NORMAN, HANSON & DETROY, LLC

newsletter

Current developments in Maine law

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Law Court expands Automobile Liability for employers

BY JONATHAN W. BROGAN

In *James Spencer, et al. v. VIP, Inc.*, 2006 ME 120, the Maine Supreme Court, by a margin of 3 to 2, held that a volunteer who was involved in a car accident on his way home from his company's annual promotional event was an "employee" at the time of the accident. Therefore, his employer could be held vicariously liable for his accident. The decision was described by the dissenting Chief Justice as "a failure to recognize the general going and coming rule, let alone to define any exceptions to the rule in a way that is consistent with the Restatement of Torts or our own jurisprudence." The sharply critical dissent stated that the decision was "likely to result in an unprecedented expansion in vicarious liability" in Maine.

Vicarious liability refers to the imposition of liability on a defendant for a tort committed by another. In such cases, which typically involve the existence of a relationship between the negligent person and the defendant, the negligence of the person is imputed to the defendant. Liability of an employer for the torts of his employee, under the doctrine of *respondeat superior*, is the most common form of vicarious liability.

In *Spencer*, James Spencer sued Justin Laliberte and VIP, Inc. for an automobile accident that occurred on July 20, 2002. The facts of the case were undisputed. Mr. Laliberte, an hourly employee at VIP's Lewiston warehouse, volunteered to help set up for the 2002 Show, Shine and Drag, a promotional event held by VIP at Oxford Plains Speedway. Mr. Laliberte received a t-shirt and $25 in cash to help pay for the cost of gas to and from the promotional event.

Mr. Laliberte awoke at 4:30 a.m. on the day of the promotion, drove to Oxford Plains, and began setting up at 6:00. He completed his duties within an hour and began driving home. While driving home, he crossed into the oncoming lane and collided with a vehicle containing the Spencers.

As a result of the collision, Nancy Spencer died and James and Brittany Spencer were injured. Apparently because of the limited liability coverage of Mr. Laliberte, Mr. Spencer and his lawyer sought vicarious liability on the part of VIP. VIP successfully moved for summary judgment. An appeal followed.

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On appeal the plaintiff argued that VIP should be vicariously liable for the actions of Mr. Laliberte because he was acting as its agent at the time of the crash. The majority, in an opinion written by Justice Dana and supported by Justices Calkins and Silver, agreed that there were material facts that had not yet been decided in the summary judgment.

The actual analysis of the alleged material facts is remarkably brief. The majority, in three short paragraphs, decided that because the $25 that Mr. Laliberte received for travel could be construed as "compensation," travel was a part of the task that Laliberte was employed to perform. Next, the majority considered whether the records supported the travel occurring within authorized time and space limits. The Court found that Mr. Laliberte traveled to and from the work as expected and therefore might be considered an agent of VIP. Finally, the Court determined

that it was a question of fact as to whether the travel was to serve VIP. Because, according to the majority, the record showed genuine issues of material fact as to whether the travel was in the scope of Laliberte's employment, the summary judgment was vacated.

Chief Justice Saufley, along with Justice Levy, objected to the Court's expansion of vicarious liability in the State of Maine. The analysis undertaken by the dissenting Justices is almost unprecedented. First, the analysis is longer, by more than five times, than the analysis of the majority. Next, the dissenters leave no doubt as to their belief that the majority was wrong in its decision. They state, "When the collision with the Spencers occurred, Laliberte was driving home from Oxford Plains Speedway after performing work there for VIP. At the time Laliberte was driving home, VIP had no control over, and no right to control, his conduct; it did not dictate what vehicle he drove, the route he took, his speed or even whether he drove home at all. What Laliberte did that day after leaving Show, Shine and Drag was of no concern to VIP at all. He thus was not VIP's servant at the time of the accident."

