NORMAN, HANSON & DETROY, LLC

newsletter

Current developments in Maine law

Fall 2013

Vol. 26, No. 3

WE'VE MOVED!

Managing partner Steve Hessert, Portland Mayor Michael Breman, and Peter DeTroy at the ribbon cutting.

On September 9, 2013, after months of renovation and anticipation, NHD moved to its new current location at Two Canal Plaza in Portland. Our new offices offer state-of-the-art design elements. Recognizing that a visit to a law firm is not always free of stress, our client meeting areas and mediation center are designed to create a calming environment, from the wall colors, to furniture and seating arrangements, and to the lighting and the use of glass walls and large windows to bring in as much natural light as possible. The legal offices also utilize these key designs. While it was not physically possible for everyone to have an office with an exterior window, interior glass walls bring daylight, outdoor views, and an open space feel to everyone while still allowing for the privacy and quiet needed for a productive work environment. Our new space is also notable for its team-oriented approach to office design. Virtually all members of the firm, whether senior members, new associates, paralegals, or legal secretaries have the same-sized work space. The design is intended to emphasize that all contribute to the success of the firm.

The renovation of the three upper stories of Two Canal Plaza involved many local craftsmen and businesses such as Archetype Architects, Whited Planning+Design, Monaghan Woodworks, Capozza Tile, Malone Commercial Brokers, and Cunningham Security. The new location comfortably accommodates the nearly 100 members and staff of the firm based in Portland.

We celebrated with a formal ribbon-cutting ceremony on September 17, as is shown in the photograph above. □

Morning receptionist Debbie Becker greets clients in the new reception area.

Attorneys and staff enjoy the lunchroom.

David Very at work in his office.

Credit Unions Keeping Track of Suspicious Activity – Brief Guide and Current Trends

By Darya I. Haag

Under the Bank Secrecy Act of 1970, as amended by the USA PATRIOT Act, credit unions and all other financial institutions in the United States must assist United States governmental agencies with detecting and preventing money laundering and associated criminal activities.

Specifically, all federally insured credit unions must report any known or suspected crime or any suspicious *transaction* related to money laundering or other illegal activity such as terrorism financing, loan fraud, embezzlement, or a violation of the Bank Secrecy Act ("BSA") by filing Suspicious Activity Reports ("SAR") with the Financial Crimes Enforcement Network ("FinCEN"). 12 C.F.R. §748.1(c)(1). A transaction is broadly defined to include "a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, share certificate, or other monetary instrument or investment security, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected." *Id.*

A. Suspicious Activities Triggering SAR Filing

A credit union must file a completed SAR with FinCEN if it knows, suspects, or has reasons to suspect of any of the following activities:

- Criminal violations involving insider abuse in any amount.
- Criminal violations aggregating $5,000 or more when a suspect can be identified.
- Criminal violations aggregating $25,000 or more regardless of a potential suspect.
- Transactions conducted or attempted by, at, or through the credit union (or an affiliate) and aggregating $5,000 or more, if the credit union or affiliate knows, suspects, or has reason to suspect that the transaction:
  - o May involve potential money laundering or other illegal activity (e.g., terrorism financing).
  - o Is designed to evade the BSA or its implementing regulations.
  - o Has no business or apparent lawful purpose or is not the type of transaction that the particular customer would normally be expected to engage in, and the credit union knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction.

See 12 C.F.R. § 748.1(c)(1)(i)-(iv); *see also Bank Secrecy Act Anti-Money Laundering Examination Manual by the Federal Financial Institutions Examination Council* ("FFIEC"), *available at* http://www.ffiec.gov/bsa_aml_infobase/pages_manual/OLM_015.htm.

The following practices have been identified as examples of suspicious activity triggering the reporting requirement: structuring/ money laundering; bribery or gratuity; check fraud; consumer lending fraud; check kiting; counterfeit checks; counterfeit credit or debit cards; other counterfeit instruments; credit card fraud; debit card fraud; defalcation or embezzlement; false statements; misuse of position or self-dealing; mortgage loan fraud; mysterious disappearance; wire transfer fraud; computer intrusion; terrorist financing; and identity theft. S*ee Suspicious Activity Reporting by the National Association of Federal Credit Unions* ("NAFCU"), *available at* www.nafcu.org/WorkArea/DownloadAsset.aspx?id=17029.

