



# Tri-State Defense Lawyers Association

Vermont · New Hampshire · Maine



## Newsletter

Winter, 2007

### **NNEDCA..... New Day! New Name!**

*Phil Coffin, Maine President  
TDLA President*

As the newly anointed Maine representative of the Board of the Tri-State Defense Lawyers Association ("TDLA") and the President of the TDLA for the coming year, I want to welcome you to our newly renamed and reinvigorated organization. Through the outstanding leadership and foresight of Beth Stouder, our outgoing Maine Board representative, and others in New Hampshire and Vermont, the former Northern New England Defense Counsel Association has changed its name to the Tri-State Defense Lawyers Association, hired a new executive director, Peggy Schultz, and taken steps to reinvigorate and revitalize both the organization and its membership. If you are not already a member of the Tri-State Lawyers Defense Association, I encourage you to join, so that you can share in the professional development and networking opportunities that we intend to make available to you.

As many of you probably know, the Defense Research Institute ("DRI") encourages each state to actively support and maintain a State and Local Defense Organization ("SLDO"). The purpose of a SLDO is to provide defense lawyers in individual states, cities or regions with an opportunity to work together collaboratively, share professional development opportunities, and to network with each

other. The SLDOs are also intended to support and enhance the mission of DRI. Because Maine, Vermont and New Hampshire are relatively small states, we have traditionally banded together, rather than creating separate state SLDOs. For years, we were known as the Northern New England Defense Counsel Association, but recently we thought that a name change was in order to better highlight and recognize the close relationship of Maine, New Hampshire and Vermont to each other geographically, culturally and historically. This made even more sense after the three states agreed to reciprocity in bar admissions.

Over the past several years, the leadership of the NNEDCA, now TDLA, came to recognize that it would be difficult to maintain a truly professional organization that is capable of providing our members with the type of professional opportunities necessary to meet the needs of today's practitioners, without an executive director to run the organization administratively. Therefore, we agreed to look for and hire a part-time Executive

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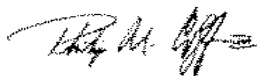
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**Phil Coffin—contd.**

Director to run a more professional organization. We are pleased to announce that Peggy Schultz, a long-time SLDO administrator, has agreed to work for the Tri-State Lawyers Defense Association as its part-time executive director. Peggy brings to the organization many years of experience in running SLDOs, and she has the energy and knowledge to assist us in bringing our organization into the 21<sup>st</sup> Century. We are hopeful that we will be able to offer you more programming and professional opportunities and provide a forum within which our membership can interact with each other, share ideas and strategies for defending cases, and work to enhance and preserve the civil justice system in the United States.

As the new Maine Board member of the Tri-State Defense Lawyers Association, I intend to make it my goal to increase the Maine membership in the TDLA, and in particular the young lawyers, and to encourage our members to become more actively involved in the Tri-State Defense Lawyers Association. In the weeks and months ahead, we may submit to you a survey seeking your thoughts on how we can best serve your needs. In the meantime, I would encourage you to contact me directly with any thoughts, questions or ideas that you may have. You may contact me at (207) 784-4000 or email me at [pcoffin@lambertcoffin.com](mailto:pcoffin@lambertcoffin.com).

In terms of future programs, the DRI Northeast Regional Meeting is scheduled for May 4-6, 2007 at the Equinox in Manchester, VT and the TDLA annual meeting tentatively scheduled for September 2007. For those of you who are members of the organization, I encourage you to bring with you one or two other lawyers in your community or firm to the annual TDLA meeting. It will be our first opportunity to get together and discuss how we can together make our organization better and more useful to its members.



Phil M. Coffin  
Maine President  
TDLA President



## Message From Your DRI Regional Director

*Matt Cairns, DRI Regional Director*

Where to start?!? So much has happened with DRI since the NNEDCA began its slow climb out of the grave. Now re-christened the Tri-State Defense Lawyers Association (TDLA), the Northern New England SLDO should be ready to join DRI in its move towards increased national influence and relevance to defense lawyers, young and all.

