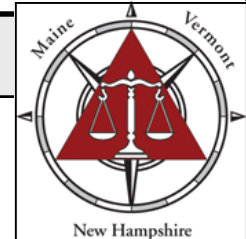


Tri-State Defense Lawyers Association

Vermont · New Hampshire · Maine



Newsletter

Spring, 2008

September is Closer Than You Think

*Phil Coffin, Maine President
TDLA President*

This is my last column as President of the Tri-State Defense Lawyers Association. Over the past two years, TDLA has come a long way toward becoming a much more viable, vibrant and meaningful organization. We successfully changed our name from the Northern New England Defense Counsel Association to DLA. We also finalized our by-laws and obtained our tax identification number as a non-profit thanks to the hard work of David Herzer of Norman Hanson & Detroy and Mark Filler, CPA of Filler & Associates. Most importantly, we hired Peggy Schultz as our first Executive Director who cajoled and assisted us in getting out several newsletters and holding our most successful Annual Meeting ever last September in Portsmouth. With DRI's help, we held cocktail receptions this winter in our three states and have gained new members as a result. This year's Annual Meeting is scheduled to take place on Friday evening

and Saturday morning September 19 and 20, again in Portsmouth. At that meeting, we hope to elect new officers for the coming year and begin the process of further expanding our membership and increasing our relevance to the tri-state defense bar. I am extremely pleased with success to date and excited about the future of TDLA. I wish to thank all of you that helped me during my tenure, especially Beth Stouder, Walter Judge, Peggy, Mary Ann Dempsey, Matt Cairn and my two co-directors Chris Poulin and Charity Clark. Unfortunately, Charity is leaving us and the tri-state region in order to relocate to New York City. We all wish her success and happiness in the Big Apple.

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Message From Your DRI Regional Director

Brooks McGratten, DRI Regional Director

On May 16th and 17th TDLA's Phil Coffin, Phil Bixby, Mary Ann Dempsey and Greg Weimer gathered with other regional DRI leaders at the Chatham Bars Inn. They reported on TDLA's successful series of winter cocktail receptions, CLE and plans for the September Annual Meeting. Mary Ann agreed to help organize a reception for the northeast region at DRI's Annual Meeting, October 22-24 in New Orleans. First and Second Vice Presidents Cary Hiltgen and Matt Cairns delivered the latest news from DRI.

My thanks to Mary Ann and Carrie Legus, who have worked tirelessly these past three years as DRI's New Hampshire and Vermont state representatives. Their terms expire in October. Greg Weimer will take the torch from Carrie, and Adam Mordecai will be the new NH state representative. Phil Bixby will remain Maine's state representative.

I look forward to seeing everyone in Portsmouth, New Hampshire at the September TDLA meeting and in New Orleans in October for DRI's Annual Meeting.

Workers' Compensation

The Workers' Compensation practice group of the TDLA plans to hold its first telephonic meeting on June 12, 2008 at 11:00 a.m. The topic of discussion will be the interplay of the Social Security Act and various Workers' Compensation statutes. We extend a special invitation to New Hampshire WC practitioners to join us, as well as anyone with expertise in SSDI issues. **For information about the WC group or how to call in for the first quarterly meeting, please contact:**

Paul Catsos at (207) 228-2779

pcatsos@thompsonbowie.com

TDLA Substantive Groups - Get Involved!

We are trying to form our Substantive Groups and are open to suggestions for the different groups. The normal groups are: Product Liability, Insurance Law, Employment Liability, Medical Liability and Professional Liability. Email me your interests and ideas and let's get these groups going! They are of a great benefit to you and your practice and TDLA is offering the venue to make them happen. *I hope to hear from you soon.*

***Peggy* pschultz@tristatedefenselawyers.org**

Tri State Defense Lawyers Association

Annual Meeting
Hilton Gardens Inn
Portsmouth, NH

www.hiltongardeninn.hilton.com

603-431-1499

September 19 & 20, 2008

Main Speaker:

Tim Schimberg

“Lawyers Helping Lawyers”

Registration Forms Will Be Coming in the Mail in the Next Few Days

Did you know.....

that in Maine, as of June 1, 2008, you will have to pay a fee to file

Dispositive motions	(\$200)	
Motions for Default and	(\$200)	Default Judgments
Motions to Reconsider	(\$100)	
Motions <i>Pro Hac Vice</i>	(\$600)	
Medical Malpractice Notices	(\$200)	

See Amendments to M.R. Civ.P. 7(b) (1) and related fee schedule.

There are additional fees as well.

Note that the fee for a jury trial will continue to be \$300.

Preparing (Your Opponent) for Mediation

By John A. Lassey
Wadleigh, Starr & Peters, P.L.L.C



Most attorneys experienced in personal injury mediation are aware that plaintiffs themselves usually come in knowing very little about the process. On the day of the session, when everybody arrives and sits around the same table with the mediator, the plaintiff is usually the loneliest person in the room. Most of the other people present — including the mediator — are lawyers, and the rest are experienced claims adjusters. The “pros” tend to call each other by their first names, talk in jargon, and maybe joke a little bit to “put everybody at ease.” Often, the effect of all of this will be to make the plaintiff feel even more isolated.

