NORMAN, HANSON & DETROY

newsletter

Current developments in Maine law
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Unfair Claims Settlement Practices Act – new amendment may be costly to insurers

BY CHRISTOPHER C. TAINTOR

On March 25, 1998, Governor King signed a bill amending Section 2436-A of the Maine Insurance Code, the "Unfair Claims Settlement Practices Act" (UCSPA). Although the amendment appears minor, it could potentially have an enormous impact on insurers doing business in Maine.

Maine historically has had both statutory and common law that is relatively favorable to the insurance industry. In *Marquis v. Farm Family Mutual Ins. Co.*, 628 A.2d 652 (Me. 1993), the Law Court held that although every contract, including every insurance contract, contains an implied covenant of good faith, there is no *tort* liability for breach of the covenant. The Court observed that "traditional remedies for breach of contract are available to the insured in the event an insurer breaches its contractual duty to act in good faith," and that "the Legislature has provided the additional remedies set forth in the Late Payment of Claims Statute . . . and the Unfair Claims Practices statute, . . . both of which provide for statutory interest and attorney's fees in certain instances for improper actions of an insurer." The Court reasoned, "allowing, in addition, an independent tort action [for breach of the duty of good faith] might well thwart the Legislature's intent to craft a comprehensive insurance code, and could subject insurance companies to multiple and inconsistent liability." The Court chose to limit an insured's remedies for breach of duty to the traditional remedies for breach of contract, and the additional statutory remedies provided in the insurance code.

Because Maine's Unfair Claims Settlement Practices Act historically has prohibited only a few narrow categories of insurer misconduct - such as "knowingly misrepresenting . . . pertinent facts and policy provisions relating to coverage," and "threatening to appeal from an arbitration award" to force an insured to accept a lower settlement - the effect of *Marquis* was to limit significantly insurers' exposure for extra-contractual damages. However, the amendment to the Act, effective June 30, 1998, opens up a field of potential litigation against insurers by imposing new obligations in settlement negotiation. It does so in terms so vague as to ensure that the statute will require judicial elaboration on a case-by-case basis.

The new Section 2436-A(1)(E) provides that a person may bring a civil action against his own insurer, and recover general damages, together with attorney's fees, costs, and interest, if the insurer has failed, "without just cause," to effect a "prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear." For purposes of the statute, an insurer acts "without just cause" if it refuses to settle claims "without a reasonable basis to contest liability, the amount of any damages or the extent of any injuries claimed."

The most important limit on obligations the new statute creates is that only those injured by their own insurer are allowed to sue. The original bill, which had the support of the Maine Trial Lawyers Association, would have allowed suits by third-party tort claimants dissatisfied with the settlement offers they have received. As enacted, the bill creates a cause of action in favor of persons insured under first-party coverages (property, business interruption, disability, UM, etc.) who contend their carriers have not acted in good faith during the settlement process. It would also, it seems, apply to persons insured under all forms of liability coverage. Assuming it does, it is not clear to what extent the statute will expand the scope

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of insurers' settlement obligations. Typically, liability policies give insurers the right to control settlement with third parties, and courts have generally respected that contractual right, only requiring insurers to exercise good faith to avoid exposing insureds to liability in excess of policy limits. The amended statute seems to go well beyond the common law by requiring insurers to settle third-party claims against their insureds whenever "liability has become reasonably clear," even if there is no real risk of exposing an insured to personal liability.

The amendment also raises definitional questions and practical problems. One is whether insurers will be required simply to respond "promptly" to settlement demands, or whether they can be held liable for failing to actively initiate settlement negotiations once "liability has become reasonably clear." As absurd as the latter interpretation might seem, it was advanced by the plaintiff, a UM claimant, in *Forcucci v. United States Fidelity and Guaranty Co.*, 817 F.Supp. 195 (D. Mass. 1993). While the court in that case rejected the argument that an insurer has a duty to come forward with an offer before it even receives a demand for settlement, insurers can expect that the same argument will be made in Maine.

Another difficult question is how an insurer ought to respond to an exorbitant, or even outrageous, demand for settlement. In a case arising under a comparable Massachusetts statute, a federal court found an insurer guilty of an unfair claims settlement practice when it declined to respond at all to an initial demand in excess of one million dollars, and then responded to a slightly lower ($990,000) demand with an offer of $25,500, on a claim that ultimately settled for $84,000. *Bradley v. United States Fidelity & Guaranty Co.*, 819 F.Supp. 101 (D. Mass. 1993). It made no difference to the court that the plaintiff's demands were outrageously excessive, or that the insurer's offer was much closer to the real "value" of the case, as determined by the settlement. Without question, the argument will be advanced that, under the new section of the Maine UCSPA, insurers are likewise obligated to respond to wildly exaggerated, even fraudulent, claims with "fair" and "equitable" offers of settlement.

