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newsletter

Current developments in Maine law

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CHOOSING, USING AND ABUSING YOUR EXPERT WITNESS

BY MATTHEW T. MEHALIC

Preliminary matters

Not every case requires an expert witness. However, the more significant the potential exposure is in a case, the more important it is to evaluate all of the facts as soon as a loss occurs to see whether an expert witness may assist in defense or recovery.

Obviously, the guidelines for choosing an expert vary from case to case. For example, in a fire loss or explosion case it is necessary that a cause and origin expert be employed upon discovery of the loss because vital information will most likely be lost if not immediately preserved. On the other hand, in an allegation of defective construction it may not be necessary to employ an engineer as soon as the loss is reported. This may be because destructive investigation of the loss by the claimant either has not begun, or is incomplete, there may be a coverage dispute down the road making the expenditure of money on an expert unjustified, or the facts of the matter may be within common knowledge not requiring the assistance of an expert. Whatever the case, whether to bring an expert witness on board in the investigation, defense or prosecution of a loss should be one of the first questions asked.

When do you engage the expert?

If it is inevitable that an expert will be needed, the expert should be engaged as early as possible. Experts not only provide opinions through reports and disclosures, but they also can provide assistance in the overall case strategy. Whether litigation has commenced or not, a good expert will be honest and tell you if you need another expert with a different expertise to provide an opinion because a particular aspect of the case is outside his or her expertise. The expert can advise on what questions should be asked when taking recorded statements. He or she may influence your settlement posture prior to litigation or mediation. Waiting until the case is certain to go to trial is not an effective use of the expert's capabilities and may lead to an unprepared expert. Furthermore, the time expended by an expert is most likely to be the same whether he is engaged at the time of the loss or after mediation has taken place. The same material will need to be reviewed and the same analysis will need to take place. Forcing your expert to review five boxes of documents in a short time period is abusing the relationship. In addition, rushing your expert may lead to incorrect or incomplete conclusions

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and subject him or her to harmful cross-examination, abuse and embarrassment on the witness stand.

How do you choose your expert?

Choosing the expert is a delicate process. Some items to consider are: honesty, education, field experience, trial experience, conflicts of interest, availability, presentation, confidence, imagination, durability, communication skills, knowledge of the law, prior opinions, and skeletons in the closet, to mention a few. Honesty is number one because at the end of the day the expert's duty is to assist the trier of fact to side with our client. If your expert tells you he is capable of evaluating a loss and you later find out that your expert has limited experience in this particular area, his or her credibility is lost and you are without an expert.

Education and experience go hand in hand. Education is not enough, nor is experience alone in most cases. An expert's ability to list his formal training and application of that training to in-field/hands-on experience over a sufficient amount of time qualifies the individual to render an opinion. In standard of care cases involving, for example, alleged improper maintenance of an appliance, a service technician may be more persuasive than the opinion of a licensed engineer. If the expert's profession requires licensure and certification, make sure those are up to date and that he or she possesses the proper training. Also, make sure continuing education requirements are current.

Communication skills are of vital importance. The most educated and experienced expert is rendered useless if he or she cannot explain things to a jury in simple terms. Chances are that if the individual taught within his profession he will be a good witness and be able to explain his analysis and opinions to a diverse audience.

It is good to have an expert that authored some articles on the particular subject your matter involves, but be wary of the expert that has authored too many pieces or testified a lot of times on different sides of the matter. This should be a red flag. Before retaining any expert, investigate the prior opinions voiced in the written materials and previous cases by an expert. Discovering on cross-examination that the expert came to an opposite conclusion in an article authored 5 years ago will destroy his or her credibility.

One of the first questions to ask your expert is if he or she has had any involvement with any of the parties-in-interest. If there is even a remote possibility that a conflict exists, do not retain this expert.

As far as availability goes, make sure the expert does not have so much work going on that he cannot devote enough time to your matter or meet unexpected deadlines. If your expert is unable to make a spur of the moment site inspection or is unable to complete an affidavit for counsel your position in the case may be compromised.

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is published quarterly to inform you of recent developments in the law, particularly Maine law, and to address current topics of discussion in your daily business. These articles should not be construed as legal advice for a specific case. If you wish a copy of a court decision or statute mentioned in this issue, please e-mail, write or telephone us.

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Too much litigation experience can hamper an expert's effectiveness. You do not want it to appear that your expert is a hired gun who gives you the opinion you want solely in exchange for money. An expert's testimony will be viewed with great skepticism if this expert only testifies for the insurance companies and always renders an opinion that the insured is never liable. However, a friendly and honest expert may recommend a colleague who is qualified to render an opinion in his stead.

It may be superficial, but how an expert appears, presents himself, and sounds is all important if the case is to go to trial. In Maine, an individual with a southern accent, who wears $5,000 suits and wingtips, is unlikely to be embraced by a jury. However, your expert should be comfortable with who he or she is and be willing to dress the part. If he or she is a mechanic, being embarrassed about wearing coveralls in a court room and having stained black hands will not suffice. In short, before you retain an expert, get a picture of him or her, speak with them on the phone, get an idea of his or her demeanor, and make sure the expert is likeable before retaining him or her.

Last, but not least, determine whether the individual has any skeletons in the closet. You are employing the individual to assist you, so no question is off limits. Discovering that your expert was disciplined for failure to meet the standards of his or her industry, or even worse, discovering your expert was successfully sued related to the performance of his or her profession will be devastating to your position and destroy the expert's credibility.

These are only some of the considerations to keep in mind when selecting an expert. Every case is unique and the questions you ask

about an expert will change depending on the facts.

Where do you get information about experts?

The easiest resource is the internet. Simply searching the expert's name may provide all the information you need. Speaking with someone who used the expert before is another good resource. However, the best resource is speaking directly with the expert and conducting your own job interview. Since you are hiring him or her, it is okay to question, request information, and get references from the potential expert. Properly vetting the potential expert up front will pay off down the road.

How do you use your expert?

Once you choose your expert, how you use your expert is the next decision you have to make.

- *Are you going to reveal your expert to the other potential claimants/litigants?*

If a site inspection occurs and other parties need to be placed on notice, your expert will be revealed to the other side. If that expert renders an unfavorable opinion and you decide to use someone else, the other parties will presume that this individual rendered an unfavorable opinion. Pursuant to Maine Rule of Civil Procedure 26(b)(4), the other party may be able to discover the opinions of this expert even if you do not call the expert as a witness.