DARYA I. HAAG

A SAR need not be filed for a committed or attempted robbery or burglary if it had been reported to appropriate law enforcement authorities. Similarly, a credit union is not required to file a SAR for lost, missing, counterfeit, or stolen securities if it has filed a report under 17 C.F.R. § 240.17f-1.

B. SAR Filing Procedures, Notification and Retention of Records

NORMAN, HANSON & DETROY, LLC

newsletter

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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A credit union must file a SAR with FinCEN within 30 calendar days from the date the suspicious activity is initially detected. If no suspect is identified on the date of detection, a SAR may be filed within 60 days from the detection date. *See* 12 C.F.R. § 748.1(c)(2)(i). If the credit union detects an ongoing money laundering scheme, or another violation requiring immediate attention, it must immediately notify an appropriate law enforcement authority or its supervisory authority, in addition to filing a SAR. *Id.*

A SAR must be complete, full and accurate when filed, in compliance with the filing instructions provided by FinCEN. As of April 1, 2013, all SARs must be filed electronically through the BSA E-Filing System which can be accessed at http://bsaefiling.fincen.treas.gov/main.html. Failure to comply with the SAR filing and reporting requirements may subject the credit union, its officials and employees to monetary penalties and other administrative sanctions.

Credit unions must maintain a copy of any SAR that they file and the original or business record equivalent of all supporting documentation to the report for a period of five years from the date of the report. Supporting documentation, identified and maintained by the credit union as such, is considered a part of the filed report even though it should not be actually filed with the submitted report. 12 C.F.R. § 748.1(c)(3). Accurate records should be kept of all transactions that have been reviewed as potentially suspicious and not followed up with a SAR report. The decision not to file a SAR should be documented with a brief statement of reasons for not doing so in the credit union's pertinent records.

The credit union management must promptly notify its Board of Directors, or a Committee designated by the Board to receive such notice (the "SAR Committee"), of any SAR filed. If the suspect identified in a SAR is a director or a member of the SAR Committee, the credit union *may not* notify the suspect, but must notify the remaining directors or designated SAR Committee members. See 12 C.F.R. § 748.1(c)(4)(ii); 31 U.S.C. 5318(g)(2).

C. SARs Are Strictly Confidential

It is important to remember that SARs are strictly confidential. No credit union, including its officials, employees, and agents, that reports a suspicious activity may notify any person involved in the transaction that the transaction has been reported. Any credit union or person subpoenaed or otherwise requested to disclose a SAR or the information contained in a SAR, *except* when such disclosure is requested by FinCEN or an appropriate law enforcement or federal banking agency, *must refuse* such request, citing 12 C.F.R. § 748.1(c)(5) and 31 U.S.C. 5318(g), and notify NCUA of the request. Nevertheless, credit unions must make the filed SAR and all supporting documentation available to appropriate law enforcement authorities or their supervisory authority upon request.

D. Safe Harbor and Section 314(b) of the USA PATRIOT ACT

Federal law (31 U.S.C. 5318(g)(3)) protects the reporting parties from civil liability for all SARs made to appropriate authorities, including supporting documentation, regardless of whether such reports are filed pursuant to the SAR instructions. Specifically, the law provides that a credit union and its officials, employees, and agents that make a disclosure to the appropriate authorities of any possible violation of law or regulation, including a disclosure in connection with the preparation of SARs, "shall not be liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, or under any contract or other legally enforceable agreement (including any arbitration agreement), for such disclosure or for any failure to provide notice of such disclosure to the person who is the subject of such disclosure or any other person identified in the disclosure." 31 U.S.C. 5318(g)(3). The safe harbor applies to SARs filed within the required reporting thresholds as well as to SARs filed voluntarily on any activity below the threshold.

Despite the apparent breadth of the safe harbor provision, disclosure of account information *should not* be made in response to *verbal* instruction from a governmental official. Such instructions have been held to fall outside the "safe harbor" in that they do not constitute a "legal authority" on which a financial institution may rely in making the disclosure. *See Lopez v. First Union Nat. Bank of Florida,* 129 F.3d 1186 (11th Cir. 1997). Therefore, any requests for SARs and supporting documentation should be reviewed carefully to verify the requestor's identity. The results of such verification must be documented and maintained as part of the SAR record.

