NORMAN, HANSON & DETROY, LLC

newsletter

Current developments in Maine law

Fall 2008

Vol. 22, No. 3

Supervisors Protected From Defamation Claims

BY MARK E. DUNLAP

Often, workplace supervisors, in either the public sector or the private sector, are called upon to evaluate the performance of their employees. Sometimes, even co-employees may be involved in the evaluation process. Occasionally, as part of the supervisor's job, there may be investigations of alleged misconduct of an employee. Obviously, sometimes there is negative information given and received about an employee under review or investigation.

What is the supervisor to do with this information? Is that supervisor risking liability for defamation by passing along the unflattering information to his or her boss? If the supervisor remains silent, however, couldn't there be negative consequences to the employer for failure to investigate wrongdoing? Couldn't employee morale plummet if the supervisor failed to candidly evaluate an underperforming employee's job performance?

The Maine Law Court recently answered some of these questions in a case I defended, *Morgan v. Kooistra*, 2008 ME 26, 941 A.2d 447. It affirmed that a supervisor reporting on his investigation of a complaint made by one of his employees against another one is protected from claims of defamatory statements made in the course of the investigation. The Law Court acknowledged that this is not a blanket protection, but applies in circumstances where the supervisor's statements are made in the scope of his employment and in good faith.

Facts

Our client, Walsh, was an assistant fire chief of the City of Portland Fire Department. In that capacity, he supervised the paramedics and emergency medical technicians in the City. In February of 2004, one of his female paramedics approached him and said that she did not want to work with Morgan, another City paramedic, because he made her uncomfortable with his sexual innuendo. She told Walsh that Morgan had made a comment about her appearance that upset her and that Morgan gave her "elevator eyes," looking her up and down. She also felt that he was looking at her rear end every time she bent over and that he was undressing her with his eyes. These actions made her unwilling to be with him in a work environment because she did not want to be alone with him.

MARK E. DUNLAP

Walsh reported this complaint to the City's Director of Human Resources who instructed him to investigate it and to report his findings to the Fire Chief. He informed Morgan's union representatives that one of their members was the subject of an investigation based on a sexual harassment type of complaint. Walsh then began his investigation. In the course of it, he interviewed several of Morgan's colleagues and received a few written reports responsive to questions he had posed to Morgan's field supervisors and others.

Sometime before receiving the February 2004 complaint from his paramedic, Walsh had been approached by two women at the Maine Medical Center Emergency Department who worked frequently with the City's paramedics. They told him that Morgan made them uncomfortable with his facial expressions and body language toward them.

INSIDE

They did not wish to do anything more than make Walsh aware of the situation, in part because they were afraid of Morgan. Walsh took the information and did nothing further with it, respecting the women's wishes.

After completing his investigation, Walsh passed his findings and recommendations on to the Fire Chief who then issued a reprimand to Morgan. The discipline was appealed by the Union and, during questioning in one of the hearings in the appeal process, Walsh stated that he had personally seen Morgan look at a female paramedic in a sexual way, had seen Morgan do the "elevator eyes" to a woman in his presence and also had heard Morgan engage in some verbal sexual innuendo toward a woman. Walsh also mentioned in the course of this process the prior complaints by the two women at Maine Medical Center, without naming them. The Fire Chief's reprimand of Morgan was ultimately overturned on appeal by an arbitrator.

Morgan later filed suit against Walsh, claiming Walsh defamed him by falsely calling the original complaint a sexual harassment complaint, by making false statements about what the Maine Medical Center Emergency personnel said to him about Morgan and by falsely testifying that he had observed the sexual look, the elevator eyes and the sexual innuendo by Morgan toward other women.

Defamation

In Maine, defamation consists of (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) amounting to at least negligence on the part of the publisher; and (d) harm to the person (actual or presumed). Harm is presumed and does not have to be proved to any dollar amount if the subject of the alleged defamatory statement is that the person has a loathsome disease, is guilty of sexual impropriety, has committed criminal conduct, or is accused of serious deficiencies in job performance.

Conditional Privilege

The Law Court, in a unanimous decision, overturned the Superior Court's refusal to grant summary judgment and dismissed the complaint against Walsh on the basis of a form of immunity known as "conditional privilege." A conditional privilege protects a supervisor from liability for defamation if the challenged statement was required or permitted in the performance of his official duties. Conduct is within the scope of employment if it is of the type the person was hired to perform and is done generally within the time and space of the employment and is done, at least partially, in the service of his employer. Stated otherwise, the conduct of an employee is **not** within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits or is not sufficiently serving the purpose of the employer.

The circumstances of this case clearly occurred within the scope of Walsh's employment. After all, he was instructed by the City Director of Human Resources to do this investigation. However, Walsh's statements about how Morgans looked at women and his sexual innuendo towards co-employees and how that affected his ability to do his job were of the type which could be actionable defamation if no immunity applied.

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.

Stephen W. Moriarty, Editor
Lorri A. Hall, Managing Editor

Norman, Hanson & DeTroy, LLC
P.O. Box 4600, Portland, ME 04112
Telephone (207) 774-7000
FAX (207) 775-0806
E-mail address: lstinitiallastname@nhdlaw.com
Website: www.nhdlaw.com

The Court's Decision

Thus, the real question that the Court had to grapple with was whether to apply the conditional privilege here. Such a privilege against a claim of defamation arises when society has an interest in promoting free (but not absolutely unfettered) speech. Such a privilege can arise in any situation in which an important interest of the person who hears the defamatory statement would be advanced by frank communication.

One of those situations, of course, is when an investigation of an employee occurs for the purposes of determining whether to discipline that employee.