- *Should the expert prepare a report?*

When you ponder this question remember, as soon as that report is drafted, if the loss is litigated and the author of the report is designated as an expert, the report's entire contents must be produced to the other side. At the very least, before the expert prepares a report tell him or her you want to have a conversation about his or her possible opinions and conclusions. This way you may be able to prevent the memorializing of damaging opinions to your case. Although you want your expert to identify and prepare you for weaknesses in your case, he or she does not need to signal to the opposing side what those weaknesses are. Also, consider having the expert send you a sample report from a previous matter before authoring a report. If you think a different format would be more beneficial or a section with a detailed factual explanation needs to be included, have the expert do it. If an expert prepares a report, any reader of the report should be persuaded by the opinions and conclusions contained therein. If you decide not to have the expert prepare a report, make sure the opinions of the expert are memorialized in your own file. If you retain an expert, chances are this is done in preparation of litigation and your notes will be protected as work-product.

- *How involved is the expert going to be?*

It goes without saying that there needs to be independent analysis in the rendering of an opinion. However, the expert can be utilized in so many more ways. Experts may accompany counsel to a deposition of the opposing expert or adverse witnesses. During breaks the expert may converse with counsel and suggest particular questions outside counsel's realm of knowledge. He or she may assist in the formulation of discovery requests to ensure questions are posed that are key to the liability determination. It is the claims handler's and counsel's job to do their homework and be up to speed on the matter and its nuances, but an expert is retained because he or she possesses knowledge of a particular subject above and beyond what an average individual possesses, including the claims handler and counsel. Therefore, use the expert to the individual's fullest capabilities. The extra fees spent in the work-up of a matter will more than be recouped if you truly use your expert to his or her fullest capacity.

Conclusion

A lot is involved in choosing your expert, including when to retain, when to reveal, and identifying what you expect of your expert. Qualification to render an opinion is not all that matters. The big picture needs to be examined, which includes assessment of extraneous factors not typically broached when interacting at a professional level. Effective use of your expert will likely influence the resolution of the matter. Finally, you owe your expert a duty not to abuse him. Last minute requests to undertake a task requiring the expert to drop everything else he or she has going on is abuse. Retaining the expert early on, providing the expert the assistance needed, and maintaining organization throughout the matter will eliminate any abuse and the potential for abuse. If you appropriately choose and use your expert, without abusing him or her, chances are the resolution of the matter will be much more tolerable. □

District Court Rules that Severance Payments Not Subject to FICA Tax

By Jeffrey B. Herbert

JEFFREY B. HERBERT

In *Quality Stores, Inc. v. United States*, No. 1:09-cv-44 (W.D. Michigan, Feb. 23, 2010), a federal district court held that certain severance payments are not "wages" and, therefore, not subject to withholding taxes pursuant to the Federal Insurance Contributions Act ("FICA"). *Quality Stores* highlights the historical uncertainty surrounding the question of whether severance payments are subject to FICA taxation. This taxpayer-favorable decision could have far-reaching implications on the way employers structure severance payments and create potential refund opportunities for FICA taxes previously withheld from severance payments. This article will discuss the historical background of this issue, the *Quality Stores* case, and the potential refund opportunities for employers.

Background

FICA imposes a tax upon the "wages" of employees to fund Social Security and Medicare benefits. For purposes of FICA, § 3121 of the Internal Revenue Code (the "Code") defines wages as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." Section 3121 further sets forth certain statutory exceptions to FICA's broad definition of wages, none of which apply to severance payments. Prior to 1950, the statutory definition of "wages" in FICA expressly excluded "[d]ismissal payments which the employer is not required to make." *See* 26 U.S.C. § 1426(a)(4) (1946). Congress changed this rule in the Social Security Amendments Act of 1950, which amended FICA by eliminating the exclusion of the so-called "dismissal payments" from FICA wages.

In the mid-1950s, several large American industrial employers adopted plans pursuant to collective bargaining agreements under which the employers agreed to fund trusts that would supplement state unemployment compensation for employees who were laid off. These payments, denominated SUB payments, depended for their effectiveness in part on their not being characterized as "wages." See *CSX Corp. v. United States,* 518 F.3d 1328, 1334 (Fed. Cir. 2008). This was because unemployment benefits in a number of states were not available to laid-off employees who were earning "wages" from their employers, and the employees' loss of state unemployment benefits would largely defeat the purpose of the supplemental unemployment benefits. Accordingly, those who adopted such SUB plans sought to ensure that the payments from those plans would not have the legal status of "wages." *See id.*

In a series of Revenue Rulings from 1956 to 1990, the IRS addressed the issue of whether payments from severance plans purporting to be SUB plans constituted wages for purposes of FICA and income tax withholding. During this period of time the IRS approved various SUB plans, authorizing the employers to treat the SUB payments under those plans as non-wages for FICA tax purposes. The IRS pronouncements did not establish a comprehensive test for when SUB payments would be regarded as not constituting wages. Instead, the IRS set forth a number of facts bearing on the decision, one of which was that the amount of payments must be linked to the receipt of state unemployment compensation. *See* Rev. Rul. 56-249, 1956-1 C.B. 488.

During the 1960s, SUB payments were treated, for income tax purposes, as ordinary income to the recipient, but not as wages for purposes of either the income tax withholding statutes or FICA. It soon became evident that treating SUB payments in this manner was creating a problem. Because SUB payments were not treated as wages, income tax was not withheld from SUB payments that were made to employees. The failure to withhold income tax from those payments meant that employees who received those payments were encountering large tax obligations attributable to the SUB payments at the end of the taxable year. In order to solve this problem, Congress enacted § 3402(o) of the Code, which ensured that SUB payments, even if not deemed "wages," would be subject to income tax withholding. *See CSX Corp.*, 518 F.3d at 1336.

Section 3402(o), entitled "Extension of Withholding to Certain Payments Other Than Wages," provides that "any supplemental unemployment compensation benefit paid to an individual, . . . shall be treated as if it were a payment of wages by an employer to an employee for a payroll period." Section 3402(o)(2) defines supplemental unemployment compensation benefits as "amounts which are paid to an employee, pursuant to a plan to which the employer is a party, because of an employee's involuntary separation from employment (whether or not such separation is temporary), resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions, but only to the extent such benefits are includable in the employee's gross income."