Most fundamentally, the amendment to the Maine Insurance Code raises extremely difficult interpretive questions: when is liability "reasonably clear," and what sort of settlement offer is "fair" and "equitable"? With respect to the first question, lawyers and insurance professionals alike understand that the process of determining whether liability is "reasonably clear" is often complicated. In an uninsured motorist case, for example, or in a suspicious fire loss, it can be hard to evaluate "liability" in the abstract, without having information that may be lacking in the early stages of the claims process. Claims professionals often must speculate about how favorable an impression the parties or their witnesses (including expert witnesses) are likely to make on a jury, what evidence will be available and admissible, and what other information might turn up that would tend to discredit a claimant's version of events. The same uncertainty pervades the claims professional's efforts to evaluate what a "fair" and "equitable" settlement might be. Factors bearing on the damages equation may include evidence - often unavailable until the claim is litigated - about pre-existing medical and psychological impairments, about the stability or security of the claimant's employment status, and about the credibility of an injured party's claims for pain and suffering or emotional distress.

None of this will come as a surprise to claims professionals, who already evaluate complex factual scenarios and try to predict the values that judges and juries will attach to them. What is new is that claims professionals' "predictions" will now take on added significance. Whenever a jury returns a verdict for the insured on a first-party claim substantially in excess of the amount the insurer offered in settlement, the insured will be able to claim that the UCSPA has been violated, and that he/she should recover attorney's fees, 18% annual interest on the claim, and possibly other damages. Settlement negotiations are likely to be tinged by threats of statutory liability, and the files of insurance claims professionals (and, perhaps, their lawyers) will be exposed to scrutiny in cases litigated under the statute.

The Maine Legislature plainly intended to enact a law that would make insurers more responsive to insureds who have sustained losses. While it is hard to quarrel with that objective, the means the Legislature chose to achieve it are likely to be confusing, burdensome, and costly to insurers doing business in Maine. □

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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 write or telephone us.

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Employment discrimination trial ends with jury awarding five-and-a-half million dollars

Jurors less receptive to personal injury claims and more responsive to importance of work

An important trial this spring in Maine Federal District Court involving employment discrimination ended with a stunning jury award to the plaintiff of $5,500,000.

NH&D attorneys Theodore Kirchner and Anne Carney represented the plaintiff in *Coffin v. Runyon*, CEO of the U.S. Postal Service. The late Judy Coffin was an engineer with the Postal Service who, her estate claimed, was discriminated against in her employment based on her gender. The Postal Service had reassigned her from a management position to a lower rank position as a result of the discrimination. For thirteen months Judy Coffin tried to return to her management position, and not succeeding, committed suicide at the age of 45.

The Postal Service claimed that Ms. Coffin was not the victim of discrimination, that her suicide was not causally related to the discrimination, and that her discrimination claim had been settled at the administrative level prior to her death. Ms. Coffin did have a claim pending with the Equal Employment Office of the U.S. Postal Service in which she was represented by another attorney.

THEODORE KIRCHNER

Difficult evidentiary issues at the seven-day trial arose from the fact that the critical witness was deceased. The estate had to prove what happened to Ms. Coffin and how she reacted to those events primarily through hostile witnesses. Many of the plaintiff's statements made to co-workers, friends, and family were not admissible at trial because they were hearsay. Ultimately, the estate *was* able to prove that Ms. Coffin was the victim of gender discrimination, that the discrimination was intentional, that the suicide was the direct result of the discrimination, and that the U.S. Postal Service had acted maliciously toward her through its employees.

The jury awarded five hundred thousand dollars in compensatory damages and five million dollars in punitive damages. By stipulation between the parties, it was agreed that judgment would be also entered for approximately $147,000, representing lost wages to the date of verdict, plus medical and funeral bills.

Because of federal statutory caps on recoverable damages, the court had to address this and other issues following the jury's verdict. The court's final judgment entered June 1 reduced the $5.5 million to the $300,000 maximum allowed by law, awarded $161,000 of lost wages prior to judgment (the amount to which $147,000 had been increased between the date of verdict and date of judgment), and awarded the plaintiff an additional $880,000 in damages, plus attorneys' fees, pre- and post-judgment interest and costs.

The jury verdict in *Coffin v. Runyon* serves to emphasize a shift in responsiveness among jurors to claims involving interference with one's employment.

