INBRIEF

Current Developments in Maine Law

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Trading Privacy for Safety: Where is the Line?

By: Christopher C. Taintor, Esq.

1. Medical Privacy: A Balance of Competing Interests

In today's world, privacy and safety, two values important to all of us, are increasingly in tension. One need only read the news to see examples, the most recent of which is the battle between the Federal Government and Apple over access to a terrorist's cell phone. We all want the government to protect us from random violence. At the same time, though, we are reluctant to let the government know our secrets.

This tension is reflected in the laws that govern the confidentiality of medical information. Arguably, in fact, the tension is greatest there. On the one hand, it is important for anyone seeking out health care to feel confident in the privacy of the information they share with doctors, counselors, and other professionals. Medical privacy is fundamental, and not just because it give us comfort. Studies tell us that when patients don't feel assured of confidentiality, they don't tell their doctors everything they should, and the result of that reticence is that doctors are less able to provide quality care. On the other hand, though, the very fact that we share private information with our doctors means that the government sometimes views medical records as fertile sources of intelligence, a trove of information that can be used to prevent crime.

For better or worse, courts, and increasingly government agencies, have resolved this tension by imposing on health care providers a duty of disclosure that generally does not apply to others. Although there are exceptions to the rule, under Maine law an ordinary citizen who learns that an

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acquaintance poses a danger to another person, or to the public generally, typically has no duty to warn anyone of that danger. *Bryan R. v. Watchtower Bible and Tract Society of New York, Inc.*, 783 A.2d 839 (Me. 1999). There is a developing body of law, however, which imposes just such a duty on health care professionals. The result, ironically, is that the information people expect to be the most private is actually the most vulnerable to disclosure.

The seminal case pitting medical privacy against public safety is *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976), where the California Supreme Court ruled that a psychotherapist may have a duty to warn third parties about a specific threat of harm to a foreseeable victim. In the forty years since *Tarasoff* was decided, nearly every state has adopted some variant of the rule, either by statute or by judicial decision.

2. The "Health or Safety" Exception to Maine's Medical Privacy Law

Although the Maine Supreme Judicial Court has never squarely addressed the issue, it has mentioned *Tarasoff* as a widely-recognized exception to the "no duty to protect" rule. Importantly, moreover, Maine's statute governing the confidentiality of health care records allows the disclosure of otherwise private information when a practitioner or facility "in good faith believes" that disclosure should be made "to avert a serious threat to health or safety." 22 M.R.S.A. §1711-C(6)(D). Although the Maine statute as originally enacted was quite vague, the Legislature recently added some clarity by amending it so that it now incorporates by reference the standards set out in the federal Privacy Rule (HIPAA). To satisfy that standard, the disclosure must be made in the good faith belief that it is "necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public," and it must be made "to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat." 45 C.F.R. §164.512(j).

Not surprisingly, health care practitioners feel some angst when they have to weigh patient privacy against public safety. Practitioners, especially therapists, ask with increasing frequency whether they have a duty to share information about patients who might be expected to harm others, and how that duty can be reconciled with their ethical obligations. In fact, though, the standards established in both Maine law and HIPAA actually give providers considerable discretion. In 2013, in the aftermath of the Newtown and Aurora tragedies, the Director of the Department of Health and Human Services Office of Civil Rights, which is responsible for enforcing HIPAA, took the remarkable step of sending an open letter addressed to "Our Nation's Health Care Providers," giving assurances that the law does not bar disclosure of otherwise confidential information "when necessary to . . . warn or report that persons may be at risk of harm because of a patient." Furthermore, he explained, "the provider is presumed to have had a good faith belief when his or her belief is based upon the provider's actual knowledge (i.e., based on the provider's own interaction with the patient) or in reliance on a credible representation by a person with apparent knowledge or authority (i.e., based on a credible report from a family member of the patient or other person). In short, a therapist or other professional is not obligated to accurately predict whether his or her patient is likely to harm someone. It is enough to have a "good faith belief" that disclosure is "necessary." Furthermore, as long as a clinician does not disclose private medical information with "malice," Maine law provides immunity from civil liability for malpractice or invasion of privacy.

From a risk management standpoint, the good faith standard and the qualified immunity defense combine to tip the legal scales in favor of disclosure. A therapist who thinks her patient *might* pose a "serious and imminent threat" to another, or to the public, may be better off reporting that concern than keeping it to herself. After all, if the therapist makes the report and the patient later sues for negligence or invasion of privacy, the clinician will have done what she could to avoid serious harm and will have a viable immunity defense. If, on the other hand, she is silent and the risk she feared materializes (i.e., the angry patient becomes violent and hurts someone), the adverse legal and professional may be much greater.