When the discussion gets going, the culture shock can be so great that the poor plaintiff starts having visions of following the White Rabbit down the hole to Wonderland. Put yourself in the plaintiff’s shoes: “My life has been ruined because of the incompetence of some lead-footed jerk (who doesn’t even have to be here), and all these people can do is joke around and talk about money — and not much of it, at that — after piously proclaiming how sorry they are!”

Typically, plaintiffs tend to be suspicious and ill at ease, to confuse what ought to be with what is, and to have only a dim idea of what to expect from the mediation. All they know about the legal system comes from their own attorney or from watching TV. They may start out with an exaggerated idea of what they are entitled to, and their thought process may have gone no further than: “I’ve been hurt. It wasn’t my fault. Isn’t that what insurance is for?”

They are probably only vaguely aware of things most lawyers would take for granted. For example, we tend to organize our thoughts and parse the case into the four elements of the plaintiff’s burden of proof: duty; negligence; causation; and damages. Insurance company claims representatives do the same, but plaintiffs are not typically wired to organize their thoughts in that direction.

Unless plaintiffs have been well prepared in advance, they do not come to a mediation fully understanding that insurance companies approach questions of value and settlement differently from the way they do. They normally haven’t thought through the reality that companies have lots of cases and can afford to play the odds, while they have only one. Plaintiffs tend to focus on themselves and how the case has changed their lives. Companies focus on bell curves; *i.e.*, on the range of values clustered about the mean, rather than on the “home run” cases out on the fringes.

Cases normally do not settle — and in my view, shouldn’t settle — until both sides have roughly the same idea of value. Given the cultural differences between plaintiffs and insurance companies, agreement on the range of values is hampered unless the plaintiff has had a fair amount of preparation in advance.

As defense counsel in our adversarial system, one of your goals should be to increase the likelihood that plaintiffs will get over their culture shock as soon as possible so they can begin to take an objective approach to settlement closer to your client’s. Of course, plaintiffs are not likely to be on the same page 100%, but your goal is to get them thinking along those lines. If the plaintiff’s attorney is experienced, this education process will probably have started well in advance of the mediation and you may not have to worry too much about it. The plaintiff’s attorney will have taken pains to educate his or her client and perhaps lower expectations of settlement value.

Preparing for Mediation - contd.

But you cannot always count on opposing counsel to succeed with such efforts. Even though the plaintiff's attorney may be very skilled and experienced, not all of their clients learn at the same rate. Not all people can be convinced by being told, and instead must be shown.

Defense counsel can and should help with this learning process. Of course, you cannot communicate directly with the plaintiff. But throughout the course of preparation for trial/settlement, you will have opportunities to "educate" the plaintiff yourself. Usually, the best time to do so is at his or her deposition. This is your opportunity to (a) psych out the plaintiff; (b) talk directly with him or her; (c) help form the impression that you are not a jerk and that your views are likely to be reliable; and (d) to subtly impress the other side with the weaknesses in their case. By doing so, you will often be lending some support to opposing counsel's education efforts.

The educational benefits of the plaintiff's deposition are significant enough that only in exceptional circumstances should you mediate a case without first deposing the plaintiff. Even if you think that you and your company know enough about the case, the injuries, the liability, etc., without a deposition, you should not forgo the deposition just to save a few bucks.

Also, and not unimportantly, by taking your opponent's deposition, you are allowing the plaintiff a rough approximation of his or her "day in court." The opportunity to "vent" can help to eliminate emotional barriers to settlement well in advance of mediation.

After depositions, expert disclosures, etc., give some thought to taking a leaf out of the plaintiff's lawyer play book. Prepare a settlement package. Send out what I call a "reverse demand letter." Make an offer and discuss persuasively all the reasons why the offer is what it is. To be effective, the offer should be in the ballpark where you want the case to end up. Don't start in the neighborhood sandlot if you truly believe the case belongs in Fenway Park.

It is best, in my view, to start somewhere near the bottom of what you and your company believe to be the normal range of values in order to encourage your opponent to come back in the same vein and to leave yourself ample room to move up, if need be.

Don't beat your chest; don't engage in hyperbole. You want to give a preview of your opening statement, the evidence you expect to come in at trial, your closing argument, and the law you expect the judge to give the jury. Include appropriate exhibits. You should explain your approach to value in language focused directly toward the plaintiff — just like you will be telling the jury.

When the day of mediation arrives, prior preparation along these lines can significantly increase the likelihood that the plaintiff will have a better understanding of the process, will be emotionally ready to negotiate in a reasonable range, and will be more prepared to reach a settlement and move on with his or her life.

*John Lassey is a member, of Wadleigh, Starr & Peters, P.L.L.C., 95 Market Street, Manchester, New Hampshire 03101. Mr. Lassey has been a trial lawyer since 1978, and a mediator since 1992.