The dissenters went on to state that courts have universally acknowledged that an employee is not within the scope of his employment while commuting to and from work. They recognize that there were some exceptions to the "going and coming rule" but that this case did not meet any of those exceptions. Typically those exceptions are based on a special errand or mission or a dual purpose of the employee and employer at the time of the alleged negligence. Without those special exceptions, the dissenters believed that tort liability for employers would be expanded beyond controllable circumstances. As Chief Justice Saufley wrote, "The decision of the Court today may ultimately cause employers to become the insurer for all harm caused on the highways by their employees while driving to and from work and also changes Maine law and moves Maine out of step with tort law across the country. This extraordinary expansion of liability without limitations or guidance is unprecedented."

Clearly, the Maine Supreme Court had a significant difference of opinion regarding the outcome of this matter. As the only issue that was decided was whether or not the summary judgment would stand, a trial may still ensue. However, it is more than problematic to have a jury determine whether or not the facts of this case establish liability on the part of the employer for the employee's accident. Clearly, the sympathy that will be generated for the Spencer family, who have lost a mother and whose remaining members were badly injured in an automobile accident, will be extraordinary. The pressure on the jury to find VIP liable, despite the traditions of the "going and coming rule" will also be extraordinary. Certainly VIP, and its insurer, will have to take all of this into account in making a decision as to whether to try this case to a jury.

For employers, this case is a warning that they need to take great care in asking employees to participate in voluntary or charity events. The extraordinary reach of this decision will mean that all plaintiffs' attorneys will be trying to find some connection between some potential employment activity and any accident. Basically, a good plaintiff's attorney will be looking for the deepest pocket possible for every accident.

This case, along with a variety of other decisions by the Maine Supreme Court in the last several years, demonstrates that the Law Court, despite earlier indications, is now resisting resolution of cases through summary judgment. Additionally, the Law Court has shown a definite shift in expanding employer, corporate, and insurer liability for accidents and actions that previously were not considered to be actionable. This Law Court has found, in recent years, that landowners can be responsible for slips and falls during snow and ice storms, employers can be liable for temporary employees (despite statutory prohibitions), and that an insurer defending under a reservation of rights loses control of the defense and may be forced to give up legitimate policy defenses because it could lead to an out-of-control judgment that cannot be overturned. The Court has determined that a general contractor may be responsible for an independent blasting contractor when it does not inform the independent blasting contractor how its job should be completed. In that case, the Law Court also determined that expert testimony was necessary to determine the appropriate standard of care for a general contractor but that when the plaintiff's expert fails to mention the duties of the general contractor, a fact finder can "reasonably infer" the general contractor was required to exercise "reasonable care" to ensure that the independent blasting contractor did the job as contracted.

It is not only employers and business people who have seen an expansion of statutory and common law liability. Medical professionals and doctors were told that despite a jury determining that a doctor was not responsible for alleged medical malpractice, the Legislature's statutory panel process, and the laws associated with the process, made the trial unconstitutional and therefore forced a retrial. Unbelievably, that case has now been tried for a third time and is on appeal

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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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for a second time because of the inability of the appellate court to give direction to the trial court about its role in applying the law as given to it by the Legislature.

Most of these cases have been decided by split courts. All of these cases mean that the defendants in Maine must understand the changing nature of this Law Court and its effect on trial judges. Trial judges are going to be less and less likely to grant summary judgments, even on what they believe to be clear legal issues, as a majority of the Law Court has signaled that tort principles should be liberally construed and that summary judgment is not appropriate in most cases. □

Briefs/Kudos

TED KIRCHNER was recently honored for six years of service as a member of the Board of Directors of Habitat for Humanity of Greater Portland. In his last three years, Ted served on the Executive Committee of the Board as Secretary, and over the years has spent a substantial amount of time performing volunteer work. During Ted's association with Habitat for Humanity, approximately 22 new homes have been constructed in the greater Portland area. Two additional homes were constructed locally for shipment to Hattiesburg, Mississippi for re-assembly as part of the post-hurricane relief effort.

AARON BALTES recently gave a presentation to a local chapter of Business Network International in South Portland, Maine.

