NORMAN, HANSON & DETROY, LLC

newsletter

Current developments in Maine law

Spring 2010
Vol. 23, No. 3

Blasters Beware: Strict Liability Ahead

BY AARON K. BALTES

For nearly sixty years, blasters in Maine have exploded ledge secure in the knowledge that they could only be held liable for negligently caused damage. In the recent decision of *Dyer v. Maine Drilling & Blasting, Inc.*, 2009 ME 126, a majority of the Law Court overruled long-standing precedent and adopted a strict liability cause of action against those who engage in "abnormally dangerous activities."

In 2004, Maine Drilling began blasting rock near the home of Vera Dyer in Prospect in connection with the replacement of the Waldo-Hancock Bridge. Over 100 blasts were conducted, the closest being approximately 100 feet from the Dyer home. In the spring of 2005, several changes from the pre-blasting condition of the house were noticed: (1) the center of the basement floor had dropped by as much as three inches; (2) the center beam in the basement was sagging causing the first floor to be unlevel; and (3) new or enlarged cracks had appeared in the basement and garage floor.

Ms. Dyer filed suit, alleging causes of action in strict liability and negligence. Maine Drilling's motion for summary judgment was granted. The trial court cited *Reynolds v. W.H. Hinman Co.*, 145 Me. 343, 75 A.2d 802 (1950) in rejecting the strict liability claim, and further found no triable issue of fact regarding causation to support the negligence claim.

AARON K. BALTES

Strict liability doctrine is said to have originated in the English case of *Rylands v. Fletcher*, (1868) 3 L.R. 330, which involved not blasting but rather water from a man-made reservoir which escaped and flooded an abutting mine site. A defendant who engaged in such a "non-natural use" of land was held to do so "at their own peril." However, many American courts were initially less amenable to the concept, in part because of concern that dangerous activities were essential to industrial development and strict liability would have a chilling effect on such enterprises (a popular political chestnut from this era was "The business of America is business").

In the late 1800s, dicta from two Law Court decisions cast doubt on the strict liability approach. See *Burbank v. Bethel Steam Mill Co.*, 75 Me. 373 (1883); *Simonton v. Loring*, 68 Me. 164

INSIDE

Blasters Beware: Strict Liability Ahead 1

Important Changes to the Treatment of Construction Workers and Independent Contractors Under the Maine Workers' Compensation Act 3

New Associate: Kristina M. Balbo 6

NHD Plays Key Role in Securing Long Term Lease of Hurricane Island 6

Recent Additions and Amendments to the Maine Insurance Code 7

Recent Legislative Enactments 7

New Associate: Kelly M. Hoffman 8

Briefs/Kudos 8

New Attorney : Kevin M. Gillis 9

New Member: Doris V. R. Champagne 9

NHD Attorneys Listed in "Super Lawyers" 10

New Sticker Case May Provide Answers To Medicare Conundrum 11

Recent Law Court Decision 12

NHD is proud to Announce its Sponsorship of the US Biathlon Team and Maine Winter Sports Center! 13

Successfully Securing "Hobby" Losses for Tax Purposes 14

NHD Provides Pro Bono Legal Analysis of a Program Designed by Maine's Nursing and Healthcare Leaders to Treat Impaired Nurses 16

(1878). In the 1950 *Reynolds* decision, the Law Court expressly declined to adopt a strict liability claim for abnormally dangerous activities. At that time, although the First Restatement of Torts published in 1939 established a strict liability cause of action for such cases, a majority of states had switched to a negligence approach. Defining which activities were extra hazardous was seen as difficult and arbitrary, and the negligence claim was considered to be sufficient to compensate the plaintiff with a meritorious case.

The Second Restatement of Torts, promulgated in 1979, maintained a strict liability approach with significant revisions. The First Restatement defined an activity as "ultrahazardous" simply if it "necessarily involved a risk of serious harm" and was "not a matter of common usage." The Second Restatement § 520 refined the definition to a six factor test that considered:

- The existence of a high degree of risk of harm;
- Likelihood that the harm will be great;
- Inability to eliminate the risk by the exercise of reasonable care;
- Extent to which the activity is not a matter of common usage;
- Inappropriateness of the activity to the place where it is carried on;
- Extent to which its value to the community is outweighed by its dangerous attributes.

Since the mid-1900's, the modern trend around the nation has been the adoption of strict liability in blasting and other cases involving abnormally dangerous activities. At least 41 states have adopted some form of strict liability for blasting, including all New England states except for New Hampshire.

In the wake of *Reynolds*, it did not take all that long for the Law Court to hint that it might reconsider its rejection of strict liability. In 1964, the Court rejected a strict liability claim arising out of the collision of a truck with a house, cryptically suggesting that the holding might have been different if the case involved "what might properly be deemed to be an extra-hazardous activity." *Hayes v. Bushey*, 196 A.2d 823 (Me. 1964).

In 1990, in a case involving hazardous waste, a federal judge in Maine questioned the scope of the *Reynolds* case and predicted the Law Court could adopt strict liability in hazardous waste cases. *Hanlin Group v. Int'l Minerals & Chem. Corp.*, 759 F.Supp. 925 (D.Me. 1990). Further, the authors of *Maine Tort Law* have long characterized strict liability theory in Maine as an "open question." *Id.* § 14.05.

In the *Dyer* decision, the Law Court recited the above history and then methodically examined each of the rationales for *Reynolds* and explained how each had been undermined by developments over the last 50 or so years. As noted above, the substantial majority of states have adopted some type of strict liability for blasting. Many courts have noted that blasting is inherently dangerous and the risk cannot be eliminated even with the exercise of case. Indeed, the Dyer's expert testified that blasting may cause damage even if it is within the applicable administrative guidelines set forth by the Bureau of Mines.

Accordingly, the Law Court reasoned that, although blasting is a lawful and beneficial activity, its costs should fall on the blasters that benefit from the blasting, rather than on an "unfortunate neighbor." Cost-spreading is a major theme in the *Dyer* decision. The Law Court noted that blasters were already generally required to carry liability insurance by administrative regulations and/or municipal ordinance, so a "strict liability scheme" should not greatly increase costs for these businesses.

As further justification, the Law Court also recited the various forms of strict liability that have been adopted for other types of cases in recent decades, either by statute or by court decision:

- Products liability;
- Explosions of natural gas;
- Oil spills and hazardous waste;
- Injuries caused by wild or domestic animals.

Whenever a party advocates the adoption of a new cause of action, their adversary typically argues that the courts should refrain from "judicial legislation" and leave it to the Legislature to address the issue. Maine Drilling's argument in this regard fell on deaf ears. Despite the fact that certain administrative regulations create a heightened standard of care for blasting at quarries, the Law Court refused to consider this as a legislative intent to not have such standards apply to blasting in general.