Maine Update

By Kate Acheson Kerkam
Lambert Coffin



In 2007 and the first quarter of 2008, the Maine Supreme Judicial Court, sitting as the Law Court, issued several opinions of significance to civil litigation defense attorneys. Notably, in *Ryder v. USAA General Indemnity Co.*, 2007 ME 146, 938 A.2d 4, after a nineteen-month-old child was struck and killed by a driver immediately upon exiting her mother's vehicle, the mother brought suit under a UIM policy, which included coverage for "bodily injury," seeking damages for negligent infliction of emotional distress. The Court concluded that the policy "provides UIM coverage in connection with a negligence claim for bystander distress, but only if the claimant has suffered serious emotional distress that constitutes a diagnosable sickness or disease." Presumably, the duty to defend will also be implicated.

In *Jipsen v. Liberty Mut. Ins. Co.*, 2008 ME 57, 942 A.2d 1213, the Law Court concluded that, because UIM coverage provided in a policy unambiguously embodied the offset provision of 24-A M.R.S. § 2902, the insurer was liable to the insured only up to the policy limit for the amount by which the insured's UM coverage exceeded the amount paid by the underinsured motorist responsible for vehicle accident in which insured was injured. By contrast, in *Molleur v. Dairyland Ins. Co.*, 2008 ME 46, 942 A.2d 1197, the Law Court concluded that it would be against public policy to allow an insurance company to use the offset provision to avoid coverage.

The Law Court also issued several opinions with respect to the duty to indemnify, and interpretations of contractual policy limits. In *Foremost Ins. Co. v. Levesque*, 2007 ME 96, 926 A.2d 1185, the Law Court held that, as with cases involving the duty to defend, an insured is entitled to attorney fees to defend against a declaratory judgment action in a duty to indemnify case. In *State Farm Fire & Cas. Co. v. Haley*, 2007 ME 42, 916 A.2d 952, because the plain language of an insurance policy clearly dictated that the insurer was to pay interest only in the instance of a judgment, and because a settlement was not a judgment, the Court held that an insurer was not obligated to pay prejudgment interest in excess of its policy limit.

Moreover, the Law Court has further defined the circumstances under which a municipality can be held liable for tort damages under the exceptions to immunity provided in the Maine Tort Claims Act (MTCA). In *Reid v. Town of Mt. Vernon*, 2007 ME 125, 832 A.2d 539, a plaintiff's husband was killed after he fell into a dumpster at a Town's transfer station. In a 5-1 decision, the Law Court concluded that the Town was not liable under the exception to immunity under the MTCA for negligence in the maintenance or use of "machinery and equipment" because dumpsters did not fall into that category, and that because the dumpster was not fully enclosed within a building, it did not fall under the "public building" exception to immunity. By contrast, in *Rodriguez v. Town of Moose River*, 2007 ME 68, 922 A.2d 824, the Law Court concluded that the public building exception to municipal immunity was applicable when a plaintiff was injured when she slipped and fell on the steps of a home owned by the Town's clerk, because the clerk conducted official business out of her home and was required as part of her employment contract with the Town to perform the services out of her home; the clerk had no discretionary function immunity because her failure to replace a handrail did not involve governmental policy related to her duties; she was not entitled to intentional act immunity because her decision was not intentional. The Town similarly was not entitled to discretionary function immunity.

Maine Update-contd.

In *Alexander v. Mitchell*, 2007 ME 108, 930 A.2d 1016, a case related to municipal liability, the Law Court concluded that a contractor, on entering into a contract to plow a Town's roads, did not undertake a duty to protect members of the road-using public from ice and snow. The Court noted that the case sounded in tort but in fact it was "springing from the existence of [the defendant's] contract with the Town." The Court held that the defendant contractor had a duty only to the Town to perform in accordance with the terms of his contract, and he did not owe a duty of care to other private parties

In an opinion that could have far-reaching consequences given Maine's seasonal tourism market, and the number of vacation homes that are rented out for brief periods of time, in *Benham v. Morton & Furbish Agency*, 2007 ME 83, 929 A.2d 471, the Law Court concluded that a cottage where a guest fell and was injured was not rented under a lease, as the trial court had held, but that it was rented pursuant to a license and, therefore, a duty of reasonable care was owed to the guest. The Court specifically looked to the short duration of the rental agreement, two weeks, and noted that "it strongly suggests that the cottage rental was more akin to a place for travelers, lodgers, and transient guests, and did not convey a 'possessory interest in the land to another for a period of time.'"

In a procedural decision relating to a negligence claim, when a plaintiff's first action was dismissed for failure to file proof of summons, the Law Court concluded that the "saving statute," 14 M.R.S. § 855, was inapplicable to cause the date of the filing of a second negligence action to relate back to the date of the filing of the first action when the failure to effectuate service was not a defect in form that was curable at the time her first action was dismissed. *Oppenheim v. Hutchinson*, 2007 ME 73, 926 A.2d 177. The Law Court had previously determined that the failure to effectuate service was not the result of excusable neglect, when the failure to timely file was as a result of a failure of attorney office procedures. Accordingly, the second negligence case was dismissed for not meeting the limitations period of 14 M.R.S. § 752.