Other circumstances in which the Maine Court has recognized the conditional privilege are, for example, statements made in: (1) college tenure review; (2) review board hearing suspending a doctor's hospital privileges; (3) student disciplinary procedure; and (4) employee evaluation and promotion process. The policy reason for this privilege is relatively clear. It centers on the need for honest and sometimes critical evaluation of a person's job performance. Such evaluations are vital to employee rating, promotion or discipline. As the Law Court said in the context of a college professor's tenure review: "If those who know most about an employee's job performance are deterred from frank evaluations by fear of defamation actions, and recommendations then come to be discounted as benign pablum, we all lose." *Lester v. Powers*, 596 A.2d 65 (Me. 1991).

Abuse Of Conditional Privilege

Clearly, then, the Walsh investigation was initially entitled to the conditional privilege because frank and free communication is necessary in the area of employee discipline. However, this privilege can be lost if Walsh "abused" the privilege. That is, to abuse the privilege is to make statements outside the normal channels or with malice (knowing it is false, with a reckless disregard for its truth, or acting out of spite or ill will). Morgan claimed that Walsh, if he had a privilege

at all, abused it and so lost it.

The Court held that there was no evidence that Walsh abused the privilege. Nor did Walsh make any of his statements outside the "normal channels." His statements were necessary for the accomplishment of his purpose, which was to investigate and report on his findings regarding a complaint he had received about the actions of one of his employees. Thus, he was fully entitled to the conditional privilege and to have judgment in his favor.

Conclusion

This decision by the Law Court should be comforting to those who find themselves in a position to be critical or unflattering of the job performance of one under their supervision or of a co-employee. These people can take heart that, if they play it by the book in the normal course of their jobs, and do not act maliciously or in bad faith, they are protected from liability for defamation. ☐

New Member: Kathryn M. Longley-Leahy

Norman Hanson & DeTroy is pleased to announce that Kathryn ("Kass") M. Longley-Leahy, a Maine attorney with over twenty years experience in the area of Wills, Trusts and Estate Planning, has joined the membership of the firm effective September 2, 2008.

Born and raised in Lewiston, Maine, Kass attended local schools, and thereafter received her undergraduate degree in mathematics from Newton College (now part of Boston College). Following a semester's leave from her Wharton MBA studies at the University of Pennsylvania to co-manage her father's successful 1974 Maine Gubernatorial Campaign (dubbed by the New York Times as "the most astounding political upset of the year, if not in decades…"), Kass graduated from Wharton with a concentration in Finance. Business career experiences have included positions as a corporate financial analyst with Corning Glass Works in Corning, New York, as the Financial Director of GEAR: Manufacturing, Marketing and Design, Inc., a small NYC start-up company founded by Marimekko owner and designer to introduce designer luggage into high-end US retail markets, and as a Senior Rating Analyst at Moody's Investor Service responsible for the monitoring, evaluating, rating and publishing of credit ratings for industrial debt obligations of private and public companies within the food, beverage, tobacco, forestry and electronics industries. While working in NYC, Kass took advantage of the opportunity to enhance her business and investment career by entering law school at the evening division of Fordham University's School of Law. Her subsequent return to Maine due to a family illness resulted in her completion of her law degree at the University of Maine School of Law while working as an Investment Analyst within UNUM's Investment Division. Before long, Kass had transitioned her business and investment experiences to the full time practice of law in Maine with a concentration in the areas of wills, trusts, probate and estate planning, a practice that has continued for the past twenty years. Despite the demands of operating a solo law practice, Kass found time to recently complete an LL.M. master's degree in taxation from Boston University's School of Law.

While living and working in Yarmouth, Kass has been active in her community. She has served multiple terms on the Yarmouth Zoning Board of Appeals, is a co-founder of Yarmouth Arts, a non-profit organization committed to encouraging arts and cultural activities within the Yarmouth community, and is a member of the Yarmouth Chamber of Commerce. Past activities include Board membership on the Center for Grieving Children, the Greater Portland Boys and Girls Club, frequent host family for the Maine Irish Children's Program, certification as an Emergency Medical Technician (EMT), Sugarloaf Ski Patrol, an active volunteer in the Yarmouth schools, and a supporting member of the Yarmouth Playmakers, Music Boosters and various other school organizations.

KATHRYN M. LONGLEY-LEAHY

During her free time, Kass can be found most early morning hours swimming at the local Y. She enjoys the many outdoor activities Maine has to offer, and has a special interest in the piano, photography and spending time with family. Kass and her husband, Tom, live in Yarmouth, and have raised four children, Ben, Tara, Dan and Kevin. ☐

Like-Kind Exchanges Under Internal Revenue Code Section 1031

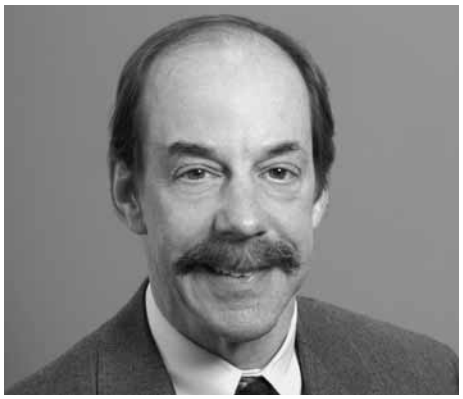
By John W. Geismar

A general rule of federal income taxation is that where gain is realized upon the transfer of property that gain will be recognized for tax purposes, with the government taking its share of the gain or profit. An important exception to this general rule is embodied in Internal Revenue Code Section 1031, entitled "Exchange of Property Held for Productive Use or Investment." The federal tax laws have for many years recognized the principle that where one investment is simply exchanged for another, that such a transaction represents a continuum for another, that such a transaction represents a continuum of the same form of investment. Since the property of the taxpayer held for investment has been exchanged for other similar property, the revenue laws recognize that the same economic pursuit is continuing. The revenue laws have also recognized the practical reality that in situations of this type, it is not "fair" to recognize a tax on the disposition of investment property where a gain is realized, because there is no cash derived from the disposition with which to pay the tax which would be due at such time under the general rule.