ANNE CARNEY

While jurors seem to be less receptive to personal injury claims generally, they are willing to award sizable verdicts, under appropriate circumstances, for employment discrimination. At NH&D we have observed this phenomenon on a number of occasions. Jurors seem to realize the importance of employment in one's life, and are willing to express that importance with large verdicts against businesses or persons who interfere with the rights of their employees. □

Norman Hanson & DeTroy website available in mid-August

More information will be available faster to clients and friends of the firm by using our new website at www.nhdlaw.com. The service will be in place by the middle of August and will offer an archive of past newsletters, direct e-mail to NH&D attorneys, and a range of other useful resources. □

Briefs/Kudos

TOM MARJERISON returned in June from a highly unusual leave of absence spent at The Hague, Netherlands. The American Bar Association selected Tom to serve as a Legal Specialist to the Office of the Prosecutor to aid the International Criminal Tribunal for the former Yugoslavia. The U.S. Government, the ABA, and the Coalition for International Justice assembled a team of attorneys charged with reviewing the records of suspected war criminals in Bosnia-Herzegovina.

EMILY BLOCH enjoyed a lively spring of professional activities: she co-chaired the conference "Law, Feminism and the 21st Century" sponsored by the Maine State Bar Association and the University of Maine School of Law. The conference featured nine legal scholars from New York and New England. Emily also organized and co-chaired the Maine Civil Liberty Union Foundation's ceremony of the Justice Louis Skolnik Award. The award, for outstanding contributions to civil liberties in Maine, was given to Portland attorney Patricia Peard.

No one at NH&D is employing a publicity guru, but attorneys CHRIS TAINTOR and DAVE VERY were both featured on the front page of the Maine Lawyers Review in late April. Chris and David had represented winning parties in two unusual appeals before the Maine Supreme Judicial Court.

ANNE JORDAN has been elected to the Board of Directors of the Camp Fire Boys and Girls Hitinowa Council.

STEVE MORIARTY has joined the Board of Editors of Maine Business and Employment Law, a publication for employers and the human resource community issued by Northern New England Law Publishers, Inc.

Norman, Hanson & DeTroy has joined eleven other Portland law firms pledging over $330,000 to pay for two public interest attorneys to practice family law for low-income families. Chief Justice Daniel Wathen announced the establishment of the Frank M. Coffin Fellowship for Family Law on May 1st. Judge Coffin, senior judge on the U.S. District Court, was instrumental in bringing the law firms together to fund the program, but did not know it would bear his name.

As Chair of the Workers' Compensation Section of the Maine State Bar Association, STEVE HESSERT organized a seminar on workers' compensation litigation held in late April in Augusta. BOB BOWER led the audience through the Rules and Regulations governing Section 312 independent medical exams, and STEVE MORIARTY presented a summary of recent Law Court decisions affecting workers' comp practice. Claims people, attorneys, and members of the Workers' Compensation Board attended.

STEVE MORIARTY was re-elected in June to the Cumberland Town Council for a fourth time.

This spring JOHN WALLACH and his wife Aurelie visited Buenos Aires, the world capital of tango, where he advanced his not inconsiderable skills in the art of the tango. They also ventured into the Iguazo Falls on the border of Brazil and Argentina.

Automobile insurers have reason to smile about a new bill that becomes law in August that stiffens driving requirements for young teenagers. Driver education will be mandatory for 16- and 17-year olds, road tests will be more challenging, and teens must certify they've driven at least 35 hours with a licensed driver 20 or older. Penalties for driving under the influence have been toughened. The Bureau of Motor Vehicles has also lengthened required hours of driver's ed from six to 10.

While Norman, Hanson & DeTroy is moving toward its twenty-third year of service to our clients, some members of our loyal support staff are creating a continuity unusual in private law firms. PATTE O'DONNELL is well into her 18th year overseeing the critical business aspects of billing; legal assistant MAGGIE DEGRISHE has been keeping workers' compensation cases up to snuff for 15 years; Ted Kircher's administrative assistant SUE POLLARD is also a 14-year member; and Steve Hessert's administrative assistant DEANNA PIKE has contributed 13 years of legal experience.

BOB BOWER, who specializes in employment/labor law and workers' compensation, led off a one-day seminar in Portland on workers' compensation in June, updating the new case law, legislation and regulations in Maine. Attendees included claims representatives, rehabilitation specialists, and human resource directors.

ROD ROVZAR served as parliamentarian once again at the 59th annual meeting of the Maine Credit Union League in Augusta in mid-May. This was the 19th year Rod has served the League in this capacity. Rod also led two all-day seminars in June for credit unions which discussed ownership, account contracts, probate matters, trusts, and other management concerns.

DAN CUMMINGS served as co-faculty member for a June seminar on "Complying with the Fair Debt Collection Practices Act," sponsored by the National Business Institute.