The admissibility of non-physician ethics expert opinion was examined in *Foster v. Oral Surgery Assocs.*, 2008 ME 21, 940 A.2d 1102. After prolonged litigation and several earlier appeals, the Law Court affirmed a judgment as a matter of law in favor of the defendants in a case arising from a series of consolidated cases associated with the failure of implants the defendants inserted in the plaintiffs' jaws to relieve joint malfunction. The Law Court held that it was not error for the trial court to exclude the proffered expert testimony of a professor who the plaintiff had proffered to give an expert opinion regarding informed consent, concluding: "Because both the relevant statute and case law require evidence regarding the practice of medical professionals in the relevant field under similar circumstances and conditions, the court did not commit clear error or abuse its discretion by excluding the testimony of [an "ethics" expert]."

Finally, in *Dowling v. Salewski*, 2007 ME 78, 926 A.2d 193, the Law Court concluded that a real estate buyers' legal malpractice claim alleging negligence in a real estate transaction was time-barred because the lawyer's comments that the buyers' title was "good" or "clear" was not a "real estate title opinion" and thus, under 14 M.R.S. § 753-B, the statute of limitations ran from the date of the act or omission, not from the date of discovery.

Members and Firms In the News!

-**Philip M. Coffin III**, a partner in the firm of **Lambert Coffin**, in Portland, Maine, has been appointed by the Chief Justice of the Maine Supreme Judicial Court to serve as a member of the court's Advisory Committee on Professional Responsibility. This Committee oversees the rules governing the conduct of lawyers in the state.

-**H. Peter Del Bianco, Jr.**, a partner in the firm of **Lambert Coffin**, in Portland Maine, was honored by the Maine Civil Liberties Union at its recent annual Justice Louis Scolnik dinner celebrating contributions of individuals who have led in the fight to protect civil liberties and civil rights of all Maine people. Peter was congratulated by the organization and its membership for his significant service as President of the MCLU Board.

-**Alicia F. Curtis**, an associate with the firm of **Lambert Coffin** in Portland, Maine, authored the lead article in the Spring 2008 edition of the Maine Bar Journal. Entitled "The Reasonable Value of Medical Services: A Hospital Bill, the Insurer's Payment, or the Jury's Choice?," the article analyzes the current state of the law in Maine on the amount a plaintiff may claim for medical treatment expenses when those expenses have been reimbursed by an insurer at a discounted rate. The article is available online at <http://www.mainebar.org/images/temp/pdf/MBJspring2008.pdf>.

-**Hoff Curtis** of Burlington, Vermont and Portland, Maine is pleased to announce that **Gregory A. Weimer** has become a shareholder and director of the firm. Mr. Weimer's practice involves both trial and appellate advocacy in the state and federal courts of Maine and Vermont. He also helps clients resolve their disputes through mediation.

-**Matt Cairns**, DRI Second Vice President, has joined the multidisciplinary law firm **Gallagher, Callahan & Gartrell** in Concord, New Hampshire (www.gcglaw.com). Matt will continue his practice defending the interests of businesses, individuals, municipalities and insurers in civil litigation including products liability, commercial litigation and other complex matters. He can be reached at cairns@gcglaw.com.

-**Walter Judge** of **Downs Rachlin Martin** (Burlington, VT) was invited to join the International Association of Defense Counsel (IADC). Walter was also asked to author the Vermont sections to two new 50-state treatises being published by DRI: Trade Secrets and Non-Compete Agreements. Both of these books will be forthcoming in 2008.

-**Marc Heath** of **Downs Rachlin Martin** (Burlington, VT) was a speaker at a DRI mini-seminar in Boston on May 2 entitled "Defending Against Damages Claims in Complex Commercial Cases." The seminar was hosted by DRI member Kurt Gerstner of the Campbell Edwards & Campbell firm in Boston.

-**Christopher J. Poulin** recently joined the law firm of **Getman, Stacey, Schulthess & Steere, P.A.** in Bedford, New Hampshire. Chris will specialize in insurance defense. Most recently Chris was the Chair of the Insurance Defense Practice Group at Devine, Millimet and Branch, P.A. in Manchester, New Hampshire. Chris can be reached at cpoulin@getmanstacey.com.

Judge Joseph Laplante to Speak at TDLA Annual Meeting

Dear TDLA members,

I would like to extend a personal invitation to all defense counsel in the Tri –State region to attend the 2008 Annual Meeting of the Tri-State Defense Lawyers Association. New Hampshire is proud to once again host the TDLA Annual Meeting that will be held in downtown Portsmouth, N.H. at the Hilton Garden Inn Hotel.

This hotel is in a great location- right in the middle of downtown Portsmouth within walking distance of shops, Prescott Park, Strawberry Bank and the famous “deck” restaurants with outdoor seating right on the water.