These general concepts of business necessity and tax "fairness" were questioned by Congress in the early 1980's, in particular, when some of the outer bounds of business necessity were probed in the matter of *Starker v. United States*, 602 F.2d 1341 (9th Cir. 1979). In the *Starker* case, the taxpayer transferred property in a like-kind exchange to a transferee who promised to obtain like-kind property for the taxpayer. Nearly 5 years elapsed before the replacement property was located and transferred to the taxpayer. This long delay in designating and closing upon the conveyance of the property to be received by the taxpayer was perceived as an abuse of the like-kind exchange principles under the federal tax laws. Accordingly, in 1984, Congress added to the existing provisions of Section 1031, the "identification" and "exchange" timing requirements of Section 1031(a)(3).

The Statute generally requires that any property which may be transferred to the taxpayer in a transaction which is to qualify under Section 1031 must be identified within 45 days of the transfer of the transferor's property being relinquished to the transferee. The second timing requirement is that the taxpayer actually close upon acquisition of property to be received in the like-kind exchange transaction within 180 days of closing upon the conveyance of the relinquished property or the due date for the transferor's tax return for the taxable year in which the transfer of the relinquished property occurs, whichever is sooner.

The foregoing time limitations are entirely arbitrary. They were perceived by Congress, however, to present a realistic compromise. The 45 and 180-day time limits were perceived by Congress to accommodate the realistic needs of taxpayers in accomplishing an exchange of properties legitimately entitled to tax deferral under Section 1031 while at the same time imposing limits upon excessive maneuvering which additional time would provide to taxpayers if limits were not placed upon the taxpayer's ability to identify replacement property and to close upon its acquisition. Accordingly, the 45 and 180-day rules are intended to separate like-kind exchanges which occur within an appropriately short temporal period from those which in effect take too long, and accordingly take on far more of the characteristics of a sale and acquisition of other similar property, which is not entitled to deferral under Section 1031.



JOHN W. GEISMAR

A. General Considerations

A taxpayer needs to keep in mind that qualification under Section 1031 of the Code does not avoid tax. It merely defers tax. This is because the property received by the taxpayer in a like-kind exchange will have transferred to it the taxpayer's tax basis in the property relinquished. As a taxpayer "trades up" in one or more series of exchanges, each successive property nevertheless retains the basis of the original property relinquished, subject to certain basis adjustment rules. When the taxpayer makes his or her final disposition of the property, which does not qualify for like-kind exchange treatment, gain on that final disposition will be based upon the amount received, less the carry-forward basis.

Under current federal income and estate tax laws, if the taxpayer dies owning property which has been the subject of a like-kind exchange, the value of the property will be included in the taxpayer's estate for federal estate tax purposes, although the testamentary beneficiary of the property will receive that property with a stepped-up date of death fair market value basis. While the like-kind exchange property may or may not be taxable in the taxpayer's estate, the tax-

payer's demise does present an opportunity for not just tax deferral, but tax avoidance on a like-kind property's appreciation in value.

Applicability of Section 1031 is not elective. If a transaction is structured to comply with the Statute, then the rule of tax deferral afforded under the Statute will automatically apply. This is important to remember in the event the taxpayer seeks a transaction which for the taxpayer's purposes the non-recognition rule will not apply. The taxpayer may want to avoid Section 1031 treatment, inasmuch as the taxpayer may not recognize loss under the general rule of Section 1031. It is also equally important to remember that unless each of the requirements of the Statute is met, no form of election or other self-serving statement on the part of the taxpayer will turn a transaction which does not qualify for non-recognition treatment under Section 1031 into one that will.

B. Like-Kind Property

To qualify for non-recognition of gain under the Statute, a taxpayer must exchange "like-kind property." Like-kind property under the Statute is "property held for productive use in a trade or business or for investment" Section 1031(a)(1). There are a number of Revenue Rulings and Private Letter Rulings which discuss whether property in a certain transaction has been exchanged for other property of a "like-kind." The Department of Treasury Regulations under Section 1031 state that "the words *like-kind* have reference to the nature or character of the property and not to its grade or quality . . . . The fact that any real estate involved is improved or unimproved is not material, for that fact relates only to the grade or quality of the property and not to its kind or class." Regulations Section 1.1031(a)-1(b). Accordingly, under the Statute, vacant real estate can be exchanged for an office building, and either (or both) can be exchanged for a working farm. The office building can be brand new, while the farm can be 300 years old.

The Statute permits the exchange of property held for productive use in a trade or business or for investment for property of a like kind. Thus, under the Statute, property which is used in a trade or business may be exchanged by the taxpayer for property which the taxpayer will hold for investment purposes. Similarly, property which the taxpayer holds for investment may be exchanged by the taxpayer for property which the taxpayer will use in a trade or business. Regulations Section 1.1031(a)-1(a)(1).

A determination as to whether property is of a like-kind requires more attention where personal property is involved. The non-recognition rules of Section 1031 do not apply to an exchange of one kind or class of property for property of a different kind or class. Regulations Sections 1.1031(a)-2(a). The Regulations set up specific general asset classes for depreciable tangible personal property. Depreciable tangible personal property is of a like class to other depreciable tangible personal property if the exchanged properties are either within the same general asset class or within the same product class established under the Regulations. *See* Regulations Section 1.1031(a)-2(a)(2) for a list of the general asset classes and Regulations Section 1.1031(a)-2(a)(3) for a description of product classes. Intangible and non-depreciable personal property can be exchanged for like-kind property. No classes are provided for these assets. Goodwill of a business is not of a like-kind to goodwill of another business. Regulations Section 1.1031(b)-1(c)(2).