The DRI Board of Directors has been working hard to position DRI as the preeminent organization for lawyers committed to civil justice for individuals, corporations and insurers. We have done more than pay lip service to the goal of diversity, gender and ethnic. DRI now has a stand alone Diversity Program and Committee, and includes diversity in every one of its many initiatives. We have established two \$10,000 diversity scholarships for law students and an annual award for an individual in a law firm or corporation who actively and positively promotes the concept of diversity by enhancing or contributing to the overall environment of the legal profession. Everyone should know about our groundbreaking "Women in the Courtroom" whitepaper and program that Mary Ann Dempsey and Carrie Legus have already brought to New Hampshire and Vermont. Finally, DRI is the largest supporter of the National Foundation of Judicial Excellence, a foundation destined to be the one of the most balanced, current and successful vehicles for educating our State Court appellate judges on issues facing each of us in our practices.

Matt Cairns—contd.

DRI's membership grew 1.5% in 2006 and now stands at approximately 22,500 individual members, most of whom practice in firms with less than 50 members. If you include attorney members of corporate legal departments, our membership may surpass 23,000. We have almost 200 law student members and have an active program to grow that number at law schools across the country. Other important membership initiatives include growing corporate members, members from large law firms and commercial litigators. Of course, DRI remains committed to providing education and opportunities for practice development for young lawyers with its annual Young Lawyer's seminar and active Young Lawyer sections in every committee and state.

On issues of national importance, DRI has taken several positions of note. At the October Board meeting, the Board passed a resolution to oppose the Judicial Transparency and Ethics Enhancement Act that would give the Inspector General subpoena power to investigate the Judiciary and to report to Congress on the judiciary. The Board also joined with ABOTA in its resolution opposing legislation to create Medical Screening Panels that would limit a litigant's access to jury trials in medical malpractice cases.

As you can see from this very brief recap of the past year, a lot has happened with DRI and more is on the way. I encourage all Tri-State members to call or email me with questions, comments or suggestions for what DRI can do for you and your firms. I promise that I will get your ideas in front of the right people on the DRI Board, Executive Committee and Executive staff.



## New Hampshire President Welcomes Changes

*Chris Poulin, New Hampshire President*

Greetings to all New Hampshire defense attorneys! Welcome to the premiere Newsletter of the Tri-State Defense Lawyers Association (TDLA) – formerly called the Northern New England Defense Counsel Association.

Our new group was hatched at DRI's Annual Meeting in San Francisco back in October, 2006. After attending a few "invigorating hospitality hours," a group of New England defense counsel got together and decided to re-energize the defense bar in Vermont, New Hampshire and Maine. As a result, the Tri-State Defense Lawyers Association (TDLA) was born.

After a long and arduous grassroots campaign, I became President of the New Hampshire Chapter of the Tri-State Defense Lawyers Association. As President, I plan to use this Newsletter to announce exciting CLE seminars and social functions to facilitate more communication within the New Hampshire defense bar, as well as with our regional colleagues.

I welcome your thoughts and suggestions in making the Tri-State Defense Lawyers Association a success.

Until our next newsletter, please spread the word ! **Join now!**

Sincerely,

Chris Poulin  
New Hampshire President



## Vermont President Ready to Energize TDLA

*Charity Clark, Vermont President*

My name is Charity Clark, and I am an associate at Downs Rachlin Martin in Burlington. It is a pleasure to serve as this year's Vermont President for the Tri-State DLA (formerly the Northern New England Defense Counsel Association). As a young lawyer, I approach my role with the enthusiasm particular to young lawyers. In that spirit, I implore my fellow young lawyers to join and become active in this worthwhile professional organization. If you practice civil defense law, then Tri-State DLA can offer you important legal and practice information; an opportunity to get involved and meet your colleagues in the defense bars in Vermont, New Hampshire, and Maine; networking opportunities; a chance to be published in a young lawyers column in the newsletter; and many other opportunities and resources.

More specifically, some of the benefits of membership in Tri-State DLA for all include:

Summaries and highlights of recent state and federal cases in Vermont;

Opportunities to foster collegiality among the defense bar;

A vehicle for communication with the Vermont Legislature;

Expert witness database search program;

Opportunity to attend the Tri-State DRI Annual Meeting and CLE program in a great location in one of the three states.

This inaugural newsletter features recent state and federal case summaries. For the defense bar, the past several months saw important decisions on products liability, wrongful death, and the Vermont Consumer Fraud Act, among others. For future newsletters, we welcome submissions of case summaries that signify a change in or clarification of Vermont law.

