INBRIEF

Current Developments in Maine Law

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Marijuana and Employment: Removing the Smoke Screen

By: Jessica S. Smith, Esq.

JESSICA S. SMITH

The first half of 2018 has been a roller coaster of a year for marijuana law in Maine. The moratorium on recreational marijuana use ended; the Law Court found that Maine's Workers' Compensation Board cannot force an employer/insurer to pay for medicinal marijuana; the FDA has approved the first prescription drug with the marijuana component CBD; and the Maine Legislature overrode three vetoes by Governor LePage regarding a bill to legalize recreational marijuana and two bills rehabbing Maine's medical marijuana laws.

All this activity has Maine employers asking where they stand when managing their employees. This article will address the questions employers are asking and what the law is today.

Can I refuse to hire someone or fire an employee that uses marijuana outside of work?

No, the fact that someone uses marijuana outside of the workplace cannot be the reason you refuse to hire or adversely affect his or her employment. However, impairment while at work or poor job performance can be the reason for refusal to hire or discipline an employee. Under the Marijuana Legalization Act, 28-B M.R.S. § 112, an employer may create workplace policies that:

- Prohibit marijuana in the workplace;
- Restrict marijuana use in the workplace and within the course and scope of employment, and
- Discipline employees under the influence of marijuana while engaged in activities within the course and scope of employment.

The important thing is that employers have policies in place that prohibit marijuana use and impairment and they consistently follow those policies. Such policies might include a Drug Free Workplace, those that prohibit smoking any substance while at work, and that impose discipline for poor work performance.

How to determine if an employee is using marijuana at work?

Maine's substance use law has not caught up to the legalization of recreational marijuana. The law regarding recreational use of marijuana is clear that an employer can discipline an employee who is high at work; however, what constitutes sufficient proof is still uncertain.

An employer is able to drug test an employee if they have an approved substance use testing policy and a compelling reason to believe the employee is under the influence. 26 M.R.S §§ 683, 684. If the employee refuses to take the test or the employee tests positive, then an employer can refuse to hire the employee, change the employee's work assignment, impose discipline, or terminate the employee. 26 M.R.S. § 685. However, while traditional drug testing can detect marijuana, marijuana stays in a person's system for several weeks. A test that reads positive for marijuana does not prove that the employee is under the influence at the time the test was taken.

As an alternative, an employer can conduct an impairment analysis to document why they believe an employee is impaired. An impairment analysis considers an employee's physical characteristics, workplace behaviors, and work performance as evidence of impairment. If an employer suspects an employee is high at work, they must document why they believe the employee is under the influence. The person conducting the analysis should have a witness to confirm and corroborate any findings.

"THE IMPORTANT THING IS THAT EMPLOYERS HAVE POLICIES IN PLACE THAT PROHIBIT MARIJUANA USE AND IMPAIRMENT AND THEY CONSISTENTLY FOLLOW THOSE POLICIES. SUCH POLICIES MIGHT INCLUDE A DRUG FREE WORKPLACE, THOSE THAT PROHIBIT SMOKING ANY SUBSTANCE WHILE AT WORK, AND THAT IMPOSE DISCIPLINE FOR POOR WORK PERFORMANCE."

Can I refuse to hire or fire someone who uses medical marijuana?

No, the Maine Medical Use of Marijuana Act (MMUMA) allows an employee to use medical marijuana and their employment cannot be adversely affected because they use medical marijuana. As of July 9, 2018, revisions of MMUMA became law. These revisions not only protect patients and their caregivers, but also anyone that is involved in the marijuana industry. Therefore, the fact that an applicant or employee works or has worked at a marijuana manufacturing facility, a manufacturing testing facility, or for a dispensary cannot be a factor in the hiring process or be the basis of any change to an employee's terms of employment. This also applies to directors and officers associated with these organizations.

Can an employer regulate the use of medical marijuana at the workplace at all?

Yes, the law does provide that an employer can prohibit employees from using medicinal marijuana if their use would put the employer in violation of federal law, or if an employee's administration of marijuana on the premises of the business is inconsistent with the use of the premises. Additionally, an employer can prohibit the smoking of marijuana on its premises if it prohibits all smoking (marijuana, tobacco, e-cigarettes). 22 MRS § 2430-C.

However, an employer is not responsible under the Workers' Compensation Act for paying the cost of medical marijuana prescribed for an injured worker under MMUMA. *Gaetan Bourgoin v. Twin Rivers Paper Company, LLC, et al.,* WCB-16-433, 2018 ME 77 (June 14, 2018)(J. Hjelm) For a more detailed discussion of *Bourgoin,* see the accompanying article in this issue on workers' compensation appellate decisions.