In addition, under Section 314(b) of the USA PATRIOT ACT, a financial institution may voluntarily share information with other financial institutions "for purposes of identifying and, where appropriate, reporting activities that the financial institution or association suspects may involve possible terrorist activity or money laundering." Upon proper registration with FinCEN, a credit union may share information under the protection of "safe harbor" from liability to the "full extent provided in subsection 314(b) of Public Law 107-56 [the USA PATRIOT Act]." As revealed by the FinCEN in its recent report, the number of SARs referencing 314(b) increased from a total of two in 2002 to 3,671 314(b) SARs in 2012. *See The SAR Activity Review – Trends, Tips & Issues* (Issue 23, May 2013), *available at* http://www.fincen.gov/news_room/rp/files/sar_tti_23.pdf ("FinCEN 2013 Report").

E. Suspicious Activity Reporting Current Trends

Staying abreast of the trends and issues faced and identified by similarly situated financial institutions is essential for a credit union, its officials and employees, to be able to successfully identify and report suspicious activi-

ties. In this context, it is worth noting that FinCEN has updated its SAR forms with a designated reporting field for suspected elder financial exploitation, which has been on the rise in the recent years. Indeed, in the year after FinCEN issued its Advisory to Financial Institutions on Filing Suspicious Activity Reports Regarding Elder Financial Exploitation, FIN-2011-A003, there has been a 382 percent increase in relevant post-advisory filings from the prior 12-month period. *See FinCEN 2013 Report.*

In its 2013 Report, FinCEN pointed to the statistics showing that "abuse by a relative or caregiver" has been identified by depository filers as the *most* reported characterization of suspicious activity. *Id.* It was followed by "other suspicious activity types" that facilitated the financial exploitation, including identity theft, misuse of position or self-dealing, embezzlement/theft/disappearance of funds, check fraud, check kiting, and counterfeit credit/debit card.

A typical SAR report involving elderly exploitation would describe the perpetrator coercing or persuading the elderly victim into completing financial transactions that benefited the perpetrator at the victim's expense. Other reported instances included the perpetrator abusing his or her power of attorney over the victim's account. Filers of SARs would usually report suspicious wire activity by their elderly customers, such as multiple same-day wire transfers, sometimes from different locations, to different cities in the United States, as well as unusual wires to moderate and/or high-risk countries. *Id.*

For further information about Suspicious Activity Reporting and compliance, please contact the firm's Credit Union Group. □

Workers' Compensation – Appellate Division Decisions

By Stephen W. Moriarty

STEPHEN W. MORIARTY

In 2012 the Legislature created the Appellate Division of the Workers' Compensation Board much on the model of the Appellate Division of the former Workers' Compensation Commission, which went out of existence in 1993. In the years following the parties had no guaranteed right of appeal to any higher authority. Instead, an aggrieved party could file a Petition for Appellate Review with the Law Court, but the Court exercised discretionary review and was not required to accept a case for appeal. In recent years the number of cases taken by the Court has dwindled substantially. To illustrate, the last workers' compensation opinion from the Court was issued on March 21, 2013.

Effective August 30, 2012, the Division was created by §321-A and §321-B to hear appeals from all decisions of hearing officers. The Division in each case consists of a panel of at least three hearing officers excluding that officer whose decision is on appeal. The Division does not exercise discretionary review, but instead must hear all cases appealed by any party, thus guaranteeing a right to appellate review. Findings of fact are not subject to appeal, but the Division may otherwise affirm, reverse, or modify the decree under appeal.

Decisions of the Appellate Division are then appealable to the Law Court, which continues to exercise discretionary review and may select those cases which it concludes have sufficient legal merit to be heard.

Effective February 9, 2013 the Board promulgated Chapter 13 of the WCB Rules, which sets forth the procedures for appealing to the Appellate Division. Shortly afterward the Division began hearing its first appeals. The following is a summary of the more significant decisions.

Apportionment for inflation adjustments.