Interestingly, a Maine statute originally enacted in 1852 imposes strict liability on blasters who fail to give warning or who blast after sunset. There was no issue of nighttime blasting or inadequate notice in the *Dyer* case, and the Law Court likewise rejected Maine Drilling's argument that this statute indicated a legislative intent to not require strict liability for blasters who blast during the daytime with sufficient notice.

Lastly, the Law Court was impressed with the Second Restatement's formulation of the strict liability cause of action, noting that it provided a "scheme of clear criteria" for determining which activities require a strict liability approach, thus addressing the arbitrariness concern voiced by the *Reynolds* court in 1950. The *Dyer* court thus formally adopted section 520 of the Second Restatement governing strict liability for abnormally dangerous activities. □

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: 1stinitiallastname@nhdlaw.com
Website: www.nhdlaw.com

Important Changes to the Treatment of Construction Workers and Independent Contractors Under the Maine Workers' Compensation Act

By Charles C. "Chip" Hedrick, Esq.

CHARLES C. "CHIP" HEDRICK

New Presumption of Employee Status

All businesses in the construction trades need to be aware of Section 105-A of the Maine Workers' Compensation Act (the "Act"), which became effective in January. Modular home dealers, property management companies, and others who hire persons to perform construction work on real estate owned or occupied by a third party also should be aware of this new provision and related amendments to the Act. Section 105-A creates a sweeping presumption that a person performing "construction work" on a "construction site" for a "hiring agent" is the employee of the hiring agent. Notably, this presumption even applies to workers who are sole proprietors, partners in a partnership, members of LLCs, twenty percent owners of corporations, and shareholders of professional corporations, and to workers who are the parents, spouses, and children of the foregoing. There are only two exceptions to the presumption of employee status. The first exception is for "construction subcontractors" who meet all the criteria of a stringent new twelve-part test. The second exception is for persons who own and operate equipment weighing more than 7,000 pounds and who are hired to operate the equipment on the construction site or to use the equipment to transport materials to or from the site. If a worker performing construction work on a construction site does not meet either exception, then that worker is deemed to be the hiring agent's employee. Under the Act, the hiring agent must procure workers' compensation insurance coverage for each worker deemed to be an employee. Failure to procure workers' compensation insurance coverage for an employee as required by the Act carries possible criminal penalties and civil fines. According to the Maine Workers' Compensation Board, Section 105-A is intended to prevent the misclassification of workers in the construction industry as independent contractors.

Prior Law

Before enactment of Section 105-A, the definition of "independent contractor" found in Section 102 of the Act applied to the construction trades. The less stringent definition of "independent contractor" set forth in Section 102 contains a list of eight factors to be considered by the Board in determining whether a person is an independent contractor. Under Section 102, the presence or absence of any one factor is not decisive. By contrast, all twelve criteria in Section 105-A must be met before a "person" performing "construction work" on a "construction site" is deemed to be a "construction subcontractor."

"Construction Work"

Section 105-A defines "construction work" as "any part of the construction, alteration or remodeling of a structure, including related landscaping and other site work." Surveying, engineering, examination or inspection of the construction site, and the delivery of materials to the construction site do not constitute "construction work."

"Construction Site"

Under Section 105-A, a "construction site" is a location where a structure that is attached or will be attached to real property is constructed, altered or remodeled. The definitions of "construction work" and "construction site" are broad enough to cover public, industrial, commercial, and residential construction projects.

"Hiring Agent"

Section 105-A defines a "hiring agent" as a person who hires or contracts with another person to perform "construction work." Owners and occupants of real estate who hire persons to perform construction work on that real estate are not hiring agents. Clearly, the definition of "hiring agent" covers general contractors and subcontractors who hire subordinates. The definition appears broad enough to reach property management companies, modular home dealers, and others who hire persons to perform construction work on real estate owned or occupied by a third party.

"Person"

Section 105-A's definition of "person" includes an individual; a sole proprietor; a working member of a partnership or limited liability company; a parent, spouse, or child of a sole proprietor, partner, or working member of a limited liability company; a working owner or part owner of a corporation; and a working shareholder of a professional corporation. At first glance, this

definition of "person" may appear unremarkable. However, the fact that Section 105-A's definition of person includes working members of partnerships and limited liability companies, the spouses, children, and parents of such persons, owners of corporations, and shareholders of professional corporations indicates a further tightening of the law. In circumstances other than construction work, pursuant to Section 102(11)(A)(4) of the Act, an individual owning twenty percent or more of the voting stock of a corporation or a shareholder of a professional corporation can submit an Application for Waiver to the Workers' Compensation Board and be deemed not to be an employee for purposes of the Act. Likewise, in circumstances other than construction work, if a twenty percent owner of a corporation or a shareholder of a professional corporation has submitted an Application for Waiver, that person's parent, spouse, or child can submit an Application for Waiver to the Board and be deemed not to be an employee for purposes of the Act. However, Section 105-A's definition of person means that the possession by a shareholder or a shareholder's parent, spouse, or child of an approved Application for Waiver, does not necessarily mean that person comes within the "construction subcontractor" or heavy equipment owner/operator exceptions to the presumption of employee status. *In other words, a subcontractor's approved Application for Waiver provides no protection to the "hiring agent" (e.g., general contractor) against the presumption that a person performing "construction work" on a "construction site" is the hiring agent's employee.*

Similarly, pursuant to Section 102(11)(B) of the Act, persons operating a business or practicing a trade, profession, or occupation as a sole proprietor, member of a partnership, or member of a limited liability company, are not treated as "employees" for purposes of the Act unless they elect to be covered by the Act by procuring and maintaining workers' compensation insurance. However, *pursuant to Section 105-A's definition of "person," a sole proprietor, partner, or LLC member who performs construction work on a construction site will be treated as an employee of the hiring agent unless the sole proprietor, partner, or LLC member meets the "construction subcontractor" exception or the heavy equipment owner/operator exception.*

Employees of Independent Contractors

Prior to the effective date of Section 105-A, pursuant to Section 102(11)(A)(8) of the Act, employees of an independent contractor were not considered to be employees of the person who employed the independent contractor for purposes of the Workers' Compensation Act. However, the same legislation which enacted Section 105-A amended Section 102(11)(A)(8) so that it now reads *except as otherwise provided in Section 105-A* employees of an independent contractor are not considered to be employees of the person who employs the independent contractor. This seemingly small change opens the door to have employees of independent contractors who perform "construction work" on a "construction site" deemed to be the employees of the "hiring agent." This change to Section 102(11)(A)(8) makes it essential for persons employing subcontractors on a construction site to require the subcontractor to furnish proof that its employees are covered by workers' compensation insurance.

Owners and Operators of Heavy Equipment

As previously mentioned, Section 105-A provides an exception to the presumption of employee status for a person who owns and operates an item of equipment which weights more than 7,000 pounds and whom is hired to operate the equipment on the construction site or to use the equipment to transport materials to or from the site. A truck with a gross vehicle weight rating greater than 7,000 pounds qualifies as an item of equipment under this exception. If the item of equipment is leased from a person in the leasing business, the person to whom the equipment is leased will be treated as its owner for purposes of this exception, unless the equipment is leased from the hiring agent or an affiliate of the hiring agent. Owners and operators of heavy equipment can seek predetermination of independent contractor status by filing an Application for Predetermination with the Workers' Compensation Board.

