NORMAN, HANSON & DETROY, LLC

newsletter

Current developments in Maine law

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Superdeluxe Bully: Lessons In Intellectual Property

By Darya I. Haag and Lance E. Walker

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Last year, in March of 2012, a Bangor sandwich shop called "Coffee Pot Café" waged what the Bangor Daily News termed "a legal battle" against another sandwich maker, "The Legacy Sandwich," over the latter's use of the terms "deluxe" and "superdeluxe" to describe its sandwiches. Lance Walker and Darya Haag represented The Legacy Sandwich, and while the lawsuit against our client was ultimately dismissed with prejudice, it generated extensive media coverage and heated public reaction through social media and online newspaper commentaries. This lawsuit also sent an important message to businesses, their management teams and their owners: choosing, using and protecting a name is an art that must be done with great care and foresight. Understanding your intellectual property rights and respecting the same rights of others is a must for any business that strives for success.

1. Case Overview

Soon after The Legacy Sandwich (the "Legacy") opened its doors, it received a cease & desist letter from Coffee Pot Café, another recently opened sandwich shop in Bangor, demanding that Legacy removed the words "deluxe" and "superdeluxe" from its menus. Legacy refused to comply and Coffee Pot Café sued, asserting a variety of trademark infringement claims, both, under the Lanham Act and the Maine Deceptive Trade Practices Act. Almost immediately after the lawsuit was filed, it became a top news story. The media attention it received was due in part to the name "Coffee Pot" which until recently stood for a landmark destination in Bangor, Maine—a famous sandwich shop known for its "Coffee Pot" sandwiches and their "Deluxe" and "Superdeluxe" varieties. Coffee Pot had been owned and operated by Mr. Skip Wrist for almost 70 years until it closed its doors on December 31, 2009. Instead of selling the business and its goodwill to another owner, Mr. Rist simply closed it because he did not want to see the business go downhill. He sold and gave away the tangible property and donated the sign to a local museum. What did remain, however, was the name "Coffee Pot" which in the minds of consumers still rang "a popular sandwich made by Skip Rist," and in the minds of entrepreneurs—a "business opportunity."

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Shortly after Mr. Rist's Coffee Pot closed, new sandwich stores purporting to sell the legendary Coffee Pot sandwiches emerged. Plaintiff Coffee Pot Café was one of such newcomers. Without ever receiving any endorsement or permission from the original owner, not only did it adopt the name of the "original" Coffee Pot as its own and sold sandwiches using the names "Coffee Pot," "Deluxe" and "Superdeluxe," it also registered the terms "Coffee Pot Café," "Deluxe" and "Superdeluxe" as trademarks with the State of Maine, and wrote on its menus, *"THEY'RE BACK!!! Coffee Pot Sandwiches made the same way, by the same people."* Coffee Pot Café then sued the Legacy for refusing to remove the words "deluxe" and "superdeluxe" from its sandwich names.

Under the basic principles of the trademark law, plaintiff's suit was destined to fail. It is well-settled that no one can claim an exclusive right to use a descriptive term at least until the term has developed what is called a "secondary meaning," which means that in the minds of consumers the otherwise descriptive term is now associated with the source of the product and not with a characteristic or quality it is otherwise used to describe. Even a Google search can prove that terms "deluxe" and "superdeluxe" are popular laudatory terms that are used by businesses across the country to describe the quality and size of products and services, and are therefore not entitled to trademark protection. The four weeks during which the Coffee Pot Café used "deluxe" and "superdeluxe" until the Legacy started using these terms is simply not enough for a descriptive mark to become distinctive. Even much longer periods have been held by the courts to be too short.

The Coffee Pot Café's argument that these terms acquired distinctiveness through decades of use by the original Coffee Pot sandwich shop was also without merit. Distinctiveness may not be derived from a former owner's use of the mark--it must be generated anew by the new owner claiming the benefit of secondary meaning. Here, Coffee Pot Café was required to show that the public associated the terms "deluxe" and "superdeluxe" with it as the new trademark owner, and not with the original Coffee Pot sandwich shop.