Please contact me if you have suggestions or questions. I look forward to a constructive and rewarding year!

Charity Clark  
Vermont President

## ***Laughter Is Good for the Soul***

-The judge read the charges, then asked, "Are you the defendant in this case?"  
"No sir, your honor, sir," replied Bob, "I've got a lawyer to do the defendin". I'm the guy who done it."

-A salesman was assigned to secure an important client but failed in his mission. He faxed his secretary and asked her to break the news indirectly to his boss. His note read, "failed in securing client, prepare the boss."  
He received the following fax from his secretary: "The boss is prepared....prepare yourself."

-My boss didn't come into work today. He called this morning and said he was having a vision problem. When I asked what was wrong, he replied, "I Just can't see myself at work today."

## Quick Comment from Your DRI Reps



**Mary Ann Dempsey**  
New Hampshire

As the DRI State Representative for New Hampshire, I could not be more excited to see our local defense organization begin to revitalize itself with the goal of providing more substantive information to its members on a regular basis. I have been working with DRI for the past two years to increase membership from our state and this effort goes hand-in-hand with the creation of the Tri-State Defense Lawyers Association (TDLA). Any organization, either national or local, is only as strong as its membership and, in turn, these organizations must provide its members with resources that help the members in their practice. As a young lawyer, it is difficult to manage both a new practice and create ways to market and generate business. DRI and TDLA can be invaluable resources in this regard. Getting involved in these organizations, writing articles, joining a substantive law group, and attending meetings is the best way to cultivate a young defense practice. Contact me any time at 603-629-4532 or mdempsey@wigginnourie.com.



**Phil Bixby, Maine**

As Maine's Representative to DRI, I am pleased to see the progress being made by the Tri-State Defense Lawyers Association (TDLA), and hope to assist the TDLA in the coming years as it continues to develop and expand. DRI, as the pre-eminent international association of lawyers engaged in the defense of civil actions, has great interest in seeing local defense organizations such as the TDLA succeed. I hope and expect that the TDLA will become a vibrant association involving, and providing value to, both experienced defense lawyers and those new to the defense bar in northern New England. DRI is currently offering your first year membership FREE if you are joining for the first time and you are a membership in TDLA. Please contact me at (207) 761-0900, or at pbixby@fgwl-law.com. for more DRI information.

## Message from the Executive Director



What a wonderful time to become a part of your organization and have the opportunity to help provide the direction to launch into a new chapter. The renaming of the organization to Tri-State Defense Lawyers Association opens the door to a new day with the goal of providing members more value. You play a very important role in helping TDLA provide what you need for your defense practice. Therefore, please call my number (304-344-1611) or send an email ([www.tristatedefenselawyers.org](http://www.tristatedefenselawyers.org)) any time to provide input for what you would like to see the organization offer.

We hope to take small steps in the beginning with you noticing improvements in communications, Newsletter regularity, Annual Meeting improvements, Young Lawyer activity, improved website, email updates on Federal and State rulings and an easy to operate Expert Witness Search. More information will come.

Dues were not collected last year but you will be seeing very soon a 2007 form in the mail. Please complete and return, along with recruiting new members for the organization. I will ask you periodically to look around your organizations for potential members. You have the power to help our membership grow and I hope you exert that power! We want to invigorate the organization with new members. As with any group, more opportunity comes with increased participants. Any of our officers would be happy to talk with members who have questions or concerns.

Other state defense lawyer associations are very active in providing defense attorneys a common ground for communication. This is now a reality for TDLA with an official office with an Executive Director who will coordinate those communications. Please help to get TDLA on the move to better days. Be looking for emails from me!!

*Peggy L. Schultz*

# Recent Developments of Interest in Vermont Tort/Insurance/Civil Procedure/Evidence Law

Walter E. Judge, Jr., Downs Rachlin Martin, PLLC

## 1. Daubert

After a relatively slow start, the Daubert doctrine of the court acting as “gatekeeper” of the admissibility of expert testimony is now firmly established in the federal and state courts of Vermont, and the language of Vermont Rule of Evidence 702 has been conformed to that of the federal rule, incorporating the Daubert factors. Our federal and state courts have issued decisions both granting and denying Daubert motions. Here are the most recent decisions.