Violence, of course, is not the only risk that might be predicted based on information shared in a health care encounter. Doctors and other health care professionals may be put on notice of other risky behaviors – patients who continue to drive after they have become physically or mentally impaired, or who have unprotected sex after they have been diagnosed with sexually-transmittable diseases – and many wonder what they can and should say in those circumstances. If a doctor diagnoses a patient with a communicable disease and has good reason to think the patient will knowingly infect a partner, does he have an obligation to speak up? Around the country there are not only judicial decisions but state statutes imposing affirmative duties to disclose in these circumstances. See, e.g., Iowa Admin. Code §641-11.18(141A) (requiring physicians to notify their patients' known sexual or needle-sharing partners if they believe in good faith that patient, "despite strong encouragement," will not disclose HIV status); Mich. C.L.A. §333.5131 (same); Md. Code, Health – General §18-337 (same). Although Maine does not have a law requiring doctors to notify those whom their patients foreseeably might harm, it is conceivable that the dangers posed by these patients could be sufficiently "serious" and "imminent" to justify disclosure in at least some circumstances (there are special confidentiality protections for patients who are diagnosed as HIV-positive). And if the doctor is at liberty to disclose, it is a short step to saying that he has an affirmative duty to reach out and protect his patient's partner.

3. Exceptions to the Exception

Not every health care professional practicing in Maine is regulated by Maine law and HIPAA. For some, the barriers to disclosure are higher.

Information acquired by an alcohol or drug abuse treatment facility, for example, has heightened protection under federal law. Alcohol and drug treatment facilities may communicate with law enforcement officers concerning "a patient's commission of a crime on the premises of the program or against program personnel or to a threat to commit such a crime."

42 C.F.R. 2.12(c)(5). Otherwise, disclosure of treatment records is permissible only pursuant to a court order, where "necessary in connection with investigation or prosecution of an extremely serious crime, such as one which directly threatens loss of life or serious bodily injury, including homicide, rape, kidnaping, armed robbery, assault with a deadly weapon, or child abuse and neglect." 42 C.F.R. 2.63. Under Maine

law, the records of "Employee Assistance Programs" – programs created "to assist employees with family, legal, financial, mental health, and alcohol and other drug-related problems that may affect their ability to perform their jobs and their well-being" – are entitled to this same heightened degree of confidentiality. Code Me. R. tit. 14-118 Ch. 6, § V(C)(2)(a).

A different standard also applies to information acquired in the course of treating students. Under the Family Educational Rights and Privacy Act (FERPA), student health and counseling records can be disclosed only in a "health or safety emergency," where necessary "to protect the health or safety of the student or other individuals." The disclosure can be made to law enforcement personnel, public health officials, and trained medical personnel. 34 C.F.R. §99.31(a)(10) & §99.36

4. Conclusion

There is plenty of room for debate around the issue of medical privacy. Physicians believe that when patients lose confidence that their personal information will be kept private, that loss of trust undercuts the physician-patient relationship, which "could lead to negative, and possibly expensive, health consequences in other areas." Molnar & Eby, Medical Fitness To Drive & A Voluntary Reporting Law at 29-30 (AAA Foundation for Traffic Safety 2008). And in a variety of contexts, it has been found that being assured of confidentiality makes people more willing to seek medical treatment. Ford CA, et al. Influence of Physician Confidentiality Assurances on Adolescents' Willingness to Disclose Information and Seek Future Health Care: A Randomized Controlled Trial. *JAMA.* 1997; 278(12):1029-1034 (finding that adolescents are more willing to communicate with and seek health care from physicians who assure confidentiality). Gradually but surely, however, those assurances of confidentiality have been giving way to society's desire for protection. As we become ever more attuned to the risks around us, both patients and health care professionals would do well to be conscious of the shrinking scope of medical privacy.

Workers' Compensation– Appellate Division Decisions

By: Stephen W. Moriarty, Esq.

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Apportionment.

In multi-injury cases the employer at the time of the most recent injury is initially responsible for payment of all benefits owed to an injured worker. However, §354 of the Act provides that the last employer may seek financial contribution or reimbursement from an earlier employer or employers if two or more earlier injuries have contributed to current incapacity. The apportionment remedy applies whether an earlier injury was traumatic or gradual in nature.