ADRIAN KENDALL, of NH&D's commercial group, has been appointed Chair of the University of Pennsylvania's Alumni Secondary School Committee for Maine. Adrian will oversee the interview process for all Maine students applying to the University of Pennsylvania and will act as liaison between the university and alumni who serve as interviewers. An important part of the application process, the interview is often the best chance for worthy Maine applicants to let their accomplishments and personalities shine. The application process has become increasingly competitive – the University of Pennsylvania received 20,483 applications for the Class of 2010, of which only 3,617 were successful.

Adrian has been appointed to serve on the Organizing Committee of the American Bar Association's International Law Section's 2007 Annual Fall Conference, which will be held in London. Adrian, whose practice focus includes international and commercial law, was a resident of the United Kingdom for 11 years. He will use this experience to cement existing ties and build new friendships.

DAVE HERZER has been invited to join the Board of Directors for Group Main Stream, a client of the firm that operates group homes for mentally or physically challenged adults.

JENNIFER RUSH and her husband, Adam, became parents for the first time with the birth of their daughter, Evelyn, on October 18, 2006. On January 11, 2007, **CAROLINE SMARC** and her husband, Tom, welcomed their new baby girl, Carolee Ava. Congratulations to the new parents!

At the annual winter meeting of the Maine Bar Association in January, **STEVE HESSERT** was re-elected Chair of the Workers' Compensation Section. At the meeting Steve also presented a program on medicare secondary payor issues with Thomas Hatchfield, insurance specialist for CMS in the Boston Regional Office.

BOB BOWER recently retired from the Board of Trustees at Kieve-Wavus Education, Inc. after 21 years of service. During those years Kieve-Wavus grew from a small boy's summer camp to a year round state designated non-traditional limited purpose school. Kieve-Wavus served over 10,000 children and adults from all over Maine last year. Bob has served in a variety of roles from chair of the Curriculum Committee to legal counsel and Chairman of the Board.

DEBRA TRAFTON has joined the firm to support Lance Walker in the litigation practice group. Debra received her B.A., cum laude, from the University of Southern Maine and has been employed as a legal secretary for many years. In addition to her legal career, Debra is an artist who owns and operates the DLT Art Studio, LLC in Auburn, Maine. She has exhibited throughout Lewiston/Auburn and Portland. Her art work has been purchased by private and commercial collectors. Debra has donated her art work to local agencies in annual fund raising events including: L/A Arts, The Lewiston Public Theater, The MPBN Channel 10 in The Great TV Art Auction to name a few. □

Employers must beware of the National Labor Relations Act when writing employee handbooks

BY ROBERT W. BOWER, JR.

Employers properly seek to apply work rules and policies uniformly by writing and disseminating an "employee handbook" to employees. Such consistent application of personnel policies decreases the risk of employment discrimination claims. However, the drafting of such handbooks requires care as the policies themselves can create legal liability. A recent decision of the United States Court of Appeals for the District of Columbia Circuit illustrates that among the considerations employers must take into account when drafting an employee handbook is the National Labor Relations Act.

The National Labor Relations Act, 29 USC §§151-169, establishes rights for all employees regardless of whether those employees are represented by a union or not. For example, section 7 provides that employees:

> Shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and **to engage in other concerted activities for** the purpose of collective bargaining or **other mutual aid or protection**, and shall also have the right to refrain from any and all of such activities…
>
> *Id.* at §157 (emphasis added).

Employers commit an "unfair labor practice" subjecting themselves to statutory penalties and remedies when they "interfere with, restrain, or coerce employees in the exercise [of their section 7 rights]." *Id.* at §158(a)(1).

A recent decision of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") illustrates an example of an employee handbook which causes liability under section 7. In *Guardsmark, LLC v. National Labor Relations Board*, Decision No. 05-1216 (February 2, 2007), the D.C. Circuit considered three work rules contained in an employee handbook. The first rule required that employees register their complaints about working conditions only through their chain of command. The second prohibited employees from soliciting and distributing literature "at all times while on duty or in uniform." The third rule prohibited employees from "fraternize[ing] on duty or off duty" with other employees.

The question for the Court was whether the National Labor Relations Board ("NLRB") ruled properly when it found the first two rules violative of section 7 and the fraternization rule not in violation of section 7.

