on the grounds that the debris that the insured deposited onto his property came from his waste-hauling operations, and therefore the remediation claim by the state was excluded by the policy’s business pursuits exclusion.

On appeal, the Supreme Court reversed, finding that the pollution was subject to an exception to the “business pursuits” exclusion. The policy’s business pursuits exclusion contained an exception for “activities which are ordinarily incident to non-business pursuits.” The Court noted that there has been much litigation in other jurisdictions over the interpretation of exception to the exclusion, but did not have a difficult time in concluding that plaintiff’s depositing of commercial debris on his own property for “fill” purposes was an activity done for his personal use because it did not further his business interests.

The Court then went on to consider Northern’s argument that the claim was excluded by the “owned property” exclusion, which bars coverage to damage caused by the insured to his own property. The Court found that other courts have held that the owned property exclusion does not bar coverage for groundwater remediation expenses because the pollution can affect other people’s property. The Court also rejected Northern’s argument that the groundwater pollution under plaintiff’s property did not constitute “property damage” because it did not meet or exceed state or federal clean water regulations.

Finally, in a significant development for Vermont law, the Supreme Court affirmed one of the trial court rulings adopting the “continuous trigger” theory of coverage, as well as the “time on the risk” theory of apportionment. In this case, the pollution was not discovered until after the Northern policy had already expired, but there was evidence that the pollution began leaching into the ground during the Northern policy period. The Court found that the injury-producing occurrence (dumping contaminated debris and leaching of pollutants into the groundwater) occurred during the policy period.

At the same time, however, and over the plaintiff’s objection, the Court affirmed the trial court’s apportionment of remediation costs between Northern and the plaintiff based on the time that Northern was “on the risk” relative to the time when the contamination began.

It should be noted that the Chief Justice, joined by another justice, dissented, arguing that the policy’s business pursuits exclusion clearly excluded coverage for the claims in this case. The dissent argued that the plaintiff used his own property as an alternative landfill for the waste that he collected in his business.

## RELEASE/LIABILITY WAIVER

**Vermont Supreme Court holds that liability waiver was not invalid as a matter of public policy, but that by its language it did not release the allegedly negligent event being claimed by the plaintiff; therefore, summary judgment for defendant was reversed.**

Thompson v. Hi-Tech Motor Sports, Inc., 2008 VT 15 (Feb. 8, 2008). Plaintiff was injured while test-driving a motorcycle. Before doing the test-ride at the dealer, she signed a release. During her test-ride, she hit a guardrail, injured herself, and sued the dealer. The parties cross-moved for summary

*contd. on page 17*

# Recent New Hampshire Supreme Court Decisions – 2008

*By* Christopher J. Poulin, *Getman, Stacey, Schulthess & Steere*

Tarbell v. City of Concord, September 12, 2008

The plaintiff, the Tarbell Trust, owned an apartment building in Concord. The Rattlesnake Brook flows under and through the property by a channel and exits by way of a culvert. The City uses the adjacent Penacook Lake for a municipal water supply. Through various means, including pumping water to and from the Contocook River and lake by way of flashboards at the top of the dam and a spillway when the water in the lake reached a certain height, the City regulates the flow and quantity of Rattlesnake Brook for this purpose.

In May 2006 the lake's water overflowed into Rattlesnake Book, resulting in sever property damage to the Tarbell apartment building. Tarbell filed suit against the City for negligence, nuisance and trespass. The City moved for summary judgment asserting discretionary function immunity for its decisions regarding the proper management of the lake and the adjacent water treatment plant and spillway, specifically the decisions not to pump water from the lake and to leave the flashboards in place. The trial court agreed and granted summary judgment on all counts. Tarbell appealed.