The Statute excludes specific property from qualifying for like-kind exchange treatment. These properties are listed in Section 1031(a)(2) include (1) stock in trade or other property held primarily for sale (inventory); (2) stocks, bonds or notes; (3) other securities or evidences of indebtedness or interest; (4) interests in a partnership; (5) certificates of trusts or beneficial interest; or (6) choses in action.

Although interests in a partnership cannot be exchanged under Section 1031, if the taxpayer holds an interest in a partnership which has in effect a valid election under Internal Revenue Code Section 761(a), then the taxpayer will be treated as owning an interest in each of the assets of the partnership, which may then qualify for deferral under Section 1031.

Real property located in the United States and real property located outside the United States are not property of a like-kind. Property which the taxpayer's transferee agrees to produce, or construct, even though it does not exist at the time of the agreement is entered or the taxpayer's property is relinquished, can be like-kind property if it otherwise complies with the statute and regulations, including, in particular, the timing rules for identification of and closing on replacement property.

For an exchange to qualify for non-recognition treatment to the taxpayer both the property relinquished and the property received must be used in the taxpayer's trade or business or be held for investment. It is therefore possible that in a simultaneous exchange between two taxpayers, Taxpayer A may qualify for Section 1031 treatment, but Taxpayer B, because of his or her use of the property relinquished to A or his or her intended use of the property to be received from A does not meet the trade or business or held for investment requirement of Section 1031(a).

C. The Time Requirements

A deferred exchange is any exchange which does not, in effect, provide for all of the property conveyances and tender and receipt of all cash consideration in connection with the conveyances at the same meeting or closing. For an exchange of property of a like kind to be eligible for non-recognition of gain under Section 1031, the 45 and 180-day timing rules must be met. Even though the other rules of the Statute are complied with, and even

if the properties exchanged are held for investment or for use in a trade or business and are otherwise identical, the property exchanged will not be "like kind property" under the Statute unless the timing rules are satisfied. Neither timing rule is extended by virtue of the fact that the last day falls on a weekend, holiday, or other "non-business" day. For practical purposes, this operation of these rules may shorten the time limits. Of course, the timing rules will be complied with in a simultaneous closing where the taxpayer relinquishes like-kind property and receives at that closing like-kind property. Since this type of closing is more the exception rather than typical, the timing rules are an important consideration.

In 2000, the Treasury adopted a safe harbor rule for reverse exchanges using the 45 and 180-day guidelines. Reverse exchanges are distinguished from "forward exchanges" discussed above because they involve the taxpayer's acquisition of the Replacement Property before disposition of the Relinquished Property. Although it is preferred to structure a reverse exchange that falls within the "safe harbor" in order to be assured of the result, reverse exchanges may be successfully concluded consistent with the federal common law under the *Starker* case.

1. The Identification Period. "Any property received by the taxpayer shall be treated as property which is not like-kind property if the property is not identified as property to be received in the exchange on or before the day which is 45 days after the date on which the taxpayer transfers the property relinquished in the exchange, ..." The identification period begins on the date the taxpayer transfers the relinquished property and ends at midnight on the 45th day thereafter. If as part of the same exchange, the taxpayer transfers more than one relinquished property and the relinquished properties are transferred on different dates, the identification period is determined with reference to the earliest date on which any of the properties are transferred.

Any replacement property that is in fact received by the taxpayer before the end of the identification period will in all events be treated as identified before the end of the identification period. In other words, if the taxpayer closes upon the acquisition of the replacement property before the end of the 45-day identification period, that requirement of the Statute and the Regulations is deemed to have been satisfied.

The replacement property must be sufficiently described in the written document signed and delivered by the taxpayer. According to the Regulations, "real property generally is unambiguously described if it is described by a legal description, street address, or distinguishable name (e.g., the May Fair Apartment Building). Personal property generally is unambiguously described if it is described by a specific description of the particular

2008 Fall Forum and Client Reception

November 21, 2008
Portland Regency Hotel • 20 Milk Street
The Fall Forum 2 - 4 PM
Annual Client Reception 4 - 7 PM

The 12th annual Norman, Hanson & DeTroy, LLC, Fall Forum for our clients will be held in Portland on Friday, November 21, 2008, at the Portland Regency Hotel.

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

We hope to see you there!

type of property. For example, a truck generally is unambiguously described if it is described by a specific make, model, and year."

The Regulations allow for some flexibility for identification of Replacement Property in a deferred exchange. Under the Regulations, a taxpayer is allowed to identify properties valued in excess of the value of the property relinquished, and to achieve like-kind exchange treatment so long as one or more but not all of the properties identified are in fact acquired by the taxpayer. The taxpayer is able to take one or two approaches under the Regulations. The taxpayer may identify three separate properties as replacement property, without regard to the fair market values of the properties. The other approach permits the taxpayer to identify any number of properties as long as the fair market value of all of the properties so identified as of the date the relinquished properties were transferred does not exceed twice the value of those relinquished properties.

If the taxpayer has identified replacement property and before the end of the 45-day identification period wishes to change his or her mind, the taxpayer may revoke an identification and identify other replacement property. The revocation and re-identification should all be in accordance with the written identification and communications requirements set forth above.

The reverse exchange safe harbor rules also employs a 45-day identification rule for the period of time to identify relinquished property, as well as a 180-day period to close upon disposition of the property to be relinquished, measured from the date of acquisition of the Replacement Property. Often the 45-day identification rule has little practical application, since the taxpayer has already identified the property he or she would like to relinquish, and has by virtue of timing exigencies decided to go ahead with acquisition of the replacement property. Structuring reverse exchanges is a bit more involved, as it requires the creation of a separate (and unrelated) person to take title to (and indicia of ownership of) the replacement property pending disposition of the property to be relinquished.