TDLA is proud to announce that the Honorable Joseph N. Laplante, United States District Court Judge for the District of New Hampshire will be our keynote speaker Friday evening, September 19. Judge Laplante will speak on his experiences during his first year while serving on the Federal bench. This should be a very interesting topic! In addition, we have a great CLE seminar scheduled for Saturday morning. I certainly hope that you can find the time in your schedule to join us the weekend of September 19 and 20.

Sincerely

Chris Poulin
New Hampshire President, TDLA



Message from the Executive Director

It's time to write a short message to our members. Hmmmmm, what can I say to Maine, Vermont and New Hampshire members that will interest them? How can I draw them in? Maybe ***"This column is about sex, drugs and cheating"***.....that would probably work, but it's not my area of expertise. Sorry. My expertise is in making organizations work. Work for its members. How do you do that? **Get members involved because it is their input that provides the architecture to build the value.**

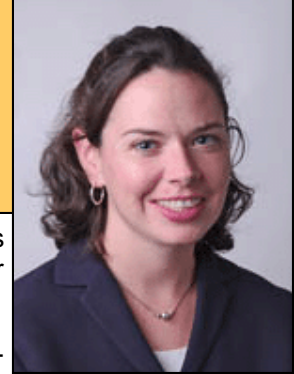
TDLA wants to give you value through its CLE, Substantive Groups, Expert Witness Search, Newsletter and more.....and, not to mention that we offer a common ground for defense lawyers to communicate. Everyone is so busy these days with the endless communications that we feel we must respond to immediately, it is difficult to find the time to take advantage of, or even recognize, something that may ultimately help you win your next case. Get involved in the Substantive Groups. If you are currently on one of the DRI Substantive Groups, you know how much you enjoy being a part of it. Just think, if it were on the local level, what you could possibly reap from developing closer relationships with the attorneys in your area.

With that said, I do want to speak toward sex, drugs and alcohol! One of our speakers for the Annual Meeting is Tim Schimberg. His topic....."Lawyers Helping Lawyers". You don't want to miss his presentation. He will be addressing these issues that sometimes professionals and attorneys must face.....and, he will do so in a very direct manner. *Hope to see you there!*

Peggy

New Hampshire Statutory Updates Regarding Insurance Law

By Mary Ann Dempsey, Wiggin & Nourie, PA



Effective January 1, 2008, RSA 417:4, XIV makes the following an unfair claims practice to knowingly underestimating the value of any claim by an insurer or by an adjuster representing the insurer.

Effective January 1, 2008, RSA 417:26, RSA 417:26 allows the insurance department to issue subpoenas if it has any reason to suspect that a person has been engaging in criminal activity and sets forth the three ways in which a subpoena may be served.

Effective January 1, 2008, RSA 417:28 expands the reporting requirements of insurance fraud to any person or entity governed by the insurance statutes.

Effective January 1, 2008, RSA 417:30 sets forth antifraud plans that insurers must submit to the insurance commissioner in writing.

Effective January 1, 2008, RSA 412:17-a prohibits an insurer from refusing to issue an auto policy solely on the basis that the applicant is a volunteer driver nor may the insurer issue a surcharge on that basis.

Effective January 1, 2008, RSA 130-A:6-a, Property Owner Notification (change in lead levels)

Effective September 11, 2007, RSA 264:15, regarding Uninsured or Hit-and-Run Motor Vehicle Coverage was amended to provide that excess and umbrella policies shall also provide uninsured motorist coverage equal to the limits of liability purchased, unless the named insured rejects the coverage in writing. A rejection of such coverage by the named insured shall constitute rejection of coverage by all insureds eligible under the policy.

Effective July 17, 2007, RSA 188-F:19, Liability Limited (immunity for donating person/company allowing use of premises, personnel or equipment to the community college system of New Hampshire to assist in training courses if acting pursuant to a prior written request or acceptance by the Chancellor of the community college system, and the damage is not caused by willful, wanton or grossly negligent misconduct)

Effective July 17, 2007, RSA 507-B:4, Limit of Liability (limit of liability of a governmental unit for bodily injury, personal injury or property damage sustained by one person increased from \$150,000 to \$275,000, with an occurrence limit of \$925,000)

Effective July 17, 2007, RSA 541-B:14, Limitation on Action and Claims (limits on tort actions arising out of any single incident against any agency increased from \$250,000 to \$475,000 per claimant, and increased from \$2 million to \$3,750,000 per single incident)

Effective July 13, 2007, RSA 264:16 was amended prohibits a health insurer was coordinating benefits against medical payments coverage. It also prohibits the assignment of medical payment coverage to any health care provider. It prohibits an insured from submitting medical bills to his health care provider and then being reimbursed from his auto insurer. The insured cannot duplicate payment from medical payments coverage and a health insurance policy for the same medical expense. The statute does not apply to any commercial policy insuring more than 4 automobiles or covering a garage, auto sales agency, repair shop, service station, public parking space operation hazards, or trucking operation.

Effective July 1, 2007, RSA 358-S:2, Registration; Surety Bond; Escrow of Deposits (any person operating or opening a martial arts school shall post a surety bond in the amount of \$50,000 with the Department of Justice)

New Hampshire Update -contd.