"Construction Subcontractor"

As noted above, Section 105-A contains a twelve point definition of "construction subcontractor." All twelve points must be satisfied in order for a person who performs "construction work" on a "construction site" for a "hiring agent" to qualify as a "construction subcontractor." The twelve points are as follows:

1. The person either possesses or has applied for an employer identification number or a social security number *or* "has agreed in writing to carry out the responsibilities imposed on employers" under the Maine Workers' Compensation Act;
2. The end result of the work is the primary element bargained for by the "hiring agent" and the person has "control and discretion over the means and manner of performance of the construction work";
3. The person has control over the time when the work is performed (but this does prohibit a completion schedule);
4. The person hires and pays the person's assistants, if any. If the assistants are the person's employees, the person supervises the details of their work;
5. The person holds himself or herself out as being in business for himself or herself;
6. "The person has continuing or recurring construction business liabilities or obligations";
7. "The success or failure of the person's construction business depends on the relationship of business receipts to expenditures" (With respect to this element, Question 17 of the Workers' Compensation Board's Application for Predetermination re-

quires the person to submit signed copies of business tax returns for the prior three tax years.);

8. The person's remuneration is not determined unilaterally by the hiring agent;
9. The person is responsible for the expenses related to the service or construction work performed (e.g., purchasing materials, paying the person's workers or subcontractors); however, the hiring agent may provide the supplies or materials necessary to perform the work;
10. "The person is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work";
11. The person supplies the "principal tools and instruments used in the work," but the hiring agent may furnish tools or instruments that are unique to the hiring agent's special requirements or are located on the hiring agent's premises; and
12. "The person is not required to work exclusively for the hiring agent."

Application for Predetermination

The Maine Workers' Compensation Board has a new Application for Predetermination (Form WCB-263) specifically to request a predetermination that a person comes within either the exception for heavy equipment owners and operators or the exception for "construction subcontractors." I have spoken with an owner of a landscaping business who in January of this year submitted the new Application for Predetermination seeking a predetermination that one of the workers his company uses as a subcontractor qualifies as a "construction subcontractor" under Section 105-A. The landscaping business owner tells me that the subcontractor is a sole proprietor who has his own customers apart from the work he does for the landscaping business. In accordance with the Application for Predetermination, the subcontractor submitted copies of his recent tax returns with the Application. The Board approved the application. This anecdote shows that although the twelve part test for the "construction subcontractor" exception is stringent, it can and has been met.

Optional Insurer Referral Provision

In a case where an insurer believes in good faith that an employer withheld from it or from the State Tax Assessor records of payments to a person deemed to be the person's employee under Section 105–A, the insurer is provided with immunity for referring the employer and the person deemed to be the employee to the State Tax Assessor for "appropriate action." The apparent intent of this provision is to encourage insurers to report illegal construction subcontracting arrangements to the State Tax Assessor so that the State Tax Assessor can pursue failure to make required income tax withholdings and other violations of Maine law.

Penalties

Failure to procure workers' compensation insurance coverage for an employee as required by the Act constitutes a Class D crime, subjects the hiring agent to a civil penalty which could exceed $10,000, and carries other sanctions. If the hiring agent is a corporation, both the corporation itself and any agent of the corporation having primary responsibility for obtaining insurance coverage are liable for these penalties.

Public Construction Projects

The same legislation that enacted Section 105-A also enacted 26 M.R.S.A. § 1302-A. In the case of construction projects performed for the State of Maine, the University of Maine System, or the Maine Community College System, Section 1302-A requires the general contractor or designated construction manager to provide the agency with a list of all subcontractors and independent contractors on the job site, the identity of who directly contracted with each subcontractor and independent contractor, and the identity of the workers' compensation insurer for each subcontractor and independent contractor. A contractor or subcontractor who violates Section 1302-A is subject to a forfeiture of not less than $250.00.

Conclusion

Section 105-A and the related changes to the Maine Workers' Compensation Act make it essential for all "hiring agents"—i.e., businesses in the construction trades, modular home dealers, property management companies, and others who hire businesses or individuals to perform construction work on real estate owned or occupied by a third party—to ensure that the person being hired meets the "construction subcontractor" exception, meets the heavy equipment owner/operator exception, or is covered by workers' compensation purchased by the hiring agent as required by the Act. Furthermore, these changes to the Maine Workers' Compensation Act make it essential that "hiring agents" obtain proof from the subcontractors that they hire that the subcontractors' own employees are covered by workers' compensation insurance. Failure to do these things could subject the hiring agent to civil and criminal penalties under the Act as well as to liability to workers injured on the construction site. □

New Associate: Kristina M. Balbo

We are pleased to announce that Kristina M. Balbo joined the firm in August, 2009, as an associate attorney. Kristina is originally from Oakland, Maine, and graduated *magna cum laude* from Bowdoin College in Brunswick, Maine in 2001. While in college, Kristina was involved in numerous theater productions, and won the Alice Merrill Mitchell Award in acting for her lead performance in Dürrenmatt's *The Visit*. She was also active in the English department, and won the Brown Prize for Extemporaneous Writing. Kristina studied French and travelled extensively in France both during and after school, and is fluent in French.

Following graduation, Kristina lived in Abu Dhabi, UAE for three years, giving private English lessons. She was an active member of the Abu Dhabi Dramatic Society, and starred in a variety of plays. She also volunteered for Feline Friends, an organization dedicated to caring for the large feral cat population in Abu Dhabi.

Kristina returned to Maine in 2004, where she worked as a legal assistant and paralegal in Portland before beginning law school in 2006. She attended the University of Maine School of Law and graduated *summa cum laude* in 2009. While in law school, Kristina was a representative for the Inns of Court and won the Faculty Significant Achievement Award. She worked at the Cumberland Legal Aid Clinic, where she had the opportunity to brush up on her French while helping a Burundi family obtain political asylum. She also managed to squeeze in time for acting, and is starring in the upcoming local independent film *Up Up Down Down*.

KRISTINA M. BALBO

Kristina continues to live in Portland. In her free time, she acts, fosters cats, and runs with the Portland Hash House Harriers. □

NHD Plays Key Role in Securing Long Term Lease of Hurricane Island

By Kathryn M. Longley-Leahy, Esq.