### **Vermont federal court denies competing Daubert motions to exclude causation experts in suit alleging the contracting of Legionnaires Disease from contaminated water supply.**

Adel v. Greensprings of Vermont, Inc., 363 F.Supp.2d 683, U.S.D.C., D. Vt., No. 2:02-cv-21 (Jan. 28, 2005) (Sessions, C.J.). In this toxic tort case, plaintiffs put forth a Ph.D. in microbiology and immunology, Dr. Clancy, as an expert to testify that the water system was negligently maintained; that the negligence caused Legionnaires bacteria to be present; and that plaintiff contracted Legionnaire’s Disease as a result of the negligence. Defendants argued that Clancy’s epidemiological evidence was insufficient. The Court rejected Defendant’s challenge, finding that Clancy’s scientific methodology was sufficiently reliable even though there are other, arguably better, methods for detecting the presence of Legionnaire bacteria. Plaintiffs then challenged Defendants’ rebuttal expert, Dr. Gump, an M.D., who was offered to challenge the validity of Clancy’s methodology. Plaintiffs’ argument was that Gump hadn’t worked on Legionnaire’s issues in many years, and that he had prepared for his opinion merely by boning up on recent research articles on Legionnaire’s. The Court rejected Plaintiffs’ challenge that Gump was unqualified.

### **Vermont federal court refuses to exclude Plaintiff’s “retail store safety expert” in negligence suit alleging that merchandise display rack was improperly designed.**

Wisdom v. The TJX Companies, Inc., \_\_\_ F.Supp.2d \_\_\_, 2006 WL 149004, 2006 U.S. Dist. LEXIS 3166 (D. Vt. Jan. 18, 2006) (Sessions, C.J.). Plaintiff, a shopper at TJ Maxx, tripped over the protruding “foot” of a clothing display rack. In her negligence suit against the defendant for using hazardous display racks, she disclosed an expert who worked in retail for over 40 years and currently works as a safety expert on retail premises issues. He opined that the legs of the display rack in issue stuck out too far on the floor and created a protrusion hazard. Defendants basically said, “Duh,” and sought to exclude his testimony as not assisting the jury to understand something that a layman is capable of grasping. Judge Sessions disagreed on this point. Defendants also objected to the testimony on the standard Daubert grounds involving the expert’s absence of experience with designing clothing racks, his lack of familiarity with the specific rack at issue, and his not being aware of any studies. Here, Judge Sessions fell back to the old “many years of practical experience” response and denied the motion on this point. Finally, defendants argued that the expert did not present sufficient proof that the display rack was defective. Judge Sessions said this was close call but said that discovery was not closed and the expert could still come up with stronger testimony on defectiveness. Therefore, he denied defendants’ motion but with leave to re-file it on the last point (e.g., proof of defect).

### **Vermont Superior Court refuses to exclude plaintiff’s experts in residential carbon monoxide poisoning case.**

Monahan v. GMAC Mortgage Corp., 2005 VT 110, Vermont Supreme Court, September 16, 2005.

The mortgage company failed to maintain flood insurance, as it was allegedly supposed to do pursuant to the mortgage escrow arrangement with the homeowners/borrowers. The home sustained flood damage and the homeowners made a claim to the mortgage company. Plaintiff homeowners also alleged that the mortgage company lied to them about the status of their insurance and improperly adjusted their flood damage claim. The jury awarded punitive damages upon the trial court’s jury instructions. Mortgage lender appealed. The Vermont Supreme Court vacated the punitives award, holding that “no reasonable jury could conclude that the evidence pertaining to GMAC’s breach of the escrow contract satisfies the high standard for punitive damages in breach of contract cases.” Wrongful conduct is not necessarily sufficiently malicious to warrant the imposition of punitive damages.

**Vermont Updates—contd.**

**3. “Economic Loss Rule”**

**Vermont Supreme Court reaffirms that the economic loss rule bars claims against third parties such as insurance adjusters, where no personal injury is claimed.**

Hamill v. Pawtucket Mut. Ins. Co., 2005 VT 133, Vermont Supreme Court, Dec. 30, 2005. Plaintiff's house lost power while he was away and his pipes burst and caused water damage. Plaintiff and the insurer could not agree on the value of the damage. Plaintiff eventually sued the carrier and its adjusters, claiming that the improper adjusting of the claim delayed resolution of the claim and made the damages worse. Plaintiff and the carrier settled. As to the claim against the adjusters, the trial court granted summary judgment to the adjusters on the grounds that the adjusters had no duty to avoid economic harm to plaintiff. Relying on well-established precedent on the economic loss rule, the Vermont Supreme Court affirmed.