Significantly, to support its decision in *Bourgoin,* the Law Court cited two cases that found that employers were not required to accommodate employees who used medical marijuana, because the federal CSA preempted state medical marijuana law. This is a strong indication the Law Court would find in favor of the Employer in an accommodation or discrimination suit based on the use of medical marijuana. "[A] person's right to use medical marijuana cannot be converted into a sword that would require another party…to engage in conduct that would violate the CSA". *Bourgoin,* at ¶ 24.

How does the federal law affect an employer's state law requirements?

This area of the law is still very much developing. The Department of Justice under the Obama administration had issued an advisory letter stating that the federal government was not going to delegate resources or funds to prosecuting parties that violated the federal CSA when complying with state law. However, the Trump administration issued a rescission of this policy. In *Bourgoin,* the Law Court found that this policy was transitory and that whether or not the federal government was committed to enforcing the law, it had nothing to do with the existence of the law. "The magnitude of the risk of criminal prosecution is immaterial in this case. Prosecuted or not, the fact remains that Twin Rivers would be forced to commit a federal crime if it complied with the directive of the Workers' Compensation Board." *Bourgoin,* at ¶ 28.

However, on June 25, 2018, the FDA approved the first prescription derived from a component of the marijuana plant. The prescription is Epidiolex and is derived from CBD, a component of the marijuana plant, which does not cause euphoria or intoxication like the THC component of the plant. Epidiolex is approved to treat seizures in children who suffer from Lennox-Gastaut

and Dravet syndrome.; Because CBD is classified as a Schedule I Drug and is illegal for use under the CSA, the developer of Epidiolex conducted studies to assess the abuse-potential of the drug in order to win DEA approval for medical use. Prior to the actual release of the drug for prescription use, the DEA and FDA will review the data to make a scheduling determination for Epidiolex, separate from marijuana.

While this new approval and new scheduling does not affect Maine Law at the moment, it could in the future. The new schedule classification of Epidiolex opens the door for rescheduling and FDA approval of other CBD based prescriptions. If CBD or specific prescriptions that contain CBD are no longer Schedule I drugs, the manufacture, distribution, dispense, or possession would not be illegal under the CSA.

Summary of what an employer can do to limit marijuana use in the workplace:

1. Prohibit employees from using recreational marijuana at work or coming to work impaired.
2. Discipline employees under the influence of recreational marijuana while engaged in activities within the course and scope of employment.
3. Conduct drug testing of employees who an employer reasonably believes is under the influence of recreational marijuana.
4. Prohibit smoking or the administration of medical marijuana on workplace premises.
5. Refuse to pay for medical marijuana prescribed for an injured worker under the Workers' Compensation Act.
6. Refuse to be complicit in any activity where the employer would necessarily violate federal law to comply with state marijuana laws.

In conclusion, the legal landscape surrounding marijuana use in the workplace, especially the use of medical marijuana, is volatile. New state and federal laws and regulations, as well as court decisions, will continue to influence an employers' obligations to employees who use marijuana. Future interpretations of the Law Court's decision in *Bourgoin* are likely to have a significant impact on how employers comply with state laws and regulations.

Workers' Compensation: Law Court and Appellate Division Decisions

By: Stephen W. Moriarty, Esq.

STEPHEN W. MORIARTY

Employer Responsibility for Medical Marijuana

Since the enactment of the Maine Medical Use of Marijuana Act (MMUMA) a conflict sprang into existence between the Act and the federal Controlled Substances Act (CSA), which classifies marijuana as an unlawful Schedule I drug, even when prescribed under medical supervision in accordance with a state law. Under MMUMA a "qualifying patient" may be prescribed marijuana for medical use, and Section 206 of the Workers' Compensation Act requires an employer to pay for reasonable and proper medical treatment as well as medicines. Therefore, from the outset the two statutes were inconsistent with each other.

The issue was finally addressed in a recent decision of the Law Court. The employee had sustained an original back injury in 1989 and had been totally disabled ever since. Conventional treatment proved unsuccessful in alleviating his symptoms or in restoring work capacity. Ultimately in 2012

he obtained a medical marijuana certification and since that time had used marijuana to control chronic pain. He then filed a Petition for Payment requesting his employer to pay for the cost of the marijuana. A Hearing Officer granted the Petition in 2015, and the Appellate Division affirmed in 2016. The Law Court then accepted the case for appellate review.

In a 5-2 decision, the Law Court in *Bourgoin v. Twin Rivers Paper Company, LLC,* 2018 ME 77 (June 14, 2018), the Court examined the two statutory schemes in detail and ruled that "compliance with both is an impossibility." The decision is narrow in its focus and is based upon the federal supremacy of acts of Congress over state laws, frequently referred to as federal preemption. The Court found that MMUMA presented a case of "conflict preemption," in which there is a direct conflict between state and federal law. The Court concisely described the controlling issue as follows:

> Consequently, when framed in terms of the conflict preemption rubric, the dispositive question presented here is whether Twin Rivers is necessarily in violation of the CSA if it were to comply with the Board's order to pay for the medical marijuana that Bourgoin is authorized to purchase pursuant to the MMUMA.