Lawyers practicing real estate in Maine attended a June seminar led by PAUL DRISCOLL who offered an in-depth, detailed look at real estate transactions and some of its unusual problems. It was sponsored by the Maine State Bar Association. □

Three significant Law Court decisions

By David P. Very

Liability for an attractive nuisance

In *Collomy v. School Administrative District No. 55*, 1998 ME 79 (April 22, 1998), the Law Court addressed a landowner's liability to a trespassing child. On a warm Saturday morning in early June, Trevor Carter, a twelve-year-old boy, and his twelve-year-old friend were dropped off at the Baldwin Elementary School playground by his friend's father. Trevor believed he had a Little League game at the school that morning, but discovered later that the game was at a different school. No one else was on the playground, and after a while, the boys became curious and entered a cinder block shed on the playground which housed an emergency generator.

The shed had been vandalized in the past and had been broken into on prior occasions. Trevor testified that the door was unlocked and ajar. His friend found a can of duplicating fluid and took it outside, then poured some fluid on the ground and set fire to it. When the fire was out, Trevor went back into the building because it was cooler. His friend then took more duplicating fluid and this time half-filled the cinder block step in the doorway and tried to ignite it. Trevor told his friend not to do it and that he was going to get out of the building. As Trevor started to leave, his friend threw another match into the block, the fluid ignited, flashed back, and ignited Trevor's clothes, causing severe burns to his lower extremities.

Trevor's mother filed a complaint against the school district, alleging that the school district stored highly flammable substances in a negligently constructed, operated or maintained storage shed on the playground. The Superior Court granted summary judgment in favor of the school district, and the plaintiff appealed.

The Law Court first addressed the issue of whether Trevor was a trespasser. The school district agreed that Trevor was not a trespasser on the playground because children often played on the playground and fields when school was not in session. Plaintiff argued that the door of the building was open, that there were no signs prohibiting entrance into the shed, and that no teacher had ever told Trevor not to enter the shed. Plaintiff also argued that the shed was in the middle of the playground and that there were no clear lines as to what children could and could not do.

The Law Court disagreed and held that the shed did have a different use from the playground equipment. The Court stated that while the school district did give children reason to believe that they were permitted to play on the playground equipment when school was not in session, the plaintiff introduced no evidence that the district allowed the children to play in the building whether school was in session or not. The Court declared, "Where one enters a part of premises reserved for the use of the occupant and its employees, and to which there was no express or implied invitation to go, there can be no recovery for resulting injury, even though one is an invitee to other parts of the premises." Therefore, the Law Court upheld the Superior Court's finding that Trevor was a trespasser when he entered the shed.

The plaintiff then argued that even if Trevor was a trespasser, the school district owed him a duty under the attractive nuisance doctrine. The Law Court has previously adopted this definition of the attractive nuisance doctrine:

> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and (b) the condition is one of which the possessor knows or has reason to know in which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

The *Collomy* case focused on the third element of the doctrine, whether Trevor appreciated the risk. Plaintiff argued that when Trevor initially entered the shed, he did not know it was dangerous. The Law Court agreed that there was an issue of fact as to whether Trevor appreciated any risk when he first entered the building. The Law Court noted, however, that Trevor's understanding when he first entered was not material because he was not injured then. The determinant period for appreciating the risk was when Trevor chose to enter the building for the second time, because that was when the accident occurred.

The Court found that before entering the building again, Trevor had knowledge that there were flammable materials in it and that his friend had already ignited the materials once. He also admitted that it was not a safe place to be and that he knew fire could seriously burn him. The Court observed that Trevor had seen the effects of flammable fluids when his friend lit the match the first time and Trevor had

admitted he understood it was dangerous and that someone could get hurt. The evidence, the Court found, unequivocally revealed that Trevor appreciated the dangers before re-entering the building. Although Trevor clearly did not anticipate that his friend would throw a match onto the fluid when he was trying to leave, the Court stated that he did know the fluid was in the building, that his friend would play with the fluid, that the fluid was flammable, and that the flammable fluid could hurt or burn him. The Law Court held as a matter of law that Trevor realized the risk of entering the shed the second time.

Finally, plaintiff argued that even if Trevor was a trespasser and was not within the attractive nuisance doctrine, the school still owed him a duty to refrain from wanton, willful or reckless acts of negligence. The Court found that the school district was not liable despite the fact that the district had left highly flammable materials in an unlocked, cinder block building on the playground with knowledge that children had and would likely trespass, and had failed to remove the flammable fluid or failed to post warning signs on the property.