Finally, even had the terms "deluxe" and "superdeluxe" acquired distinctiveness, the Legacy, just like anyone else, would still be entitled to use these laudatory terms to describe its products under the doctrine of "fair use." The fair use defense bars trademark infringement claims even if the contested descriptive mark has acquired distinctiveness. As explained by the Second Circuit Court of Appeals, "when a plaintiff has chosen a mark with some descriptive qualities, he cannot altogether exclude some kinds of competing uses even when the mark is properly on the register." *Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 12 (2d Cir. 1976)*

2. Lessons Learned

This trademark infringement lawsuit involving two small family-run sandwich shops and the publicity it has generated have several important messages to all business owners, regardless of their size or nature of their products. First, the digital transparency and online social presence have made it mandatory for any business that wants to grow and succeed to take intellectual property seriously. This includes both, your intellectual property and that of your competitor. Any name or logo you use to market or refer to your business or your products and services may become a trademark if it meets certain criteria, regardless of whether or not you register it on the state or federal level. If it does, you can enforce it by seeking to estop others from using a confusingly similar name or logo; and vice versa—others can sue you if they believe that your trademark infringes on theirs. Registering your mark with the United States Patent and Trademark Office provides you with a number of important presumptions and strategic advantages in protecting your trademark, but registration is not necessary for the trademark rights to exist. On the other hand, registering a mark on the state level does not mean that the mark is legally enforceable. Unlike the federal agency, the state trademark registration office will register most terms that have not been previously registered without taking into account other factors that might make the mark unenforceable.

Understanding how the trademark and copyright laws work *before* you come up with a name or logo for your new product and invest money into promoting it is crucial. Few things can be more frustrating than receiving a "cease and desist" letter demanding that you stop using the name which you have just finished putting on your new sign, business cards, letterheads and for which you have already registered the domain name, or maybe even paid large amounts of money for media promotions. Consulting a professional and doing proper research in advance will reduce the risk that your company's new name or logo infringes on another person's trademark.

If you do receive a cease and desist letter, knowing your rights is equally important. Not all trademark infringement allegations have merit. Just like Coffee Pot Café, some trademark owners assert trademark infringement claims without any sound basis either

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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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because they are not familiar with the core principles of the trademark law; or because by creating enough pressure through a trademark infringement lawsuit they hope to cause the competitor to abandon the mark—a practice known as "trademark bullying."

Further, remember that media fondly covers intellectual property disputes. If you sue or get sued because of a trademark, your customers and their friends on Facebook will soon know about it. Anticipated public response is an important consideration in deciding whether or not to press charges against a competitor; and also in structuring the defense. Either party can greatly benefit from the free press coverage, depending on whose story is more compelling to a consumer. The converse is also true—a party who looks like a trademark bully or a free-rider to the consumers can expect negative publicity and lost sales.

Finally, a strong trademark is an asset that must be taken into account throughout the life cycle of every successful company, including when a decision must be made on whether to sell the business and associated goodwill or to simply shut it down. The owner of the original Coffee Pot sandwich shop did not sell his business in part because of the great sentimental significance it had to him and his family. Yet as soon as the old Coffee Pot closed its doors, multiple new businesses emerged, each trying to profit off the name Coffee Pot and free-ride on its reputation. Had the owner sold—rather than simply closed—the business, he would have had a number of mechanisms through a properly drafted purchase and sale agreement to maintain control over the quality of the products now made by somebody else under his name and otherwise ensure that the goodwill generated by his family for years does not get easily wasted.

Please contact Darya Haag or Lance Walker if you have any questions about protecting your brand or any other intellectual property rights. □

Bad Faith In Uninsured Motorist Cases

By Jonathan W. Brogan

The issue of tortious bad faith in first party and uninsured motorist cases was settled with *Marquis v. Farm Family Insurance*, 628 A.2d 644 (Me. 1993). In that case, our Law Court decided that although there exists a contractual basis for a "duty of good faith and fair dealing" in the insurance contract, no such duty exists in tort. The legislature has passed unfair claim practices statutes (UCSPA) (24-A, 2436 and 2436-A), which proscribes the statutory limits of alleged bad claim practices. But, the plaintiff's bar has endeavored, since *Marquis*, to turn those statutes into a quasi-tort system of potential recovery.

Recovery, under the UCSPA, is limited to interest at 1 ½ percent per month and attorney's fees. Plaintiff's attorneys, however, see UCSPA claims as an opportunity to further leverage the insurer into settling difficult claims at inflated prices. The provision most cited by plaintiff's attorneys using the UCSPA is § 2436-A(1)(E). It states that an insurer can only be held liable if "without just cause" it fails to promptly settle a claim where "liability has become reasonably clear". "Without just cause" is defined as acting "without a reasonable basis contest[ing] liability, the amount of any damages or the extent of any injuries claimed."