Stated in the alternative, the Court asked "can Twin Rivers be *required* to pay for Bourgoin's acquisition and use of marijuana – conduct that is proscribed by federal law but allowed by the State because a MMUMA certification had been issued to him?" In examining the matter, the Court found that the actual risk of criminal prosecution was immaterial to the result, as an order directing Twin Rivers to pay for marijuana would force it to commit a federal crime.

Accordingly, the Court found that "Because the CSA preempts the MMUMA when the MMUMA is used as the basis for requiring an employer to reimburse an employee for the cost of medical marijuana, the order based on the MMUMA must yield." The Court vacated the decision of the Appellate Division and remanded the matter with instructions to deny the Petition for Payment.

Significantly, the Court did not invalidate the MMUMA or suggest that the Legislature had overreached its authority in enacting the statute. Nevertheless, it is unmistakably clear that the Board may no longer order an employer to pay for the cost of medical marijuana, even though the injured worker may otherwise qualify for a certification under MMUMA.

Since *Bourgoin* was decided, two panels of the Appellate Division have vacated ALJ decisions ordering employer payment of marijuana. See, *Crandall v. University of Maine System,* Me. W.C.B. No. 18-22 (App. Div. 2018) and *Doten v. Domtar Industries, Inc.,* Me. W.C.B. No. 18-23 (App. Div. 2018).

Average Weekly Wage

The employee worked for the same employer for 52 weeks preceding a December 17, 2014 injury, but for approximately 13 of those weeks she was out of work for non-occupational reasons. During this period of time she received STD benefits which were substantially lower than her customary weekly earnings. In determining the average weekly wage, the ALJ excluded from consideration the weeks in which the employee received STD benefits and took the remaining weeks into consideration in arriving at an average. The employer appealed to the Appellate Division.

In *Thibeault v. Twin Rivers Paper Company, LLC,* Me. W.C.B. No. 18-20 (App. Div. 2018) the Division ruled that STD benefits were not similar or analogous to vacation pay and should not be considered in determining the average weekly wage. The Division found that during the period in which the employee had been taken out of work by her physician she received no wages, earnings, or salary from her employer. The Division found that including the weeks of STD benefits would artificially deflate the average weekly wage and would not fairly compensate the employee for the loss of earning capacity following the injury.

Accordingly, the Division found that the ALJ had properly excluded the STD benefits received during the weeks in which she did not work and had correctly calculated the average weekly wage.

Statute of Limitations

Ten years ago the Law Court ruled in *Wilson v. Bath Iron Works,* 2008 ME 47, 942 A.2d 1237 that the two-year statute of limitations does not begin to run until the employer files a First Report of Injury, regardless of how much time may have passed since the injury occurred. In the following years the employer community invested considerable effort to amend Section 306(1) to reverse the *Wilson* decision, as the effect of that case was to delay the commencement of the statute of limitations indefinitely until such time as an employer had an obligation to file a First Report. Ultimately the Legislature amended Section 306(1) effective August 30, 2012. Since then the Law Court has never had an opportunity to interpret the language of the amended statute, but in a recent decision the Appellate Division confronted the matter "head on" and set forth the proper method for applying the amended statute.

In *Bickmore v. Johnson Outdoors,* Me. W.C.B. No. 18-18 (App. Div. 2018) the employee sustained two separate injuries eight years apart while working for the same employer but when different insurers were on the risk. The insurer at the time of the second injury filed a Petition for Award seeking to establish the compensability of the first injury and a corresponding obligation on the part of the first insurer to contribute to payment of benefits owed to the employee. The first insurer had actually paid medical expenses in connection with this injury but had never been required to file a First Report. More than six years from the date of the last payment had elapsed before the duty to file a First Report arose.

In its opinion the Division set forth the complex legislative history behind the 2012 amendment to Section 306(1), and the details of that history are beyond the scope of this summary. Ultimately, the Division concluded that the amendment lacked clarity and was susceptible of different interpretations. Indeed, the Division found that it was not clear exactly what the Legislature had intended and observed that the Legislature had never specifically stated that it was acting to modify *Wilson.* Because the meaning of the statute was found to be ambiguous, the Division analyzed the legislative history in detail and concluded that the Legislature had in fact acted to limit the scope of *Wilson.*

Specifically, the Division held as follows:

> …we conclude that the appropriate interpretation of section 306(1) as amended is: except as otherwise provided in section 306, a claim is barred two years after the date of injury or, if within that two year period the employee's employer

is obligated to file a first report under section 303 and fails to do so, two years from the date the employer files the first report

Thus, the Division held that if an employer is not required to file a first report within the two year period immediately following an injury, the statute of limitations bars a claim filed after that point.