On appeal, the Court discussed the availability of the various governmental immunities to the City. Generally speaking, immunity was originally available for governmental functions but not for proprietary functions. Later on, the Court, in Merrill v. Manchester abrogated its original immunity principles and clarified that immunity is only available for liability based on the exercise of judicial or legislative functions and executive or planning functions based on policy decisions made with a high degree of official judgment or discretion. The latter was the birth of discretionary function immunity. The Court then applied the Merrill test to Tarbell's arguments and noted that its subsequent decision in Cannata v. Town of Deerfield, upon which Tarbell relied, did not alter that test.

In addition, Tarbell was not complaining about the manner in which a decision was carried out, as in Cannata, but was complaining about the decision not to lower the water in the lake. Consequently, the Supreme Court affirmed the trial court on that issue.

However, the Court took issue with the application of discretionary function immunity as to the other claims. According to the Supreme Court, the trial court failed to assess each claim against the city independently and then decide whether immunity applied. Count One, for example, dealt with an invasion of Tarbell's property rights caused by the City's failure to construct a second outlet for the lake when it constructed the dam. This was not, according to the Court, an issue of management of the dam and the water supply, as held by the trial court. Nonetheless, the Court held that the decisions made relative to the construction of the dam were characterized by a high degree of discretion or judgment, thereby entitling the City to immunity on that claim.

With regards to the count in which Tarbell claimed that the City was negligent for failing to maintain and clean out debris that had collected in the brook and in the culverts, the Court held that the City was not entitled to immunity. The City had not asserted that that negligence was part of a plan or policy concerning the maintenance of the drainage systems. Without such, the City could be held answerable for the resultant overflow onto Tarbell's property.

The nuisance and trespass claims also did not fall under the trial court's broad umbrella of the management of the dam and the water supply. Historically, municipalities have been held accountable for property invasions (trespass) and using its property in an unlawful and unreasonable manner (nuisance). Discretionary function immunity, according to the Court, simply has no place in nuisance and trespass claims.

***New Hampshire Update—contd.***

The Court also refused to assess the City's argument on appeal that the surviving claims had not been properly pled and were otherwise unsupported by the evidence because the City had not raised those arguments below. Instead, the City had asserted discretionary function immunity only. Thus, the case was affirmed as to Counts I and III but reversed as to Counts II, IV, and V.

State v. Langill, April 4, 2008

This is a criminal case relating to the admissibility of fingerprint evidence in a burglary case.

The victim reported to the police that someone had broken into her Derry apartment and stolen $1200.00 from her bedroom safe that was inside her bureau and $5 in coins from a bottle on the bureau. Police lifted latent fingerprints from the bureau, safe and bottle. A level one criminalist from the State Crime Lab identified one print as belonging to the defendant, Richard Langill.

Prior to trial, Langill moved to preclude the introduction of the criminalists' opinion into evidence, arguing that she was not qualified as an expert and that the ACE-V method for fingerprint methodology is scientifically unreliable, that the criminalist did not employ the methodology correctly, and that the admission of the print would be unfairly prejudicial. The trial court disagreed as to the first arguments but did hold that the ACE-V method had not been fully accomplished.

The Supreme Court applied Daubert in conjunction with RSA 516:29 to determine whether the trial court had exceeded its authority in excluding the fingerprint evidence. According to the Court, this law permits a trial court to assess whether the witness has applied the principles and methods reliably to the facts of the case. Nevertheless, the Court noted that trial court did not have to make a determination of the correctness of the method, only whether it was reliable, or trustworthy.

For purposes of the case at bar, the Court held that the trial court abused its discretion in finding that the criminalist's failure to take bench notes resulted in the method being unreliable. The Court also found that the criminalist's failure to have a blind verification of her results did not mean that the method was unreliable. As a result, the trial court's order of preclusion was reversed.

Alonzi v. Northeast Generation Services Co., January 15, 2008

The plaintiff's decedent was employed by the defendant when he accidentally died from electrocution. He died without leaving any dependants. His estate brought wrongful death and negligence actions against three defendants, including the defendant, NGS. NGS moved to dismiss the claim against it asserting the workers compensation bar under RSA 281-A:8 and its death benefit provision, RSA 281-A:26. The trial court, relying on Park v. Rockwell, denied the motion but certified the question for interlocutory appeal.