Norman, Hanson & DeTroy attorneys played a prominent role in securing the future of one of Maine's most historic islands by assisting the newly formed Hurricane Island Foundation in both obtaining its tax-exempt status as a public charitable organization, and thereafter successfully negotiating a 40 year lease agreement between the owner of Hurricane Island and the Hurricane Island Foundation. The Hurricane Island Foundation was formed with the support and the institutional memory of what was the Hurricane Island Outward Bound School, a school that used Hurricane Island as a base of operations for its well-known Outward Bound experiential educational programs in which over 35,000 outward bound students of all ages from all corners of the world have participated. The mission of the Hurricane Island Foundation is to create and preserve the Hurricane Island community to support and enhance educational opportunities, primarily for Maine youth, through educational partnerships throughout the State of Maine. Outward Bound's Director of the National Sea Program joined in the celebration of this success, by releasing the following statement: "Hurricane Island has been synonymous with a spirit of adventure, challenge, and community, and Outward Bound celebrates the news that for the next half century the Island will continue to be a place for students from Maine and elsewhere to learn and discover more about themselves and their environment."

Norman, Hanson and DeTroy is very proud of its involvement in securing and protecting Hurricane Island by providing legal expertise in the areas of non-profit organizations, tax and real estate law to the Hurricane Island Foundation, thereby enhancing the Foundation's ability to preserve Hurricane Island's natural beauty and cultural heritage for the benefit of students from Maine and elsewhere for years to come. □

Recent Additions and Amendments to the Maine Insurance Code

By Hannah L. Bass

The 124th Maine State Legislature enacted three notable provisions relating to insurance, effective September 12, 2009. These statues are described briefly below, but should you have any questions, please call.

Coverage for Family Childcare Providers – 24-A M.R.S.A. § 3060.

The intent of this newly-enacted provision was to ensure that family childcare providers operating out of their homes could obtain homeowners insurance policies and would not be subject to cancellation or nonrenewal because of the operation of a daycare. This section prohibits an insurer from refusing to issue or renew a policy covering a primary residence of a family childcare provider who is certified under state law and who demonstrates satisfactory evidence that the business is covered by separate insurance for business liability.

The statute also relieves a homeowners insurer from the duty to defend or indemnify a family childcare provider, subject to the above conditions. In practice, a possible weakness of the statute is that it does not provide the homeowners insurer with full protection from suits that are connected in some way with a daycare operation. In many instances, the licensed childcare provider is not the only defendant, but may be one of multiple defendants, including spouses and children of the licensed daycare provider. Arguably, the statute will not be interpreted to allow a homeowners insurer to deny a defense to a family member who is otherwise an insured under the homeowners policy, but who is not the licensed daycare provider, and perhaps not even an insured under the business liability policy.

Subrogation of Medical Payments Coverage – 24-A M.R.S.A. § 2910-A.

This statute amended the existing medical payments subrogation statute to establish a dollar amount threshold. As amended, the statute does not allow subrogation for medical payments unless the insured's settlement or award exceeds $20,000. One substantial question that arose last fall related to the effective date of this statue. Typically, statutes that prescribe policy changes requiring modification of forms include a statement that the effective date will apply to policies issued or renewed after that date. No such statement was included with this provision.

After NH&D attorneys brought this issue to the Bureaus' attention, it responded with a clarification of the application of the effective date. On February 5, 2010, the Maine Bureau of Insurance issued Bulletin 371 clarifying that the new law applies to all policies issued or renewed on or after the effective date of September 12, 2009.

Disclosure of Coverage Limits to Claimant – 24-A M.R.S.A. § 2164-E.

This statute requires an insurer to provide the liability coverage limits to a claimant or claimant's attorney within 60 days of receipt of a written request. This statute requires the disclosure prior to the commencement of any civil action. □

Recent Legislative Enactments

By Jonathan W. Brogan

As of September 12, 2009, several bills that had been passed by the Legislature became law. These bills may have a substantial affect on evaluation of claims, claims practices and issues that eventually reach trial.

- 24-A M.R.S.A. § 2910-A precludes subrogation against an insured unless the insured was awarded or had settled damages that exceeded $20,000. Several plaintiffs' firms have stated that this is retroactive for policies written prior to September 12, 2009. The Superintendent of Insurance, Mila Kofman, has recently issued Bulletin 371 that states that the new law only applies to policies issued or renewed on or after September 12, 2009.
- 24-A M.R.S.A. § 2164-E mandates disclosure of insurance policy limits to an injured party upon inquiry. Previously limits only needed to be revealed when there was ongoing litigation.
- 18-A M.R.S.A. § 2-804 raises the punitive damage limit to $250,000 and expands available pecuniary loss recovery in wrongful death actions. 18-A M.R.S.A. § 3-108 extends the statute of limitations for actions against the estate of a decedent from three to six years.
- 28-A M.R.S.A. § 2509 raises the cap on liquor liability damages from $250,000 to $350,000.
- 28-A M.R.S.A. § 2056(2) expands the automobile bicycle "3-foot rule" to cover car/pedestrian collisions.

If you have any questions about these changes or how they affect claims that you are working on, please do not hesitate to contact me at jbrogan@nhdlaw.com at any time. □

New Associate: Kelly M. Hoffman

We are pleased to announce that Kelly M. Hoffman joined the firm in January 2010 as an associate attorney. Kelly was raised in Stafford, Virginia and graduated from Johns Hopkins University in 2000. While in college, Kelly was a standout athlete as the goalkeeper for both the Field Hockey and Lacrosse teams.

Following graduation, Kelly worked for the Office of the Public Defender in Baltimore, Maryland. She then studied international relations and economics at Seton Hall University's Whitehead School of Diplomacy and obtained her masters degree with highest honors in 2005.

Kelly attended the University of Maine School of Law and graduated with honors in 2008. While in law school, Kelly was a member of the Moot Court Board as well as an editor of the Ocean & Coastal Law Journal. She is fluent in German and spent her first summer during law school as an associate at the law firm of Hausmaninger Kletter in Vienna, Austria.

She lives in Portland with her fiancée, who is also an attorney. They enjoy spending time outdoors with their new puppy. As well, Kelly will coach field hockey this fall to local high school students. □

KELLY M. HOFFMAN

Briefs/Kudos

ROD ROVZAR recently accompanied a large Maine credit union contingent to visit and breakfast with Maine's Congressional delegation. Senators Snowe and Collins have long been credit union supports, as has Congressman Michaud, who has served on his local credit union's Board of Directors. Congresswoman Pingree has also lent her support to credit unions by becoming a sponsor of a bill in the House which will loosen restrictions on credit union commercial lending. Rod will also be appearing as a guest with George Smith and Harry Vanderwide on the MPBN program *Wildfire*.

STEVE HESSERT and **DORIS CHAMPAGNE** attended the 2010 ALFA International Workers' Compensation Practice Group Face-to-Face meeting in January in Chicago, Illinois. The group met to discuss upcoming events, including a teleseminar planned in August 2010 on Medicare Secondary Payer Law updates and a two-day seminar in New Orleans on relevant workers' compensation topics in early 2011.

JOHN VEILLEUX and **TOM MARJERISON** coach the Casco Bay Thrashers squirt hockey team (9-10 year olds). On February 21st the Thrashers won the Central Massachusetts Classic tournament in Marlborough, Massachusetts by beating Newport, Rhode Island 4-1. The Thrashers also played for the State Championship on February 27, losing an overtime thriller to Houlton 4-3.