The Division then addressed the issue of whether the amended version of Section 306(1) could be applied retroactively. The panel found no express or implied legislative intent that the amendment should be given retroactive effect. However, the panel concluded that this finding was not determinative, and that retroactive application must be resolved by considering the timing of two events. In particular, if the date that an employer becomes obligated to file a first report and the date that the employer actually files a first report occur after the effective date of the 2012 amendment, the amended version of Section 306(1) will therefore apply to determine whether or not a claim is barred by the statute of limitations. Accordingly, because of the passage of time the first insurer in Bickmore had no obligation to file a first report for the initial injury until long after the amendment took effect. All claims with respect to the initial injury were barred by the statute of limitations.

This is an extremely important decision and resolves a number of questions that have remained unanswered since the 2012 legislative effort to modify or reverse the scope of *Wilson.* Carriers and self-insureds can now determine with greater accuracy whether or not the statute of limitations on a particular claim has expired.

Waiver of Issues

The employee filed a Petition for Award resulting from a December 8, 2015 injury to her neck and left hand. She also filed a Petition for Reinstatement. She had not worked for the employer since the date of injury, and a dispute arose as to whether the employer had offered her suitable employment which had then been rejected without good and reasonable cause. Also in dispute was the issue of whether or not the employee had properly preserved her claim for reinstatement.

In *Ornberg v. Pineland Farms Potato Company, Inc.,* Me. W.C.B. No. 18-17 (App. Div. 2018), the Petition for Award was granted and the employee was given the protection of the Act. However, the claim for incapacity benefits was denied pursuant to Section 214(1)(A) on the grounds that a bona fide offer of employment within the restrictions had been rejected without reasonable cause. There was conflicting evidence on this issue: The employer's evidence showed that an offer had been made while the employee argued that no such offer had been extended. As the finder of fact, the ALJ accepted the testimony from the employer's witnesses, and the Appellate Division affirmed, finding that an ALJ has full authority to select between the testimony of conflicting witnesses.

On the Petition for Reinstatement, the employee evidently had made only a vague and limited reference to the matter during litigation, without actually requesting reinstatement. No mention of the issue was made in the employee's written position paper or in post-hearing proposed Findings of Fact. Following in the footsteps of *Henderson v. Town of Winslow,* Me. W.C.B. No. 17-46 (App. Div. 2017) and *Waters v. S.D. Warren Company,* Me. W.C.B. No. 14-26 (App. Div. 2014), the panel found that the ALJ committed no error in finding that the claim for reinstatement had been abandoned. The key significance of the decision is that all issues raised by the parties, whether in the nature of claims for benefits or defenses to such claims, must be explicitly developed and maintained both during litigation and in the post-litigation stage in drafting closing memos and proposed Findings of Fact. When a party barely mentions an issue at all and fails to support its position with developed argumentation, the issue will be found to have been waived.

"IN PARTICULAR, IF THE DATE THAT AN EMPLOYER BECOMES OBLIGATED TO FILE A FIRST REPORT AND THE DATE THAT THE EMPLOYER ACTUALLY FILES A FIRST REPORT OCCUR AFTER THE EFFECTIVE DATE OF THE 2012 AMENDMENT, THE AMENDED VERSION OF SECTION 306(1) WILL THEREFORE APPLY TO DETERMINE WHETHER OR NOT A CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS."

MaineCare Long Term Care Benefits For The Elderly

By: Charles C. Hedrick, Esq.

CHARLES C. HEDRICK

I. OVERVIEW

Medicaid, known in Maine as MaineCare, covers the cost of long term care for elderly adults who meet income and asset limits and medical criteria. According to the Maine Health Care Association ("MHCA"), a trade association which represents long term care facilities, 73% of the nursing facility residents in Maine receive MaineCare. Also according to the MHCA, 75% of the residents in assisted living facilities in Maine which accept MaineCare (not all such facilities do) receive MaineCare. The following statics from Genworth Financial, Inc., show the cost of paying for long term care with your own resources:

Average Private Pay Rate for a Semi-Private Nursing Facility Room (2017)			
Location	**Daily Rate**	**Monthly Rate**	**Annual Cost**
Lewiston Area	$275	$8,365	$100,375
Portland Area	$325	$9,870	$118,443
State Median	$301	$9,140	$109,683

Average Private Pay Rate for a One Bedroom Assisted Living Facility (2017)			
Location	**Daily Rate**	**Monthly Rate**	**Annual Cost**
Lewiston Area	$178	$5,400	$64,800
Portland Area	$181	$5,500	$66,000
State Median	$161	$4,890	$58,680