In 1990, the IRS issued Revenue Ruling 90-72, its most recent guidance on the issue of SUB payments and FICA tax. In Revenue Ruling 90-72, the IRS stated that the definition of SUB payments in § 3402(o) is not applicable to FICA, and that for FICA purposes supplemental unemployment benefits are defined "solely through a series of administrative pronouncements published by the IRS." Citing the 1950 legislation that extended FICA to "dismissal payments" as well as the regulations providing that "dismissal payments" constitute wages for income tax withholding purposes, the IRS stated that in order to be exempt from inclusion within the definition of "wages" under FICA, payments made to employees involuntarily separated from the service of the employer had to be "designed to supplement the receipt of state unemployment compensation." The IRS characterized Revenue Ruling 90-72 as restoring the distinction between SUB pay and dismissal pay by reestablishing the link between SUB pay and state unemployment compensation originally established in earlier revenue rulings.

The *Quality Stores* Background

Quality Stores, Inc. operated a chain of retail stores specializing in agricultural supplies and related production. During the period preceding the bankruptcy cases ("the Pre-Petition Period"), Quality closed many of its locations and also terminated approximately 75 employees in its corporate office. In 2001 an involuntary Chapter 11 bankruptcy petition was filed against Quality. After the petition date (the "Post-Petition Period"), Quality closed its remaining stores and distribution centers and terminated all of its remaining employees.

Quality made severance payments to employees who were terminated during both the Pre-Petition and Post-Petition Periods. The payments were made under severance plans and because of the employees' involuntary separation from employment, which resulted directly from a reduction in force with the discontinuance of a plant or operation. The payments were not connected to the receipt of state unemployment compensation and were not attributable to the rendering of any particular employment service. The Pre-Petition Period severance payments were paid on a weekly or a semi-weekly basis in accordance with Quality's normal payroll period. Several payments for the Post-Petition Period were paid in a lump sum. Neither the Pre-Petition nor Post-Petition Period payments were connected to the receipt of state unemployment compensation.

The severance payments were included in the employee's gross income, and Quality reported the severance payments as wages on the W-2 forms issued to the employees. Quality withheld federal income tax and the employee's share of FICA tax from the severance payments and also paid the employer's share of FICA tax on the severance payments. In 2002, Quality filed refund claims with the IRS for overpaid FICA, plus interest, on the severance payments. The bankruptcy court concluded that the severance payments made to the employees under the Pre and Post-Petition severance programs were not wages for FICA purposes. The bankruptcy court relied in part on the analysis and resolution of the same legal question by the Federal Court of Claims in *CSX Corp., Inc. v. United States. See* 52 Fed.Cl. 208 (Fed.Cl.2002). After the decision by the bankruptcy court, however, the United States Court of Appeals for the Federal Circuit reversed the lower court's decision in *CSX*. In the reversal, the United States moved for reconsideration of the bankruptcy court's decision in this case. The bankruptcy court granted the motion for reconsideration, and on reconsideration, ratified its prior opinion and order.

The *Quality Stores* Decision

On February 23, 2010, the United States District Court for the Western District of Michigan affirmed the holding of the bankruptcy court that severance payments made by the taxpayer were not subject to FICA taxation. The district court recognized that "[i]n enacting the FICA provisions, Congress intended to impose FICA taxes on a broad range of employer-furnished remuneration in order to accomplish the remedial purpose of the Social Security Act." The court also recognized, however, that the remedial purpose of the statute is not unlimited. "Otherwise," reasoned the court, "the benefits become the basis of the very taxes collected to return as benefits." The court's analysis concluded by noting that "at one end of the spectrum are social security benefits and at the other end of the spectrum are

wages/earnings, and at the point on the spectrum where severance payments are intended to serve the same purpose as social security benefits, i.e., support for workers in lieu of a lost ability to earn wages, the collection of social benefit taxes on the wage-replacement benefits makes little sense."

The district court in *Quality Stores* determined that the severance payments at issue satisfied the statutory definition of "supplemental unemployment compensation benefits" Because an amendment to § 3402(o) was required in order to subject SUB payments to income tax withholding, the district court reasoned that SUB payments were not "wages," including for purposes of FICA taxation. The district court noted that if SUB payments already fell under the definition of wages, there would be no need for § 3402(o) to specifically provide that such payments should be "treated as if it were wages." In additional, the district court rejected the application of Revenue Ruling 90-72 because it did not have the force and effect of a regulation. Accordingly, the district court held that the severance payments are treated as wages only for income tax withholding, and thus, not as wages for FICA tax purposes.

Impact of the *Quality Stores* Decision

The area of FICA taxation of severance payments is still unsettled. On April 27, 2010, the United States filed its Notice of Appeal on the district court's decision in *Quality Stores*, asking the United States Court of Appeals for the Sixth Circuit to reverse the lower court's decision. The IRS has stated that it will continue to follow the decision by the Court of Appeals for the Federal Circuit in CSX that held that payments made to involuntarily terminated workers should be classified as "wages" for FICA tax purposes. As such, the IRS is continuing to deny claims that seek a refund of FICA tax paid on severance payments.

In light of the current uncertainty, and expecting that the IRS will issue assessments to employers that decline to withhold and remit FICA taxes on severance payments, employers should continue to withhold FICA tax on severance payment that fall within the definition of SUB payments under Code § 3402(o)(2); that is, on severance paid from a plan to workers who were terminated involuntarily because of a reduction in force or plant closure. The exception to this recommendation would be if the severance qualifies as SUB payments under Revenue Ruling 90-72. After filing returns and remitting FICA taxes on severance, taxpayers and employers should consider filing protective refund claims to preserve their opportunity to receive a refund if the courts are ultimately to decide that severance payments are not subject to FICA tax. Protective refund claims are filed to preserve a taxpayer's right to claim a refund when the taxpayer's right to the refund is contingent on future events "e.g., future litigation" and may not be determinable until after the statute of limitations expires. Without a protective refund claim, taxpayers will only have a 3-year statute of limitations in which to seek a refund. The taxpayer who paid significant FICA tax in 2007 on severance pay will only be eligible to receive a FICA refund on these payments until April 15, 2011 unless the tax payer files a protective refund claim. □

NH&D listed among "Best Law Firms"

We are pleased to announce that U.S. News Media Group and Best Lawyers have ranked Norman, Hanson & DeTroy as among the best law firms in the Portland metropolitan area. The ranking is based upon nationwide surveys of thousands of lawyers and clients who were asked to rate the best law firms within designated practice areas. We achieved Tier 1 rankings in the following practice categories:

- Alternative Dispute Resolution
- Criminal Defense: Non-White Collar
- Criminal Defense: White-Collar
- General Commercial Litigation
- Insurance Law
- Personal Injury Litigation – Defendants
- Personal Injury Litigation – Plaintiffs
- Tax Law
- Workers' Compensation Law – Employers

The rankings will be published by U.S. News and World Report in the month of October. Congratulations to all who helped us achieve this recognition, and our thanks to those whose support and satisfaction make it possible. □

The Rulemaking Authority of the Workers' Compensation Board

By Stephen W. Moriarty

As is true with many administrative agencies of the State, the Workers' Compensation Board has been granted broad rulemaking authority by the Legislature. Specifically, §152(2) provides that "the board shall adopt rules to accomplish the purposes of this Act" in order to "ensure the speedy, efficient, just and inexpensive disposition of all proceedings under this Act." In a number of decisions the Law Court has held that the Legislature intended to delegate expansive authority to the Board to implement the purposes of the Act, and the following observation is particularly noteworthy:

> …the Act reflects not so much a legislative intent to comprehensively address every workers' compensation issue in a detailed and specific way, but to commit some issues to a process in which the participants of the system, labor and management, can work out flexible and realistic solutions. *Bureau v. Staffing Network, Inc.*, 678 A.2d 583, 588 (n. 2) (Me. 1996).

In the Court's view, it was expressly intended by the Legislature that the Board would exercise its rulemaking powers to fill in the "gray areas" that exist in the language of the statute.

Generally speaking, whenever the validity of a rule has been challenged the Court has deferred to the Board's expansive rulemaking authority. There have been cases, however, in which rules have been struck down. For example, in *Lydon v. Sprinkler Services*, 2004 ME 16, ¶¶ 12-15, 841 A.2d 793, 797 – 798, the Court invalidated a rule which allowed a medical professional to serve as a §312 examiner if he or she had examined "an" employee at the request of an employer during the previous 52 weeks. Also, in *Beaulieu v. Maine Medical Center*, 675 A.2d 110, 111 (Me. 1996), the Court invalidated a rule excluding the inclusion of fringe benefits in average weekly wages for pre-1993 injuries. In these cases the Court has found a direct conflict between a rule and clear statutory language. As a general proposition, therefore, unless there is a direct conflict with statutory language a rule will be upheld as a proper exercise of agency authority.

The Board's rulemaking authority was recently challenged by an employer in the matter of *Baker v. S. D. Warren Company*, 2010 ME 87 (August 26, 2010). In this matter, the employee was found to have been totally disabled on an ongoing basis as the result of occupational injuries sustained in 1986 and 1991. Following his retirement, he received in a single lump sum payment the amount of $56,000 paid pursuant to a disability feature in a life insurance policy which had been provided by the employer. The employer sought to coordinate benefits by offsetting the disability payment in accordance with *Nichols v. S. D. Warren/Sappi*, 2007 ME 103, 928 A.2d 732. In that case the Court held that payments received under a disability feature within a life insurance policy provided by the employer were subject to coordination. The presiding hearing officer initially ruled that the employer was entitled to a full offset for the after-tax amount of the benefit.

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Coincidentally, earlier this year the Legislature effectively overturned *Nichols* by amending §221 to exempt disability payments paid pursuant to a disability feature in a life insurance policy from coordination. Although the amendment is fully retroactive, the Court observed that the employee's claims for the 1986 and 1991 injuries were still governed by former §62-B, and the Court did not reach the issue of whether the amendment to §221 also applied to the predecessor statute. As a result, the Court held that the employer was still entitled to a coordination of benefits based upon the receipt of the lump sum disability payment.

However, after the employee had filed a motion for findings, the Board adopted Chapter 9, §2 of the WCB Rules, which took effect on September 16, 2009. The new rule applies retroactively to all cases, including those on appeal. In a nutshell, the rule modifies the coordination of benefits provisions of §221(3) and provides that whenever any benefit that was otherwise intended to be paid over an employee's lifetime is instead paid in a lump sum, an employer may only coordinate the benefit based

upon the employee's life expectancy as established in "standard actuarial tables". In other words, an employer may not take a "holiday" for the after-tax value of the lump sum payment, but instead must pro-rate the amount of the offset over the employee's statistical life expectancy. The obvious result of this change is to reduce the amount of the weekly offset that the employer may take.

At the outset the Court held that the new rule applied to the employee's claim, even though the offset provisions of former §62-B applied to his case. Without explanation, the Court held that the Board intended the rule to apply to claims governed by §62-B, even though the text of the rule mentions only current §221(3). The Court's rationale for making this analytical leap is not clear.

More importantly, S. D. Warren claimed on appeal that the Board had exceeded its powers and authorities by adopting a rule which conflicts with the language of §221 and which minimizes the cost savings to employers which the Act was intended to achieve. The benefits coordination statue was designed to prevent a double recovery of both retirement and workers' compensation benefits (or the stacking of such benefits) and to reduce the costs of the workers' compensation insurance premium. *Foley v. Verizon*, 2007 ME 128, 931 A.2d 1058, *Ricci v. Mercy Hospital*, 2002 ME 173, 812 A.2d 250. The employer also challenged the provision of the rule requiring the use of statistical life expectancy as opposed to actual life expectancy or a "rated-age" calculation, which would take into account personal health factors which might otherwise diminish life expectancy.

In rejecting the employer's appeal, the Court found no direct conflict between the statutory language and that of the new rule, particularly as the Act does not address in any way the concept of rated-age and its applicability to benefit entitlement. Therefore, without any conflict with the statute, the Court deferred to the rulemaking authority of the Board and essentially found that the Board had properly fulfilled its function of filling in "gray areas" left unaddressed by the statute. While a full payment holiday may have resulted in a greater benefit to the employer, the Court observed that the rule did not necessarily preclude an employer from obtaining the full benefit of the offset, depending upon a claimant's actual life span. Notwithstanding this uncertainty, the Court held that "the consequences of the new rule are not in conflict with the statute" and the validity of the rule was upheld. □

2010 Fall Forum and Client Reception

November 19, 2010
Portland Regency Hotel • 20 Milk Street
The Fall Forum 2 – 4 pm
Client Reception 4 – 7 pm

The 14th annual Norman, Hanson & DeTroy, LLC, Fall Forum for our clients will be held in Portland on Friday, November 19, 2010, at the Portland Regency Hotel.