Where different employers are responsible for earlier injuries, the most recent employer may seek apportionment against them. If the same employer was involved at the time of all injuries but was insured by different carriers, the most recent carrier may seek apportionment against the earlier insurers. The apportionment doctrine was first recognized by the Law Court in 1975, but for many years it has been codified in the Act.

The occurrence of a prior injury or injuries is a necessary prerequisite to seeking apportionment. In the case of a gradual injury there may be multiple contributing causes, including the cumulative effects of work performed for other employers. However, the statute does not permit an employer to seek apportionment against contributing causes, but only as against contributing injuries.

The point was illustrated in a recent decision from the Appellate Division. In *City of Portland v. Moses*, App. Div. Dec. No. 16-4 (February 22, 2016) the claimant suffered a gradual stress injury while working for the City of Portland, but for several years earlier was concurrently employed by two other communities. Portland sought contribution from the two other employers, but the Administrative Law Judge denied the Petition for Apportionment. On appeal the Division upheld the decision of the ALJ.

The Division recognized that events which occurred during the course of employment with the other communities may have contributed to the development of the employee's gradual injury. However, there was insufficient proof that the employee had actually sustained an injury while working for either of the other employers, and that therefore without the occurrence of an earlier injury no apportionment could be awarded. The panel affirmed that contribution to a condition, without more, is insufficient to support an apportionment, and affirmed the ALJ's findings that the only gradual injury that had occurred was that sustained while working for the City of Portland.

Employment status.

In its first decision of the new year, the Appellate Division reversed a decree of an Administrative Law Judge granting a complaint filed by the Abuse Investigation Unit alleging a failure on the part of an owner of a hair and tanning salon to obtain workers' compensation coverage for individuals claimed to have been employees. In *Workers' Compensation Board AIU v. Bangz*, App. Div. Dec. No. 16-2 (February 9, 2016) respondent Bangz appealed from a decision imposing a civil penalty for lack of coverage, and argued that the persons in question were not employees within the meaning of the Act and that therefore she was not required to obtain coverage.

The evidence showed that Bangz leased space for a hair and tanning salon and rented portions of the space to two other stylists and a nail technician. There was a written lease between the parties which specified a daily rental rate and which designated those days on which the stylists and the nail technician could work in the rented space. The stylists and technician set their own prices, collected their own fees for services rendered, and provided all supplies and materials that were necessary for their businesses. The AIU claimed that these individuals were employees of Bangz, and as noted the assigned ALJ agreed and imposed a civil penalty.

The case was remarkable similar to *Workers' Compensation Board AIU v. Blind Faith Tattoos*, App. Div. Dec. No. 14-20 in which a penalty claim had been brought against Blind Faith Tattoos for failing to secure coverage for its employees. Blind Faith Tattoos rented studio space in Bangor, and within the same building rented space to other tattoo artists and a body piercer. The hearing officer had concluded that the fellow occupants of the building were employees within the meaning of the Act and imposed a penalty for lack of coverage. The Division vacated the decision and ruled that the claimed employees were simply lessees of the respondent, and that the only relationship between them was that of landlord/tenant. Accordingly, because there was no indication of an actual employment relationship, the Division ruled that there was no obligation to secure the payment of workers' compensation benefits.

In *Bangz*, the panel relied upon the earlier *Blind Faith Tattoos* decision and ruled that the key issue was whether or not a contract of employment existed between the parties. The Division found no indication of a contract of hire, and once again described the relationship of the parties as essentially equivalent to that of landlord/tenant. Because a contract of hire is a necessary prerequisite to the existence of an employment relationship, and because the evidence did not show such a contract, there was therefore no duty to obtain coverage and the decision of the ALJ was vacated.

The key "take away" from these decisions is that not every commercial relationship between individuals rises to the level of a contract of employment, triggering the coverage obligations of the Act. Whenever there is an indication that a contractual relationship did not exist, a claim for penalties should be vigorously defended and the details of the relationship between the parties should be thoroughly investigated.

"NOT EVERY COMMERCIAL RELATIONSHIP BETWEEN INDIVIDUALS RISES TO THE LEVEL OF A CONTRACT OF EMPLOYMENT, TRIGGERING THE COVERAGE OBLIGATIONS OF THE ACT."

US-EU Announce Deal on Data Sharing "Privacy Shield" to Replace "Safe Harbor"

ADRIAN P. KENDALL

By: Adrian P. Kendall, Esq.