The D.C. Circuit considered each rule on its merits.

CHAIN-OF-COMMAND RULE

Guardsmark's Chain-of-Command Rule read as follows:

> While on duty you must follow the chain of command and report only to your immediate supervisor. If you are not satisfied with your supervisor's response, you may request a meeting with your supervisor and his or her supervisor. If you become dissatisfied with any other aspect of your employment, you may write the Manager in Charge or any member of management. Written complaints will be acknowledged by letter. All complaints will receive prompt attention. *Do not register complaints with any representative of the client* (emphasis added).

The D.C. Circuit held that the NLRB properly determined that this Chain-of-Command Rule effectively

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chilled employees' rights to "engage in … concerted activities for the purpose of … mutual aid or protection. …" The NLRB and then the D.C. Circuit both held that the rule appeared to be written broadly enough to proscribe employee complaints to outsiders even on nonworking time. The D.C. Circuit held that employees have a statutorily protected right to solicit sympathy, if not support, from the general public and customers regarding their terms and conditions of employment. While work rules proscribing complaints to customers only during working time may not violate section 7, the broad Chain-of-Command Rule in this case went over the line and violated section 7's employee protections.

SOLICITATION RULE

The employee handbook contained the following Solicitation Rule:

> Solicitation and distribution of literature not pertaining to officially assigned duties is prohibited *at all times while on duty or in uniform,* and any known or suspected violation of this order is to be reported to your immediate supervisor immediately (emphasis added).

The NLRB and the Court held that this solicitation rule inappropriately chilled section 7 rights because it

"undoubtedly places restrictions on protected off-work solicitation [and] absent some persuasive justification for the rule, should be deemed overbroad and unlawful." The NLRB and the Court were concerned that the rule prohibited off-duty solicitation if the employee was dressed in his/her uniform. If so, this rule clearly infringed on employees' rights to engage in "concerted activities" for the purposes of collective bargaining or other mutual aid or protection, and therefore, it constituted a violation of the Act.

FRATERNIZATION RULE

Finally, the Court took up the employer's Fraternization Rule as follows:

> While on duty you must NOT …*fraternize on duty or off duty*, date or become overly friendly with the client's employees or with co-employees (emphasis added).

This was the only point at which the D.C. Circuit disagreed with the NLRB. The Board had held that the Fraternization Rule did not violate the Act because "employees would reasonably understand the rule to prohibit only personal entanglements rather than activity protected by the Act."

The D.C. Circuit disagreed. It reasoned that if the only purpose for the rule was to prohibit "dating" and "becoming overly friendly" then the word "fraternize" would have no independent meaning. The Court resorted to rules of statutory construction, which require it to give effect to every clause and word of a statute. The Court believed that employees would reasonably interpret the Fraternization Rule to bar them from discussing terms and conditions of employment. Such a bar would violate the employee's section 7 rights.

The employer in *Guardsmark* was unionized, but the principles articulated in the Act and the D.C. Circuit's opinions apply equally to unionized and non-unionized employers. Many of our corporate clients have employee handbooks. The *Guardsmark* decision reminds us that those handbooks must be dusted off frequently and evaluated for compliance with all applicable employment and labor laws, as well as effectiveness. For example, the employer in *Guardsmark* had three rules that were found in violation of the statute. Yet each of them could have been written in such a way to avoid this problem. For example, the Chain-of-Command Rule could have added the phrase "while on duty" to its last sentence and avoided the National Labor Relations Act problem. (But such a rule could be detrimental to "best practices" in preventing discrimination claims!) Second, the Solicitation Rule could have passed section 7 muster had the employer clarified that it applied only to solicitation occurring while the employee is on duty. Finally, the Fraternization Rule could have been narrowed to meet its intended purpose by stating clearly that it prohibited "dating" or "becoming overly friendly with the clients, employees or with co-employees." It was the additional ban on "fraternization" that broadened the rule sufficiently to run afoul of protected rights under section 7.