The Forum will be followed by our annual client reception at the hotel, and we cordially invite all interested clients to join us. Please mark your calendars, and look for your invitation and topic announcements in the mail.

We hope to see you there!

Recent Law Court Decisions

By David P. Very

DAVID P. VERY

Expenditure of Time And Effort Alone Not Recoverable

In the absence of physical harm or economic loss, does time and effort alone, spent in a reasonable effort to avoid or remediate reasonably foreseeable harm, constitute a cognizable injury for which damages may be recovered pursuant to negligence or implied contract? In the case of I*n re Hannaford Bros. Co. Customer Data Security Breach Litigation*, 2010 ME 93 (September 21, 2010), the Law Court answered in the negative.

Data thieves breached Hannaford's computer system and stole over four million debit and credit card numbers, expiration dates, security codes, PINs, and other information belonging to customers who had used Hannaford's electronic payment processing services. A number of Hannaford customers experienced fraudulent and unauthorized charges on their credit card accounts or bank accounts. These customers expended time and effort identifying the fraudulent charges and convincing their banks and credit card companies that the charges should be reversed. A group of 21 representative plaintiffs filed a complaint against Hannaford. Hannaford filed a motion to dismiss and at the time of the Court's ruling, all of the plaintiffs had been fully reimbursed by their banks or credit card companies for the fraudulent charges. The lower court found that the plaintiff's claims for various consequential losses, such as the loss of cumulated reward points and the time spent identifying and persuading financial institutions to reverse fraudulent charges, failed because the losses were "too remote, not reasonably foreseeable, and/or speculative." The lower court further concluded that there was "no way to value and recompense time and effort," noting that "those are the ordinary frustrations and inconveniences that everyone confronts in daily life with or without fraud or negligence."

The Law Court stated that the tort of negligence does not compensate individuals for the typical annoyances or inconveniences that are part of everyday life. Liability in negligence, therefore, ordinarily requires proof of personal injury or property damage and an individual's time, alone, is not legally protected from the negligence of others.

The Court stated that when personal injury or property damage is established, loss of time may be a cognizable harm, but only if it can be assigned a value reflecting a loss of earnings or earning opportunities resulting from personal injury or property damage. The Court stated quite clearly, however, that the law does not recognize the expenditure of time and effort alone as harm. The Court held that the same is true for contract damages in that contract damages are more restrictive than compensatory damages for a tort.

The Law Court therefore concluded that the time and effort expended by the plaintiffs, even if it represented reasonable efforts to avoid reasonably foreseeable harm, merely represented the ordinary frustrations and inconveniences that everyone confronts in daily life. As a result, the Court concluded that the expenditure of time and effort alone does not represent a cognizable injury recoverable in either negligence or implied contract.

What Constitutes An "Appurtenance" For Purposes Of The Maine Tort Claims Act

The Maine Tort Claims Act (MTCA) provides an exception to governmental immunity for negligent acts or omissions involving public buildings or the "appurtenances" to any public building. In *Searle v. Town of Bucksport*, 2010 ME 89 (August 31, 2010), a divided Law Court determined that a set of bleachers at a high school football field did not constitute an appurtenance thus entitling the Town to immunity.

John Searle was injured when he fell through an opening in the visitors' bleachers caused by a missing board while attending a football game at Bucksport High School. Prior to the injury, the school's maintenance staff noticed the missing board but took no action. The Town filed a motion for summary judgment, which was granted by the Superior Court, and the plaintiff appealed.

The four judge majority stated

that an appurtenance is an object or thing that belongs or is attached to a public building, and does not include personal property maintained outside the building. The Court then stated that the proper analysis was to determine whether the bleachers were "fixtures" or "personal property." The Court stated that a fixture is something so closely connected to land that it is regarded as an irremovable part of the real property with which it is associated. This would include a physical annexation of the object to the land, an adaption of the object to the use of the land, and an intent for the future of the structure on the property. The majority held that since the bleachers were not actually attached to the ground by physical fasteners, because these were generic bleachers which had no specific adaption to the football field, and because these particular bleachers had been moved on two prior occasions, the bleachers were not an essential part of the realty. Therefore, they did not qualify as "fixtures" and thus constituted "personal property." As a result, the bleachers could not be considered appurtenances and the Town was entitled to immunity.

The majority of the Court further stated that the Town was also entitled to immunity pursuant to the public outdoor recreation immunity statute. This provides entities with immunity from claims resulting from the use of buildings, structures, or equipment designed for use primarily by the public in connection with public outdoor recreation. The Court stated that this statute should be interpreted broadly to encompass a wide spectrum of activities to include spectators at outdoor sporting events.

The dissenting justices stated that it was improper for the majority to equate the term "fixture" with the term "appurtenance." The dissenters argued that if the Legislature intended municipalities to only be liable for fixtures, it would have said so in the statute. The dissent argued that the visiting bleachers were not in any way portable and had to be disassembled in order to be moved. As such, it certainly was not akin to objects which usually constitute personal property. Further, the Court argued that the ordinary definition of an appurtenance is an object that either "belongs" to a building, or is "attached" to a building. The Court noted that using the majority's definition of appurtenance, the home bleachers, which were attached to the realty and designed for the field, would constitute an appurtenance. The dissenters argued that it made no sense that an injury occurring in the home field bleachers would be compensable but an injury occurring in the visitors' bleachers would not, as both set of bleachers clearly belonged to the school.

Further, the dissent took issue with the majority's characterization that the mere watching of a high school football game constituted public outdoor recreation to provide the Town with immunity from claims. The dissent stated that paying to watch a high school football game from the bleachers does not fit the definition of outdoor recreation in the MTCA.

Landowner's Duty To Protect Patrons From Harm From Third Parties

In *Belyea v. Shiretown Motor Inn*, 2010 ME 75 (August 10, 2010), the plaintiff was assaulted in the parking lot owned and operated by the Shiretown Motor Inn. Just prior to his assault, he was a patron at The Lounge Down Under, which is a tenant of the Shiretown Motor Inn and is located on Shiretown's property. The Inn was granted summary judgment and the plaintiff appealed.

The Law Court stated that the lower court correctly recognized that a proprietor of an inn, hotel or motel is liable for an assault upon a guest or patron by a third person where he has reason to anticipate such assault, and fails to exercise reasonable care under the circumstances to prevent the assault or interfere with its execution. The Court noted that the innkeeper/guest relationship is a special one giving rise to an affirmative duty to protect. The Court cautioned that absent such a special relationship, there is no general duty to protect. In instances of nonfeasance rather than misfeasance, and absent a special relationship, the law imposes no duty to act affirmatively to protect someone from danger unless the dangerous situation was created by the defendant.