In the *Collomy* decision, the Law Court has reiterated that a landowner does not have a duty to "child proof" his premises, even if he is aware that children are trespassing and meddling with dangerous materials.

David Very represented the defendant school district in this suit.

Malicious prosecution claims

A question that often comes to the mind of an insurance adjuster is whether it is possible, given a frivolous lawsuit, to file a counterclaim or action against a plaintiff for malicious prosecution. In *Pepperell Trust Company v. Mountain Heir Financial Corp.*, 1998 ME. 46 (March 5, 1998), the Law Court set forth the elements and procedure of a malicious prosecution claim.

The Court stated that the tort of wrongful use of civil proceedings, or malicious prosecution, exists where (1) one initiates, continues, or procures civil proceedings without probable cause, (2) with a primary purpose other than that of securing the proper adjudication of the claim upon which the proceedings are based, and (3) the proceedings have terminated in favor of the person against whom they are brought. The court has stated that the groundlessness of a suit may in many instances be so obvious and palpable, that the existence of malice may be inferred from it. The Court has also noted that malice may properly be inferred from gross and culpable negligence in failing to make suitable and reasonable inquiries before instituting suit.

The Court reiterated that an essential element in a claim for malicious prosecution must be a favorable termination for the plaintiff in the offending suit. An action is ended when it's adjudicated in favor of the plaintiff, or is withheld or dismissed. However, the Court specifically held that a claim for malicious prosecution or wrongful use of civil proceedings cannot be brought as a counterclaim to the offending lawsuit in which the defendant argues that conclusion in its favor is a likely outcome. Also, a malicious claim cannot be brought until the possibility of change in the outcome of the offending action has been eliminated by exhausting post-trial or appellate remedies.

One can only bring a malicious prosecution action after the offending lawsuit has fully concluded in favor of the original defendant, including the right to post-trial process or appeal.

Party not permitted to submit contradictory affidavit to defeat summary judgment motion

In *Zip Lube, Inc. v. Coastal Savings Bank*, 1998 ME 81 (April 23, 1998), the plaintiff submitted an affidavit that was in direct contradiction to his deposition testimony in opposition to defendant's motion for summary judgment. The Superior Court refused to consider the affidavit to the extent it conflicted with his deposition testimony and granted judgment in favor of the defendant.

On appeal, the plaintiff argued that his conflicting testimony is a matter best left to the factfinder to determine his credibility at trial. The Law Court disagreed and adopted, for the first time, the rule that a party will not be permitted to create an issue of material fact in order to defeat a summary judgment motion simply by submitting an affidavit disputing his own prior sworn testimony. The Law Court stated that when an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory. The Court did note that such an affidavit may be properly considered only if the party provides the trial court with a satisfactory explanation of why the testimony is changed. □

Workers' compensation - Law Court decisions

By Stephen W. Moriarty

Inflation adjustments

At the time of the employee's August 2, 1990 injury, Section 55-B of the former Act provided that benefits for partial incapacity could not be adjusted for inflation. The Law Court recently rejected an innovative attempt to obtain the equivalent of an inflation adjustment by discounting the value of current earnings.

In *Saunders v. MacBride Dunham Management*, 1998 ME 72 (April 6, 1998), the parties had agreed upon the average weekly wage and had also agreed to a fixed level of partial incapacity after the employee returned to work following the injury. Eventually the employer filed a Petition for Review contending that the disabling effects of the injury had ended. The parties stipulated to the amount of post-injury weekly earnings, and the employee argued that the value of his current earnings should be discounted for inflation and that the resulting differential between the pre-injury average weekly wage and the discounted value of current earnings entitled him to a higher level of partial. The employee was entitled to 43% partial when current earnings were compared against the pre-injury average weekly wage, but his entitlement would have increased to 53% partial if current earnings were discounted. The Board denied the Employer's Petition for Review and ordered continuing payment of benefits for 43% partial, and the Law Court accepted the employee's appeal.

On appeal the employee contended that he was not seeking an inflation adjustment in the ordinary sense of that term, but argued that "the effects of inflation must be discounted in determining post-injury earning capacity." The Court observed that the Legislature had initially provided an inflation adjustment for partial incapacity but had then repealed and replaced the statute to eliminate the entitlement. When the inflation adjustment was repealed in 1987, the legislative goal was to

STEPHEN W. MORIARTY

reduce workers' compensation costs generally to discourage insurance carriers from leaving the state. The Court found that the Legislature intended that no consideration of inflation should be given in calculating benefits for partial incapacity, and that discounting the value of current earnings for inflation would conflict with legislative intent. The employee's appeal was denied.