There are many multiple-injury cases in which the first injury occurred before January 1, 1993, and §201(6) provides that an injured workers' entitlement is based upon the law in effect at the time of injury. For such earlier injuries involving overall total incapacity, inflation adjustment benefits must be paid on the third anniversary of the injury and annually thereafter. There are no inflation adjustments payable for injuries occurring on or after January 1, 1993. However, where two or more injuries combine to produce total incapacity and at least one of them occurred before January 1, 1993, the Law Court held in *Dunson v. South Portland Housing Authority,* 2003 ME 16, 814 A.2d 942 that the most recent injury must pay all benefits owed to the employee, including any inflation benefits attributable to earlier injuries. However, the *Dunson* Court did not indicate whether the most recent injury had apportionment rights as against another injury's inflation benefits.

In *Delano v. City of South Portland,* App. Div. No. 13-11, the employee worked for the same employer

at the time of a February 28, 1991 back injury and a December 14, 2007 neck injury. At the time of the first injury the City was self-injured, and at the time of the second injury the City was insured through the Maine Municipal Association. Following litigation it was determined that the employee was totally incapacitated and that the first injury was 90% responsible for the disability. In accordance with established law, the second injury paid all incapacity benefits to which the employee was owed, and was reimbursed by the first injury for its 90% share based upon its average weekly wage. There were no issues raised on appeal concerning the degree of disability or the underlying apportionment obligation. The second injury was also required to pay to the employee the inflation adjustments to which he was entitled by the law in effect at the time of the first injury. However, in his decree the hearing officer specified that the second injury was not entitled to be reimbursed for the inflation adjustments that it was required to pay, and the employer/MMA appealed.

On appeal the employer/MMA argued that the most recent employer was subrogated to the rights of the employee and was entitled to recover reimbursement from the earlier injury to the same extent that an employee was entitled to receive benefits directly. The *Dunson* Court had implied that the most recent injury was entitled to recover by apportionment all obligations to pay compensation originating from an earlier injury. Since the entitlement to inflation adjustments belonged exclusively to the earlier injury, the employer/MMA argued that both the statute and *Dunson* compelled an entitlement to reimbursement of inflation benefits paid on account of the first injury.

The three-member panel unanimously agreed and noted that the apportionment statute (§354(3)) explicitly provides that the most recent employer is entitled to recover all payments made to an employee for which an earlier injury may be liable. Accordingly, because the employee's rights against the initial injury included disability benefits plus inflation adjustments, the Division vacated the decision of the hearing officer and ruled that the second injury was entitled to receive payment for both the 90% share of incapacity attributable to the initial injury *plus* payment of all inflation adjustments made to the employee on account of the first injury.

The employer/MMA was represented by Steve Moriarty in litigation and on appeal.

Average weekly wage calculation.

In its first decision the Division dealt with an interesting dispute regarding the appropriate method of calculating the average weekly wage. In *Gushee v. Point Sebago*, App. Div. No. 13-1, the employee had been hired in the spring of 2007 and was employed throughout the winter in the initial year of his employment. In the following two years, however, he only worked 36 weeks per year, having been laid off over the course of the winter months. The claimant sustained an occupational injury to his back on December 10, 2010.

There were no issues concerning the occurrence of the injury, and the key question involved the legally appropriate method of calculating the average weekly wage under the statute.

Because the claimant's earnings varied from week to week Method A did not apply. The hearing officer also concluded that Method C did not apply, as the claimant worked more than 26 weeks per year and therefore did not qualify for "seasonal" status. The presiding hearing officer determined that Method B could be fairly and reasonably applied, and calculated the wage by dividing total earnings in the one year period preceding the injury by the number of weeks worked. On appeal the employer argued that the residual option, known as Method D, should have been applied and that comparable employee wage information should have been considered.

On appeal the Division held that the employee's employment history was not "consistently intermittent" within the meaning of *Alexander v. Portland Natural Gas*, 2001 ME 129, 778 A.2d 343, notwithstanding the fact that he had been laid off for the two winters preceding his injury. The Division also observed that the employer maintained all fringe benefits during each period of layoff and considered the claimant to be a full-time employee. Most importantly, the Division found that the employee did not choose a part-time relationship to the labor market.