Though the language of the statute is clear, and its intent obvious, plaintiff's attorneys have tried to turn the statute on its head. They have done that by arguing that summary judgment can never be had in a case involving the statute because the statute itself requires the insurer to demonstrate its reasonable denial. The reasonableness of an insurer's denial and the basis supporting that denial, argue plaintiffs, is inherently fact based and, under the usual standard applicable to summary judgment motions, the determination of that question is exclusively within the province of a jury.

The argument of the plaintiff's bar is simple. Each and every time they raise a dispute as to whether an insurer has acted "without just cause", the factual basis for the just cause needs to be explored by a jury and the legitimate disputes between the plaintiff and the insurer over a value of the claim are enough to ensure a trial.

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This would all seem quite incredible if some courts had not already ruled that the plaintiff's contentions are valid and that a mere dispute over the value of a claim is enough to raise a factual issue of "reasonableness" thereby allowing the plaintiff to get this claim to a jury. Once the threat of a jury trial exists for these extra-contractual claims many insurers pay a premium on the underlying claim just to avoid a possible verdict and appeal. Therefore, insurers must do all they can to demonstrate that they followed the statute and acted with "just cause" in denying a claim or questioning its value.

Clearly, if there is a legitimate liability defense, all claims of statutory bad faith end. A much more difficult issue is when a plaintiff has an uninsured or underinsured motorist claim and the basis for his damages are clearly flawed. At that point, the only claim to negotiate is damages, and any disagreement must be well thought out and completely supported.

Insurance professionals deal with claims every day. They deal with those claims based on their own experience and the experience of their peers, their training, and their understanding of the general value of a claim before a jury in Maine. Plaintiff's attorneys want to put those insurance professionals on trial. They want to point out that their training is not in either medicine or law but is based on their alleged bias towards protecting the insurer. Basically, they hope to put these claims before a jury so that they can both inflate the value of the underlying claim and take advantage of rich interest and attorney's fees provisions.

How can an insurance professional avoid this unlimited liability? It is important, in any UIM case, to document the file fully and completely as soon as that claim comes in. Expect each UIM case to have a bad faith component. Expect that the plaintiff's attorney will try to pursue at least a statutory bad faith component under 2436-A.

To avoid that possibility, acquire all of the medical records of the plaintiff, including preexisting medical records. That would include all of the plaintiff's alleged expert medical records. Ask the plaintiff's attorney to provide you with all the causation opinions of their experts. Do all of this in writing and follow up quickly if that information is not provided. Once those medical records have been provided, and if questions are raised by those medical records, ask to speak to the insured about those questions. Ask to speak to the insured in a recorded statement. If the plaintiff refuses to provide that recorded statement, ensure that the plaintiff's attorney sends you a letter stating that his client has refused to submit to a recorded statement. Even if the insured refuses to submit to a recorded statement, take a statement from the insured about any questions that exist regarding the insured's claim. Most insurance contracts provide that, in first party situations, a statement under oath may be taken. If the insurance professional has questions about the nature and cause of the plaintiff's damages, an examination under oath can be helpful.

Plaintiff's attorneys many times will present causation opinions from their expert doctors. Once they file suit, and no expert was retained by the insurer prior to their filing suit, they will point to this as further evidence that their client's claim was denied "without just cause". Although the claim is without basis, courts may be swayed. Therefore, in difficult cases, it may be necessary to have a records review or other review done of the plaintiff's medical claims prior to suit.

All of this adds more work to any file involving a UIM claim. However, all of that work is important because at some point an adjuster who investigated the claim may be giving a deposition to a plaintiff's attorney about the "reasonableness" of her decision in valuing a claim.

Once the insurer has reached what it believes to be an undisputed value for the claim, that should be communicated to the plaintiff's attorney in writing. Because undisputed claims must be paid, that money should be tendered to the plaintiff's attorney immediately. All of this needs to be documented.

Many states, with statutes similar to Maine, have ruled that summary judgment on a UCSPA claim is proper so long as there exists a "genuine issue" as to the insurer's liability, either for the accident or the amount of damages. Courts have recognized that the settlement of personal injury claims are always the subject of negotiation and insurance companies and their adjusters are entitled to seek the best bargain they can make subject to the constraints of the UCSPA. The proper test is objective, not factually subjective. Courts should not be required to weigh the conflicting evidence that was before the insurer, they should decide whether evidence existed to justify the actions of the insurer. If it is undisputed that evidence existed creating a "genuine dispute" as to the value of an insured's damages, then, as a matter of law, there should be no basis for an Unfair Claims Practices Act or bad faith claim.