Clarifying Sections 218 and 214

In *Thompson v. Claw Island Foods*, 1998 ME 101 (May 8, 1998), the employee had injured his back in January 1993 while working for an employer on Vinalhaven Island, and was forced to stop work. He received benefits for total incapacity, and several months after his injury was advised that his position had been eliminated. In late 1993 the employee moved with his family to Searsport, and he estimated that his new residence was located 45-60 minutes away from the Vinalhaven ferry terminal, and that the ferry ride to the island took over one hour one way.

Shortly after the worker relocated, the pre-injury employer made a written offer of reinstatement to a seasonal position lasting from July to January. The employee refused the offer and the employer then terminated his benefits pursuant to a 21-day letter. The employee filed a Petition for Review, which was ultimately denied by the Board pursuant to Section 214(1)(A) on the grounds that the employee had refused an offer of reasonable employment. The Court granted the employee's Petition for Appellate Review.

In a lengthy opinion, the Court clarified key provisions of Section 218 and Section 214. Initially the employer contended that, pursuant to Section 218(5), it was entitled to cease paying benefits on the grounds that the employee had failed to accept an offer of reinstatement to a suitable position. The Court held that this remedy was unavailable to the employer under Section 218, as the provisions of that section apply only when an employee files a petition seeking reinstatement. Because no such petition had been filed in the pending case, it was inappropriate for the employer to have suspended benefits pursuant to Section 218(5). Section 218 therefore does not provide employers with an independent basis for terminating compensation, and can be applied only after an employee has filed a petition seeking reinstatement and has then refused an offer of reinstatement to a suitable position.

Turning to Section 214(1), the Court held that the statute required the Board to make a two-step analysis. First, the Board must determine whether a "bona fide offer of reasonable employment" had been made and second, whether that offer had been refused without "good and reasonable cause." Section 214(5) defines reasonable employment as a position within the employee's capability to perform which does not present a threat to the employee's health and safety and is "within a reasonable distance from that employee's residence." However, the statute does not indicate whether the residence is to be determined as of the time of the injury or as of the time of the making of an offer of

reinstatement. The parties urged the Court to arrive at a single definition of the term "residence," and although the Court recognized the administrative efficiencies that would follow from the adoption of a single definition, it determined that a single judicially-created definition was not consistent with the language and purpose of the Act.

The language of Section 214 was taken directly from the Michigan statute, and in a recent decision the Michigan Court of Appeals had held that the term "residence" referred to the place of residence at the time of the making of an offer of reinstatement. The Law Court declined to adopt the Michigan rule and held that the proper definition of the term rested with the discretion of a hearing officer based upon the facts of each case. Facts a hearing officer should consider will include the length of time between an injury and the offer, the employee's motivation for having made the move, and whether a reasonable employee would have understood that an offer of reinstatement at the new place of residence was possible. With regard to motivation, the Court suggested that the Board examine whether the employee moved to enhance job opportunities or rehabilitation, or to facilitate a return to the job market. Accordingly, the place of residence referred to in Section 214(5) may be either the residence at the time of the injury or the residence at the time an offer of reinstatement is made, depending on full exploration of all appropriate facts as to why the employee moved.

Assuming that a determination that a bona fide offer of reasonable employment has been made, the Court then held that the Board must determine whether the employee refused the offer for good and reasonable cause. All factors relevant to the decision to decline the offer must be considered, and when a relocation has occurred, the Board must once again consider the reasons for the relocation. Citing a decision from the Michigan Supreme Court, the Court indicated that appropriate considerations include the timing of the job offer, the reasons for the move (if the employee has moved), the diligence of the employee in trying to return to work, whether there had been a return to work with another employer, and whether the effort and expense of acceptance of the offer of reinstatement were unacceptable to a reasonable person.

Having defined the appropriate standards to be applied, the Court concluded that the Board had misconstrued the language of Section 214(1) and had implicitly found that the place of residence must be determined with reference to the time of injury. The Court also found that the Board failed to fully examine the employee's reasons for having refused the reinstatement offer. Accordingly, the Board's decision was vacated and remanded for further consideration in accordance with the opinion.

This important decision vests substantial discretionary authority in a Hearing Officer to determine whether a reinstatement offer was reasonable and whether that offer was refused without good and reasonable cause. The Court deliberately refused to establish any controlling tests, and determined instead that each case should be decided upon its own facts, based on application of appropriate criteria. Invariably, different Hearing Officers may apply the criteria in different ways and the results will not always be consistent. It will also be difficult to predict the outcome of a Section 214 dispute, given the absence of rigid tests or standards. Nevertheless, the Law Court has emphatically stated its preference for discretionary determinations based upon a weighing of all appropriate criteria, as opposed to uniform tests and definitions.