Employers must have a firm understanding of the details of the language in their employee handbooks. The use of jargon or historical language that has become archaic can lead to confusion and ultimately violation of the law. Further, language in the employee handbook that does not precisely address the business interests at hand can create spillover into prohibited areas. Please give us a call if you have any questions regarding the specifics of your particular employee handbook. □

John R. Veilleux: New Member of Firm

We are pleased to announce that John R. Veilleux, who joined the litigation group as an associate in 2000, has become a member of the firm as of January 1, 2007. John is a graduate of Colby College where he was a member of the hockey team. He enrolled in the University of Maine School of Law in 1996, and graduated cum laude in 1999. While at law school John was a member of the Moot Court Board and also served as an articles editor for the Ocean & Coastal Law Journal. Also while at law school John worked as a summer intern at NH&D in 1997 and 1998.

Since joining the firm, John has focused his practice in civil litigation, to include personal injury cases, construction litigation, timber trespass claims, and boundary disputes. He has extensive jury trial experience in the Maine Superior Court and has been a frequent presenter at client seminars on issues relating to civil litigation. He is a frequent contributor to this *Newsletter*.

John and his wife, Lisa, currently reside in Yarmouth with their three sons, Tyler (almost 8) and 5 year old identical twins, Jacob and Justin. His love of hockey continues, and John is currently the Initiation Director of the Casco Bay Hockey Association, where he also serves as a Board member. He is also in charge of three different introduction to hockey groups, involving nearly 200 children, and coaches one of the three groups. In his spare time John also plays hockey once per week in the Portland Men's League. □

JOHN R. VEILLEUX

Superior Court: Emotional Distress Does Not Constitute "Bodily Injury"

BY LANCE E. WALKER

In the next couple of months, the Law Court will consider a decision by the Superior Court in Penobscot County that the term "bodily injury," as defined in most general liability and UM insurance policies, does not include claims for emotional distress.

In August 2002, Robert Donath negligently operated a motor vehicle which in turn struck Daisy Ryder causing severe injuries resulting in her death. Daisy's mother, Nettie and brother, Dominic, witnessed the accident. Nettie Ryder and Daisy's father, Joshua Ryder filed a wrongful death action against Donath. In that action, Nettie also asserted an independent account against Donath for emotional distress based on a theory of bystander recovery and Nettie brought a claim against Donath on behalf of Dominic for his emotional distress, also based on the law of bystander recovery.

The Plaintiffs also filed a separate action (*Ryder v. USAA Casualty Insurance Company*, CV-05-137, Superior Court, Penobscot County, Hjelm, J.) against Donath's insurer and USAA in order to determine the amount of coverage available under the Policy issued to Donath and the existence of uninsured motorist coverage under the USAA Policy. Donath's liability carrier, Progressive Northern Insurance Company, settled the claims brought against Donath on Dominic's behalf for the full amount of coverage allowed under Donath's policy: $50,000.00. The Plaintiffs then dismissed all claims that had been asserted against Progressive and they were given leave to amend their Complaint to pursue only their claims against USAA for recovery of damages under the UM provision.

The central issue before the Court on the parties' cross motions for summary judgment was whether USAA was obligated to provide UM coverage for the bystander emotional distress claims.

The USAA policy defined "bodily injury" as "bodily harm, sickness, disease, or death." This is generally the same definition given to bodily injury by ISO and non-ISO member insurers alike. The Court concluded that the term "bodily injury" unambiguously does not include a claim for bystander emotional distress. Characterizing the psychic distress that constitutes a claim for bystander recovery as qualitatively different than that of any of the four definitional constituents of "bodily injury" the Court stated that the definition requires some physical harm or compromise to the body without reference to any psychic damage.

Justice Hjelm relied heavily on Massachusetts case law in arriving at his conclusion. In *Allstate Insurance Company v. Diamant*, 518 N.E. 2.d 1154, 1157 (Mass. 1988) the Massachusetts Supreme Judicial Court concluded that "bodily injury" has a more restricted meaning than "personal injury:" the latter is broader than "bodily injury" and includes not only physical injury but also any affront or insult to the reputation or sensibilities of a person. By comparison, "bodily injury" is a narrow term and encompasses only physical injuries to the body and the consequences thereof. Massachusetts has joined with those other jurisdictions that find that "bodily injury" constitutes only a narrow subset of injuries that can be described more broadly.