2. The 180-Day Rule. The taxpayer must receive the identified property within 180 days of his or her transfer of the relinquished property. Again, if more than one property is relinquished in the context of the exchange transaction, the 180-day period begins to run upon the transfer of the first of the properties transferred. The exchange period ends at midnight on the earlier of the 180th day after the taxpayer transfers the relinquished property or the due date (including extensions) for the taxpayer's Income Tax Return for his or her taxable year in which the transfer of the relinquished property occurs. If the closing upon acquisition of the replacement property does not take place within the 180-day time frame, the property exchanged will not be treated as like-kind property under the Statute. As provided for in the Statute and Regulations, it is quite possible for the 180-day period to be foreshortened. For a calendar year taxpayer, if the exchanged property is relinquished very late in the year, and if the taxpayer fails to properly file for an extension to file his or her Tax Return for that year, then closing on the acquisition of the replacement property must occur by April 15th.

D. Conclusion

The foregoing is an outline of the statutory requirements which must be met in order to qualify an exchange for non-recognition treatment under the like-kind exchange rules. Provided that property of a like kind is exchanged, and if in the context of a deferred exchange the property is exchanged within the time requirements of Section 1031(a)(3), then the exchange of property will qualify for non-recognition treatment. There are numerous issues, including: (1) reporting requirements; (2) avoidance of constructive receipt issues (including the use of prescribed safe harbors; (3) the transfer of like-kind property subject to liabilities; and (4) like-kind exchanges which include the receipt by the taxpayer of money or other property which does not qualify for like-kind treatment (boot); and (5) related party rules, which must also be considered.

The foregoing are important to initially determining whether it makes sense to structure a transaction as a Like Kind Exchange and to determining the tax and financial benefit to incurring the expense of an exchange transaction.

Like Kind Exchanges present a great opportunity for investors and business owners to use the leverage of money that would otherwise go to paying tax on a gain from a disposition of property to invest in the new investments. ☐

Medicare Set Asides In Liability Cases: Required Or Not?

By Jonathan W. Brogan

Much has been made and discussed about the Medicare Secondary Payment Statute (MSP) and changes made by Senate Bill 2499. The passage of Senate Bill 2499 places directly into question an issue that workers' compensation carriers have been dealing with since 2001. The issue is whether, in the general liability context, a carrier and its attorneys must protect the future interests of Medicare and/or Medicaid.

There are three issues that will be addressed in this article. First, the current obligations of liability primary payers, which includes tortfeasors and their insurers, under the MSP will be addressed. Second, the impact of the forthcoming requirements under Senate Bill 2499 and third, whether Medicare set aside accounts (MSA) are now required in liability settlements will be addressed.

Current Obligations of Primary Payers

For years, primary payers have been responsible for reimbursing Medicare for payments made by Medicare. Most plaintiff attorneys and all defendant attorneys and insurance carriers understand that when Medicare makes a payment, it is entitled, pursuant to statute, to repayment. All good plaintiff attorneys work with CMS to make whatever arrangements they can to reduce and repay liens and to release their clients from lien obligations.

Additionally, insurance carriers are required to place Medicare on notice once they make a payment or "should have made primary payment." In other words, if there is a Medicare lien, insurers are required to inform Medicare when they settle a case.

Medicare has broad enforcement rights if it is not repaid. It can pursue primary payers and any entity that received a primary payment, including a beneficiary, provider, supplier, physician, attorney, state agency, or private insurer. Medicare has a subrogation right as well as rights of joinder and intervention. The State of Maine also has reimbursement rights under 22 M.R.S.A. § 14 for Maine Care payments, but a discussion of those rights is beyond this article.

Impact of Senate Bill 2499

Senate Bill 2499, which has been codified at 42 U.S.C. § 1395y(b)(8), will become law as of July 1, 2009. According to CMS guidelines and under the bill as passed, an insurer must determine if a claimant is entitled to benefits under Medicare. Once that is determined, the insurer must put Medicare on notice within the time specified by the Secretary after the claimant resolves his/her settlement judgment or award (regardless of whether or not there is a determination or admission of liability). The penalty for noncompliance is $1,000 per day, per claim.

According to CMS guidelines published as of August 1, 2008, there are 45 items of data that insurers need to report. They include the injured person's name, social security number, attorney's name, type of insurance, nature of injuries involved, and how the case was resolved. The bill is meant to ensure that Medicare is aware of settled or tried claims and that its liens are resolved after adequate notice and with time for Medicare to determine its interest.

The rule-making procedure for the bill was open for public comment until September 30, 2008. Final rule-making is not complete at this time. However, all of us on the defense side must assume that we will be required to determine each plaintiff's Medicare enrollment status, and will be required to report ongoing claims to Medicare.

JONATHAN W. BROGAN

Whether MSA are Required.

At this point in time, there have been no directives from CMS or anyone else that future payments need to be protected. Many of you may be aware that in the workers' compensation setting, it is standard practice for workers' compensation carriers and employees to set up Medicare set aside accounts (MSA) that CMS must approve before a workers' compensation lump sum settlement can be finalized.

> CMS has "review thresholds" for workers' compensation cases. They are:
> (1) That the claimant is a Medicare beneficiary at the time of the settlement and the total settlement is greater than $25,000; or
> (2) that the claimant is not a Medicare beneficiary at the time of the settlement but has a reasonable expectation of Medicare enrollment within 30 months of the settlement and the total settlement amount is greater than $250,000.

One must remember that the review thresholds are described by CMS as

agency "workload review" thresholds and are not "safe harbors." CMS has taken the position in workers' compensation cases that Medicare's interest must always be considered and protected even if the review thresholds are not met.