Three months after the European Court of Justice struck down the US-EU "Safe Harbor" agreement in the case *Maximilian Schrems v Data Protection Commissioner* (C-362- 14), the EU and the USA announced in early February that they have agreed to a successor data protection regime. In the words of the European Commission: "This new framework will protect the fundamental rights of Europeans where their data is transferred to the United States and ensure legal certainty for businesses." The new EU-US "Privacy Shield" will again allow companies to store Europeans' personal data on American computers, subject to adherence to more rigorous compliance requirements.

Background:

The European Court of Justice had invalidated the "Safe Harbor" regime in the *Schrems* case by finding that it gave personal data of EU citizens insufficient protection against American intelligence gathering activities. Although the negotiations were at times rocky and hard fought, the stakes were too high for the parties not to find common ground: failure to reach a deal could have (i) led to economically and politically damaging enforcement litigation by EU nation state data protection agencies to prevent the transmission of personal data outside of the EU, and (ii) severely hampered the efficiency and effectiveness of multinational commercial activities.

"Privacy Shield" Summary:

The new arrangement will impose increased obligations on companies in the U.S. to protect the personal data of Europeans and requires stronger monitoring and enforcement by the U.S. Department of Commerce and Federal Trade Commission, including through increased cooperation with European Data Protection Authorities (DPAs). "Privacy Shield" includes commitments by the U.S. that access by public authorities to personal data transferred under the new arrangement will be subject to clear conditions, limitations and oversight, designed to prevent generalized access. Europeans will be able to raise any inquiry or complaint in this context with a dedicated new ombudsperson.

"Privacy Shield" Key Elements:

Business and industry representatives on both sides of the Atlantic have been asking for a clear and uniform interpretation of the *Schrems* ruling, as well as more clarity on

the mechanisms they would be permitted to use to transfer data. The following elements of the "Privacy Shield" arrangement should provide a framework to address those concerns:

- **Strong obligations on companies handling Europeans' personal data and robust enforcement:** U.S. companies wishing to import personal data from Europe will need to commit to robust obligations on how personal data is processed and individual rights are guaranteed. The Department of Commerce will monitor that companies publish their commitments, which makes them enforceable under U.S. law by the Federal Trade Commission. In addition, any company handling human resources data from Europe has to commit to comply with decisions by European DPAs.
- **Clear safeguards and transparency obligations on U.S. government access:** For the first time, the US has given the EU written assurances that the access of public authorities for law enforcement and national security will be subject to clear limitations, safeguards and oversight mechanisms. These exceptions must be used only to the extent necessary and proportionate. The U.S. has ruled out indiscriminate mass surveillance on the personal data transferred to the US under the new arrangement. To regularly monitor the functioning of the arrangement there will be an annual joint review, which will also include the issue of national security access. The European Commission and the Department of Commerce will conduct the review and invite national intelligence experts from the U.S. and European Data Protection Authorities to participate.
- **Effective protection of EU citizens' rights with several redress possibilities:** Any citizen who considers that their data has been misused under the new arrangement will have several redress possibilities. Companies will have deadlines to reply to complaints. European DPAs can refer complaints to the Department of Commerce and the Federal Trade Commission. In addition, alternative dispute resolution will be available free of charge. For complaints on possible access by national intelligence authorities, a new ombudsperson position will be created.

Next Steps:

This agreement marks a political resolution; the full, intricate legal framework has yet to be hammered out, so affected companies should still be adhering to the interim guidance. The EU College of Commissioners has mandated that Vice-President Ansip and Commissioner Jourová prepare a draft "adequacy decision" in the coming weeks. In the meantime, the U.S. side will make the necessary preparations to put in place the new framework, monitoring mechanisms and a new ombudsperson. Once the full framework is in place, affected US companies will need to gauge how they can effectively comply and at what cost as rigorous enforcement should be expected.

Time will tell if the goals of data security, trust and economic certainty will be fully met, especially on the issue of limited access by the NSA and other intelligence gathering agencies. Opponents have already voiced concerns over how any US safeguard assurances can be believed in the wake of the Snowden revelations and other spying activities that have recently become public. Another legal challenge may well loom, but it is highly likely that the European Court of Justice will uphold the "Privacy Shield" data protection scheme in the absence of specific proof of a breach.

"THIS AGREEMENT MARKS A POLITICAL RESOLUTION: THE FULL, INTRICATE LEGAL FRAMEWORK HAS YET TO BE HAMMERED OUT, SO AFFECTED COMPANIES SHOULD STILL BE ADHERING TO THE INTERIM GUIDANCE."