Effective July 1, 2007, RSA 490-E:5, Immunity from Civil Liability (“no mediator, arbitrator, or other neutral party involved in dispute resolution under contract with the New Hampshire judicial branch shall be held liable for civil damages for any aspect of judicial branch dispute resolution processes, unless such person acted willfully.”)

New Hampshire Case Summaries

Barbuto v. Peerless Insurance Company, (December 18, 2007)

Supreme Court held that insurer’s right to setoff in uninsured motorist coverage is distinct from its right to reimbursement and policy provisions allowing for both did not conflict.

Maloney v. Dennis S. Badman, (December 20, 2007)

A primary care physician, who prescribed medication to a patient, did not have a duty to prevent the patient’s suicide.

State Farm Insurance Company v. Bruns, (February 13, 2008)

Court held that claims of false imprisonment and invasion of privacy were not entitled to coverage under personal umbrella liability policy because they were inextricably intertwined with sexual abuse claims which were excluded from coverage.

Bates v. Phenix Mutual Fire Insurance Company, (February 13, 2008)

No coverage for property damage when water overwhelmed a culvert and broke through a road acting as a temporary dam causing water damage to plaintiff’s personal and real property. Court held that damage was caused by flood and not by an explosion and therefore precluded from coverage.

Chesley v. Harvey Industries, Inc., (April 22, 2008)

A writ filed on the third anniversary of an event was timely filed within three years.

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

This case was decided on interlocutory appeal and overrules case law that has existed for over 25 years.

The case was brought by the Estate of Glenn Hopkins. Mr. Hopkins was employed by the defendant was fatally electrocuted while working. Mr. Hopkins had no dependents at the time of his death. The defendant moved to dismiss the claims against it claiming that it was barred by the workers’ comp statute and the Estate was only entitled to death benefits as set forth by statute.

In 1981, the NH Supreme Court had decided the case of *Park v. Rockwell International Corp.*, where it held that the exclusive nature of the death benefits available under worker’s compensation law for employees who die without dependents in the course of their employment violated equal protection afforded by the state constitution. At the time of *Park*, the worker’s compensation statute allowed no more than \$1,200 in burial expenses for an employee killed without dependents. If the decedent had not been working, his estate could have sought a wrongful death claim and recover up to \$50,000 in damages. The court held that this created a disparity that violated equal protection.

The court held that, since it decided *Park*, a number of things had changed that now warranted it to overrule that decision. *Park* stands alone amongst decisions throughout the country. Every other jurisdiction that has addressed the constitutional issue has upheld the exclusive remedy provision as it relates to non-dependents.

The court decided that the workers compensation limit of \$5,000 in burial expenses for individuals who die without dependents was not unconstitutional.

RECENT DEVELOPMENTS OF INTEREST IN VERMONT TORT/INSURANCE/CIVIL PROCEDURE/ EVIDENCE LAW

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



Duty/Proximate Causation

Vermont Supreme Court addresses duty and proximate causation issues; holds that driver of pickup truck owed no duty to inebriated person riding in bed of truck who fell out and was killed.

Collins v. Thomas, 2007 VT 92, Vermont Supreme Court, August 24, 2007. Drunk Plaintiff died when he stood up and fell out of the back of a pickup while it was moving. There was no evidence that the driver drove improperly. Plaintiff argued that the truck's inspection sticker was expired and that the truck had other defects. The court found that none of these contributed to the incident and were irrelevant. The court further found that the driver of the vehicle, who did not operate the vehicle improperly, had no duty to prevent the intoxicated occupant of the back of the pickup truck from falling out.

Products Liability/Failure to Warn/Pre-Emption

Vermont Supreme Court holds that state common law failure-to-warn claim in pharmaceutical case is not pre-empted by federal law.

Levine v. Wyeth, 2006 VT 107, --- A.2d ---, 2006 WL 3041078, Vermont Supreme Court, Oct. 27, 2006. The Vermont Supreme Court essentially ruled that, although the FDA had approved and mandated the warning label on Wyeth's drug, the FDA approval was a "floor" and not a "ceiling" and that Wyeth could and should have added an additional warning. This case is currently on appeal to the United States Supreme Court.

Products Liability/Causation/Proof of Defect

Second Circuit interpreting Vermont law holds that in certain circumstances, a product liability plaintiff can proceed under an "inference of defect" theory.

Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc., 473 F.3d 450 (2d Cir. Jan. 5, 2007). After a kitchen fire, court granted summary judgment to defendant when plaintiff's experts could do little more than point to the coffee-maker and speculate that it was defective, although they admittedly could identify no specific defect. In reversing, the Second Circuit reasoned that there was circumstantial evidence sufficient to allow a jury reasonably to find: 1) that a defect in the coffee maker was the more probable cause of the fire; and 2) that the coffee maker was in substantially the same condition as it was when last in Defendant's possession and control. Thus, the district court erred in dismissing Plaintiff's breach of warranty and strict products liability claims.