The Law Court has not addressed this issue squarely, although in *Maine Bonding v. Douglas Dynamics*, 594 A.2d 1079 (Me. 1991), the Court held that an insurer has a duty to defend a claim for emotional distress allegedly caused by a wrongful discharge from employment because "it is possible,

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albeit remotely so, that there would be coverage if the Plaintiff can establish that he suffered 'bodily injury, sickness, or disease as a result of the emotional distress caused by his discharge.'" *Id.* at 1081. The Court's language in *Maine Bonding* seems to suggest that the Court concedes that emotional distress does not itself constitute "bodily injury." However, the Court leaves open the possibility that if the emotional distress manifests itself physically, there is a potential that the policy would provide coverage.

This dictum from the Law Court is in stark contrast to Justice Hjelm's declaration that emotional distress does not constitute "bodily injury" "irrespective of whether psychic injuries have physical manifestations or consequences, because those damages do not arise from corporeal contact." Justice Hjelm suggests that merely because psychic injuries may have physical manifestations, they are not transformed into "bodily injury" as that term is defined. In order for an injury to be considered an indemnifiable "bodily injury" it must be caused by physical contact in the first instance and not from psychic injury.

The Law Court may well agree with Justice Hjelm's rationale that emotional

distress, standing alone, cannot possibly constitute "bodily injury" as that term is defined in most general liability and UM policies. However, the Court has already indicated that should an alleged emotional injury manifest itself physically, that physical manifestation would constitute "bodily injury," for which coverage would be provided. Although the Law Court expressed its skepticism about whether or how frequently emotional distress claims manifest themselves in a physical way, it expressly left open that possibility for purposes of the duty to defend. *See Douglas Dynamics*. Justice Hjelm's decision, by contrast, disregards whether physical injury results from emotional distress. Instead, Hjelm states that "corporeal contact," not psychic distress, must cause the bodily injury. This not only seems to run counter to the Law Court's language in *Douglas Dynamics*, but it also departs dramatically from the evolution of emotional distress torts in Maine.

Recovery for mental suffering was historically prohibited absent physical injury to the person or a physical impact or blow. *Herrick v. Evening Express Publishing Co.*, 113 A. 16 (Me. 1921). This rule is consistent with Justice Hjelm's decision in *Ryder* but does not reflect the modern view. Limiting emotional distress claims in this way was deemed to be a necessary safeguard against fraudulent claims. The Law Court progressively liberalized the limitations in recovering for emotional distress over the course of the next six decades until the Court's holding in *Gammon v. Osteopathic Hospital of Maine, Inc.*, 534 A.2d 1282, 1283 (Me. 1987).

In *Gammon*, the Court reviewed its previous emotional distress cases and noted that they had been less than a model of clarity. Although the Law Court would not expressly overrule its previous holdings in the emotional distress area, it eliminated several of the earlier arbitrary distinctions in its prior opinions. For example, the *Gammon* opinion dropped the requirements of showing of physical impact, objective manifestation, underlying or accompanying tort, or specific circumstances as "more or less arbitrary requirements" that should not by themselves bar a claim. Instead, the Court chose to rely on the trial process and the principle of foreseeability to insure against fraudulent claims. In this way, the *Gammon* opinion still serves as Maine's modern explanation of emotional distress claims. Justice Hjelm's decision departs from these principles by suggesting that only injuries resulting from physical contact are indemnifiable under the definition of "bodily injury."