**4. Insurance Coverage Decisions**

**Vermont Supreme Court holds that, as a matter of law, intent to harm can be inferred in sexual harassment claims thereby precluding coverage under Homeowners' and Business Liability policies.**

Serecky v. National Grange Mutual Insurance, et al., 2004 VT 63, 177 Vt. 58, Vermont Supreme Court, July 9, 2004. Plaintiffs claimed that they were sexually harassed by their employer. The employer held a homeowner's policy and two business liability policies. After entering into an agreement with the employer whereby the employer assigned his indemnification rights to Plaintiffs and stipulated to judgment of \$100,000, plaintiffs pursued coverage. The insurers moved for summary judgment and the trial court granted the motions.

On appeal, the Supreme Court affirmed the lower court's decision on the summary judgment motions. The Court concluded that, as a matter of law, intent to injure is inferred in claims for sexual harassment. Accordingly, any injury arising out of sexual harassment cannot be the result of an “accident” as construed by the policies. Coverage therefore did not exist for Plaintiffs' claims.

Vermont Supreme Court, reversing trial court, holds that business liability policy affords no coverage for surveyor's professional negligence.

Maine Mut. Fire Ins. Co. v. Tinker, 2005 VT 35, 872 A.2d 360, Vermont Supreme Court, March 16, 2005 (Entry Order decision). In this entry order decision, the Vermont Supreme Court found that the claim against the insured arose out of his professional services, and the policy in question was not a malpractice policy. The policy in question excluded coverage for professional services and the Court found the exclusion language to be unambiguous. The Court also found that the insured's deposition testimony showed that he understood or should have understood that the policy in question was not a malpractice policy.

**Vermont Supreme Court holds that a Worker's Compensation carrier is not automatically entitled, under the Vermont WC statute, to receive reimbursement from, or a future credit against, underinsured motorist benefits that the injured worker receives under his employer's automobile liability policy, except to prevent a double recovery.**

Travelers Ins. Co. v. Henry, 2005 VT 68, 882 A.2d 1133, Vermont Supreme Court, June 24, 2005. The Court noted that it had previously held that under Vermont's WC statute, the WC carrier was entitled to first-dollar reimbursement from any third party recovery. However, the Court noted that the Vermont Legislature had since amended the reimbursement section of the WC statute. The Court interpreted that amendment to mean that the WC carrier is not entitled to first-dollar reimbursement in every case. Now, the WC carrier can only obtain reimbursement from that part of any third-party award that addresses economic damages. Note: subsequent to this decision, the Second Circuit came to essentially the same conclusion in the appeal of a different case, Travelers Ins. Co. v. Carpenter, 411 F.3d 323 (2d Cir. 2005).

**Vermont Supreme Court affirms trial court grant of summary judgment for insurer against homeowners, holding that policy does not afford coverage for claim of minor-on-minor sexual molestation.**

Concord Mut. Ins. Co. v. Madore, 2005 VT 70, 882 A.2d 1152, Vermont Supreme Court, July 1, 2005. The insureds were sued because their minor son allegedly molested another minor child. The insurer filed a declaratory judgment action arguing against coverage and moved for judgment on the pleadings in its favor. The trial court found

***Vermont Updates—contd.***

unambiguous the policy's exclusion for bodily injury arising out of sexual molestation of any person" and granted Plaintiff insurer's motion. The Vermont Supreme Court agreed. It held that the perpetrator's intent was not at issue in its application of the relevant policy language.