Inadequate Verdict/Civil Procedure/New Trial/Additur

Vermont Supreme Court holds that in personal injury case where jury found defendant 50% liable and awarded plaintiff medical specials and lost wages, award of zero for pain and suffering could not stand, and new trial would be ordered.

Smedberg v. Detlef's Custodial Service, Inc., 2007 VT 99, September 21, 2007. The plaintiff was at work and slipped on the floor and was badly injured. The jury found plaintiff 50% at fault. It awarded damages, but zero for pain and suffering. The plaintiff appealed. The Vermont Supreme Court remanded for a new trial. It held that because the jury had found liability, and awarded medical specials, and because there was essentially undisputed evidence that plaintiff endured some amount of pain and suffering, a zero award in this category could not stand as a matter of law. The issue then became: should the parties get a completely new trial, or a trial solely on damages, as plaintiff requested. The court came to the conclusion that the only fair thing to do is order a completely new trial.

Vermont Update - contd.

Vermont Supreme Court holds that superior court was correct to order additur to plaintiff's damages award or require new trial.

Wetmore v. State Farm Mut. Automobile Ins. Co., 2007 VT 97 (Sep. 19, 2007) (Entry Order decision). This was a case by plaintiff against her underinsured motorist carrier arising out of a rear-end accident. The only issue at trial was the amount of plaintiff's damages. The court agreed with plaintiff that the jury's award of zero for future pain and suffering was inconsistent with its awards of \$19,200 for future medical expenses and \$10,000 for permanent injury.

Consumer Fraud

Vermont Supreme Court holds that real estate agent's failure to disclose presence of leaking underground storage tank in the area is a "material" non disclosure as a matter of law.

Vastano v. Killington Valley Real Estate, Vermont Supreme Court, 2007 VT 33, May 1, 2007 (Entry Order decision). Because of a leaking underground storage tank in the area, the water well of the house that the plaintiff purchased was periodically tested. The tests came back negative, but the selling real estate agent knew of the testing and did not inform the plaintiff-purchaser. After the sale, the plaintiff-purchaser found out about the testing and sued the agent. The jury returned a verdict for the defendant agent and plaintiff appealed. Even though the plaintiff-purchaser testified that she did not know what she would have done differently had she known of the testing prior to the purchase, the Vermont Supreme Court reversed, finding that the failure to disclose by the agent was a "material" omission as a matter of law.

Vermont Supreme Court affirms trial court's decision that statements by defendant construction company were not false or misleading under the Consumer Fraud Act.

EBWS, LLC v. Britly Corp., 2007 VT 37 (May 25, 2007). The Vermont Supreme Court agreed with the trial court that the statements of the president of a construction company that was hired to build a dairy creamery building were not false or misleading in any material way. The statements were in response to questions of whether the company could build a creamery building. The president responded, "no problem, I can do that," and also stated that he had built buildings "substantially more complex" than the building in question and that "this is an easy building."

Vermont Supreme Court holds that overvalued appraisal prepared for mortgage lender did not give rise to consumer fraud claims by the borrower/homeowner.

Webb v. Leclair, 2007 VT 65, Vermont Supreme Court, July 12, 2007 (Entry Order decision). The Court held that the appraiser's relationship was with the mortgage lender, not with the homeowner. The Court also decided that a professional malpractice claim could not be recast as a consumer fraud claim.

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 were quoted a trade-in figure for their current leased vehicle. The plaintiffs then purchased a new vehicle from the dealer based on a total price that included the trade-in figure. The dealer later found out that the amount the plaintiffs owed on their leased trade-in was significantly higher because of excess mileage, 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, holding 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.

Vermont Update - contd.

Insurance Coverage Decisions

Vermont Supreme Court holds that policy obtained while restaurant was “closed for the season” covered restaurant fire loss that occurred after restaurant re-opened, and that insured did not deliberately conceal her intent to reopen the restaurant a couple of months after the policy was obtained.

Debartolo v. Underwriters at Lloyd's of London, 2007 VT 31, Vermont Supreme Court, April 25, 2007 (Entry Order decision). The insured's restaurant was closed for the season when she applied for insurance. Four days after reopening, there was a fire. Lloyd's denied coverage, arguing that the policy's "Declarations" page described the covered property as a "vacant restaurant." The insured argued that the policy itself was ambiguous as to whether coverage would continue after the restaurant re-opened, and should therefore be construed in favor of coverage. The Vermont Supreme Court sided with the insured, even though Lloyd's agent had sent a letter to the insured, when it issued the policy, requesting that the insured notify the agent when she reopened. The court held that the letter was not part of the policy and imposed no obligation on the insured to notify Lloyd's that she had reopened.

Vermont Supreme Court revisits interplay between worker's compensation and underinsured motorist (UIM) coverage, and reaffirms that WC carrier gets reimbursement from UIM benefits attributable to injured employee's economic losses.