Insurers can continue to expect plaintiffs and their attorneys to try to use the UCSPA as a weapon to effectuate better settlements than they otherwise would be entitled. Through the use of careful investigation, complete documentation, and prompt written offers to the plaintiffs, the possibility of a successful UCSPA claim can be limited and the probability of summary judgment, prior to trial, enhanced. □

Workers' Compensation – Law Court Decisions

By Stephen W. Moriarty

Six-year statute of limitations.

In its final workers' compensation decision of 2012, the Law Court addressed an issue of first impression in Maine: whether the six-year limitations set forth in §306(2) begins to run only when an employer has filed a required First Report of Injury with the Board. The factual background to the appeal is clear and straightforward.

In *Graves v. Brockway-Smith Company*, 2012 ME 128, 55 A.3d 456 the employee sustained a gradual overuse injury to his left shoulder in January 2003 and reported his injury in a timely fashion. However, because he did not lose any time from work, the employer was not required to file a First Report pursuant to §303, and did not do so. The employer paid all medical expenses associated with the injury, and the last such expense was paid on June 27, 2003. The employee ultimately resumed medical treatment in 2008 and underwent left shoulder replacement surgery the following year.

A Petition for Award for the 2003 injury was filed on March 15, 2010, more than six years following the last payment of any type made on account of the injury. The employer then filed a First Report and asserted that the claim was time-barred pursuant to §306(2). The presiding hearing officer relied upon the Court's decision in *Wilson v. Bath Iron Works*, 2008 ME 47, 942 A.2d 1237 and held that the six-year statute of limitations did not begin to run until the First Report of Injury was ultimately filed. Payment of partial benefits at a 100% rate were ordered, and the hearing officer submitted his decision to the full Workers' Compensation Board on the issue of whether *Wilson*, which was limited to the two-year statute of limitations set forth in §306(1), applies in the same fashion in the six-year context. The Board declined to undertake review, and the Law Court granted the employer's Petition for Appellate Review.

In a 4-3 decision, the Court upheld the ruling of the hearing officer and relied upon the language in §306(1) which states in part that "a petition brought under this Act is barred unless filed within 2 years after the date of injury or the date the employee's employer files a First Report of Injury as required in §303, <u>whichever is later</u>" (emphasis added). The Court recognized as it had in *Wilson* that the filing of a First Report triggers the Board to provide information to the injured worker regarding rights under the Act. Although *Graves* involved the six-year statute of limitations and although §306(2) does not contain the "whichever is later" found in §306(1), the majority found that the lack of a duty to file a First Report within the six year period following the injury was not controlling and that the "policy reasons" of the *Wilson* decision compelled a finding that the Petition for Award had been filed in a timely manner.

The three dissenting justices found that *Wilson* did not apply to §306(2) and that the majority opinion was inconsistent with the purpose of the statute of limitations to provide a terminal date for litigation. The dissenters observed that the employee had adequate time to determine his rights under the Act, particularly as medical benefits had been paid on his behalf.

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In the immediate future there will be no attempts to overturn the *Graves* decision in the Legislature. For the moment, therefore, neither the two year nor the six year statute of limitations will begin to run until a first report of injury is filed as required by §303. The filing of a first report for a "medical only" or "report only" injury would presumably not start the running of the statute, as the Board would not be mandated to provide injured workers with the necessary information concerning their rights and entitlements under the Act. Accordingly, only the filing of a <u>required</u> first report carries legal weight, and until such filing has been made the statute of limitations will not begin to run. □

NHD Attorneys Listed in "Best Lawyers"

Norman, Hanson & DeTroy is proud to announce that eighteen of its attorneys have been named to the spring 2013 edition of *The Best Lawyers in America*, the oldest and most respected peer review publication in the legal provision. First published in 1983, *Best Lawyers* is based on an exhaustive annual peer-review survey comprising nearly 4 million confidential evaluations by some of the top attorneys in the country. The *Best Lawyers* list appears regularly in *Corporate Counsel Magazine*, and is published with collaboration with *U. S. News & World Report*. In this edition, for the first time, Paul Driscoll , Mark Lavoie and Jim Poliquin have been designated as the "Lawyer of the Year" in their areas of practice.