Recent Decisions From The Law Court

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By: Matthew T. Mehalic, Esq.

No Duty To Indemnify Due to Applicability Of Intentional Loss Exclusion

In *Metropolitan Property and Casualty Ins. Co. v. Estate of Benson*, 2015 ME 155 (Dec. 1, 2015), the Law Court addressed whether the Superior Court properly granted summary judgment to Metropolitan. The matter arose out of a confrontation in Monument Square in Portland in 2010. Eric Benson was with a female companion when they came into contact with William Googins. Googins made a comment about Benson's female companion. Subsequently, Benson and Googins engaged in a verbal altercation, which ended with Googins punching Benson in the face causing Benson to fall backwards. Benson hit his head on the pavement and died. Googins pleaded guilty to criminal aggravated assault.

The Estate of Benson sued Googins in tort alleging negligence. The Estate settled with Googins for $400,000, with a covenant not to execute against Googins' personal assets in exchange for an assignment of Googins' rights against Metropolitan. The Estate then filed a reach-and-apply action against Metropolitan and Metropolitan filed a declaratory judgment seeking a determination as to its obligation to indemnify Googins. Cross-motions for summary judgment were filed by the parties and the Superior Court granted summary judgment in favor of Metropolitan holding that Metropolitan had no duty to indemnify Googins. On appeal the Law Court affirmed the Superior Court judgment in favor of Metropolitan.

The applicable exclusion provided,

1. Intentional Loss. We do not cover bodily injury or property damage which is reasonable expected or intended by you or which is the result of your intentional and criminal acts or omissions. This exclusion is applicable even if:
   A. you lack the mental capacity to govern your conduct;
   B. such bodily injury or property damage is of a different kind or degree than reasonably expected or intended by you; or
   C. such bodily injury or property damage is sustained by a different person than expected or intended by you.

The Law Court interpreted the exclusion as providing two separate exclusions. One of the exclusions, the first, was for "bodily injury or property damage which is reasonably expected or intended by you." The other exclusion, the second, was for "bodily injury or property damage . . . which is the result of your intentional and criminal acts or omissions." Metropolitan had moved for summary judgment claiming both exclusions eliminated indemnification coverage, but the Superior Court held that only the second exclusion was applicable. The appeal was confined to the issue of the applicability of the second exclusion.

In interpreting the second exclusion, containing the "intentional and criminal" component, the Law Court distinguished the exclusion from those exclusions involved in prior decisions that only contained the language of the first exclusion, including *Patrons-Oxford Mutual Ins. Co. v. Dodge*, 426 A.2d 888 (Me. 1981), and *Royal Ins. Co. v. Pinette*, 2000 ME 155, 756 A.2d 520. The language at issue, the Court held, applies "where an insured commits a volitional act resulting in injury, and where that act is also criminal." *Estate of Benson*, 2015 ME 155, ¶ 16. The Court explained that if "intentional" as used in the first exclusion were given the same meaning, then all losses that resulted from an insured's conscious actions would not be covered." *Id.* at ¶ 17.

Such an interpretation would have been sweeping and effectively negated coverage in nearly all cases.

Here, however, the Metropolitan policy uses "intentional" in the context of the phrase "intentional and criminal." By using "intentional" in conjunction with "criminal," the word "intentional" has a broader meaning because it is coupled with the limiting principle of criminality.

Id. at ¶¶ 17-18.

The Law Court then turned its attention to whether there was any genuine issue of material fact that Googin's conduct was intentional and criminal. Because in his deposition he testified multiple times that

he intended to strike Benson in the face the Court held that there was no genuine issue of material fact that Googin's conduct was intentional. This was despite the fact that Googin testified that he did not intend or expect to hurt Benson by punching him. The Court held that this was irrelevant to the second exclusion "because that exclusion operates based on whether the insured intended to commit the act, not whether he or she intended the ultimate harm." *Id.* at ¶ 21. The Court also found that no genuine issue of material fact existed as to whether Googin's conduct was criminal, due to the fact that Googin pleaded guilty to aggravated assault. The fact that the aggravated assault could be committed recklessly as opposed to intentionally under the criminal statutes did not impact the Court's holding because of Googin's testimony relating to his intent to strike Benson in the face.