With the passage of the new bill and stricter enforcement of Medicare reporting requirements, many have been left to wonder whether MSAs are now required for non-workers' compensation cases. Many vendors have interpreted the bill to mean that MSAs are now required for all liability cases and have adopted the review thresholds used in workers' compensation cases as a guideline for liability MSAs. However, there is no bureaucracy in place for CMS to conduct formal review/approval assessments for liability claims. Some CMS regional offices have elected to review liability MSAs, but there is no guarantee that the regional office will agree to review each submitted proposal as it is solely discretionary.

Where does this leave third-party payers with real Medicare payment issues? First, it is incumbent to make sure that CMS is notified of any pending settlement. Next, once that notification has taken place, a decision must be made as to whether or not the defendant insurer feels comfortable paying a liability claim without a MSA. In many cases, defendants and insurance carriers are requiring MSAs and plaintiffs are objecting. Clearly, if an insurer will not pay without a MSA, the case will not settle.

Plaintiff attorneys are correctly pointing out that MSAs are not "required." Defendants are correctly responding that no one knows whether Medicare will begin enforcing this law against plaintiffs and third-party payers, as well as the attorneys involved, and therefore it is prudent to prepare a set aside and submit it so that there can be no question that every potentiality was addressed.

Of course, this debate raises further issues. For instance, there is no need for a MSA if there are no future medical bills anticipated. In most cases, especially chronic pain cases, plaintiff attorneys try to increase their special damages by arguing that thousands of dollars will need to be paid, in the future, to the plaintiff for narcotic medications, physical therapy, psychological evaluation and treatment, and other medical treatment. If that plaintiff is a Medicare recipient, or a recipient of social security disability payments that includes Medicare insurance, then the issue of future payments has to be addressed. No one at this point can predict what CMS will do.

One option that we can use to address this issue is to obtain an estimate of the plaintiff's future anticipated medical needs. In Maine, in order to demonstrate that these future medical services are related to a particular liability event, the plaintiff must prove, by a preponderance of evidence, that the plaintiff needs future medical treatment. Plaintiff attorneys are not allowed to speculate what might happen but have to have specific medical evidence that says that it is more probable than not that treatment will be rendered. A life care plan or other reliable analysis may provide this proof. Once the funds designated for future medical care are clearly identified, the settlement agreement must reflect that those funds have been considered and that the plaintiff understands the intended purpose of those funds. If future medical treatment is identified, and a MSA is not pursued, the plaintiff must agree to segregate these funds and use the funds only for their intended purpose, i.e., future medical care.

Of course, one could try to obtain an MSA using an MSA vendor. Basically, MSA vendors contract to shepherd the process through CMS, typically through structured settlements to pay for the estimated medical costs. They then submit the MSA to CMS for approval. As was already stated, there is no formal review approval process for liability claims. If CMS decides not to act, the process undertaken should be reflected in correspondence and releases.

We are all entering into a new world. We are doing so without any real guidance from the bureaucrats who will control this new world. Settlement agreements must contain provisions reflecting that the parties have taken Medicare's interest into account and should be drafted by legal counsel experienced in Medicare compliance.

In general, the release must include language showing that the parties reached a settlement in compliance with Medicare set aside provisions. As was stated before, the provisions must be made addressing the issue of future medicals, conditional payments, and indemnification.

There is no clear direction as to whether CMS will choose to require MSAs in liability cases. As Medicare's financial condition becomes more critical, or terminal, it certainly is rational to believe that it will be looking for other sources of payment. None of the options outlined here have been approved by CMS or anyone else with authority. Also, it is not known whether CMS will accept even thoughtful protection of their rights. However, it is important to remain aware of new CMS requirements and to make sure that Medicare issues are addressed in any settlement involving Medicare payments. ☐

Workers' Compensation – Law Court Decisions
A Recent Law Court Decision

BY STEPHEN W. MORIARTY

Rejection of Offer of Reasonable Employment

Section 214(1)(A) provides that an employee forfeits the right to receive compensation benefits if an offer of reasonable employment is rejected without good and reasonable cause. The statute serves the dual purpose of encouraging employees to return to work while at the same time providing a mechanism for employers to reduce workers' compensation costs by reinstating injured workers to suitable positions. Procedurally, an employer bears the initial burden of showing that an offered position was "reasonable" within the meaning of the statute, and if such a finding is made the hearing officer must then examine whether good cause existed to reject the offer. In a recent decision the Law Court upheld a determination by a hearing officer that an employer had failed to sustain its initial burden.

In *Avramovic v. R. C. Moore Transportation, Inc.*, 2008 ME 140 (September 9, 2008), the employer had consulted with Expediter Corporation to develop an opportunity for home-based employment to an individual who had sustained a back injury and who was no longer capable of working for the pre-injury employer. A position was offered to the employee which involved conducting telephone surveys from home while working for a company known as Information Direct, Inc. (IDI). The claimant did not accept the offer, and the employer claimed that he had forfeited his rights to compensation as the position fit within his medical restrictions. The hearing officer concluded that the employer's offer of new employment was not reasonable or bona fide, and refused to order a forfeiture.

On appeal the Court emphasized that determination of the reasonableness of an offer rests with the discretion of a hearing officer, and essentially refused to overturn the hearing officer's judgment. Of significance to the Court was the fact that the offered position was not actually available in the ordinary competitive labor market and that there was insufficient evidence offered concerning the nature of IDI's business operations, such as how long it had been in operation, whether job trainees actually become employees following completion of training, and what type of work would actually have been involved. While the hearing officer was not *compelled* to find that the position was unreasonable, the Court found that he committed no error in finding that the employer did not establish that the position offered was reasonable.