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Workers' Compensation Law – Employer

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Medical Malpractice Law – Defendants

Personal Injury Litigation – Defendants

Peter J. DeTroy

Arbitration
Bet-the-Company Litigation
Commercial Litigation
Criminal Defense: Non-White Colar

Criminal Defense: White-Collar Mediation

Personal Injury Litigation – Defendants

Personal Injury Litigation – Plaintiffs

Paul F. Driscoll

LAWYER OF THE YEAR

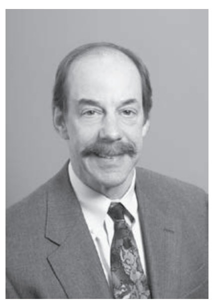
Litigation – Real Estate

Real Estate Law

Mark E. Dunlap

Personal Injury Litigation – Defendants

Commercial Litigation – Insurance Law



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Personal Injury Litigation – Defendants

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Insurance Law

Estate And Transfer Tax Relief Provided By Newly Effective Maine And Federal Estate Tax Legislation

By Kathryn M. Longley-Leahy

Maine residents, non-Maine residents owning property in Maine and United States' taxpayers facing Maine and/or federal gift and estate tax exposure under pre-2013 estate tax laws are all beneficiaries of the newly effective Maine and/or federal estate tax legislation that became law on January 1, 2013. Maine's newly effective estate tax legislation is the product of legislation passed by the Maine Legislature in 2011. The new federal estate tax legislation, passed by Congress during the early morning hours of January 1, 2013 as part of the American Tax Relief Act of 2012's sweeping reduction in income and transfer taxes (i.e. estate, gift and generation-skipping transfer taxes) ended over a decade of estate planning uncertainly due to constant changes in estate tax exemptions, rates and applicability within federal estate tax laws. This article highlights the key provisions of the new Maine and Federal estate tax legislation, respectively, and briefly addresses the likely impact of the new legislation on existing estate plans.

Maine's New Estate Tax Laws

Beginning with deaths occurring on or after January 1, 2013, the Maine estate tax exemption (i.e. that 'exempt' amount under which no Maine estate tax will be imposed) jumped to $2,000,000, double Maine's pre-2013 $1,000,000 estate tax exemption. Additionally, the new Maine estate tax rates for estates that exceed the applicable exemption have become far less onerous. Beginning with 2013 decedents, Maine will apply a three-tiered Maine estate tax rate structure (8%, 10% and 12%) only on the amount of taxable estates above the $2 million Maine exclusion amount.

Retained as part of the Maine's 2013 estate tax laws is both the estate tax deduction allowed for the value of what is referred to as "Maine QTIP" (Qualified Terminal Interest Property) that is set aside in trust for the sole benefit of the surviving spouse upon the death of the first deceased spouse, and the pre-2013 requirement that the value of taxable gifts (i.e. those gifts that exceed the current federal gift tax exclusion amount of $14,000 available to present interest gifts) made by a decedent within one (1) year of the decedent's date of death be recaptured and added to the value of the decedent's Maine estate for estate tax purposes.

The use of QTIP property as an important estate tax planning tool warrants further explanation. The federal QTIP trust has been a popular federal estate tax planning provision often incorporated in a married person's Will to provide financial security during the surviving spouse's remaining lifetime, while simultaneously controlling the eventual disposition of the remaining QTIP assets upon the surviving spouse's death. To qualify QTIP property for the unlimited marital deduction available to most transfers between spouses, both Maine and federal tax law requires that that the QTIP property meet certain IRS requirements that the property be for the sole lifetime benefit of the surviving spouse, all income be distributed annually, allow the spouse to direct that non-productive assets be made productive, etc. Upon the death of the surviving spouse, the QTIP trust directs how and where the remaining trust assets are distributed.

The Maine QTIP election, a variation on the federal QTIP, allows the estate of decedents with surviving spouses to elect to create a separate Maine QTIP trust and fund the trust

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with a value of the estate equal to the difference between the federal estate tax exclusion ($5,250,000 in 2013) and the Maine estate tax exclusion ($2,000,000 in 2013), a "gap amount" of $3,250,000 in 2013. The election *postpones* Maine estate tax on the Maine QTIP property from the estate of a decedent with a surviving spouse until the death of the surviving spouse at which time the remaining value of the Maine QTIP trust assets is included in the estate of the surviving spouse for Maine estate tax purposes. As an example, assume that upon the 2013 death of a married person, the decedent's estate is valued at $5,000,000. Since the value of the $5,000,000 Maine estate in the above example is under the available federal estate tax exemption of $5,250,000, the estate is not subject to federal estate taxation; however, $3 million of the $5 million left in trust for the surviving spouse would be subject to Maine estate taxation. The estate of the first deceased spouse would elect to treat the $3 million that exceeds the Maine estate tax exemption as Maine QTIP property, thereby eliminating Maine estate tax on the assets held in the Maine QTIP trust until the death of the surviving spouse.