This decision once again calls attention to the interpretation of the intentional injury exclusion. The Law Court's elaboration on application of the exclusion is helpful for future guidance in similar circumstances where intent and criminal conduct exists.

UM/UIM "Other-Owned-Vehicle" Exclusion Upheld . . . Once Again

In *Estate of Paul Galipeau v. State Farm Mut. Auto. Ins. Co.*, 2016 ME 28 (Feb. 11, 2016), the Law Court once again revisited the "other-owned-vehicle" exclusion in uninsured and underinsured motor vehicle coverage. The Estate alleged that it was entitled to stack four separate vehicle insurance policies owned by the decedent Galipeau. One of the policies named as a covered vehicle the motorcycle Galipeau was riding at the time of the accident. The other three policies did not name the motorcycle and all four policies contained an "other-owned-vehicle" exclusion and an "anti-stacking" provision. State Farm denied coverage under three of the vehicle insurance policies. All four policies had UM/UIM coverage limits of $100,000. State Farm issued payment under the policy covering the motorcycle Galipeau was riding at the time of the accident in the amount of $50,000, after accounting for the offset provided by the tortfeasor's $50,000 liability limit. The Estate alleged that State Farm's denial of coverage under the three policies was a breach of contract.

The Superior Court granted State Farm summary judgment and the Estate appealed. On appeal the issues before the Law Court were (1) whether the other-owned-vehicle exclusion violated Maine's UM statute, 24-A M.R.S. § 2902, and (2) whether State Farm's other-owned-vehicle exclusion does not apply because Galipeau paid a premium for UM coverage on each of his four State Farm policies. The Law Court found in favor of State Farm on both issues and affirmed the Superior Court summary judgment in State Farm's favor. In doing so, it pointed to the clear precedent "back some thirty years" enforcing the other-owned-vehicle exclusion and not allowing stacking in circumstances such as those presented before the Court. *Id.* at ¶ 11 (citing *Hall v. Patriot Mut. Ins. Co.*, 2007 ME 104, 942 A.2d 663; *Cash v. Green Mountain Ins. Co.*, 644 A.2d 456 (Me. 1994); *Bear v. U.S. Fid. & Guar. Co.*, 519 A.2d 180 (Me. 1986); and *Gross v. Green Mountain Ins. Co.*, 506 A.2d 1139 (Me. 1986)); *see also Dufour v. Metropolitan Property and Liability Ins. Co.*, 438 A.2d 1290 (Me. 1982) ("the Plaintiff fails to offer any rational basis for allowing a motorist who has insured two vehicles under two separate policies to 'stack' uninsured motorist coverage when a motorist who has insured two vehicles under a single policy, yet pays two premiums, cannot.")

The Law Court declined to overrule the long-standing precedent despite the Estate's contention that invalidating other-owned-vehicle exclusion was a growing national trend among courts in other jurisdictions. The Court pointed to literature to the contrary identifying that there was no growing trend and instead, the trend was that when a court invalidated the exclusion on public policy grounds legislators stepped in to amend uninsured motorist laws to expressly permit such exclusions. The Court also added that if a change in settled Maine UM insurance law was warranted on public policy grounds, such a change would be best addressed to the Legislature. Therefore, for the foreseeable future, it appears that enforcement of these UM/UIM provisions is here to stay.

"THIS DECISION ONCE AGAIN CALLS ATTENTION TO THE INTERPRETATION OF THE INTENTIONAL INJURY EXCLUSION. THE LAW COURT'S ELABORATION ON APPLICATION OF THE EXCLUSION IS HELPFUL FOR FUTURE GUIDANCE IN SIMILAR CIRCUMSTANCES WHERE INTENT AND CRIMINAL CONDUCT EXISTS."

Heavy Metal Lessons: Adventures in IP and Rock and Roll

ADRIAN P. KENDALL

By: Adrian Kendall, Esq.

What can a lawyer learn from Heavy Metal band Metallica? When it comes to intellectual property protection and client relations, the answer is plenty.

On December 30, 2015, an IP lawyer sent a cease and desist letter to the members of Sandman, a Canadian Metallica tribute band, demanding that the band cease using the Metallica name and logo. Our clients work hard to develop value in their brands, so in the legal profession we use these letters all the time - that's standard procedure to stop unauthorized use ("infringement") and protect a client's valuable IP.

But Sheppard Mullin lawyer Jill Pietrini almost certainly did not count on her letter going viral and drawing the ire of the band's fans. Per Metallica's very public apology in Rolling Stone, the attorney apparently did not consult with her clients before sending the letter. Calling their own lawyer "very overzealous", Metallica told Sandman they could "file the letter in the trash" and to "keep doing what you're doing ... we totally support you!"