This decision does not suggest that offers of reinstatement to innovative or unconventional types of employment will always be found to be unreasonable. The Court essentially ruled that the hearing officer did not abuse his discretion in reaching his conclusion based upon the evidence offered. However, the decision underscores the importance of presenting thorough and comprehensive information regarding the nature of the proposed employment. If the type of employment is unconventional, the employer extending the offer must establish that the employment opportunity is genuine and that the proposed new employer is in fact actively engaged in business activities with employees of its own.

On a related matter, the hearing officer had awarded ongoing benefits for partial incapacity based upon a finding that the work search efforts were insufficient to establish entitlement to benefits at a 100% rate. The evidence established that the employee had applied for over 300 positions and had participated in 13 interviews. Approximately 250 of the job applications were in the accounting and financial services area, but the remaining applications involved a broader variety of positions. Relying upon its earlier decision in *Monaghan v. Jordan's Meats*, 2007 ME 100, 928 A.2d 786, the Court held that the hearing officer did not adequately evaluate all appropriate criteria for assessing the adequacy of the work search, and that too much emphasis had been placed upon a single factor. This portion of the decision was vacated and the matter was remanded for further reconsideration of the work search efforts in light of the *Monaghan* criteria.


STEPHEN W. MORIARTY

Provisional Orders and "Pay Pending Appeal"

In a recent decision the Law Court addressed the novel issue of whether benefits payable pursuant to a provisional order must continue when the Board has ordered termination by decree and the employee has filed a motion for findings of fact. Pursuant to §205(9)(B)(2), benefits paid per decree or in accordance with another compensation payment scheme must continue until there has been final determination of the matter through the dispute resolution procedures of the Act. Often referred to as the "pay pending appeal" provision, the applicability of this section of the Act to provisional orders has been uncertain.

In *Mariner v. A. P. Concrete*, 2008 ME 123 (July 24, 2008), the employer voluntarily initiated payment of benefits without prejudice and then filed a 21 day letter discontinuing benefits on the basis of surveillance evidence. The employee filed both a Petition for Review and a Motion for Provisional Order, and the Board directed reinstatement of benefits pending full hearing. Ultimately, the Board granted the employee's Petition for Review by awarding the protection of the Act, but denied all claims for ongoing benefits. The employer immediately stopped payment of compensation.

The employee filed a Motion for Findings of Fact, which was ultimately denied. Thereafter the employee did not appeal the decision to the Law Court. Instead, he filed a Petition for Forfeiture with the Board's Abuse Investigation Unit alleging that the employer wrongfully stopped paying benefits while the Motion for Findings of Fact remained pending before the hearing officer. Because a provisional order had initially issued in the case, the Abuse Investigation Unit found a violation of the "pay pending appeal" provision of the Act and ordered payment of a penalty. The Court accepted the case for appellate review.

Acknowledging that the statutory language was ambiguous, the Court reviewed the broader structure of the Act and noted that the purpose of the payment without prejudice option was to encourage employers to pay voluntarily without resorting to litigation while simultaneously preserving the option to reduce or discontinue on 21 days notice. The Court drew a clear distinction between a provisional order and a formal determination of an obligation to pay compensation following hearing on the merits. As the Court observed, a provisional order "is an interim measure designed to protect injured employees from an employer's unilateral decision to discontinue benefits until the hearing officer has had an opportunity to fully consider the facts and law related to the claim". Therefore, the Court found that such an interim order is not equivalent to an award of compensation based upon the merits of a claim.

Once the hearing officer found that the employee had no continuing entitlement to benefits, the earlier provisional order expired as a matter of law and had no continuing legal effect. The Court unambiguously concluded that the statutory scheme "compels the conclusion that the payments made without prejudice…do not become subject to the payment-pending-appeal provisions of the Act or Rules when a provisional order reinstating benefits pending a hearing is entered". Accordingly, the Court vacated the decision of the Abuse Investigation Unit and eliminated the penalty that had been imposed. ☐

New Associate: David A. Goldman

We are pleased to announce that David A. Goldman joined the firm in August 2008 as an associate attorney. Dave was raised in Woodbury, New York and graduated from Colby College in Waterville, Maine in 1998. While in college, he was a founding member of the Blue Lights *a cappella* singing group and helped produce two albums that the group released on campus.

Following graduation, Dave lived in and worked in Orlando, Florida for one year and then in New York City for three years. While in New York, he first worked in the advertising field and was involved with developing IBM's online advertising strategy. He also had the unique opportunity to serve as the ESPN fantasy baseball correspondent for the New York Mets. Immediately before law school, Dave worked for over a year as a video game tester. Yes, he assures us, that was a real job.

Dave attended law school at the University of Maine School of Law and graduated magna cum laude in 2006. While in law school, he served as an intern for one semester with the Honorable Kermit V. Lipez of the First Circuit Court of Appeals and was the Articles Editor of the Ocean and Coastal Law Journal.

Following graduation, Dave clerked with Chief Justice Humphrey, Justice Crowley and Justice Warren of the Maine Superior Court for one year and clerked for an additional year with Chief Justice Humphrey and Justice Nivison of the newly-formed Maine Business and Consumer Court.

Dave and his wife Beth live in Yarmouth with their 2 year old son Jacob and newborn son Sam. Dave's leisure activities include playing fantasy baseball, skiing and building elaborate train track configurations for Jacob to play on with his Thomas the tank Engine trains. ☐

DAVID A. GOLDMAN

A Recent Law Court Decision

By David P. Very

Duty to protect a third party from harm

In 1999, the Law Court in *Bryan R. v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 1999 ME 144, 738 A.2d 839, held that there is no general obligation to protect others from the actions of third parties, even where one knows the third party is or could be dangerous. Six years later, in *Fortin v. The Roman Catholic Bishop of Portland*, 2005 ME 57, 871 A.2d 1208, the Law Court recognized an exception to that general rule in cases where there is a "special relationship" between a plaintiff and a defendant. In the recent case of *DeCambra v. Carson*, 2008 ME 127 (July 29, 2008), the Law Court held that a girlfriend/boyfriend relationship does not constitute a "special relationship" under *Fortin*.