II. ASSET LIMITS

A. Asset Limits for a Single Person

To qualify for MaineCare, the person who needs long term care (the "applicant") is subject to strict asset limits. If the applicant is unmarried, then the asset limits generally are: less than $10,000 (consisting of less than $2,000 in "countable assets" and $8,000 in savings), a vehicle, prepaid burial arrangements up to $12,000, and a primary residence worth not more than $750,000 net of the outstanding balance of any mortgage. Although the $750,000 primary residence exclusion may sound generous, MaineCare requires the applicant to apply almost all of his or her income toward his or her cost of care and Medicare and other medical insurance premiums. The "personal needs allowance" (i.e., the amount of income an applicant is allowed to keep for spending money) is $70/month for an applicant in a residential care facility and $40/month for an applicant in a nursing facility. Because of the minimal size of the personal needs allowance, and the fact that the applicant is restricted to having less than $10,000 in savings and countable assets, it is unlikely that the applicant would be able to pay the carrying costs of any residence, let alone a $750,000 residence, for long.

B. Asset Limits When the Applicant is Married

If the applicant is married, and if his or her spouse is not also on MaineCare or applying for MaineCare, then the applicant is called the "institutionalized spouse" and the applicant's spouse is called the "community spouse." When there is a community spouse, the asset limits are substantially different from when the applicant is single. For instance, the rule that the applicant is ineligible for MaineCare if his or her equity interest in the primary residence exceeds $750,000 does not apply if the applicant's spouse is residing in the residence. How much the community spouse may keep in other assets depends on whether the institutionalized spouse is entering a nursing facility or a residential care facility. If the institutionalized spouse is entering a nursing facility, then

the community spouse may keep $123,600 in countable assets. This amount is called the "Community Spouse Asset Allowance." The Community Spouse Asset Allowance is above and beyond the $10,000 that the institutionalized spouse may keep and is above and beyond the value of a vehicle and the primary residence. If the institutionalized spouse is entering a residential care facility, then the institutionalized spouse is subject to the same asset limits discussed previously but the community spouse is allowed to keep an unlimited amount of assets.

III. TRANSFERS OF ASSETS

A. 5-Year Look Back

When an applicant applies for MaineCare, DHHS audits that person's finances for the preceding 60 months. This is known as the 5-year look back. If the applicant is married, the audit includes the spouse's assets. The purpose of the audit is to see if the applicant or the applicant's spouse transferred assets for less than fair market value within the look back.

B. Transfer Penalty

For each $8,476 transferred during the 60 month look back for which the applicant did not receive fair market value, DHHS assesses a penalty of one month of ineligibility for MaineCare. The penalty is assessed regardless of whether or not the transfer was made by the applicant or by the applicant's spouse. For example, if you apply for MaineCare, and during the 60 month look-back your spouse spent $85,000 helping your grandchildren pay for college, then DHHS would take the $85,000 transferred and divide it by $8,476. The result would be a 10 month penalty, meaning that for the first 10 months after your MaineCare application was approved MaineCare would not pay for your long term care. The transfer penalty applies regardless of whether or not the transfer was eligible for the annual exclusion or for the educational or medical expenses exclusion from the federal gift tax. If a significant gift was made, then it might be wise for the family to muster other assets to pay for the individual's long term care and wait until 60 months have elapsed since the month of the transfer before filing a MaineCare application, thereby avoiding the transfer penalty in its entirety. In other words, the timing of when a MaineCare application is filed can be critically important.

C. Exemption for Assets Transferred to Spouse

An important exception to the transfer penalty is that transfers from one spouse to the other are not penalized. This provides a valuable opportunity for last minute planning in the case of a married couple when one spouse is healthy and wants to remain in the community and the other spouse needs long term care. Even with respect to exempt assets, such as a vehicle or a primary residence, it is often good practice to transfer such assets to the community spouse before the applicant applies for MaineCare. That is to prevent a MaineCare lien from attaching to the assets in the event that the community spouse dies before the institutionalized spouse.

D. Exemption for Assets Transferred to Disabled Child

Assets may be transferred, without penalty, to the transferor's child who does or would meet the SSI criteria of total and permanent disability or blindness. The transfer may be made directly to the child or to a trust established for the sole benefit of the child. In the case of an applicant with a blind or disabled child, this exemption presents an opportunity both to bring the applicant within the MaineCare asset limits and to preserve assets for the benefit of the blind or disabled child.

E. Exemption for Primary Residence Transferred to Caregiver Child

The primary residence may be transferred, without penalty, to a child over age 21 if the child resided in the home for at least two years prior to the applicant entering a nursing facility and provided care which enabled the applicant to live at home rather than in a nursing facility for that period. Prior to the transfer a letter should be obtained from the applicant's primary care physician documenting that the above requirements were met.