However, it is important to keep in mind that Justice Hjelm was engaging in contract interpretation of the term "bodily injury" and, as such, he was not constrained by whether such injuries are equal in scope to those that are compensable under common law. As several courts have noted, insurers are free to limit the range of injuries that are indemnifiable under a contract of insurance, which is decidedly different in scope than the range of injuries for which the law allows recovery. A possible distinction between those cases and the *Ryder* case is that most of those courts were interpreting general liability policies, which are not considered compulsory insurance under most states' insurance codes. UM coverage, on the other hand, is compulsory insurance in Maine and for that reason the Court may reach a different conclusion about what types of injuries constitute indemnifiable "bodily injury". For example, the Law Court may find that the legislature, despite the fact that it used the identical definition of "bodily injury" that the insurance industry uses, intended that "bodily injury" be equal in scope to the types of injuries for which the law allows recovery, including emotional injuries if they manifest themselves physically. The Law Court may decide that any other interpretation would render USAA's policy in derogation of the UM statute making it unenforceable.

Even if the Court agrees that the policy limitation on the scope of indemnifiable injuries does not have to comport with the universe of what is recoverable under tort law, it may still be troubled by the fact that this decision, if affirmed, has the potential to leave a large gap in liability and UM coverage.

The Law Court's institutional compulsion to reach a result that is good for the insured (and therefore inherently "good") should not influence its interpretation of unambiguous policy language even if the result leads to a potential gap in coverage between indemnifiable injuries and injuries for which the law simply allows recovery. There are many types of damages for which liability and UM insurance were never intended to provide coverage. This does not, standing alone, render all such limitations on the scope of indemnifiable injuries void simply because of the Court's unstated desire that insurers be held to provide coverage for nearly all things at all times. However, a cursory examination of the Court's history in the insurance coverage arena demonstrates that it is precisely those perceived public policy effects that often drive its analysis.

The *Ryder* case is currently being briefed by the parties and we should see a decision from the Law Court later this spring. □

Workers' Compensation-
Law Court decisions

By Stephen W. Moriarty

STEPHEN W. MORIARTY

Apportionment and MIGA

The Maine Insurance Guarantee Association (MIGA) was created by the Legislature to provide a source of payment of covered claims under certain insurance policies in the event of an insurer having become insolvent. MIGA has frequently been described as "a guarantor of last resort", and the statute contains a unique provision which essentially requires a claimant to exhaust all possible claims against solvent insurers before seeking payment or reimbursement from MIGA. In the Workers' Compensation context, MIGA would assume responsibility for payment of benefits if there were only one injury and if the insurer responsible for that injury had become insolvent. However, in cases involving multiple injuries and other responsible parties, MIGA cannot be found to be responsible for payment of benefits.

The issue was initially addressed by the Law Court in *MIGA v. Folsom*, 2001 ME 63, 769 A.2d 185. In that proceeding, the employee had sustained three different occupational injuries while working for the same employer, but a different insurer was responsible for each injury. The second insurer became insolvent, and MIGA stepped into its shoes. The remaining two insurers were fully solvent. In anticipation of an apportionment proceeding before the Board, MIGA filed a declaratory judgment action in Superior Court seeking a determination that it had no responsibility to either of the remaining insurers for its share of the employee's entitlement to benefits.

In a detailed decision the Court traced the scope of the MIGA statute and observed that the definition of a "covered claim" excluded any liability in the nature of a subrogation claim. Noting that the apportionment section of the Workers' Compensation Act specifically defines the right to seek apportionment in terms of subrogation, the Court held that MIGA was excluded by statute from liability in an apportionment proceeding. Accordingly, only the two remaining solvent insurers were responsible for payment of the employee's compensation entitlement.

In a more recent decision the Court affirmed *Folsom* and further protected MIGA from financial responsibility to the detriment of a remaining responsible insurer. In *Juliano v. Ameri-Cana Transport*, 2007 ME 9 (January 12, 2007), the employee had sustained three distinct occupational injuries, the first of which was covered by an insurer which had since become insolvent. The remaining two injuries were covered by Wausau Insurance Company. The first entry occurred in 1981, and the law in effect at the time of that injury provided for an annual inflation adjustment to benefits for total incapacity. Following hearing the Board awarded benefits for total incapacity and found that all three injuries contributed equally to the disability. As the insurer on the risk at the time of the last injury, Wausau was ordered to pay benefits to the employee, and MIGA was ordered to reimburse Wausau one-third share.