Maine Estate Tax on Non-Residents Owning Maine Property

According to Maine Revenue Services, an estimated 35- 40% of Maine's taxable estates are submitted by estates of non-Maine residents owning property in Maine. It is a common belief among non-residents (and, often, their estate planning attorneys) that a non-resident's Maine based property is not subject to Maine estate tax if the value of the property is less than the available Maine estate tax exemption; however, such is not the case. Rather, the Maine estate tax imposed on a non- resident's estate with property in Maine is based upon the total value of the non-resident's *entire* estate for federal estate tax purposes (even if a federal return is not required to be filed with the IRS). Once that total estate value is determined, the Maine estate tax is calculated based upon the proportionate value of the Maine property to the non-resident's total estate value as determined under federal estate tax rules. While the higher Maine estate tax exemption will benefit non-resident estates, non-resident property owners are advised to address the potential for Maine estate tax exposure in their estate planning process.

New Federal Estate Tax Legislation

After a decade of federal estate tax planning uncertainty and fluctuation in the estate tax rates and exclusion amounts, the American Taxpayer Relief Act of 2012 (the "2012 Taxpayer Relief Act") restored some certainty by "permanently" extending, and slightly modifying other changes made to federal estate tax laws by the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) and the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (2010 Tax Relief Act). The following is a summary of the more important estate tax provisions included in the new 2012 Taxpayer Relief Act, effective January 1, 2013:

- Made permanent The 2010 Tax Relief Act's temporary, federal unified estate, gift tax and generation-skipping transfer tax exemption of $5,000,000, adjusted annually for inflation, bringing the inflation-adjusted 2013 federal estate tax exemption to $5,250,000;
- Set the maximum federal estate tax rate of 40 percent, up from the 35% rate established by the 2010 Tax Relief Act;
- Made permanent the "spousal portability" provision, otherwise known as "the deceased spouse unused exemption (DSUE)" introduced by the 2010 Taxpayer Relief Act. The DSUE permits the estate of a decedent with a surviving spouse to make a "portability election" allowing the surviving spouse to add to his or her own available federal estate tax exemption, the first deceased spouse's *unused* federal estate tax exemption.
- Confirmed the continuation of the "stepped-up tax basis" (i.e. the tax basis of assets owned by the decedent increases to the fair market value as of the date of death);
- Extends the federal estate tax deduction for state estate taxes, and permanently repeals the state death tax credit;
- Permanently repeals the qualified family-owned business interests (QFOBI) deduction and the installment payment of estate tax for closely-held businesses;

Given the higher federal estate tax legislation, the federal estate tax exposure for the vast majority of taxpayers has been eliminated. This is especially true for married taxpayers who can take advantage of the "spousal portability" provisions allowing a married couple to exempt from federal estate tax twice the applicable federal exemption amount, or up to $10,500,000 in 2013, of their combined estate assets.

Impact of the New Estate Tax Legislation on Existing Estate Plans

The higher estate tax exemption levels created under the newly effective Maine and federal estate tax legislation, respectively, will likely eliminate both Maine and federal estate tax exposure for the vast majority of taxpayers. Notwithstanding the potential elimination of estate taxes on an individual's estate, previously executed estate planning documents that were prepared based upon previously effective estate tax laws should be reviewed to eliminate what may now be unnecessary provisions. Married couples may no longer need a marital or credit shelter trust that may have been included in their estate plan to shelter assets from estate taxes upon the death of the surviving spouse. In light of the higher estate tax exemptions and the option for "spousal portability" of a deceased spouse's unused federal estate tax exemption, joint ownership of spousal assets may now provide a simpler estate planning solution to asset ownership. One spouse owning the majority of assets in a retirement plan may no longer need to designate a martial trust as the beneficiary of a retirement account. Those with blended families or second marriages with children from prior marriages may want to revisit the use of trusts tied to prior estate tax exemption levels. No two estate planning situations or planning objective are alike, and the complexities of estate tax planning is not conducive to generalizations. As with any life change, be it the birth, maturity, separation, divorce or death of a family member or named beneficiary, new tax laws, elder law concerns, etc., every taxpayer should periodically review existing estate planning documents to insure that estate plans properly reflect estate planning objectives under existing tax laws.