Accordingly, the division affirmed the hearing officer and found that it was "not unfair or unreasonable" to treat the claimant as a full time employee and to apply Method B. The Division did not actually find that the hearing officer was *required* to use Method B, but merely that she had not misconceived the law in doing so. Presumably the Division might have ruled otherwise if the employment itself was inherently and unavoidably less than full time, as with a teacher whose work is limited to the academic year.

Section 312 exam and clear and convincing evidence.

In *Meade v. Southworth-Milton, Inc.*, App. Div. No. 13-2, the presiding hearing officer found that the level of psychological permanent impairment resulting from a 2003 injury was 0%. It can be inferred from the opinion that a §312 examiner had been appointed by the Board and had assessed PI at 0%.

On appeal the employee argued that the hearing officer inappropriately disregarded the opinion of an examiner retained by the employee who had assessed psychological impairment at 7%. That opinion had been rendered in a 2009 report that had been generated in earlier litigation. Significantly, however, that physician had also concluded at the time of his exam that the employee had not yet reached maximum medical improvement. The Division appropriately held that without maximum medical improvement "permanent impairment cannot, as a matter of law, be established". Therefore, since the

§312 exam was more recent, and since the examiner concluded that MMI had been attained, the Division ruled that the hearing officer did not commit any error in assessing impairment, and observed as well that the opinion of the privately-retained physician was insufficient to overcome the weight to be given to the opinion of a §312 examiner.

Jurisdiction of Appellate Division.

As noted, the Appellate Division came into existence on August 30, 2012. In *Haskell v. Katahdin Paper Company, LLC,* App. Div. Dec. No. 13-3 a Board Decree had issued before the effective date of the statute but a Motion for Findings of Fact had been filed. That Motion was ruled upon on August 31, 2012. The Division ruled that it had jurisdiction over the appeal because the decision on the Motion for Findings was rendered after the effective date of the statute. Accordingly, the jurisdiction of the Division extends to appeals from all decisions issued on or after August 30, 2012.

In the same case the Division addressed a "combined effects" injury in which the employee had a pre-existing degenerative condition in the cervical spine which rendered him "very prone" to worsening even from the effects of a minor incident. In this case the claimant worked in a noisy industrial environment in which there was an increased risk of unusually loud noise above and beyond the risk associated with everyday living. While working the employee heard a "loud bang" from an upper level and turned his head sharply, and experienced an immediate onset of symptoms in his neck. The Division discussed the concept of "legal causation" at length, and concluded that there were a number of employment-related risks which satisfied the requirement of legal cause and vacated the decision of the presiding hearing officer. The Petition for Award and a companion Petition for Payment of Medical and Related Services were both granted.

Rejection of §312 opinion.

In *Bean v. Charles A. Dean Memorial Hospital*, App. Div. No. 13-6, the presiding hearing officer rejected the opinion of the §312 examiner who had concluded that the effects of gradual employment activities were causally responsible for neck and shoulder symptoms and the resulting disability. The hearing officer found that the conclusions of the §312 examiner were based largely upon the employee's reports of ongoing symptoms which were found to be unreliable and inconsistent based upon contemporaneous medical evidence.

On appeal the Appellate Division affirmed the hearing officer and found that there was sufficient clear and convincing medical evidence in opposition to the examiner's findings to support a rejection of her opinions. In addition to the lack of documentation of ongoing problems, the Division noted that the §312 examiner had in a conclusory way merely found that the mechanism of injury was consistent with the employee's complaints, but the hearing officer had reached an opposing conclusion. The Division gave deference to the findings of the hearing officer and noted that "the hearing officer could reasonably have been persuaded by the contrary evidence that it was highly probably that the IME was wrong". It should be noted that the Division did not hold that the hearing officer was required to reject the opinion of the §312 examiner, but merely that the failure to follow the opinion was adequately based upon the evidence.