ADRIAN KENDALL, a member of NHD's financial institutions and commercial law practice groups, presented a seminar on effective techniques to avoid and deal with identity theft in a presentation on March 9 at the Community Credit Union in Lewiston, Maine. Every year, approximately 10 million Americans become identity theft victims and NH & D is proud to team up with Maine's credit unions to combat this growing crime.

DORIS CHAMPAGNE was a speaker at the Annual Symposium put on by the GenRe in Stamford, Connecticut, in February. She gave talks on the Medicare Secondary Payer Laws and provided pertinent legal updates for six states on the east coast.

On February 17, **STEVE HESSERT** participated as a speaker in a national teleseminar sponsored by the ALPHA International Workers' Compensation Practice Group entitled "H1N1: Employer Medical and Legal Strategies for Managing Contagious Disease Outbreaks". The seminar addressed employment and management issues presented by contagious disease outbreaks. The panelists also included a medical expert, an employment lawyer from Cincinnati, and a workers' compensation attorney from Philadelphia. Topics covered included H1N1 issues in the context of OSHA, ADA, FMLA, EEOC, State Human Rights, and State Workers' Compensation Laws.

Congratulations to **MATT MEHALIC** and **KIMBERLY MEDSKER**, who have announced their engagement and plan a late July wedding on Deer Isle.

KATHRYN M. LONGLEY-LEAHY recently participated as a faculty member in an Advanced Elder Law Seminar held in Portland, Maine in December for attorneys, accountants and other professionals who work in the area of Elder Law. Kathryn presented a session on the types of financial, emotional, physical abuse being encountered by the Elderly population today, and ways to protect against such abuse, and a second session on the ethical challenges and responsibilities professionals face in working with elderly clients to clearly identify the client whose interests are to be protected. □

New Attorney: Kevin M. Gillis

We are pleased to announce that Kevin M. Gillis joined the firm as an attorney in February, 2010. Kevin has practiced law in Maine since 1979. His practice is concentrated in the areas of workers' compensation, employment law, and insurance regulation. He has represented several of Maine's largest employers and insurers before the Maine Superior Court, the US Department of Labor, the Maine Workers' Compensation Board, the Maine Bureau of Insurance, and the Maine Legislature. He has also argued many cases on appeal to the Maine Supreme Court and the US Court of Appeals for the First Circuit, and is one of the few lawyers in Maine who has argued before the US Supreme Court. Kevin has been recognized for legal excellence by being selected for inclusion in the 2008 through 2010 editions of The Best Lawyers in America. He is the co-author of the *Maine Employers' Guide: Workers' Compensation.*

Kevin grew up in Portland, and graduated from Deering High School. He then attended Dartmouth College, and graduated *magna cum laude* in 1976, completing majors in Government and Economics. He then attended Cornell Law School, graduating *cum laude* in 1979.

Kevin lives in Portland with his wife Carolyn. They have two children. Melissa, age 22, lives in Los Angeles and is employed by MTV. Michael, age 19, is a sophomore at Dartmouth College. Kevin enjoys golf, and is a member of the Portland Country Club. He continues to

KEVIN M. GILLIS

defy age by playing basketball, which he previously played competitively. He also enjoys running and hiking. □

New Member: Doris V. R. Champagne

Norman, Hanson & DeTroy, LLC is pleased to announce that Doris Champagne, who joined the workers' compensation group in 2001 as an associate, was made a member of the firm as of January 1, 2010.

Doris grew up in Bangor, Maine. After graduating from Bangor High School, Doris attended the University of Maine, where she majored in Journalism, with a concentration in Russian language and history. In 1992, she moved to Washington, D.C. and worked as an analyst and reports officer for the CIA. While at the Agency, Doris developed extensive knowledge of Middle Eastern, South Asian, and Far East Asian countries.

Returning to Maine in 1996, she enrolled in the University of Maine School of Law and served as a writer and an editor of the *Maine Law Review*. After earning her law degree, Doris was an associate with a Bangor law firm for one year, and then served as a law clerk to Justice Paul Rudman of the Maine Supreme Judicial Court.

Since joining the firm, Doris has continued to focus on workers' compensation litigation. She has also gained an expertise in the Medicare Secondary Payer Laws. She is a frequent speaker and consultant to insurance companies on this issue. Doris is a member of the Maine State Bar Association and the

DORIS V. R. CHAMPAGNE

American Bar Association. She resides in Scarborough with her husband. □

NHD Attorneys Listed in "Super Lawyers"

Nine attorneys from Norman Hanson DeTroy's office in Portland and Lewiston were included in the New England Super Lawyers and Rising Stars directory.

New England Super Lawyers uses an independent and extensive nomination, research and review process to identify lawyers who have attained a high degree of peer recognition and professional achievement.

Congratulations to the following Norman Hanson DeTroy attorneys who were recognized. □

John V. Bonneau
Estate Planning & Probate, Business/Corporate

Jonathan W. Brogan
Personal Injury Defense: General, Medical Malpractice, Products Liability

Peter J. DeTroy
Professional Liability: Defense, Civil Litigation Defense, Criminal Defense

Paul F. Driscoll
Real Estate, Business Litigation

James D. Poliquin
Insurance Coverage, Appellate, Business Litigation

William O. LaCasse
Workers' Compensation

Stephen Hessert
Workers' Compensation, Employment & Labor

Mark G. Lavoie
Personal Injury Defense: Medical Malpractice, General Litigation, Business Litigation

John R. Veilleux
Personal Injury Defense: General, Medical Malpractice, General Litigation, Business Litigation

New *Stricker* Case May Provide Answers To Medicare Conundrum

By Robert W. Bower, Jr.

ROBERT W. BOWER, JR.

Readers of our newsletter and adjusters struggling to comply with the Medicare Secondary Payer law are familiar with the problem of protecting Medicare's interests in settling cases under the Medicare Secondary Payer law. Several questions arise, and first among them is what obligation do we have to Medicare regarding medical bills that may be incurred post-settlement? In workers' compensation cases we have used a variety of vehicles to protect Medicare's interests, including set-aside arrangements, and elaborate settlement agreements which create various obligations of the parties and in which claimants agree that Medicare will not pay their medical bills in the future. We also use notification strategies to advise Medicare of the occurrence of settlement so that it may choose not to pay presented medical bills in the future; thus "protecting" its interests. Workers' compensation employers and insurers are even leaving the medical bills issue open when settling some cases.

Except for leaving the medical bills open, none of these strategies is fool proof. Even when Medicare "pre-approves" a set-aside arrangement, it reserves the right to alter its opinion on that issue as the employee's condition changes. Further driving the uncertainty is the fact that there are no decided cases which define whether a settling tortfeasor or workers' compensation employer/insurer is a "primary payer" of medical bills incurred post-settlement, and thus responsible to Medicare on those bills. There are no cases defining what a settling party's obligation to Medicare is in these cases. Legislative fixes to create safe harbors for settling parties are stalled in Congress. Guidance from CMS is not necessarily consistent with the statute, and changes frequently.