As for their lawyer, the legendary rockers said: she "can be found at SFO catching a flight to go permanently ice fishing in Alaska." Hopefully that was an overstatement and the attorney and client have since worked together to reset expectations, but there are a couple of clear lessons for lawyer-client relationships:

Lawyers should always consult with clients on action taken to protect their interests, especially where it can affect a very public brand, and they should work together to establish clear standards for anti-infringement action if it's going to be "automatic". Digital media is a double edged sword: it can be a powerful agent for change and promotion, but it can also make backlash virtually instantaneous and global.

When suggesting a course of action to protect a client's IP, lawyers and their clients should consider every aspect of how the infringing party is using the mark. Not every technical infringement needs to be shut down. In this case, the tribute band probably enhances the Metallica brand. If any action was necessary at all, a letter to the tribute band acknowledging the use and offering a revocable and limited, non-transferable license might have been the better approach.

Rock on!

Maine Supreme Court Issues Opinion of First Impression

By: Daniel L. Cummings, Esq.

DANIEL L. CUMMINGS

In a 22-page opinion dated February 23, 2016, the Maine Supreme Judicial Court (the "Law Court") affirmed the decision of the Business Court in the case of *Oceanic Inn, Inc. and Armand Vachon v. Sloan's Cove, LLC*, 2016 ME 34, in which it was determined that Sloan's Cove, LLC ("Sloan's), represented by Dan Cummings of Norman, Hanson & DeTroy, had properly conducted a power of sale foreclosure of real estate located in Old Orchard Beach known as the Oceanic Inn. The decision was notable for its statement of the scope of a foreclosing mortgagee's duty to a mortgagor in the setting of a power of sale foreclosure.

The case was filed in the Business Court by the owner of the Oceanic Inn, Armand Vachon, who asserted that Sloan's failed to comply with Maine law in foreclosing its mortgage and thus the sale of the real estate was void. Vachon had filed for bankruptcy protection three days after the foreclosure auction, and he was thus hoping that the Business Court would rule that the sale had no legal effect and that he continued to own the property. The Business Court, however, ruled against him.

The underlying facts of the case showed that Sloan's held a mortgage on the Oceanic Inn that had been originally granted to TD Banknorth and subsequently assigned to Sloan's. Vachon had made interest only payments to Sloan's for three years, at which time the mortgage balance became fully due and payable; but Vachon breached by not paying as required. As a consequence, Sloan's instituted its foreclosure action.

In Maine a mortgage holder may foreclose a mortgage in one of two ways—a judicial foreclosure or power of sale foreclosure. A judicial foreclosure involves the filing of a lawsuit and a resulting judgment authorizing the sale of the real estate. Once a judgment is entered, the owner has 90 days to pay the loan in full; and failing that, the mortgagee may then sell the property after advertising the foreclosure sale at least once a week for three weeks in a row in a newspaper of general circulation in the county in which the real estate is located. The sale is to the high bidder. The owner's interest in the real estate is extinguished when the 90-day redemption period expires.

A power of sale foreclosure does not involve any court action. Rather, the mortgagee must send out a notice by certified or registered mail to the owner and other lienholders giving notice of the scheduled sale. The notice must be recorded in the registry of deeds before the sale date; and like a judicial foreclosure, the mortgagee must advertise the sale in a newspaper prior to the sale. This type of foreclosure may only be valid for mortgages granted by a corporation, partnership, limited liability company or trust. The owner's interest in the real estate is extinguished upon completion of the sale, which must be to the high bidder.

As for judicial foreclosures, the Law Court has generally required that foreclosure

> "THESE PRONOUNCEMENTS BY THE LAW COURT ARE IMPORTANT IN THAT THEY PROVIDE FORECLOSING MORTGAGE HOLDERS GUIDANCE THAT HAD NOT PREVIOUSLY EXISTED REGARDING THE PROPER STANDARD FOR CONDUCTING A POWER OF SALE FORECLOSURE."

statutes be strictly followed in order to obtain a judgment of foreclosure. When an owner challenges the actual foreclosure sale itself, the Law Court has stated that the proper analysis is whether it would be equitable to set aside a foreclosure sale given the procedures that were employed by the mortgagee.