IV. INCOME

In the case of an unmarried MaineCare recipient in a residential care facility, the recipient is allowed to keep $70/month as a personal needs allowance (i.e., spending money) and enough income to cover Medicare and other medical insurance premiums. The remainder of the individual's income must be paid to the residential care facility as the individual's "cost of care" (i.e., copay). The same is true for an unmarried MaineCare recipient in a nursing facility, except that the personal needs allowance is $40/month.

A. Income Provisions for Residential Care Facilities

In the case of a married MaineCare recipient in a residential care facility, the community spouse is allowed to keep all of the community spouse's income. In addition, the "spousal living allowance" allows the community spouse to retain a portion of the institutionalized spouse's income. However, the spousal living allowance is subject to stringent asset limits and is capped the amount needed to bring the community spouse's income to 100% of the Federal Poverty Level for one.

B. Income Provisions for Nursing Facilities

In the case of a married MaineCare recipient in a nursing facility, the income provisions for the community spouse are more generous. Again, the community spouse is allowed to keep all of the community spouse's income. If the community spouse's income does not equal the "Minimum Monthly Income Standard" (currently $2,057.50/month), then the community spouse is allowed to keep enough of the institutionalized spouse's income to raise the community spouse's income to the Minimum Monthly Income Standard. The community spouse's income allowance can be increased to a maximum of $3,090/month to extent that the community spouse's housing expenses exceed a threshold amount (currently $617.25/month).

V. ESTATE RECOVERY

The Maine Department of Health and Human Services ("DHHS") may assert a claim against the estate of a MaineCare recipient for the amount of benefits paid. Significantly, DHHS is prohibited from enforcing a claim against the estate of deceased recipient until the recipient has no surviving spouse, no surviving child who is under age twenty-one, and no surviving child who is blind or permanently and totally disabled. When a MaineCare claim otherwise would fully deplete the recipient's estate, DHHS has the discretion to reduce

its claim to permit reimbursement of an heir or devisee who used his or her own resources to protect the recipient's real estate during the last two years that the recipient was institutionalized.

VI. MAINECARE PLANNING TECHNIQUES

A. Durable Power of Attorney With Gifting Power

For a married couple at or near retirement age, it often is advisable for each spouse to have a durable power of attorney that authorizes the agent to make gifts of the principal's property to the principal's spouse. That is the case even if both spouses are healthy and might not need long term care for many years. In the event that the principal's health deteriorated and the principal needed long term care, the gifting power would allow property to be transferred out of the principal's name to his or her spouse. Likewise, when an individual has a child who meets the SSI criteria of total and permanent disability or blindness, that individual might want to have a durable power of attorney authorizing the agent to make gifts of the individual's property, either outright, or in a sole benefit trust, for the benefit of the principal's blind or disabled child.

"LONG-TERM CARE IS ENORMOUSLY EXPENSIVE. FOR INDIVIDUALS WHO MEET MEDICAL, ASSET, AND INCOME REQUIREMENTS, MAINECARE CAN PROVIDE SUBSTANTIAL ASSISTANCE WITH THE COST. HOWEVER, THE MAINECARE RULES ARE COMPLEX AND SUBJECT TO FREQUENT CHANGE."

B. Testamentary Trust for the Benefit of the Surviving Spouse

Transfers to a trust generally are subject to the 5-year look back and to a transfer penalty. A significant exception applies to a testamentary trust established for the benefit of the individual's spouse. A testamentary trust is a trust set forth in an individual's will which is not funded until the individual dies. When a married individual, at or near retirement age, is updating his or her estate plan it might make sense for him or her to consider leaving all or a portion of his or her estate in trust for the benefit of his or her surviving spouse, rather than outright to the surviving spouse. The trustee is given broad discretion as to whether or not to make distributions. If distributions are made, they are to be made only to or for the benefit of the surviving spouse. This arrangement keeps the deceased spouse's assets out of the name of the surviving spouse, but preserves their availability to be used for the surviving spouse's benefit. If the surviving spouse is healthy, the trustee can freely make distributions to the surviving spouse. If the surviving spouse needs long term care and plans to apply for MaineCare, then the trustee can terminate distributions thereby preventing the trust assets from being deemed to be an available resource of the surviving spouse. Upon the surviving spouse's death, the trust terminates and the trust assets are distributed to the couple's adult children or to other specified beneficiaries.