Therefore, the questions with which we are familiar include: If we settle our case are we liable to Medicare for bills incurred post-settlement? If so, are we only able to comply with our obligation to Medicare by creating a "set-aside?" Must we have such a set-aside approved by Medicare before we are secure? At this point, there are no answers to these questions, and we continue to struggle to comply with our obligations under the Secondary Payer law, 42 U.S.C. § 1395y, while also trying to keep the ball rolling on settlements. This has proved to be a challenging task, and has created delay and added a great deal of money to many settlements.

Now, however, we may have a light at the end of the tunnel. The United States has filed a lawsuit against numerous parties contending that Medicare's interests were not satisfied when some mass tort litigation was settled. The settlement was $300 million. The tort claim involved injury from PCB's. Meanwhile, Medicare had made payments on behalf of many of the plaintiffs in the case. It had paid medical bills for those plaintiffs both before and after the 2003 tort settlement. The tort claims were settled with no consideration or mention of Medicare's interests in the settlement agreements. The United States contends that Medicare paid $67 million in "conditional payments." The United States filed suit in the United States District Court for the Northern District of Alabama seeking reimbursement of $67 million plus double damages under section 1395y. See *U.S. v. Stricker, et al.*

The *Stricker* case, therefore, may promise us answers to the most difficult and fundamental questions in this area. First, it is clear that the United States is taking the position that payments it made after the tort settlement were "conditional payments" and that therefore the settling tortfeasors continued to be primarily responsible for medical bills incurred post-settlement. Second, the defendants in the case are clearly aware of this issue. Some of the defendants have filed motions to dismiss, and some of those motions include the argument that post-settlement payments by Medicare are not "conditional" under the statute. It appears, therefore, that this fundamental issue, which has been driving the Medicare conundrum and set aside industry, will be squarely before the court.

As we know, the Medicare secondary payer issue has been primarily focused on workers' compensation settlements up to now. One of the most interesting aspects of the *Stricker* case is that it involves a tort liability case and not a workers' compensation case. Obviously, therefore, the United States believes that the Secondary Payer law applies to tort claims as well. This is a critical feature of the *Stricker* case that will help us understand our obligations to Medicare better once this case is decided.

Although the outcome is unclear, the good news is that we may have answers to the questions with which we have struggled for many years. It seems that we now have the case for which we have been waiting. Stay tuned. □

Recent Law Court Decision

By David P. Very

DAVID P. VERY

Law Court addresses the "no duty to rescue" rule

In general, under Maine common law, a person does not have an affirmative duty to aid or warn another person in peril. This rule is known as the "no duty to rescue" rule. In response to a few notorious instances of bystander inaction, other state legislatures have enacted laws imposing criminal or civil liability for failing to render reasonable assistance to a person in danger or to immediately report a crime that has been committed. Although asked to do so by victims, to date, the Maine legislature has not enacted such a law. In the recent case of *Estate of Joshua S. Cilley v. Lane*, 2009 ME 133 (December 29, 2009), the Law Court addressed the no duty to rescue rule.

Jennifer Lane and Joshua Cilley had an off and on romantic relationship for several years. On January 30, 2005, Lane told Cilley that she wanted to take some time off from their relationship. The following day, Lane was drinking beer with some friends and she left to walk a short distance to her own trailer to call her daughter. After she arrived at her trailer, Cilley arrived and entered. Lane told him to leave and Cilley refused. At some point during the argument, Cilley grabbed a small caliber rifle. Lane walked out of the trailer and as she was doing so, she heard a loud pop, which she later described as sounding like a firecracker. She looked back and saw Cilley fall to the floor and heard him say that "it was an accident" and "it was not supposed to happen." Lane stated that she did not see any blood and she did not investigate or attempt to assess whether Cilley was injured. Instead, she returned to her friend's trailer and told her friends that Cilley had pretended to shoot himself inside her trailer.

The friends went outside and saw Cilley lying on the steps to Lane's trailer, halfway outside the door. One of the friends saw a gun next to Cilley and noted that Cilley was turning white and had difficulty breathing. Another friend went to a neighboring trailer and called 911. Cilley died as a result of a single gunshot wound to his abdomen. According to the physician who treated him, Cilley could have been resuscitated if he had arrived at the hospital five to ten minutes earlier.

Cilley's estate filed a complaint against Lane alleging that Cilley died as a result of Lane's negligent failure to assist. The Superior Court granted Lane's motion for summary judgment. The Superior Court held that absent a special relationship, a person owes no duty to rescue a person notwithstanding how dire the imperiled person's circumstances are and irrespective of how slight an effort would be required to accomplish the rescue. The Superior Court further reasoned that even if Maine imposed a common law duty on social hosts to render emergency assistance for injured guests, such a duty did not apply in this case because Cilley was a trespasser.

On appeal, the Law Court reiterated that Maine law does not impose a general obligation to protect others from harm not created by the actor. The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action. The Law Court did note that as an exception to that rule, certain narrowly defined special relationships would give rise to an affirmative duty to aid and protect, such as a relationship between a common carrier and passengers, an employer and an employee, a parent and child, or an innkeeper and guest. The Plaintiff argued that Lane owed Cilley a duty because she was a social host and he was her guest. Like the Superior Court, the Law Court did not address that argument head-on as it held that Cilley was a trespasser. The Court indicated that Cilley's estate had admitted that Lane had asked Cilley to leave her trailer and that he refused to do so. Someone who was asked to leave and refuses becomes a trespasser. Under Maine law, a landowner only owes a trespasser a duty to refrain from wanton, willful, or reckless behavior. The Law Court held that Lane's failure to contact emergency assistance did not rise to the level of wanton, willful or reckless behavior because Lane did not create the danger to Cilley, nor commit any act that led to his initial injury. Therefore, the Court held that a landowner has no duty to affirmatively act to help a trespasser injured through no fault or act of the landowner.

The Plaintiff then urged the Law Court to recognize a new common law duty: the duty to seek affirmative emergency assistance through reasonable means. The Plaintiff argued that a person who witnesses another's injury, although not required to render any aid, must contact emergency assistance as long as the person can do so in a safe manner. The Estate argued that a special relationship arises when one witnesses an injury to another party and it is this relationship that imposes a duty to act, regardless of any other relationship between the parties and regardless of whether the witness caused or could have foreseen the harm.

The Law Court indicated that in deciding whether to impose a duty, many factors interplay: the hand of history, our ideals of morals and justice, the convenience of administration of the rule, and social ideas as to where the loss should fall. The Court noted that the duty proposed by the Plaintiff was in direct opposition to the principle that a person does not have an affirmative duty to aid or warn another person in peril. Further, the special relationship required to create a duty of care is based on the closeness and nature of a pre-existing relationship between the parties and the measure of control. In contrast, the Court noted, the duty urged by the Plaintiff arises not from any relationship between the parties, but simply from presence at the opportune moment.