The Law Court recognized that while the Inn had a general duty to provide reasonably safe premises owed to all persons lawfully on the land, it did not have a heightened duty to proactively prevent an assault on a guest that is reasonably foreseeable, as the plaintiff was a patron of the Inn's tenant, rather than a guest at the Inn. As a result, since there was no special relationship between the plaintiff and the Inn, the Law Court held that Shiretown did not owe the plaintiff a duty to have special security measures in place in its parking lot. The Court further stated that the parking lot itself was not unsafe in any particular regard. On the night of the assault, the plaintiff was arguable unsafe, but the source of the danger was the presence of the individuals who intended to do harm to him, not any inherent condition or circumstance of the parking lot.

This case represents a quirk in Maine law regarding special relationships. It is clear that if the plaintiff, in addition to being a patron of the

lounge was also a guest at the Inn, that the Inn may have been held liable to the plaintiff.

Setting Aside Verdicts And Jury Bias

In two separate decisions, the Law Court made it clear that it has great reluctance to disturb the verdict of a jury absent some clear evidence of jury bias, prejudice or misconduct.

In *Reardon v. Larkin*, 2010 ME 86 (August 26, 2010), following an automobile collision, the parties stipulated to liability and presented their dispute over damages to a jury. The jury awarded no damages to the plaintiff and the plaintiff argued that he should have been granted an additur or new trial because the jury had to have acted with bias or prejudice when it awarded him no damages. The plaintiff, despite an initial report of no injury, reported to an emergency room with neck discomfort and received further chiropractic treatment for lower back pain and physical therapy for low back and hip pain incurring medical bills for those treatments. Plaintiff argued that this evidence was uncontroverted. On the other hand, the defendant presented evidence that some of the plaintiff's conditions could have been congenital, caused by other events, that the plaintiff had participated in a number of physical activities, and that he had made statements to friends that he had the defendant over a barrel.

On appeal, the Law Court stated that the jury could have, and apparently was, unpersuaded by the plaintiff's evidence even to the extent that it was uncontroverted. The Court stated that a jury is not required to credit the plaintiff's evidence regarding the source of his pain and that the jury could have found the plaintiff not to be credible based on either his demeanor at trial or the evidence presented by the defendant. The Court noted that while the plaintiff asserted that jury bias generated the verdict in the case, the plaintiff had not demonstrated "serious allegations of juror bias" in the context of juror dishonesty, or "verifiable external manifestations of impropriety." The Court stated that the verdict was not so "manifestly and clearly wrong" that bias or prejudice must be inferred and thus affirmed the judgment in favor of the defendant. This case makes it clear that even in cases where there is clear uncontroverted testimony of injury, the Court will not disturb a jury's verdict if there is evidence affecting the plaintiff's credibility.

In *Ma v. Bryan*, 2010 ME 55 (June 24, 2010), the jury found for the defendant in a case involving a car accident between the parties. The plaintiff argued that she had presented evidence of the defendant's negligence which went uncontroverted by the defendant. On appeal, the Law Court stated that the jury was not required to believe "any" of Ma's testimony, even if that testimony was not disputed by Bryant. The Court made it very clear that a jury is not required to accept the plaintiff's version of the accident, even if a differing version of the accident is not presented by the defendant. The Court further noted that it was significant that it had "never" vacated a jury verdict in favor of the defendant on the ground that the jury was compelled to find in favor of the plaintiff in a motor vehicle negligence case. The Court noted that it would accord significant deference to jury verdicts because the jury is best situated to evaluate the credibility and demeanor of witnesses. The Court stated that it is still up to the jury, not the Court, to determine how credible the witnesses are. The Court stated that there was no indication that the jury reached its verdict on any improper basis and in the absence of any "verifiable external manifestations" of such impropriety, it must accept the verdict as is. The Court further stated that the jury's verdict was not so manifestly or clearly wrong that it was apparent that the conclusion was the result of prejudice, bias, passion or a mistake of fact. The Court therefore affirmed the judgment in favor of the defendant.

As stated by the Law Court itself, absent some verifiable jury misconduct, it will almost never overturn a defense verdict in an automobile accident case even if it is clear to all that the verdict should have gone the other way. □

NHD attorneys listed in "Best Lawyers"

Norman, Hanson & DeTroy is proud to announce that fourteen of its attorneys have been named to the 2010 Edition of Best Lawyers®, the oldest and most respected peer-review publication in the legal profession. First published in 1983, Best Lawyers is based on an exhausted annual peer-review survey for the new U.S. edition, more than 24,126 leading attorneys cast more than 2.8 million votes on the legal abilities of other lawyers in the same and related specialties. Because of the rigorous and transparent methodology used by Best Lawyers, and because attorney are not required or allowed to pay a fee to be listed, inclusion in Best Lawyers is considered to be a singular honor. Corporate Counsel Magazine has called Best Lawyers "the most respected referral list of attorneys in practice".

We congratulate the following attorneys for having achieved this designation. □

Robert W. Bower, Jr.
Workers' Compensation Law

Jonathan W . Brogan
Personal Injury Litigation
Medical Malpractice Law

Peter J. DeTroy
Alternative Dispute Resolution
Commercial Litigation
Criminal Defense: Non-White-Collar
Criminal Defense: White-Collar
Personal Injury Litigation

Paul F. Driscoll
Real Estate Law

Mark E. Dunlap
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Professional Malpractice Law

Mark G. Lavoie
Medical Malpractice Law
Personal Injury Litigation

Thomas S. Marjerison
Personal Injury Litigation

Stephen W. Moriarty
Workers' Compensation Law

James D. Poliquin
Appellate Law
Commercial Litigation
Insurance Law
Personal Injury Litigation

Roderick R. Rovzar
Corporate Law
Real Estate Law

John R. Veilleux
Insurance Law

The Impact of Tibbetts v. Dairyland Insurance Co. on Offset And Allocation Issues

By James D. Poliquin

The recent Law Court decision in *Tibbetts v. Dairyland Insurance*, 2010 ME 61, impacts a number of issues with respect to offsets and allocation between underinsured motorist carriers. The decision was difficult to follow in several respects and has raised a number of additional questions with respect to its scope and application.