In *DeCambra*, Zachary Fenderson had resided with his girlfriend, Samantha Carson, age 23, and her mother, Kimberly Carson, for several years. Fenderson had struggled with depression and had attempted suicide. In the spring of 2004, Fenderson and Samantha Carson were experiencing relationship problems and Fenderson moved out of the Carson residence, but he apparently retained access to the Carson home. By early July of 2004, Samantha and Fenderson had apparently ended their romantic relationship and Samantha had begun dating Lionel St. Hilaire.

On July 15, 2004, St. Hilaire was with Samantha at her residence when Fenderson arrived. Samantha believed that Fenderson was a little drunk but otherwise fine. After speaking for a few minutes, Samantha and St. Hilaire left together to visit her cousin. Fenderson also left. Samantha and St. Hilaire returned at approximately 2:30 a.m. the next morning. Kimberly Carson was sleeping at that time and Fenderson apparently was in the basement. After Samantha and St. Hilaire arrived, Fenderson walked upstairs and shot St. Hilaire three times, killing him, and then killing himself.

Kelly DeCambra, as the personal representative of the estate of her son, Lionel St. Hilaire, brought suit against the Carsons and the Carsons moved for summary judgment which the Superior Court granted. DeCambra then appealed.

DAVID P. VERY

On appeal, the Law Court explained that in *Fortin*, they held that special relationships for purposes of a negligence claim are grounded in the notion that a person or entity owed the Plaintiff a "fiduciary duty." The Court indicated that a fiduciary duty will be found to exist where "the law will recognize both the disparate positions of the parties and a reasonable basis for the placement of trust and confidence in the superior party in the context of specific events at issue."

The Law Court stated that in the instant case, the parties were not in disparate positions and one was not superior to the other. As a result, the Court held that neither of the Carsons and Lionel St. Hilaire had a special relationship. As a result, the Court indicated that a boyfriend/girlfriend relationship is not a situation that calls for an extension of the decision in *Fortin*. The Court therefore affirmed the grant of summary judgment in favor of the Carsons. ☐

KUDOS

The 2009 Edition of The Best Lawyers In America, published by Woodward/White, Inc. of Aiken, South Carolina has included the following members of NH&D: **BOB BOWER** (workers' compensation law), **JON BROGAN**, (personal injury litigation), **PETER DeTROY** (bet-the-company litigation, commercial litigation, non-while collar criminal defense, personal injury litigation, white-collar criminal defense), **PAUL DRISCOLL** (real estate law), **MARK DUNLAP** (insurance law), **JOHN GEISMAR** (tax law), **STEVE HESSERT** (workers' compensation law), **MARK LAVOIE** (medical malpractice law, personal injury litigation), **TOM MARJERISON** (personal injury litigation), **STEVE MORIARTY** (workers' compensation law), **JIM POLIQUIN** (appellate law, commercial litigation, insurance law), **ROD ROVZAR** (corporate law, real estate law).

AARON BALTES has been appointed to the Board of Directors of the Children's Museum of Maine.

The New Hampshire International Trade Resource Center recently invited **ADRIAN KENDALL** to present a fall series of seminars focusing on the topics of legal issues in international trade and doing business in Germany. Adrian previously briefed New Hampshire Governor Lynch and members of his administration prior to their 2005 trade mission to Germany, the Czech Republic and Ukraine and is a frequent speaker on seminars on business and international trade issues.

JON BROGAN recently won his eleventh club championship at the Purpoodock Country Club in Cape Elizabeth.

STEVE MORIARTY participated in a panel at the recent Comp Summit Seminar at Sugarloaf regarding the obligation to file first reports of injury in "medical only" and "report only" cases.

JIM POLIQUIN recently spoke on insurance coverage issues in litigation at the two-day Litigation Institute, jointly sponsored by the Maine State Bar Association and the Maine Trial Lawyers' Association.

ADRIAN KENDALL will attend this year's ALFA International's practice group meeting in Mumbai (formerly Bombay), India. India is one of the world's fastest growing economies and represents not just a manufacturing and outsourcing location, but also a significant market for Maine businesses. ALFA International is a global network of independent law firms, with more than 130 member firms worldwide, who provide outstanding legal services to their regional, national, and international clients. ☐

Sweet Success

NH&D congratulates **Trina Beaulier** and her company, **Simply Divine, LLC** on being named the recipient of a 2008 Maine Investors Award. The Maine Investors Award is presented by the Maine State Chamber of Commerce and recognizes Maine businesses for their growth and commitment to community development as well as their outstanding contributions to the state's economy. Trina is in great company: other recipients this year are Cianbro Corporation, Hannaford Bros., Co., and Norway Savings Bank. **Adrian Kendall**, counsel to Simply Divine, LLC, says "It's wonderful to see the success story that Trina has built from a home kitchen here in Maine to a nationally recognized specialty brand. There's no such thing as an overnight success story, and Trina's vision, hard work, and uncompromising attention to quality and detail have earned her this recognition." Simply Divine Brownies have been featured on Oprah, the NBC Today Show, the Rachel Ray Show, and have been included in gift bags at the Oscars. With the holidays just around the corner, what better excuse to indulge! To learn more about Simply Divine Heavenly Brownies or to place an order, visit www.simplydivinebrownies.com or their new retail location at 174 Lower Maine Street in Freeport. ☐

SIMPLY DIVINE BROWNIES

Norman, Hanson & DeTroy, LLC
415 Congress Street
P.O. Box 4600
Portland, Maine 04112

Return service requested

Fall 2008 issue