The Law Court further stated that it was hesitant to create a duty that would impose liability for the failure to act, or nonfeasance. The Court noted that if it were to adopt the duty requested by the Plaintiff, each person would be obligated to contact emergency assistance any time that person witnessed another's injury, which would indeed be a duty without any practical limit. Therefore, the Law Court stated that it would adhere to its established precedent and conclude that absent a special relationship or conduct that has endangered another, a person owes no duty to call aid for an injured person. The Court therefore upheld the grant of summary judgment to Jennifer Lane. □

Norman Hanson DeTroy is proud to announce its sponsorship of the US Biathlon Team and the Maine Winter Sports Center!

Peter DeTroy, Norman Hanson DeTroy's senior member, spoke for the firm: "We are proud to support the best of Maine's youth as they participate in competition around the world and as they prepare for the games in Vancouver. Their hard work, team spirit, and pursuit of excellence are values we all share and we couldn't be more excited to stand behind them. We know that these dedicated men and women have what it takes to make history. Join us as we cheer the US team on to victory!"

Biathlon is a sport that captures the attention and imagination of everyone who sees it. It combines the most physically demanding sport of cross-country skiing with the focus and precision of rifle marksmanship. These opposing disciplines collide at the shooting range. With their hearts pounding nearly three times a second, the athletes struggle to control their breathing as they shoot, knowing that every shot and the number of seconds it takes to make it, will determine who stands on the podium that day. To learn more about Biathlon and the US Biathlon team, visit www.usbiathlon.org.

The Maine Winter Sports Center works around the state to re-establish skiing as a lifestyle in Maine. At the heart of this effort is the goal of creating a new economic and cultural model for Maine's rural communities - one that keeps young families together and attracts businesses looking for a high quality of life for their employees. In this model community-run non-profit ski areas provide an epicenter for programs for all ages and serve as economic engines for these communities. These programs also provide the young athletes the foundation they will need to be Olympians should they chose to pursue that goal. For all involved, the programs stress commitment, discipline and personal responsibility, a solid foundation for success in life. To learn more about the mission and work of the Maine Winter Sports Center, visit www.mainewsc.org. □

Successfully Securing "Hobby" Losses for Tax Purposes

By John W. Geismar

The taxpayer who is carrying on a trade or business may deduct ordinary and necessary expenses incurred in connection with the business. However, a taxpayer cannot reduce his taxable income by claiming deductions he incurs for his hobby or other non-profit activity. Section 183(a) of the Internal Revenue Code provides generally that if an activity is not engaged in for profit, no deduction attributable to the cost of carrying on that activity will be allowed, except as provided in Section 183(b).

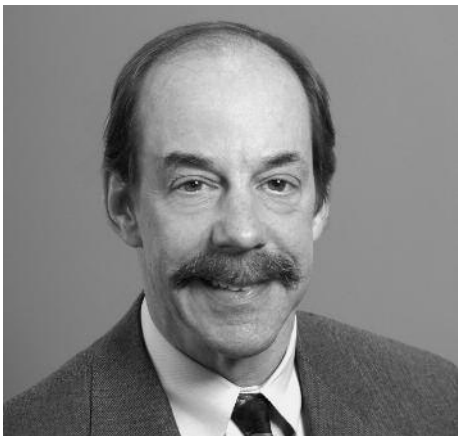
An activity that reports gross income exceeding deductions for the activity for two out of the five prior years is automatically considered an activity engaged in for profit, thereby avoiding the hobby loss rules. Certain horse activities (breeding, showing or racing) are allowed a two out of seven year privilege to avoid application of the hobby loss rules.

It is important to note that Section 183 rules are applied at the "activity" level. Depending on the facts and circumstances of the situation, a taxpayer involved in multiple endeavors may need to consider each endeavor as a separate activity. Generally, the IRS will accept the taxpayer's characterization of several endeavors as a single activity or as multiple activities, as long as the facts and circumstances support the characterization, and as long as the characterization is applied consistently.

Which the presumptions provided for in the regulations (2 out of 5 years, or 2 out of 7 years for horse activities) are not applicable, an activity will still constitute a "trade or business" within the meaning of Section 162, and escape the above-referenced limitations of Section 183, if the taxpayer's actual and honest objective is to realize a profit from the activity. The expectation of profit need not have been reasonable; however, the taxpayer must have entered into the activity, or continued it, with the objective of making a profit. Whether the requisite profit objective exists is determined by looking at all the surrounding facts and circumstances. Greater weight is given to objective facts than to the taxpayer's mere statement of intent.

A noteworthy procedural distinction is worth mentioning here. Farm activities such as agricultural cultivation or horse activities are often reported on IRS Form 1040, Schedule F, or they may be reported on Schedule C. An activity may be determined to be a passive activity where losses incurred by the activity can only be recognized to the extent of revenues, with losses in excess of gains not available to shelter other income not derived from the activity in the same year, but carried forward to shelter revenues in subsequent years from the activity, or only recognized once the activity is terminated. By distinction, hobby losses (whether characterized on Schedule C or Schedule F) cannot be carried forward, and can never be recognized in the future. This dynamic is important in determining how to best report financial results of an activity for tax purposes and in considering how best to carry on an activity in order to demonstrate that it is motivated by profit making intent, even if a profit is never recognized. These interests are of material importance where the taxpayer undertakes or pursues other profit making activities.

Norman, Hanson & DeTroy attorneys recently represented a taxpayer in the United States Tax Court sitting in Boston, Massachusetts. The Internal Revenue Service had disallowed deductions from the taxpayer's Form 1040, Schedule F for four successive years, which resulted in the assessment of additional tax of approximately $750,000.00 with respect to the four years in issue. In addition to the taxes, penalties and interest were assessed. Additional State of Maine income taxes and penalties that would have followed from successful assertion of these additional assessments by the Internal Revenue Service, would have caused additional State and Federal taxes, interest and penalties for the four years in excess of $1,250,000.00. With the assistance of Norman, Hanson & DeTroy attorneys, the taxpayer was represented in the horse activity audit and in the administrative appeal of the proposed assessments. The administrative protest and appeal of the assessments took time, but allowed the taxpayer to better refine arguments to the IRS and to continue prosecution of his horse activity. Although the client anxiously wished to settle the case, the IRS refused to entertain a reasonable settlement of the case, which was tried in the Tax Court in March of 2009.



JOHN W. GEISMAR

According to the Tax Court Judge,

> Horse breeding may be the quintessential Section 183 activity. The stereotypical scenario is probably the wealthy businessman who runs a real business during the week – with business records, income projections, accountability to banks and investors, and so on – and owns a 'gentleman farm' as a weekend retreat where he keeps horses for the recreation of himself and his family and friends. But he dabbles in breeding, with no expectation of ever making a profit, so that he can deduct the expenses of his horses and thereby have Uncle Sam subsidize the weekend farm. Think hobby loss, think horse breeding. However, there are some horse breeders who really are engaging in the activity to make a profit.