Proper analysis of these UIM coverage issues requires that three distinct questions be answered. The first question is what does Maine's UIM statute require. Phrased another way, is Maine a so-called "gap state," a "full compensation state," or some other hybrid. The second question is whether there is any statutory prohibition on insurers by contract providing a greater offset benefit to an insured than what the statute minimally may require. A contractual offset against policy limits may produce a drastically different result than a contractual offset against the insured's total damages. Once it is determined what offsets each of multiple UIM insurers are entitled to either by statute or contract, the third question is who receives the offset for payments made by or on behalf of the underinsured tortfeasor if more than one insurer lays claim to the right of offset. In addition, the answers to these questions need to be applied to two basic fact patterns that may exist. Some cases involve total UIM coverage that exceeds the insured claimant's total damages before any offset is taken against those damages. In other cases, the claimant's total damages exceed the combined total of all UIM coverages available.

Many readers consider the opinion in *Tibbetts* confusing, which in my view is attributable to three reasons:

(1) The Court does not clearly set forth what occurred below and contains no reference to the actual insurance policy language in the Dairyland and/or MMG policies, or why the Superior Court ruled against Dairyland on the offset issue in the first place;

(2) Instead of just stating outright that *Cobb v. Allstate* was wrongly decided, the Court suggests that the precise issue in *Tibbetts* was never really before the Court in *Cobb*. However, the Court then goes on to state that "to the extent our prior decisions adopt" what the Court labels as the "liability offset approach," those decisions are abandoned; and

(3) After reiterating its previous holdings that Maine law mandates the "gap approach," the Court makes the somewhat curious observation that "because it is driven by the statute, we apply this approach regardless of the offset language employed by the policies." Could this possibly mean that statutorily mandated minimum coverage actually prohibits insurers from contractually providing a greater benefit to its insured, *i.e.*, potential full recovery for injuries sustained?

UM statutes vary considerably around the country. It has been clear for some time that Maine is a so-called "gap" state, which standing alone says little because there are many kinds of gaps. There may be a gap between the amount of liability coverage and total UIM coverage; a gap between the claimant's total damages and the total

JAMES D. POLIQUIN

UIM coverage; or a gap between the claimant's total damages and the sum of the liability coverage and UIM coverage. Maine statute requires UIM coverage to fill the gap between the amount of liability coverage available to the uninsured or underinsured tortfeasor and the total available UIM coverage, such that the claimant is placed in the same position he or she would have been had the tortfeasor had total liability coverage equal to the total UIM coverage. This "gap" approach frequently leaves the injured claimant less than fully compensated than would be the case if the liability coverage offset was against total damages rather than the UIM policy limits.

In the recent *Tibbetts* case, the total UIM coverages available through multiple policies was substantially higher than the total damages sustained by the claimant as found by the jury. The claimant had received a settlement from the tortfeasor's liability insurer, which the Superior Court applied against the verdict amount. Dairyland, the admittedly primary UIM insurer, then sought to take that offset against its policy limits, with the effect of shifting more responsibility to the excess insurers. MMG, one of the excess UIM insurers, argued that

the language of the Dairyland policy specifically provided that the offset would be against total damages only, not the policy limit, and therefore *Cobb* had no application. MMG argued that the ruling in *Cobb* that the primary insurer was entitled to the offset over an excess UIM insurer applied only if the primary insurer contractually was entitled to the offset against limits in the first place. The Superior Court in *Tibbetts* ruled that the Dairyland language entitled it only to an offset against total damages, not its policy limits, and therefore *Cobb* had no application. Therefore, Dairyland was required to satisfy the entire difference between the claimant's total damages and the amount of liability coverage already received, as that amount was less than the Dairyland limits.

Dairyland appealed the Superior Court determination that its policy language did not allow an offset against policy limits, and that *Cobb* therefore compelled that it be allowed the offset as the primary UIM insurer. MMG contended that the Superior Court correctly interpreted the Dairyland policy, but that in any event, *Cobb* was wrongly decided because a primary insurer should be the first to pay, not the first to escape payment.

Interestingly, the Law Court ignored the Dairyland policy language and whether the lower court correctly interpreted that language, jumping instead to MMG's fall-back argument that even if the Dairyland policy entitled it to an offset, the primary insurer should pay first prior to exposure of the excess carrier. At least in cases where the total UIM coverage exceeds the total damages, the proper methodology is to reduce the total damages by the liability coverage received and then have the UIM carriers pay that remaining exposure in accordance with the traditional application of the "other insurance" clauses, *i.e.*, primary pays first. In those cases, an offset against damages rather than limits is necessary as a threshold matter to avoid double recovery. In effect, the excess carrier gets the benefit of the offset by reducing the total damages that have implicated the excess coverages.

The next question is what happens if the total damages far exceed the total UIM coverages available. Assume $100,000 in liability coverage, two separate UIM policies with $300,000 limits each and a million dollars in damages. Is the $100,000 liability coverage payment offset against total damages only, thereby leaving the UIM insurers responsible for a total of $600,000, $300 000 each, or do the UIM insurers take a $100,000 offset against the total $600,000 UIM limits, and if so, who gets the offset?

No dispute exists in a "gap" state such as Maine that UIM insurers are entitled to take an offset against their policy limits even if that leaves the insured claimant less than fully compensated. Section 2902(4) reads as follows:

> 4. In the event of payment to any person under uninsured vehicle coverage, and subject to the terms of such coverage, to the extent of such payment the insurer shall be entitled to the proceeds of any settlement or recovery from any person legally responsible for the bodily injury as to which such payment was made, and to amounts recoverable from the assets of the insolvent insurer of the other motor vehicle.

The unresolved issue is whether this offset can be taken by an insurer even if the insurance contract does not give the insurer that right, but instead expressly provides only a right to take an offset against total damages. The decision in *Tibbetts* can be read to suggest that an insurer may be entitled to take an offset against its policy limits even if the insurer unambiguously contracted not to do so with its insured. For example, the Court, citing Section 2904(4), stated that "the statute in fact mandates this offset" and that this approach should apply "regardless of the offset language employed by the policies."