Refusal of available work

Ironically, one week before issuing its opinion in the *Thompson* appeal, the Law Court dealt with a similar issue regarding refusal of available work under former Section 55-B. In *Longtin v. City of Lewiston*, 1998 ME 90 (April 30, 1998), the employee had been injured in March, 1990, and in November, 1993, applied for disability retirement benefits. However, in order to preserve his entitlement to maximum early retirement benefits, the employee was unable to earn more than $10,000 per year through employment over a five-year period. He evidently continued to work on a part-time basis for the City of Lewiston, but never exceeded the annual earnings cap.

For reasons which are unclear, the employee filed a Petition for Reinstatement and the employer responded by offering him a full-time position as a fire inspector paying close to the pre-injury average weekly wage. If the employee had accepted the position he would have been disqualified for the continued receipt of disability benefits, and accordingly, the employee refused the offered position.

The employer responded by filing a Petition for Review pursuant to former Section 55-B, which provided in part:

> For purposes of determining an injured employee's degree of incapacity under this section, the commission shall consider the availability of work that the employee is able to perform in and around the employee's community and the employee's ability to obtain such work considering the effects of the employee's work-related injury.

Because Section 214 of the current Act is not retroactive, the Board's analysis was limited to former Section 55-B. The Board held that the employee was physically capable of accepting the offered position, and granted the Employer's Petition for Review by ordering payment of a slight differential representing two-thirds of the difference between the pre-injury average weekly wage and the wages that the employee would have earned if he had accepted the position.

The Court granted the employee's Petition for Appellate Review and upheld the decision of the Board. In its opinion, the Court noted that "the primary considerations in determining whether post-injury employment is available are whether the employee is physically capable of performing the work and whether the employment opportunity is actually open to the employee." Noting that the expeditious return of an injured employee to suitable employment was "an overriding goal of the Act," the Court held that the

First Circuit Court interprets employer discrimination under Family Medical Leave Act

John Hodgens sued his former employer claiming he was discharged because he took medical leave protected under the FMLA. In *Hodgens v. General Dynamics Corp.*, (5/21/98 No. 97-1704), the federal appellate court responsible for claims arising in Maine has construed for the first time the Family and Medical Leave Act of 1993.

The Court of Appeals for the First Circuit held that the employee's high blood pressure and atrial fibrillation was a "serious health condition" within the meaning of the FMLA. Second, it concluded that the statutory requirement for FMLA coverage that the employee be "unable to perform" his job was satisfied by the lost time required for medical treatment for the serious health condition. It is not necessary that the health condition itself render the employee incapacitated before FMLA coverage applies.

Third, the Court analyzed whether the employer had improperly discriminated against the employee for taking his FMLA-protected leave. The employee was laid off ostensibly for performance related reasons. In reaching its decision, the First Circuit adopted the U.S. Supreme Court's framework for analyzing civil rights discrimination claims and applied that to the question of employer discrimination under FMLA.

The U.S. Supreme Court, in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) created a burden-shifting framework for courts analyzing discrimination without direct evidence of discriminatory intent. First, the employee must produce evidence that he/she took advantage of a protected right under the FMLA; second, that an adverse employment determination then occurred, and finally that the exercise of protected rights caused the adverse employment decision. If the employee demonstrates this, it is presumed the adverse employment decision was discriminatory. The burden then shifts to the employer to show there was a nondiscriminatory reason for the termination or demotion. If the employer can show the decision was not discriminatory, then the employee must show by a preponderance of the evidence that the employer's reason for the firing was a pretext for the real reason - which was discrimination motivated by the employee's exercise of protected FMLA rights.

The First Circuit held that no rational jury could conclude that the reasons for the employee's termination were a pretext for unlawful discrimination. Importantly, the employee had a record of significant performance related problems which predated his first FMLA leave. Also, the work force had previously undergone reductions in force conducted in a way that were clearly non-discriminatory. The employee's layoff at issue seemed to fit the pattern of the previous non-discrimination layoffs.

Finally, and dispositively for the Court, the employee had a great many non-FMLA-protected absences which formed a legitimate and independent basis for considering the employee for layoff, and the Court held therefore that no rational factfinder could reasonably conclude that the employer terminated the employee in retaliation for exercising his rights under the FMLA statute.