Norman, Hanson & DeTroy attorneys were able to affirm for the Tax Court that the client did not fit the stereotypical abusive scenario, and that the client was instead engaged in horse breeding to make a profit.

The Regulations under Section 183 provide that a determination as to whether a taxpayer is engaged in an activity for profit must be made by reference to objective standards, taking into account all of the facts and circumstances of each case. The Regulations further provide the following nine factors which should be considered when determining the taxpayer's intent to make a profit:

1. The manner in which the taxpayer carries on the activity;
2. The expertise of the taxpayer or his advisors;
3. The time and effort expended by the taxpayer in carrying on the activity;
4. The expectation that assets used in the activity may appreciate in value;
5. The success of the taxpayer in carrying on other similar or dissimilar activities;
6. The taxpayer's history of income or losses with respect to the activity;
7. The amount of occasional profits, if any, from the activity;
8. The financial status of the taxpayer; and
9. Elements of personal pleasure or recreation enjoyed by the taxpayer in the activity.

The list is non-exclusive, and the number of factors for or against the taxpayer is not necessarily determinative, but rather all facts and circumstances must be taken into account, and more weight may be given to some factors than to others.

The Tax Court Judge in the case recently handled by our attorneys pursued the nine point analysis outlined above as required by the Regulations. The Court was impressed by our client's business acumen and savvy. The Court ultimately determined that five of the nine factors weighed in our client's factor, one was opposed to the client, and three were neutral. Of note was:

1. Despite the fact the client did not have a written business plan, he clearly demonstrated that he had a plan for success of his horse raising business, and acted in accordance with that plan. The client would have been more certain of achieving success on this one of the nine factors if he had had a written business plan, however.

2. Although the client's business records were characterized as having "low tech informality," the Court determined that the horse raising records were in nature and scope no different than business records maintained by the client with respect to his other successful business activities. What we learned from this is that if the challenged "hobby" activity is pursued in a manner similar to the taxpayer's other business activities, that should help to carry the day with respect to this factor under the Regulations.

3. The second factor pertaining to the expertise of the taxpayer and his advisors is of note. The taxpayer can be self-taught with respect to an activity, but to the extent the taxpayer's personal expertise is lacking, there should be evidence of expert support and advisors to bolster the notion that the taxpayer is pursuing the activity with a profit objective. Documentation is helpful in this regard, although in our case, we were able to present important testimony of our client's trainer to impress the Court that our client had secured the services of a qualified expert advisor.

4. Another of the nine factors pertains to the time and effort expended by the taxpayer in carrying on the activity. In our case, the taxpayer had no records to verify the time he spent, but his testimony was deemed credible by the Court. A contemporaneously made diary would have been added evidence in support of this third criteria.

5. The criteria that there is an expectation that assets used in the activity may appreciate in value is noteworthy. From this case, the court determined that the appreciation in the value of the taxpayer's herd of horses more than offset the depreciation expense reported by the taxpayer for the tax years in issue. The need to identify the "activity" is important with respect to this particular factor. A farming activity typically takes place on a farm where due to market forces the value of the underlying real estate appreciates over time. That factor was available to the Court in our case and has been considered by courts in other "hobby loss" cases in determining this factor. Our client's farm real estate had in fact appreciated materially over the years. Nevertheless, the Court determined that the appreciation and the value of the herd more than demonstrated the taxpayer's expectation that assets used in the activity might appreciate in value, and the appreciation of the farm real estate was not considered, in our case.

6. The factor of final note in our case was with respect to the factor as to elements of personal pleasure or recreation. This factor is aimed at the so-called "gentleman farmer." The evidence produced in our case demonstrated that the taxpayer took no personal pleasure or recreation from the horse activity. The taxpayer did testify that he was pleased by and enjoyed the success of his horse raising activity. The Internal Revenue Service used this testimony to argue that the taxpayer had not satisfied this element of the regulatory test. Nevertheless, the Court determined "satisfaction with one's work to be completely beside the point in this analysis. Fortunate people choose, as their principal profit making activity, an activity they enjoy and that gives them a feeling of satisfaction. The mere fact that a taxpayer derives personal pleasure from a particular activity does not, per se, demonstrate a lack of profit motive."

As we work with tax clients, it is important to recognize when a discussion about hobby loss rules is appropriate. Cases often involve taxpayers with significant income (wage or investment) from sources outside the target business activity. The taxpayer's Schedule F operations represent a method to shelter other income from taxation, and the hobby loss cases remind us that the hobby loss rules will be vigorously enforced by the Internal Revenue Service.

Taxpayers are reminded to focus on efforts to satisfy the nine regulatory factors. Maintaining good records, developing written business plans and budgets, operating from a separate business checking account, obtaining expertise in the industry, and conducting the activity in a businesslike manner will all help to justify the profit expectation. □

Norman Hanson DeTroy Provides Pro Bono Legal Analysis of a Program Designed by Maine's Nursing and Healthcare Leaders to Treat Impaired Nurses

By Kenneth J. Albert

In 2008, the Organization of Maine Nurse Executives (OMNE) and the Maine Society of Healthcare Human Resources Administration (MSHHRA) organized a steering committee to address the needs of chemically dependent professional nurses. Research demonstrates that approximately 10% of nurses have impairment issues related to drug or alcohol abuse. The number is higher for nurses practicing in specialty areas such as emergency departments, intensive care units, and anesthesia. Alternative to Discipline programs for physicians have demonstrated a better than 80% successful re-entry into professional practice when there is a well-defined program. Given that the United States is experiencing a significant nursing shortage, we cannot afford to discard nurses, often star performers, without first offering assistance through programs that also serve to protect patients. As required by law, the Maine Legislature, in passing LD 94, authorized the Maine Board of Nursing to promulgate rules to provide nurses with an opportunity to seek treatment and continue practicing while protecting the public's health, safety, and welfare.

A steering committee co-chair, Nicole Morin-Scribner, SPHR, Director of Human Resources for St. Mary's Health System solicited the assistance of health law attorney Kenneth Albert, Esq., formerly a practicing Registered Nurse, to conduct a legal analysis of the draft publication intended for release by the steering committee. Understanding the importance of such an initiative, the firm's leadership agreed to provide legal services for the project free of charge. Professional alternative to discipline programs involving workplace drug diversion requires an analysis of Maine's employment laws, state and federal discrimination laws, state and federal mandatory reporting laws, professional licensing board regulations, and other legal and policy considerations. Norman, Hanson & DeTroy wishes to congratulate the steering committee and everyone involved in this project for recognizing that impaired professional nurses can be successfully rehabilitated while at the same time protecting the welfare of Maine citizens. □

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

Return Service Requested

Spring 2010 issue