Challenges to the opinion of a §312 examiner will be highly case-specific, and each case will necessarily turn upon its own facts. It is encouraging, however, to see that the Division was willing to closely examine the evidence and find that the §312 report lacked adequate foundation. □

NHD Attorneys Listed as New England "Super Lawyers"

We are proud to announce that the 2013 Edition of *New England Super Lawyers* and the 2013 *New England Rising Stars* has recognized a number of our attorneys for inclusion in the publication. They are as follows:

2013 New England Super Lawyers

Jonathan W. Brogan
Personal Injury Defense: General

Peter J. DeTroy
Professional Liability: Defense

Kevin M. Gillis
Workers' Compensation

David L. Herzer, Jr.
Personal Injury Defense: Medical Malpractice

Stephen Hessert
Workers' Compensation

John H. King Jr.
Workers' Compensation

Theodore H. Kirchner
Personal Liability: Defense

Mark G. Lavoie
Personal Injury Defense
Medical Malpractice

Thomas S. Marjerison
Personal Injury Defense: Counsel

James D. Poliquin
Insurance Coverage

New England Rising Stars

David A. Goldman
Insurance Coverage

Joshua D. Hadiaris
General Litigation

Kelly M. Hoffman
General Litigation

Matthew T. Mehalic
Civil Litigation: Defense

Jennifer A. W. Rush
Personal Injury Defense: Medical Malpractice

NHD Attorneys Listed in "Best Lawyers"

Norman, Hanson & DeTroy is proud to announce that eighteen of its attorneys have been named to the 2014 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* lists appear regularly in *Corporate Counsel* Magazine, and is published with collaboration with *U. S. News & World Report.*

Robert W. Bower, Jr.

Labor Law – Management
Workers' Compensation Law - Employers

Jonathan W. Brogan

Medical Malpractice Law – Defendants
Personal Injury Litigation – Defendants

Peter J. DeTroy

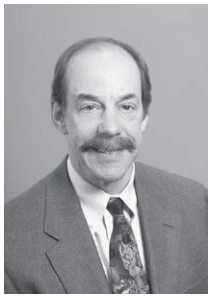
Bet-the-Company Litigation
Commercial Litigation
Criminal Defense: Non-White Colar
Criminal Defense: White-Collar Mediation
Personal Injury Litigation – Defendants
Personal Injury Litigation – Plaintiffs
Arbitration
Mediation

Paul F. Driscoll

Litigation – Real Estate
Real Estate Law

Mark E. Dunlap

Commercial Litigation – Insurance Law
Personal Injury Litigation – Defendants



John W. Geismar

Tax Law

Kevin M. Gillis

Workers' Compensation Law – Employers

David L. Herzer, Jr.

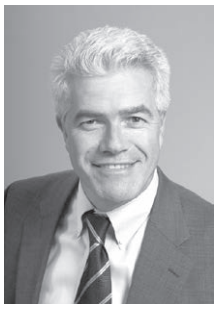
Personal Injury Litigation – Defendants
Professional Malpractice Law – Defendants
Insurance Law

Stephen Hessert

Workers' Compensation Law – Employers

John H. King, Jr.

Workers' Compensation Law – Employers



Mark G. Lavoie

Medical Malpractice Law – Defendants
Personal Injury Litigation – Defendants

Thomas S. Marjerison

Personal Injury Litigation – Defendants

NHD Attorneys Listed in "Best Lawyers" *(Continued)*

Stephen W. Moriarty
Workers' Compensation Law – Employers

Russell B. Pierce
Appellate Practice
Commercial Litigation
Ethics and Professional Responsibility Law
Product Liability Litigation – Defendants
Professional Malpractice Law – Defendants

James D. Poliquin
Appellate Practice
Bet-the-Company Litigation
Commercial Litigation
Insurance Law
Personal Injury Litigation – Defendants

Roderick R. Rovzar
Corporate Law
Real Estate Law

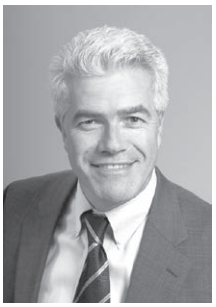
John R. Veilleux
Insurance Law
Personal Injury Litigation – Defendants

Lance E. Walker
Insurance Law

NHD Attorneys Designated as "Lawyer of the Year"

Norman, Hanson & DeTroy is proud to announce that five of its attorneys have been designated by *Best Lawyers* as the "Lawyer of the Year" for 2014 for the greater Portland area. We congratulate the following attorneys for having achieved this impressive regognition.