The Estate Planning Group at Norman, Hanson & DeTroy welcomes the opportunity to meet with clients about their new or revised estate planning objectives, identify potential planning issues and concerns, and work to create a suitably unique, efficient, and effective estate plan. □

Recent Decisions From The Law Court

By David P. Very

DAVID P. VERY

Maine tort claims act damages caps

Where an insurance policy is available to cover a judgment against a government employee sued in his personal capacity, what statutory damages cap, if any, applies? That question was answered by the Maine Law Court in *Fortin v. Titcomb*, 2013 ME 14 (January 29, 2013).

Michael Fortin obtained a judgment against Jacob Titcomb, a Wells police officer, in the amount of $125,000 for the officer's excessive use of force in arresting Fortin. The Court reduced the damages award to $10,000 pursuant to 14 M.R.S. § 8104-D, which states that the personal liability of an employee of a governmental entity shall be subject to a limit of $10,000 and that the employee is not liable for any amount in excess of that limit.

The Plaintiff first argued that the allowable damages should instead be determined by 14 M.R.S. § 8105, which establishes a cap of $400,000 for any award of damages against either a government entity or its employees, or both arising out of a single occurrence. The Law Court held that the individual employee cap speaks to the limits of damages that may be obtained from any and all claims against one single person and that statute unequivocally states that damages are limited to $10,000 for a single occurrence. The Court stated that Section 8105 has a broader application, in that it provides for the overall limitation on damages per occurrence rather than per individual defendant. The Court stated that when the defendant in such an action is the governmental entity, more than one government employee, or the government entity and one or more government employees, the liability of all the defendants together can total no more than $400,000. The Court further stated that Section 8105 works in conjunction with Section 8104-D in that a government employee is individually liable only for $10,000 according to Section 8104-D, but the damages that may be collected from all defendants in a matter involving the government entity and/or multiple government employees may be as high as, but cannot exceed, $400,000.

The Plaintiff then argued that 14 M.R.S. § 8116 provides an alternative to the damage caps in the event the government entity has insurance for itself and/or its employees. That statute states that if the insurance provides protection in excess of the limit of liability imposed by *Section 8105*, then the limits provided in the insurance policy shall replace the limit imposed by Section 8105. The Court stated that this section only provides an alternative to the $400,000 damages cap of Section 8105 in the event the government entity has insurance for itself and/or its employees. The Court stated, however, that it does not interact with the individual limit statute and thus no individual government employee may be held liable for more than $10,000, despite whether any insurance is available to cover the government employee in excess of that amount.

Therefore, the Law Court held that despite the presence of insurance, a judgment against an individual government employee may not exceed $10,000.

Justice Jabar, in a lone dissent, disagreed with the Court and stated that Section 8104-D specifically provides a $10,000 limit on the *personal liability* of an employee. Justice Jabar read the statute to only prevent a plaintiff from executing a judgment against the personal assets of a government employee in an amount greater than $10,000. While conceding that Section 8116 only includes a reference to the $400,000 cap, he argued that Section 8104-D was designed only to limit personal liability whereas the other statutes were designed to limit damages. Justice Jabar was further concerned with the application of a damage limitation cap which only applies when an employee is acting in the course and scope of his employment. Justice Jabar indicated that he believed that as a matter of law, conduct found to be so egregious that it is not entitled to discretionary function immunity because the officer exceeded the scope of any discretion he could have possessed in his capacity as a government employee, should not be considered within the course and scope of employment, and therefore should not be entitled to the damages limitation. As a result, he would have held that the Plaintiff was entitled to reach the additional insurance provided to the Town of Wells to cover the entire $125,000 judgment.

Summary judgment based on lack of causation

In a case involving a high-speed chase between an intoxicated, unlicensed motorcycle operator and a Cumberland County Sheriff Deputy, the Law Court upheld a grant of summary judgment in favor of the Defendant based on a lack of evidence supporting causation.

In *Smith v. Cumberland County*, 2013 ME 13 (January 29, 2013), the Law Court stated that causation in almost all vehicle accident cases will be a matter for the fact-finder and will not be resolvable on summary judgment. The Court added, however, the fact-finder's role in resolving claims of negligence does not exempt a negligence action from summary judgment scrutiny, as a cause of action wholly unsupported by the evidence may always be decided as a question of law. The Court noted that evidence submitted in opposition to summary judgment need not be persuasive at that stage, but the evidence must be sufficient to allow a fact-finder to make a factual determination without speculating.