In Park, the Court held that the workers compensation death benefit provision, providing for an exclusive benefit to employees who die without leaving dependents, violated the Equal Protection Clause of the New Hampshire Constitution. Under the statutory provision, the estate of a dependent less employee could recover no more than $5000 for burial expenses. In contrast, the estate of an employee with dependents could recover up to $50,000 in damages.

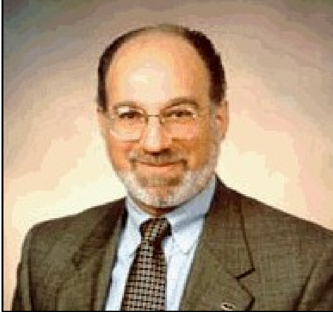
The Court noted the evolution of the workers compensation statutory scheme since the Park decision and the recognition that to avoid constitutional infirmity, a workers compensation suit restriction must be read broadly in conjunction with the entire statutory scheme. Consequently, the Court overruled Park as being "remnant of abandoned doctrine and otherwise out of step with the development of the law."

Using intermediate constitutional scrutiny, the Court first assessed whether the exclusivity of the death benefit provision is based on an "important" government interest. The Court found that it is, recognizing the overall purpose of the workers compensation statutory scheme of placing the immediate risk of workplace injury where it belongs, on the employer.

*contd. on page 17*

# THE DISCOUNT FOR LACK OF MARKETABILITY - WHAT IS IT?

*By* Mark Filler. TDLA Treasurer, *Portland, ME*



In the parlance of business valuation, we say nearly all interests in privately held companies suffer from a lack of marketability. What does this mean exactly? In truth, it is actually somewhat of a misnomer. Many valuation professionals prefer to call it a discount for lack of liquidity.

A discount is a percentage adjustment from a base value. If we first define the base, the nature of the discount becomes clearer. The base from which this discount is taken is the value of the business interest "as if publicly traded". Some valuation methods depend on data from the public stock markets as the source of value multiples. Applying this data to the particulars of the valuation subject usually results in a value for the subject interest at the "as if publicly traded" value level. These multiples have a built in assumption that the business interest can be sold immediately and converted into cash in three business days, just like publicly traded stock. This is what the term liquidity means in the context of a business valuation. Of course, it is not possible to convert an interest in a closely held company into cash in three business days.

We also know from several research studies that the public stock markets love liquidity. Publicly traded companies frequently issue restricted stock to insiders and private investors. Restricted stock cannot be sold on the public markets for a minimum of one year. These shares can be sold to private investors off the market, and any such sales get reported on documents filed with the SEC. Research studies tracking these sales indicate that restricted stock sales occur at a substantial discount from the identical publicly traded counterpart. Hence, these studies give us a look at the value of liquidity.

The purpose of the discount for lack of marketability, or liquidity, is to adjust the value for a closely held business interest from an "as if publicly traded" level, calculated using public company multiples, to a value that better reflects the amount of time it would take to sell an interest in a privately held company. The data from the research studies is a first step in arriving at the percentage to use for the discount. These studies have average discounts between 15% and 50%.

Some of the research also indicates that the percentage discount can be higher or lower depending several factors. One factor is the length of time it would take to sell out a position. Other factors include whether or not the company pays dividends, its growth rate, and the stability of its earnings.

So the discount for lack of marketability is an adjustment to a value calculated using publicly held company data to better reflect the realizable value of the closely held subject interest. It is an adjustment from a value level at which closely held stock cannot be sold, to a value level at which it is more likely that the closely held stock can be sold. *Mark G. Filler, CPA/ABV, CBA, AM, CVA leads Filler & Associates' Litigation and Claims Support practice in Portland, Maine.*

# Increasing Your Stock Value at the Firm: Become an "ECF Guru"

***By* Matthew S. Borick, *Downs Rachlin Martin PLLC***

Case Management and Electronic Case Files (CM/ECF) systems are now in use in 99% of the federal courts. But one thing is for sure: nowhere near 99% of lawyers know how to use these systems. Since the time when electronic case filing, or "ECF," became the established norm in the federal courts, I cannot count the number of occasions on which I have guided a partner or a partner's legal assistant through the process of filing a document electronically. The process is actually quite simple, but it can take some time to learn (especially for those with limited electronic savvy). And not everyone has the time to learn.