C. Medicaid Compliant Annuity

When one spouse needs nursing home care but the community spouse exceeds the $123,600 Community Spouse Asset Allowance, basic steps to reduce the countable assets should be explored, such as paying off debt, prepaying for burial arrangements, making home improvements, or purchasing a new vehicle for the community spouse. If those steps are insufficient to bring the community spouse's assets within the $123,600 limit, then the community spouse can use the excess assets to purchase a Medicaid compliant annuity. A Medicaid compliant annuity must: (1) be owned by the community spouse; (2) be irrevocable and non-assignable; (3) have a term that does not exceed the community spouse's life expectancy; (3) provide for payments in equal amounts, with no deferral and no balloon payments; and (4) name the State of Maine as the remainder beneficiary for the amount of MaineCare benefits paid on behalf of the institutionalized spouse. If the annuity complies with those requirements, then it is not counted against the $123,600 Community Spouse Asset Allowance. The annuity payments are treated as the Community Spouse's income and are not required to be applied to the institutionalized spouse's cost of care. Substantial sums, including funds in an IRA, can be sheltered using a Medicaid compliant annuity.

VII. CONCLUSION

Long-term care is enormously expensive. For individuals who meet medical, asset, and income requirements, MaineCare can provide substantial assistance with the cost. However, the MaineCare rules are complex and subject to frequent change. Individuals who might want to, or need to, avail themselves of MaineCare now or in the future should seek advice from knowledgeable counsel to mitigate the impact of transfers made within the 5-year look back and to implement strategies to preserve assets for themselves, their spouses, and their children.

Recent Decisions From The Law Court

By: Matthew T. Mehalic, Esq., CPCU

MATTHEW T. MEHALIC

Evidence of Damages Inadmissible Hearsay

In *Avis Rent A Car System, LLC v. Darron Burrill,* 2018 ME 81 (June 19, 2018), the Law Court held that evidence of damages presented by Avis was inadmissible hearsay, and as a result, a damages award in favor of Avis was vacated.

The case arose from a vehicle rental contract in Nevada. Burrill had rented a vehicle from Avis, declined the loss damage waiver protection, thereby agreeing to be responsible for all damage to the vehicle, and subsequently was involved in an accident damaging the vehicle. Despite multiple requests by Avis to Burrill for reimbursement for the damages to the vehicle, Burrill ignored those requests. Avis filed a Complaint in Maine District Court, Skowhegan, for breach of contract. Summary judgment was entered in Avis' favor for breach of contract liability, but left for hearing a determination of damages. The Court recognized that Nevada law controlled the substantive law of Avis' claims, but Maine law controlled the procedural law, including the evidentiary law.

At the damages hearing, Avis presented an affidavit of an Avis claims examiner that included as exhibits: the rental agreement; a vehicle valuation report prepared for Avis by J.D. Power and Associates; a bill for towing the damaged vehicle; and a record of the vehicle's salvage value. Burrill objected to the admission of the affidavit (other than the rental agreement) on the grounds that it was inadmissible hearsay because the exhibits were not "business records" under M.R.Evid. 803(6).

In the affidavit, the Avis claims examiner "certified that the report was kept in the regular course of Avis's business, that the affiant maintained the report as part of her duties as a claims examiner for Avis, and that it was made reasonably soon after the incident." *Burrill,* at ¶ 8. The District Court determined that a sufficient foundation was provided and admitted the affidavit and all of the attachments. Based on this information the Court entered a judgment awarding Avis damages of $15,342.57, attorney's fees of $5,985, and costs of $433.24.

On appeal, the Law Court held that the admission of the affidavit and exhibits thereto (with the exception of the rental agreement) was improper because it was inadmissible hearsay. The Court found that the Avis claims examiner was not a qualified witness to certify the records as required by M.R.Evid. 803(6) and 902(11). Previously in *Keybank Nat'l Ass'n v. Estate of Quint,* 2017 ME 237, 176 A.3d 717 and *Beneficial Me. Inc. v. Carter,* 2011 ME 77, 25 A.3d 96, the Court had held that,

> [a] qualified witness is one who was intimately involved in the daily operations of the business and whose testimony showed the firsthand nature of his knowledge but who need not be an employee of the record's creator. Where records are created by one business and then transmitted to another, the records will be admissible pursuant to M.R.Evid. 803(6) if the foundational evidence from the receiving entity's employee is adequate to demonstrate that the employee had sufficient knowledge of both businesses' regular practices to demonstrate the reliability and trustworthiness of the information.

Burrill at ¶ 18. Under the circumstances, the Court held that it would have been necessary for the Avis claims examiner to demonstrate knowledge that,

- the producer of the record at issue employed regular business practices for creating and maintaining the records that were sufficiently accepted by the receiving business to allow reliance on the records by the receiving business;
- the producer of the record at issue employed regular business practices for transmitting them to the receiving business;
- by manual or electronic processes, the receiving business integrated the records into its own records and maintained them through regular business processes;
- the record at issue was, in fact, among the receiving business's own records; and
- the receiving business relied on these records in its day-to-day operations.