In the underlying case, Smith died as a result of crashing his motorcycle in a high-speed chase with the sheriff. Because of Smith's death, the only evidence of causation came from the evidence of Smith's fall from the motorcycle, the sheriff's radio call, and the Cumberland County Sheriff's Department's reconstruction of the crash. The estate argued that the sheriff admitted that he radio dispatched using a code number that indicated that his cruiser was involved in a collision. The deputy testified that he used that code erroneously and that his cruiser was nowhere near the motorcycle when it crashed. The Law Court noted that there was no physical evidence that the cruiser made contact with the motorcycle. Further, quite remarkably, the Law Court also noted that the Plaintiff presented no record fact to dispute the County's factual assertion that the reference number to a collision was used in error. In other words, the Court did not allow the Plaintiff to use the radio transmission indicating that the cruiser was involved in a collision as factual support that a collision occurred because it had no evidence to undermine the deputy's testimony that his use of that code was erroneous.

With respect to the accident reconstruction, the County reconstructionist concluded that speed did not cause Smith to lose control and crash, but rather it was Smith's impairment due to his significant intoxication that caused the crash. The Plaintiff had argued that County policy prohibits high-speed pursuit for minor traffic infractions, and in this case, the initial pursuit resulted from the motorcycle traveling 47 mph in a 30 mph zone, and that it further prohibits the continuation of a high-speed pursuit if it will result in risk to the safety of others. Thus, one could certainly argue that the County's own reconstruction was self-serving. However, the Law Court held that even if the deputy had caused Smith to speed, the Estate produced no evidence that would support a jury's findings that speed was a cause of the crash. In other words, it did not have any expert opinion or otherwise to contradict the County's own reconstruction. As a result, the Law Court affirmed the grant of summary judgment in favor of the Defendant.

Timber trespass damages

The Law Court provided further clarification for Maine's timber trespass statute, 14 M.R.S.A. § 7552 in *Woodworth v. Gaddis*, 2012 ME 138 (December 18, 2012). The statute applies in situations involving the cutting, destruction, damage, or carrying away of any forest product, ornamental or fruit tree, agricultural product, stones, gravel, or, goods, or property of any kind from land not that person's own. This statute replaces the common law with respect to damage to those items from a trespass.

The Court indicated that the statute allows for the tripling of damages for intentional or knowing conduct where the perpetrator is "subjectively aware that his conduct was contrary to the landowner's rights in the property, or that the trespasser's conduct displayed more than an utter and complete indifference to and disregard for the landowner's rights." The Court further noted that where a person acts negligently, the statute provides that the damages will be doubled. The Court below in the case found that the Defendants were negligent but did not double the damages. The Law Court held that upon a finding that the Defendants acted negligently, the statute mandates that those damages be doubled. □

KUDOS

DAVE HERZER will speak at the 23rd New England Healthcare Risk Management Conference in Manchester, New Hampshire on the topic of "Internal Investigations and Witness Interviews" on May 20, 2013. The annual conference is offered by the Northern New England Society for Healthcare and Risk Management, which is an organization of healthcare risk managers, attorneys, insurance professionals, and medical-legal consultants interested in minimizing the potential liability of healthcare providers in Maine, New Hampshire, and Vermont.

ROD ROVZAR has been elected to his third terms as Selectman, Assessor and Overseer of the Poor, in his rural home town of Stoneham.

PAUL DRISCOLL has been elected to serve as Chair of the firm's Commercial Practice Group, succeeding Rod Rovzar who had served as Chair for over thirty years.

LANCE WALKER has been selected to serve on the Corporate Partner Steering Committee of the Maine Audubon Society.

CHIP HEDRICK, KASS LONGLEY-LEAHY, and probate paralegal **NAN RAND** of NHD's Wills, Estate Planning, Probate and Elder Law Practice Group collaborated in presenting a six-hour seminar titled "The Probate Process from A – Z" to over 50 attorneys, accountants, trust administrators and paralegals from around the State of Maine and beyond. Sponsored by the National Business Institute, the groups December presentation highlighted probate statutory requirements, ethical considerations and guidelines, estate planning pitfalls, and recommended probate administrative practices and procedures.

STEVE MORIARTY was elected in November to serve as a member of the Maine House of Representatives in the 126th Legislature. Steve has been assigned to the Joint Standing Committee on Judiciary. □

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Return Service Requested

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