Peter J. DeTroy
Arbitration



Mark G. Lavoie
Medical Malpractice – Defendants

Stephen W. Moriarty
Workers' Compensation – Employers

Russell B. Pierce
Product Liability Litigation – Defendants

David L. Herzer, Jr.
Insurance Law

Recent Decisions From The Law Court

By Matthew T. Mehalic

MATTHEW T. MEHALIC

Duty to defend

In *Hardenbergh v. Patrons Oxford Ins. Co.,* 2013 ME 68 (July 16, 2013), Patrons Oxford appealed a Superior Court order finding that a duty to defend existed. The insured, Hardenbergh, possessed a homeowners policy with Patrons Oxford. A third-party brought suit against the insured and various other business entities the insured was associated with in differing capacities. The suit alleged that Hardenbergh published untrue information as fact regarding the third-party, thereby engaging in defamation. The information was allegedly published in newsletters, e-bulletins, and on a website. Hardenbergh tendered defense of the suit to Patrons Oxford and Patrons Oxford refused to defend Hardenbergh.

Hardenbergh filed in the Superior Court a declaratory judgment action seeking a defense from Patrons Oxford and costs incurred in defending himself. Patrons Oxford filed a motion to dismiss. Hardenbergh filed a for summary judgment and Patrons Oxford filed a cross-motion for summary judgment. The Superior Court granted summary judgment in favor of Hardenburgh requiring Patrons Oxford to defend him. The Law Court vacated the judgment and remanded the case to the Superior Court for entry of summary judgment in favor of Patrons Oxford.

The homeowners insurance policy included a provision that required Patrons Oxford to defend the insured from claims for "personal injury," including from claims for "injury arising out of . . . libel, slander or defamation of character." However, excluded from the coverage were claims for "injury arising out of the business pursuits of any insured."

The Law Court considered on appeal whether the allegations of the complaint against Hardenbergh fell within the policy's "business pursuits" exclusion. This was dependent on whether the complaint contained any allegations that, if proved, could fall within the coverage afforded by the policy. The Law Court began its analysis by examining the insurance policy language to determine the scope of coverage before construing the policy language against the complaint.

The Law Court determined that the policy provided that Patrons Oxford had a duty to defend Hardenbergh for injury arising out of libel, slander or defamation of character, except where the injury arose out of the business pursuits of the insured. Although "business pursuits" was not defined in the policy, "business" was defined to "include trade, profession or occupation." "Business pursuits" was interpreted to mean pursuit of one's trade, profession or occupation.

Turning to the complaint against Hardenbergh, the Law Court concluded that all the alleged false or defamatory statements appeared in the publications of the corporation for which Hardenbergh was the editor, publisher, owner and principal. The complaint also described the publications as a "widely read weekly trade newsletter and e-bulletin." The Law Court held that statements published in a trade publication by the publication's editor, publisher, owner and principle arose out of that person's business pursuits. Therefore, Patrons Oxford did not owe the insured a duty to defend.

The Law Court also commented on the level of specificity and definiteness in the complaint's allegations in finding that Patrons Oxford owed no duty to defend. The complaint contained a paragraph with "including, but not limited to" language in regards to the alleged defamatory statements made. Despite the indefiniteness of the paragraph, the Law Court held that the balance of the complaint indicated that any other possible defamatory statements made and not specifically identified still would have been made in the trade publications. Therefore, there were not allegations contained in the complaint that, if proved, could fall within the coverage afforded by the policy, i.e., not made in the pursuit of a trade, profession or occupation. □

KUDOS

In the July 2013 edition of "*Maine*" magazine, **PETER DeTROY** was named as among the top 50 people who have made a difference in Maine. Congratulations, Peter!

At the annual Comp Summit seminar in August, **KEVIN GILLIS** participated in a program titled "Think Tank 2013" which explored a number of unresolved practice and entitlement issues. Kevin also moderated a panel featuring two prominent state senators who have been included in recent legislative activity in the workers' compensation area. **STEVE MORIARTY** moderated the ever-popular program with three hearing officers titled "A Morning with the Hearing Officers".

This year for the first time **NORMAN, HANSON & DeTROY** served as a sponsor of Maine's premiere road race, the Beach to Beacon 10 kilometer race held in early August of each year. Members of the firm participating included **J. D. HADIARIAS, JENNIFER A. W. RUSH, STEVE MORIARTY and TED KIRCHNER.**

In late November **MATT MEHALIC** will speak at a seminar sponsored by the Institute for Paralegal Education on the topic of Trial Preparation from Start to Finish.