**Vermont Supreme Court affirms dismissal of Plaintiff insurer's declaratory judgment action alleging that Defendant insured procured his policy by fraud.**

Progressive Insurance Co., v. Wasoka, 2005 VT 76, 885 A.2d 1166, Vermont Supreme Court, July 8, 2005. In this case, the insurance company alleged that the insured obtained his policy by fraudulent inducement. The issue was whether the insured really lived in Vermont, as opposed to Connecticut, when the policy was obtained in Vermont. The subject accident happened in Connecticut, where the insured was living at the time. After the accident, the insured made a claim. The insurer commenced an investigation, in which the insured gave two interviews to the insurer, but the insurer had not requested that either of these be conducted under oath. The insurer eventually requested an examination under oath, but the insured ignored the request. There was strong evidence that he was not living in Vermont, or not planning to remain there, when he purchased the policy. However, there was some evidence to the contrary. The insurer filed a declaratory judgment action against the insured, took the insured's deposition, and then moved for summary judgment. The motion was not directly on the insured's alleged fraud per se, but on the grounds that the insured violated a policy provision requiring cooperation in its investigation to determine whether the insured had committed fraud. The insured then cross-moved for summary judgment, explaining the reasons why the insurer had failed to prove that he had committed fraud in the inducement. The trial court denied the insurer's summary judgment motion, and granted the insured's, finding that the insurer had not proved fraud. The insurer moved for reconsideration, arguing that its motion was not on fraud per se, but on the insured's non-cooperation with its investigation. The trial court denied the motion for reconsideration, pointing out that the insurer's summary judgment motion was one in which it effectively sought summary judgment on the grounds that the insured had committed fraud. The Vermont Supreme Court affirmed, holding that the insurer, in seeking to vacate the summary judgment issued against it, was trying to argue too fine a distinction. The fundamental basis of its declaratory judgment action was to have the policy declared void ab initio because the insured had allegedly procured it by fraud, and the insurer's summary judgment motion stated as much, even though the insurer subsequently tried to recast the purposes of its motion. The Vermont Supreme Court found that the insurer's attempted distinction, between "fraud" and "non-cooperation in our investigation to prove fraud" was meaningless. It held that the trial court had addressed the issue that the insurer raised in the dec action: the insured's alleged fraud.

**Vermont Supreme Court holds that Underinsured Motorist Carrier cannot reduce payments to injured worker by the amount he received as Worker's Compensation benefits for the same injury.**

Feeley v. Allstate Ins. Co., 2005 VT 87, 882 A.2d 1230, Vermont Supreme Court, Aug. 17, 2005 (Entry Order decision). The Vermont Supreme Court held that it would violate the Vermont UIM statute for an insurer to reduce benefits by the amount of WC benefits received by the injured party, because the UIM statute speaks only to the comparison of insurance liability limits between the tortfeasor and the injured-insured. The amounts received by the insured from other sources is irrelevant to the operation of the UIM statute.

**Vermont Supreme Court holds that insurer is not required to cover claim that arose after policy expired, even though insurer knew of claim when it extended offer to reinstate the policy back to the expiration date.**

Anderson v. Cooperative Ins. Cos., 2006 VT 1, Vermont Supreme Court, Jan. 13, 2006. The auto policy expired on August 13, 2003 when the insured did not pay her renewal premium. Of course, the insured was in an accident on August 16. She notified her agent of the accident and was told that there was no coverage. The insured then received an automated notice from the insurer that coverage would be reinstated back to Aug. 13 if she sent payment by Aug. 31. The notice said nothing about the Aug. 16 accident. Naturally, the insured made payment and then re-submitted her claim. The insurer denied coverage. The insured sued. The issue, then, was whether she was insured for the claim that occurred during her temporary lapse in coverage. The Vermont Supreme Court had little trouble finding that there was no coverage. Plaintiff had received an explicit denial of coverage for the Aug. 16 accident before she accepted defendant's offer to reinstate her policy. The court found no implied waiver by defendant insurer of its denial of coverage for the Aug. 16 accident in its willingness to reinstate the policy. At best, defendant's conduct was equivocal – it was not a voluntary relinquishment of a known right.