This is where you come in. A simple and effective way for you to add value at your firm, even if you are not a litigator, is to master the CM/ECF System. Here are a few basic tips to help you on your way to becoming an "ECF guru":

**TIP #1: Know the local rules and procedures**

Each of the federal courts in Maine, New Hampshire, and Vermont has posted administrative procedures and rules concerning ECF:

http://www.med.uscourts.gov/ecf/adminprocedures.htm

http://www.med.uscourts.gov/ecf/usermanual.htm

http://www.med.uscourts.gov/ecf/faq.htm

http://www.nhd.uscourts.gov/ecf/cmecf/default.asp

http://www.vtd.uscourts.gov/CmEcfMain.html

Other federal courts have posted their rules and procedures as well, and you should be sure to review them when working on cases in outside jurisdictions.

Also, while there are a wide variety of ECF rules and procedures that need to be followed, some are arguably more important than others. One of the most important rules is the filing deadline. Historically, the deadline set by most courts for filing paper documents has been by closing time for the day (usually 4:30 pm to 5:00 pm). But under ECF, many federal courts – including Maine, New Hampshire, and Vermont – allow you until midnight to timely file a document. Other federal courts, however, require that electronic filing must be done during regular court hours. The rules will tell you.

Another important procedural rule to know is how to handle various types of documents such as supporting memoranda, attachments, exhibits, declarations, affidavits, and others. In Vermont, for example, our procedures contain specific instructions for how to label exhibits so that, when the electronic docket entry is generated, those exhibits will be reflected properly. Also, our rules allow us to file affidavits and declarations with electronic signatures (i.e., "/s/ John J. Doe"), provided that we maintain the originally-signed document for future production if needed, and that we do so for two years following the appeal deadline in the case.

***Vermont Update - contd.***

judgment. The court denied defendant's motion and granted plaintiff's motion, holding that the release was void as against public policy, relying on a 1995 case from the Vermont Supreme Court holding that a skier's liability waiver to a ski resort was void as against public policy. In this case, the court held that the earlier case – voiding such waivers in the case of ski resorts – did not apply and that the release was not automatically void. However, the court held that the specific language of the release did not release the motorcycle dealer from an allegation that it was negligent.

The justice who authored the earlier case invalidating a ski resort release on public policy grounds dissented, arguing that the court should have found that this release, too, was void as against public policy.

***New Hampshire Update - contd.***

It found that the death benefit was simply of an extension of that purpose. The Court went on to note that the workers compensation system was never designed to provide tort-like remedies for employers. By contrast, the estate in a wrongful death action does seek to recover tort-like damages. By enacting the workers compensation statutory scheme, the State sought to balance the interests of the competing needs of the injured employees with the responsible employers by addressing lost earning power and to protect those who relied upon the earnings. That balance is less challenging with an employer who perishes on the job but leaves no dependents. Thus, the death benefit is substantially related to the important interest of the workers compensation statutory scheme as a whole and does not violate the NH Constitution.

***Stock Value - contd.***

**TIP#3: Get to know the ECF Administrator in your jurisdiction**

As the ECF guru in your firm, whom can you go to if you have a question about what to do in a particular ECF situation? The answer is the ECF Administrator for your jurisdiction. Each of the federal courts in Maine, New Hampshire, and Vermont (and elsewhere) has a designated individual to assist with ECF matters. From my personal experience, these people are extremely helpful. Not only can they assist you with a filing, they can also help you fix any mistakes you may have made in a filing.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