In some situations, an offset against total damages, as occurred in *Tibbetts*, is in fact necessary and perhaps compelled by statute in order to avoid double recovery. *Tibbetts*, unlike *Jipson v. Liberty Mutual*, 2008 ME 57, 942 A.2d 1213, did not even involve an insurer seeking to offset against policy limits when that left the claimant undercompensated. *Tibbetts* should not be read as establishing a requirement for an offset in that situation regardless of insurance policy language. In fact, the Court in *Jipson* devoted the second half of its opinion analyzing whether the insurance policy language of the Liberty Mutual policy was or was not ambiguous on entitlement to the offset against policy limits. If in fact insurance policy language on offset means nothing, why did the Court in *Jipson* engage in an irrelevant analysis of that policy language?

There are hundreds of cases around the country that conclude in the insurance context that insurers by contract can provide greater benefits to an insured than those minimally required by statute. Only a few exceptions exist to this rule, such as a requirement of insurable interest necessary to eliminate moral hazard. In fact, Section 2902(6) regarding multiple claimant situations expressly states that insurers can provide greater benefits than statutorily required.

The Law Court currently has pending before it a case that may clarify what the Court meant by its comment in *Tibbetts* that the offset language in the insurance policies is irrelevant. I suspect that the Court will decide that an insurer is free to provide an insured with the greater benefit of an offset against total damages rather than an offset against policy limits in

those cases in which total damages exceed all available UIM coverage. That ruling would not impact the separate threshold question of whether a tortfeasor is underinsured in the first place. If that prediction is correct, then whether the UIM insurers in the above hypothetical are responsible for a total of $600,000 rather than $500,000 would depend upon whether at least one of those insurance policies has offset language that allows an offset against policy limits. In that case, the total UIM exposure would be $500,000 regardless of which insurer receives the offset. If both insurers have contractual language that entitles them to an offset against the policy limit, in my view *Tibbetts* overruled *Cobb* even in this situation, and therefore the primary carrier would pay $300,000 and the excess carrier $200,000. In fact, the hypothetical used in *Tibbetts* to demonstrate the absurdity of the *Cobb* approach is analogous to this very hypothetical. *See Tibbetts*, 2010 ME 61, ¶ 20.

In summary of the above, *Tibbetts* should be interpreted as reversing *Cobb v. Allstate* regarding the allocation of offset rights. Once the dust has settled and the issues are addressed directly, *Tibbetts* likely will not stand for the proposition that contract language regarding offset is irrelevant to the offset issue, and insurers will be entitled to provide greater benefits to an insured than would be provided by taking an offset against policy limits rather than total damages. A decision prohibiting insurers from providing more lenient offsets than they could claim by statute would be very unusual in this area of the law. □

KUDOS

ROD ROVZAR has qualified as a *Registered Maine Guide* to be both a commercial boat operator and a recreational, fishing, and hunting guide.

On July 31, 2010, **MATTHEW MEHALIC** and **KIMBERLY MEDSKER-MEHALIC** were married at Thomas and Marilyn Mehalic's home in Deer Isle, Maine. Kimberly is originally from Lolo, Montana and is the daughter of Charles Medsker and Stephanie Wortley. Matthew and Kimberly celebrated their union by honeymooning in Egypt and Jordan.

JEN RUSH has been elected to the Board of Directors for the Catherine Morrill Day Nursery, which is the oldest childcare center in Maine, having recently celebrated its 90th anniversary.

Congratulations to **LINDSEY MORRILL SANDS** and **MICHAEL SANDS.** As luck would have it, the two were chosen as winners in a contest sponsored by the Bermuda Department of Tourism and TheKnot.com and were married on October 10, 2010 at The Reefs Resort in South Hampton, Bermuda.

TED KIRCHNER has become a member of the Board of the Directors for NAMI Maine. NAMI is the National Alliance on Mental Illness. NAMI Maine is a grassroots, nonprofit organization dedicated to improving the quality of life of everyone affected by mental illness. Services are provided both directly and through a state side structure of local affiliates and support groups.

MARK LAVOIE spoke in early October at the National Congress of the American College of Surgeons in Washington, D.C. on avoiding malpractice litigation. Mark has also been appointed the first mentor for the newly-created Charles Harvey Fellowship Program to introduce University of Maine School of Law students to real life trial experiences.

KELLY HOFFMAN married **ELIZABETH HARRIS HOFFMAN** in June in Rockport, Massachusetts, followed by a celebration at the Samoset Resort in Rockport, Maine.

DAVID VERY has been appointed as the 2010-2011 Maine State Chair of the Council on Litigation Management. The Council is a nonpartisan alliance of insurance companies, corporations, Corporate Counsel, Litigation and Risk Managers, claims professionals, and attorneys. With over 7,000 members, the Council's goals are to create common interests through education and collaboration and to promote the highest standards of litigation management. David now has a leadership position within the Council, and for further information concerning the objectives of the Council please contact David directly.

STEVE MORIARTY placed first in his age division at the 33rd annual running of the Bar Harbor Half Marathon in September. **TED KIRCHNER** placed first at the St. Peter's 4-miler in Portland, and also took part in the 13th running of the Beach to Beacon 10k in Cape Elizabeth. Ted has competed every year since the race was founded back in 1997. □

New Associate: Darya I. Haag

We are pleased to announce that Darya I. Haag joined the firm in September, 2010, as an associate attorney. Darya is originally from Belarus, Europe and was a top student in her class at the Minsk State Linguistic University. In college, Darya studied five languages which allowed her to assist Canadian and Dutch charity foundations with delivering humanitarian help to the areas affected by the Chernobyl disaster. She served as an on-site interpreter utilizing her Russian, English, Dutch, German, and Belarusian language skills. Darya also wrote award-winning essays and published her poetry.

Following graduation in 2005, Darya moved to the United States where she worked in the fashion advertisement industry in New York City prior to beginning law school in 2007. Darya received her law degree from the University Of Maine School Of Law, where she graduated with honors in 2010. While in law school, she served as an intern with the Honorable Kermit V. Lipez of the First Circuit Court of Appeals. She was also a student-attorney at the Intellectual Property Clinic where she assisted Maine individuals and companies with their trademark, copyright and patent inquires. In addition, she was a representative for the Inns of Court. One of the legal papers Darya wrote during law school won her first prize in the Daniel T. Murphy legal writing contest held by the Richmond Journal of Global Law and Business, where her article was published. In her article, Darya explored international protection and enforcement mechanisms available to the American intellectual property abroad, specifically in China.

DARYA I. HAAG

Darya lives with her husband, a Maine native, in Kennebunk. Her leisure interests include swimming in the ocean, hiking and snowboarding with her husband, gardening, learning about beekeeping, as well as creating visual and literary art. □

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