### ***Vermont Updates—contd.***

**Vermont Federal Magistrate holds that an insured can assign to the plaintiff its rights against its insurer, including bad faith claims.**

R.L. Valee, Inc. v. American Int'l Specialty Lines Ins. Co., U.S.D.C., D. Vt., No. 2:05-cv-131 (March 16, 2006) (Niedermeier, M.J.). Magistrate Judge Niedermeier denied the insurer's motion to dismissed an assigned bad faith claim. The Court held that the assignment of rights is valid and can also include bad faith claims. This may seem like an unsurprising proposition, but there currently is no reported Vermont decision on the issue. The Court further held that, in determining its duty to defend, the insurer is obligated to take into account not only the allegations of the Complaint against its insured, but also known facts outside the Complaint. The insurer's duty to defend in this case was triggered by the Complaint allegations and known facts. The Court discusses two Vermont Superior Court decisions, both noting that an insurer that unjustifiably breaches the duty to defend is on the hook for any fair and reasonable settlement of the claim. Because this was a motion to dismiss, however, the Court stopped short of deciding whether Defendant in this case waived all coverage defenses. Finally, the Court ruled that Vermont's direct action statute, 8 V.S.A. section 4203(3), is not a "direct action" that destroys diversity jurisdiction against an insurer under 28 U.S.C. section 1332(c)(1).

### **5. Products Liability**

**Vermont Supreme Court affirms summary judgment for manufacturer of commercial baking equipment for lack of evidence of causation.**

Travelers Ins. Cos. V. Demarle, Inc., 2005 VT 53, Vermont Supreme Court, May 4, 2005 (Entry Order decision). Commercial food supplier and its insurance company sued manufacturer of baking mats, alleging that the defective mats had contaminated brownies. The Vermont Supreme Court affirmed summary judgment for defendant, finding that Plaintiff had not mustered evidence showing more than the mere possibility that defendant's products were defective. Plaintiff cannot get to a jury on products liability causation with evidence that raises a mere possibility of defect. Plaintiff's proffer of evidence against defendant's summary judgment motion did not satisfy the standards of Rule 56 for opposing such a motion. Plaintiff cannot contradict its own deposition testimony in opposing defendant's summary judgment motion.

## **Help Make the Newsletter Provide What You Need**

You can help to improve the Newsletter by providing input as to what you would like to see included. Also, you can write and submit articles for approval and publication. Member announcements, awards, updates, etc. are also needed. The next publication will be in May and then September. Hopefully, in 2008, there will be quarterly publications.

Give our Newsletter a name.

Send your suggestions to: [www.tridenselawyers.or](http://www.tridenselawyers.or)

## **Things You Should Know But Probably Don't**

- 40% of McDonald's profits come from the sales of Happy Meals.
- The dot over the letter I is called a "tittle".
- The Declaration of Independence was written on hemp (marijuana) paper.
- 315 entries in Webster's 1996 Dictionary were misspelled.
- The 'spot' on 7UP comes from its inventor, who had red eyes. He was albino.
- Ketchup was sold in the 1830's as medicine.
- Upper and lower case letters are name 'upper' and 'lower' because in the time when all original print had to be set in individual letters, the upper case letters were stored in the case on top of the case that stored the smaller, lower case letters.
- Most lipstick contains fish scales (eeww).

## New Hampshire Law Updates

Mary Ann Dempsey, Wiggin & Nourie, P.A.

### ***Defendant Verdict Affirmed in Medical Malpractice Case Involving Expert Testimony Relating to the Delivery of an Infant – Milliken v. Dartmouth-Hitchcock Clinic (Dec. 28, 2006)***

The New Hampshire Supreme Court affirmed a defense verdict in favor of Dartmouth-Hitchcock Clinic. The plaintiffs brought suit for the alleged negligent delivery of John Milken resulting in severe brain damage as well as a deformed and bruised skull. On appeal, the plaintiffs challenged the defendants' use of experts with respect to the cause and timing of the injury. The Supreme Court held that, because the plaintiffs' motion in limine regarding the expert testimony of Dr. D'Alton was limited to her qualifications and not because she offered opinions not previously disclosed under RSA 516:29-b, II, the plaintiffs had not preserved the issue for appeal because no contemporaneous objection was made to Dr. D'Alton's testimony. The Court held that the plaintiffs' motion in limine did properly preserve the objection as to qualification. The Court concluded, however, that the trial court properly found Dr. D'Alton qualified based on her years of experience in the field and authoring of numerous treatises. The Supreme Court similarly held that the plaintiffs did not properly preserve their objections to Dr. Lauria's testimony because, their motion in limine was not specifically ruled upon and therefore did not preserve the issues raised on appeal that were not objected to during trial. Finally, the Supreme Court affirmed the trial court's admission of defense expert Dr. Zimmerman regarding the issue of timing of the injury. Plaintiffs' counsel admitted at a bench conference during trial that Dr. Zimmerman was competent to testify on this area but plaintiffs claimed on appeal that this statement did not bind them. The Supreme Court disagreed and held that admissions made by counsel during litigation are binding upon the client unless amounting to a compromise of a claim or a confession of judgment.