This case is important for several reasons: (1) the *McDonnell-Douglas* framework will be used to analyze FMLA discrimination, (2) time away from work needed to diagnose and treat a serious health condition will satisfy the "unable to perform the functions of the job" standard, (3) good personnel file documentation reflecting the non-discriminatory basis for the termination can insulate the employer from liability. *Hodgens* puts some meat on the bones of the FMLA; employers should be aware of its reasoning whenever an employee seeks a leave of absence in Maine. □

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personal decision to remain under-employed in order to maximize other financial benefits improperly shifted greater liability to the employer beyond the extent the Legislature intended. While observing that employment may sometimes entail collateral financial consequences, the Court found that the Board properly concluded that the employee was capable of performing the job which had been offered and that the job was actually open to him. The Court affirmed the Board's award of partial benefits based on the sum the employee would have earned if he had accepted the position.

Protective decrees

Ten years ago, the Law Court held in *Lamson v. Central Maine Power Co.*, 549 A.2d 377 (Me. 1988) that an employee who had sustained an occupational hearing loss but who had not been disabled by the injury was nevertheless entitled to a determination that he had sustained a compensable occupational injury. The Workers' Compensation Act of 1992 allows employers to pay benefits "pending investigation" and without prejudice, thereby avoiding any binding obligation. Until recently it remained unclear whether an employee could compel recognition of the compensability of an injury where there was no dispute concerning an employer's obligation to pay or the amount owed.

In *Libby v. Boise Cascade Corporation*, 1998 ME 89 (April 30, 1998), the employee had been injured in July, 1994 and had received voluntary payments in full for a closed period of incapacity. The employer filed a MOP with the Board indicating that all such benefits had been paid "pending investigation" and "without prejudice." Although the employee

acknowledged that she had been paid in full, she filed a Petition for Award pursuant to Sections 305 and 307 to obtain an official determination of the compensability of her injury. The Board granted her petition, and the Court granted the employer's petition for appellate review.

In affirming the decision of the Board, the Court noted that the phrase "responsibility of an employer for the payment of compensation" found in Section 305 implied a legislative intent to permit the filing of petitions for protective relief even where all benefits owed had been paid in full. Referring to the earlier *Lamson* decision, the Court acknowledged that that case had been decided under the prior "early pay" statute, but found no distinction between the language of Section 305 and its prior counterpart, former Section 94. The Court also distinguished its opinion in *Burbank v. H.D. Goodall Hospital*, 656 A.2d 1209 (Me. 1995), in which the Court affirmed the dismissal of a Petition for Award which sought merely to broaden the description of the initial occupational injury. In *Burbank*, however, the compensability of the original injury had been accepted, and *Burbank* therefore prevents parties from obtaining additional declaratory relief after the initial compensability of an injury has been recognized.

The *Libby* decision will have its greatest impact in those cases in which an employee seeks recognition of the compensability of an injury where an employer is paying ongoing benefits without prejudice. Conceivably a Hearing Officer could grant a Petition for Award in such circumstances and say nothing about the obligation to pay compensation. However, if such a Petition for Award were granted and the employer were ordered to continue paying compensation, in all probability such a decree would create a "compensation payment scheme" within the meaning of Section 102(7). Once a compensation payment scheme has been created, an employer may not reduce or discontinue benefits with a 21-day letter pursuant to Section 205(9)(B)(1), and instead may only file a Petition for Review while the payment of benefits continues.

Thus, creation of a compensation payment scheme limits an employer's options and adds to a claim's expense. However, under Section 205(9)(A) the pre-injury employer may reduce or discontinue payment of compensation where the employee has returned to work for that employer, whether or not a compensation payment scheme has been created.

Employer immunity

In *Searway v. Charles M. Rainey*, 1998 ME 86 (April 29, 1998), the employee had been physically assaulted by his employer on the job site during the course of an argument concerning back pay. The employee then filed a civil action against his employer seeking damages for his physical and emotional injuries as well as lost earnings. No claim for workers' compensation benefits was filed. The defendant/employer raised the exclusivity and immunity provisions of the Workers' Compensation Act as a defense to the civil action, and summary judgment was entered for the defendant/employer in the Maine District Court and affirmed in the Superior Court.

On appeal, the Law Court upheld the decisions of the lower courts and expressly ruled that "intentional torts fall within the exclusivity and immunity provisions of the Act." In reaching its decision the Court relied on its earlier opinion in *Li v. C.N. Brown Co.*, 645 A.2d 606 (Me. 1994), in which the Court held that the exclusivity and immunity defense barred an action brought by the personal representative of a murdered convenience store clerk alleging both intentional and negligent conduct on the part of the employer resulting in death.

In *Searway* the Court emphasized that workers' compensation law in Maine is uniquely statutory and that it should not attach common law rules and causes of action to the statutory system in order to implement social policy. Instead, the Court held that the Legislature was the appropriate body to determine the scope of the immunity and exclusivity provisions and to amend those provisions if it so desired. Accordingly, the Court refused to create a judicial exception to the exclusivity and immunity sections of the Act. □

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