Prior to the *Oceanic Inn* case, the Law Court had not ruled on the proper standard to be applied in a power of sale foreclosure context. Vachon argued that a foreclosing mortgagee owed the owner a heightened fiduciary duty to conduct a commercially reasonable sale and to obtain the best possible price for the real estate being sold and that Sloan's breached that duty in a variety of ways. Sloan's argued that no such duty existed and that the standard of commercially reasonable is defined by the power of sale statute itself, i.e., requirements for notice, advertising, etc. and that a sale should be set aside only if it were proven that the mortgagee committed collusion or fraud or some other bad act in conducting the sale.

As part of his argument, Vachon also asserted that a mortgagee automatically owes a fiduciary duty to the owner when conducting a power of sale foreclosure, citing other states' laws for that proposition. The Law Court declared: "We decline to adopt such a per se rule. In the absence of specific facts sufficient to support the elements of a fiduciary relationship, a mortgagee foreclosing by power of sale does not owe a fiduciary duty to the mortgagor."

As to the additional claim of breach of contract, the Law Court explained: "We note, at the outset, that no part of the parties' contract states that the mortgagee, upon initiating a foreclosure by power of sale, would be required to conduct the sale in accordance with any standard beyond that which is required by statute. Nor do the power of sale statutes themselves, to which the contract does refer, contain any requirement that a power of sale foreclosure sale be 'commercially reasonable.'" After concluding that the statute governs the effectiveness of a power of sale foreclosure, the Law Court also noted: "Given these circumstances, and assuming, solely for the purpose of this argument, that Maine law requires that a power of sale foreclosure auction meet the standard of commercial reasonableness, we cannot agree with Oceanic's argument that a fact-finder could rationally conclude that the sale was commercially unreasonable."

These pronouncements by the Law Court are important in that they provide foreclosing mortgage holders guidance that had not previously existed regarding the proper standard for conducting a power of sale foreclosure. The court made clear that a mortgagee is entitled to rely on the statutory requirements to guide it in properly foreclosing its mortgage. Without more than a mortgagee-mortgagor relationship, there is no heightened duty beyond compliance with the statute.

Kudos

DAVE GOLDMAN has been elected president of the Cumberland County Bar Association, Maine's largest county bar organization.

KELLY HOFFMAN was a presenter for the Labor and Employment Law Section of ALFA International webinar on the cutting-edge topic of "Transgender Issues and the Law: Title VII, Title IX, and Equal Protection" held in February 2016. She discussed how schools across the country are treating transgender students when it comes to the use of locker rooms or restrooms. Kelly also presented on several recent federal and state court decisions, and addressed best practices for employers to avoid litigation in this developing area of employment law.

CARL WOOCK participated in a panel presentation in early March hosted by the North Carolina Law Review at the University of North Carolina School of Law in Chapel Hill. The event, which discussed the role of federalism in Supreme Court decision making, featured two panels of law professors and focused upon a law review article that Carl co-authored with Professor Jason Mazzone of the University of Illinois, titled "Federalism as Docket Control", which was published by the North Carolina Law Review last December.

STEVE MORIARTY was elected chairman of the Cumberland Planning Board in January. Steve joined the Board as a member one year earlier.

BOB CUMMINS was a weekly presenter in a forum of lectures over the winter and spring months sponsored by Hofstra University School of Law focusing on how the law can be instrumental for social change.

RUSS PIERCE authored a chapter on Documentary Evidence in a newly released treatise, "A Practical Guide to Evidence in Maine", published by MCLE New England.

BOB BOWER has been reappointed to the Maine Board of Arbitration and Conciliation as well as the Maine Civil Service Appeals Board. Bob continues to serve on the Maine Labor Relations Board.

JON BROGAN and **DAVE HERZER** each wrote chapters for the recently-published 4th Edition of "The Comprehensive

Guide to Lost Profits and Other Commercial Damages", published by Business Valuation Resources, LLC. Jon's chapter is titled "Economic Damages for Personal Injury" and Dave's chapter is titled "Expert Depositions: Accountants, Economists, and Appraisers".

NH&D has been awarded the "Allied Member of the Year" Award by the Maine Restaurant Association for its legal service to the Association and its members. The firm was honored at the annual awards banquet in February and **DAVE HERZER, DARYA ZAPPIA** and **ADRIAN KENDALL** were the subjects of a video testimonial shown at the banquet.

Adrian Kendall, Darya Zappia and Daver Herzer accept the "Allied Member of the Year" Award from the Maine Restaurant Association.

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Return Service Requested

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