JOHN MURPHY, president of the Maine Credit Union League and Synergent along with **ROD ROVZAR**, led a presentation for the Credit Union League of Connecticut on October 10, 2013 at the Ashlar Village in Wallingford, Connecticut. John and Rod spoke on creating credit union service organizations. Rod focused on the mechanics of creating a four-profit subsidiary, entity choices, accounting, ownership and management. John spoke about case studies, including CUSO Mortgage Corp. and Synergent. Both program leaders spoke about Maine's very successful experience with the formation, management and continuing CUSO operations. The event was well attended and included representatives from credit unions who partner in business with Synergent.

DORIS RYGALSKI presented a seminar on Estate Planning matters to the staff at the University of Southern Maine on June 5, 2013. The program was co-sponsored by NHD and Penobscot Financial Advisors. Doris also presented on the Estate Planning topic at a Lunch 'N Learn put on by Synergent for its employees on June 21, 2013.

Our librarian **DON BERTSCH** shot his first hole in one at the Links at Outlook on September 29. Congratulations, Don!

JONATHAN BROGAN was inducted as a Fellow of the Litigation Counsel of America at the Greenbrier in Greenbrier, West Virginia. Jon was also reappointed for his third term by the Maine Supreme Judicial Court to the Advisory Committee on the Rules of Evidence. We congratulate Jon on winning his 14th club championship at the Purpoodock Club in Cape Elizabeth!

The Katahdin Counsel Recognition Program was created by the Maine Supreme Judicial Court "to focus the public's attention on the critical role that pro bono publico plays in maintaining a vibrant civil justice system". **DARYA HAAG** received a 2013 Katahdin Counsel award for providing pro bono representation to an asylum applicant and her five minor children in their ongoing efforts to obtain asylum from both the Democratic Republic of Congo and Equatorial Guinea. **DARYA** is a member of the Pro Bono Panel of the Immigrant Legal Advocacy Project. **KELLY HOFFMAN** also received a Katahdin Counsel award for her efforts in representing individuals in a variety of civil claims including a case against the IRS.

LANCE WALKER has been selected to serve as Vice President of the Falmouth Little League Board of Directors. □

New Associate: Johnathan G. Nathans

We are pleased to announce that Johnathan Nathans joined the firm as an associate attorney in September 2013. John was born in Warwick, New York and attended Trinity Pawling School. He attended Providence College on a baseball scholarship, but transferred to the University of Richmond after the baseball program was cut. While at the University of Richmond, John majored in Political Science with a minor in Leadership Studies and was the captain of the baseball team his senior year. As a student athlete, John was awarded the Patricia Cochran Cecil Scholarship in 2000 and 2001 for dedication in the classroom and on the playing field.

Following college, John signed as a free agent with the Boston Red Sox and was assigned to the Gulf Coast League. He rose steadily through the Red Sox minor league system making a name for himself as a defensive catcher. In 2003 John was promoted to the AA Portland Sea Dogs and arrived in Portland, Maine for the first time. As a Sea Dog, John was voted the "Tenth Man of the Year" by the fans at the end of the 2003 season. John spent the 2003 and 2004 seasons with the Portland Sea Dogs and met his wife, Kate, during that time.

After three more seasons of professional baseball and a career-ending injury, John decided to return to Portland, Maine. He attended the University Of Maine School Of Law where he was on the Dean's List and was chosen as co-captain of the moot court team. During law school, John was a Student Assistant District Attorney at the Cumberland County District Attorney's Office where he had successful verdicts in two jury trials, argued multiple suppression motions, and argued a case in front of the Maine Law Court. In addition to his time at the District Attorney's Office John has served as a law clerk at the U.S. Attorney's Office in Portland, Maine where he had the opportunity to work with the health care fraud unit, drug unit, and appellate division.

JOHNATHAN G. NATHANS

Following law school John was a judicial law clerk for Justices Bradford, Horton, Mills, and Wheeler before accepting an associate position at Norman, Hanson & DeTroy, LLC where he looks forward to starting his second career in Portland, Maine.

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