Id. Because the proper foundation was not established by the Avis claims examiner's affidavit the J.D. Power and Associates' valuation report, the bill for towing, and

the record of the vehicle's salvage value were excluded. The damages award was vacated.

Under Nevada contract law, when a plaintiff establishes liability for breach of contract, but fails to prove specific damages, the plaintiff is only entitled to nominal damages. The Court remanded to the District Court for a finding of nominal damages and what the appropriate attorney's fees would be for an award of nominal damages.

This decision is important to recognize the avenues a party has to admit documents typically considered "business records" and who the potential authenticators of such documents could be. It is also important in that it identifies that admissibility should not be taken for granted and all the enumerated requirements set forth in the Rules of Evidence and case law need to be satisfied in order for valid admissibility.

Evidence of Specific Diminution in Market Value Not Necessary to Prove Nuisance and Evidence of Insurer Conduct Admissible

In *Kathleen West et al. v. Jewett and Noonan Transportation, Inc.*, 2018 ME 98 (July 12, 2018), the Law Court addressed whether, when a Defendant has caused a physical invasion of the plaintiff's property, the plaintiff must present evidence of a specific diminution in value in order to establish common law nuisance. The case arose out of a 9000 gallon oil and kerosene spill by Jewett and Noonan Transportation, Inc. ("Jewett") onto a parcel of property owned by the Wests.

In the Wests' common law nuisance claim, they presented evidence that they had intended to subdivide and develop the land upon which the spill occurred. As a result of the spill, four potential developers they had engaged in discussion pre-spill lost interest in the project. The Wests' expert, a civil engineer, testified at trial that the cost to restore the land would be $490,000. The jury awarded the Wests this amount in compensatory damages for the nuisance claim.

The Court held that substantial interference with the physical condition of the Wests' land was not in dispute because of the spill of 9000 gallons of oil and kerosene on the land. Because the interference was "more than mere physical discomfort or mental annoyance, the Wests did not need to show a specific depreciation in the market or rental value of the land." *Id.* at 16. The cost to repair the land was sufficient evidence to justify the jury award.

Another issue involved in the case was whether introduction of evidence relating to the conduct of Jewett's insurer was an abuse of discretion by the trial court. Following the spill, Jewett undertook clean-up efforts in conjunction with the Maine Department of Environmental Protection and the Wests. Jewett's team consisted of its safety director, an engineer and environmental scientist, and a representative of Jewett's insurer. Of the 9000 gallons of oil and kerosene spilled, only 7,800 gallons was captured through the clean-up efforts. The Wests wanted to excavate to remove the uncaptured spill. However, Jewett's team decided that natural attenuation was the most cost-effective means to address the remaining spill. Jewett stalled the performance of the DEP order to excavate and emails existed that the Jewett team discussed the idea of parking excavation equipment on the property to create the appearance that excavation would be imminent, with the hope that excavation could be avoided. Additional soil samples were taken by Jewett, which revealed that lower contamination levels were present than had existed in the prior year. The DEP determined based on these samples that excavation was no longer necessary.

Jewett sought to exclude evidence of its team's conduct, including reference to its insurer, arguing that admission of evidence referencing an insurer was prejudicial. Jewett also argued that reference to the existence of an insurer influenced the jury's award of compensatory damages. The evidence had been admitted in support of the Wests' punitive damages claim. No punitive damages were awarded by the jury.

The Law Court held that because the Wests did not seek to admit the evidence of Jewett's insurer's conduct as proof that Jewett was insured against liability, but to convince the jury that the team assembled by Jewett, including the insurer, acted with malice when it sought to delay the clean-up process, the trial court did not abuse its discretion in admitting the evidence. The Court also found that there was no evidence of how Jewett was prejudiced by the admission of this evidence where no punitive damages were awarded.

This decision is important in that the Court elaborated on the reach of M.R.Evid. 411. The rule prohibits admission of evidence that a "person was or was not insured against liability" "to prove whether the person acted negligently or otherwise wrongfully." If the purpose for seeking admission of evidence pertaining to an insurer is for establishing something other than that prohibited by M.R.Evid. 411, admission is within the trial court's discretion. This decision in certain contexts could have far reaching effects.

"THE COURT HELD THAT SUBSTANTIAL INTERFERENCE WITH THE PHYSICAL CONDITION OF THE WESTS' LAND WAS NOT IN DISPUTE BECAUSE OF THE SPILL OF 9000 GALLONS OF OIL AND KEROSENE ON THE LAND. BECAUSE THE INTERFERENCE WAS 'MORE THAN MERE PHYSICAL DISCOMFORT OR MENTAL ANNOYANCE, THE WESTS DID NOT NEED TO SHOW A SPECIFIC DEPRECIATION IN THE MARKET OR RENTAL VALUE OF THE LAND.' "

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