MIGA filed a Motion for Findings of Fact, and the Board modified its decision in accordance with *Folsom*. Specifically, the Board found that while MIGA was not required to reimburse Wausau for its one-third share, it was nevertheless obligated to pay the mandated annual inflation adjustments to the employee on the grounds that such benefits were a direct obligation owed to an employee. The Law Court accepted the case on appeal solely to review MIGA's obligation to pay inflation adjustments.

The Court held that the Legislature determined that in multi-injury cases the last insurer was exclusively responsible for payment of benefits subject to the right to seek apportionment against prior responsible insurers. The Court was sensitive to the fact that Wausau did not begin to cover the employer until the law had been changed to eliminate the annual inflation adjustment in effect in 1981. Nevertheless, the Court held that the last insurer was responsible for payment of the employee's entire benefit, including that portion attributable to the initial 1981 injury. Wausau was therefore found to be liable for payment of the inflation adjustment, and MIGA was relieved of all responsibility. In fact, Wausau was directed to reimburse MIGA for the inflation adjustment benefits that had been paid during the pendency of the appeal.

Of course, if the original 1981 insurer had still been solvent, it would have borne the responsibility of payment of the inflation adjustment. The scope of the Court's decision is therefore limited to those situations in which MIGA has assumed its role as a final guarantor following insolvency.

Discrimination

In our last issue we reported on the decision of the full labor-management Board in the matter of *Shaver v. Poland Spring Bottling Corp.*, in which the Board granted a petition to remedy discrimination. In that proceeding a claimant was terminated when he failed to immediately report the occurrence of an occupational injury in accordance with the employer's established personnel policy. Even though the occurrence of the injury was not in dispute and the claimant received full workers' compensation benefits for his disability, the Board found that the termination was discriminatory and improperly penalized the employee for an assertion of rights under the Act.

The employer filed a Petition for Appellate Review, and shortly before Thanksgiving the Court exercised its discretion and declined to accept the case on appeal. As a result, the decision of the Board stands. At this point, therefore, there will be no guidance from the Court on the extent to which an employer's bona fide interests as reflected in a personnel policy may trigger the anti-discrimination provisions of § 353. At a minimum, however, employers should not penalize an employee in any fashion for reporting an occupational injury within the statutory 90-day period, notwithstanding legitimate employer concerns for the prompt reporting of injuries. □

Anne Jordan nominated to become Commissioner of Public Safety

Governor John Baldacci recently nominated Anne Jordan to become Maine's next Commissioner of Public Safety. There are eight bureaus within the Public Safety Department, including State Police, the Maine State Fire Marshal's Office, Maine Drug Enforcement, and the Bureau of Highway Safety. The Department has over 600 employees and an annual budget in excess of $92 million.

Anne joined the firm as an associate attorney in 1997, and became a member of the firm in 2001. Following her graduation from the University of Maine School of Law in 1984, she worked for six years as an Assistant and then Deputy District Attorney in York County, and practiced with another Portland law firm before joining NH&D. In her years at the firm Anne has focused her practice in civil litigation, domestic relations, animal welfare law, and fraud and arson investigation.

As a legal professional Anne has pursued a broad variety of professional interests and has been extensively involved in public service. Anne currently serves as Chair of the Governor's Advisory Board on Executive Clemency (the Pardon's Board), and has served on the Task Force for Fire Safety for Children. Currently she also serves on the Maine Harness Racing Commission and the Animal Welfare Advisory Council. Anne has been particularly active in the arena of animal protection, and last year received wide recognition for her efforts in drafting and securing the passage of Maine's Pets and Domestic Violence Law.

Anne and her husband Jeff reside in South Portland, with their two children. Jeff formerly served as South Portland's City Manager, and is now the Deputy Director of the Brunswick Local Redevelopment Authority.

ANNE H. JORDAN

We offer Anne and her family our warmest congratulations and wish her the very best in her challenging new position. She will be greatly missed by all of us here at NH&D. □

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