Progressive Casualty Insurance Co. v. Estate of Keenan, 2007 VT 86, Vermont Supreme Court, August 31, 2007. In this case, the court reaffirmed its decision in Travelers Ins. Co. v. Henry, 2005 VT 68, 178 Vt. 287, 882 A.2d 1133 (2005) that any first-party UIM awards must be allocated between economic and noneconomic damages, with the WC carrier obtaining reimbursement out of the economic damages part of the award and the employee retaining the noneconomic damages part of the award. In this case, the court held that, even where an injured party is not made entirely whole by a first-party UIM award, any UIM benefits received must be apportioned between economic and non-economic losses so that the WC carrier can be reimbursed from the amount of the UIM award that is attributable to economic damages. Allocating an entire UIM award to noneconomic damages, so as to avoid any need to reimburse the WC carrier, is inconsistent with Henry. Two justices dissented, arguing that an injured employee should not have to give back any amount from a first-party UIM award to his employer's WC carrier unless and until he is made completely "whole" by the UIM award.

Vermont Supreme Court affirms validity of “owned vehicle exclusion” in auto liability carrier's UM/UIM policy.

Hubbard v. Metropolitan Property & Casualty Ins. Co., 2007 VT 121, Vermont Supreme Court, Nov. 2, 2007. The Vermont Supreme Court found that an exclusion in a UIM policy that excludes UIM coverage if the carrier has paid out under the liability coverage on the same vehicle is logical and consistent with the policy of Vermont's UIM law. Vermont's UIM law determines whether a tortfeasor is underinsured by comparing his liability coverage to the victim's UIM coverage. In a case wherein a victim could recover the same amount under either the liability coverage or the UIM coverage on the same vehicle, the driver is by definition not "underinsured."

Vermont Supreme Court affirms that the policy term “explosion” did not afford coverage for property damage caused by oil spilling out of homeowners' heating oil tank when the tank's valve was broken by an object falling off a basement shelf.

Sperling v. Allstate Indemnity Co., 2007 VT 126, Vermont Supreme Court, November 9, 2007. In the face of a pollution exclusion, the Vermont Supreme Court refused to require coverage for the cost of cleaning up an oil spill in the insured's basement. The court also refused to find that the circumstances of the spill could be viewed as an "explosion" so as to trigger the policy's personal property coverage.

Vermont Update—contd.

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). Where the tortfeasor's insurance company knew of the victim's insurance company's med-pay lien, it was still on the hook for the lien even after settling with the victim, where the victim's carrier did not know about the settlement.

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).

Daubert

Vermont Supreme Court holds that trial court's exclusion of plaintiffs' fire cause-and-origin experts in kitchen fire case was abuse of discretion and reverses summary judgment to appliance maker.

985 Associates, Ltd. v. Daewoo Electronics America, Inc., 2008 VT 14 (Feb. 8, 2008). A fire broke out in the kitchen of plaintiff's apartment while nobody was home. An adjuster for plaintiff's insurance company purported to locate the fire in the area of the microwave oven and hired experts to look at the oven. The insurance company's experts could find no defect with the oven, but nevertheless concluded that it must have been the cause of the fire. The superior court granted summary judgment to the oven manufacturer on the grounds that the plaintiff's expert testimony was speculative and did not follow a proper methodology for identifying the oven as the cause of the fire. The Vermont Supreme Court reversed. It found that although the experts could not identify a defect in the oven, and had no expertise with microwave ovens, they were qualified to speculate to a jury that the oven was the source of the fire. Note: since adopting the Daubert standard in 1995 and despite its decision in USGen New England, Inc. v. Town of Rockingham recognizing the abuse of discretion standard for review of a trial court's decisions, the Vermont Supreme Court has never excluded an expert witness under Daubert in a civil case.

Statute of Limitations

Vermont Supreme Court holds that the statute of limitations from bringing a personal injury claim against an out-of-state driver is tolled as long as the driver resides out of state, even though the plaintiff could have made service of process upon the Vt. Commissioner of Motor Vehicles during the limitations period.

Andrews v. Stam, 2007 VT 79, Vermont Supreme Court, August 17, 2007. You figure this one out.

Vermont Supreme Court affirms two trial court decisions that mixed contracts for sale of goods and services are governed by six-year statute of limitations for contracts, rather than four year statute of limitations under U.C.C.

Lamell Lumber Corp. v. Newstress Int'l, 2007 VT 83, Vermont Supreme Court, Aug. 31, 2007 (contract to design, manufacture, ship, and install precise concrete panels was predominantly a contract for services and not subject to the UCC).

Openaire, Inc. v. L.K. Rossi Corp., 2007 VT 120, Vermont Supreme Court, Oct. 25, 2007 (Entry Order decision) (contract to design, fabricate, deliver, and install a retractable outdoor swimming pool cover is a contract for services and not subject to the UCC).

Punitive Damages

Vermont Supreme Court affirms punitive damages award against abusive landlord.

Villeneuve v. Beane, 2007 VT 75, Vermont Supreme Court, August 7, 2007 (Entry Order decision). In an effort to get an unwanted family that was behind in rent out of his rental house, the landlord tricked the