### ***Supreme Court Provides Guidance Regarding Exhaustion of Coverage for Purposes of the Guaranty Fund***

The New Hampshire Supreme Court recently issues two decisions relating to the New Hampshire Insurance Guaranty Association – ***OB/GYN Assoc. of Southern New Hampshire v. N.H. Insurance Guaranty Fund*** (Dec. 19, 2006) and ***N.H. Insurance Guaranty Assoc. v. Elliot Hospital*** (Dec. 20, 2006). The Guaranty Act (RSA 404-B:1 et seq.) is a statutory mechanism which pays covered claims under certain insurance policies because of the insolvency of an insurer. In ***OB/GYN Assoc.***, the Estate of Hanh Tran sued her doctor (Wasserman) insured by PHICO, and Wasserman's employer, OB/GYN, insured by Covenant. Covenant settled the claim for both Wasserman and OB/GYN and then took an assignment of Wasserman's rights against the Guaranty Fund since PHICO was insolvent. The Supreme Court noted that the Guaranty Assoc. is "the insurer of last resort" and coverage under the Guaranty Act is limited based on the Guaranty's status as a nonprofit entity and because of the method in which it is funded. The Court held that the "nonduplication of recovery" provision within the Guaranty Act requires that a claimant with an alternative source of insurance coverage for a covered claim exhaust that coverage before seeking coverage under the Guaranty Act. The Court further held that the term "claim" encompasses both the insured's claim against the Guaranty Assoc. and the third party's underlying claim against the insured and, "the term 'covered claim' refers to a claim against an insolvent insurer to which the Guaranty Act applies." In applying this statutory principles, the Supreme Court held that the Estate's claim against OB/GYN also constituted a covered claim because the only theory of liability against OB/GYN was vicarious liability and therefore involved the same factual allegations and legal assertions. The Supreme Court concluded that there was no coverage obligations under the Guaranty Act because, based on the facts of the case, "exhaustion of the Covenant policy was a prerequisite for OB/GYN's claim against NHIGA under the Wasserman assignment."

In ***Elliot Hospital***, the Supreme Court held that a claim against a hospital constitutes a claim against an insurer for purposes of RSA 404-B:12, I. Unlike ***OB/GYN Assoc.*** which involved vicarious liability, the Court held that in this case, because the case involved two separate allegations of fault against two separate entities (Elliot Hospital and Dartmouth Hitchcock Clinic), a claim against the Elliot did not constitute a claim against Hitchcock Clinic whose insurer was insolvent. Therefore, the claim against the Elliot did not constitute a covered claim under RSA 404-B:12, I and, the plaintiffs did not have to pursue a claim against the Elliot and exhaust its insurance coverage before bringing a claim against the Guaranty Fund.

### ***Supreme Court Addresses Insurance Coverage Issues Related To Primary v. Excess Insurance Regarding Rental Vans***

In the matter of ***Warner v. Clarendon Ins. Co.*** (November 2, 2006), Jennifer Corlett, a Maine resident, rented a Ryder truck from its agency in Idaho. Scott Brown was named

### ***New Hampshire Updates—contd.***

Ryder truck from its agency in Idaho. Scott Brown was named as an additional driver on the policy. Ryder was insured Frontier Ins. which became insolvent. Clarendon Ins. was the reinsurer for Frontier. Ryder's policy provided liability coverage in the amount of \$2 million dollars. While driving the Ryder truck from Idaho to Maine, Scott Brown fell asleep at the wheel in Hopkinton, NH and struck a vehicle operated by Lynn Warner. Ms. Warner brought suit against Corlett and Brown and then brought a declaratory judgment regarding Clarendon's coverage obligations to Corlett and Brown. The Ryder Rental Agreement contained an "Other Insurance" clause stating that any coverage provided under the liability protection plan was excess to other valid and collectible insurance. The Ryder insurance policy had 2 endorsements (Star-2 and Star-3) that affected the "Other Insurance" clause set forth in the Rental Agreement. Star-2 provided that coverage was primary but only with respect to the limit of insurance required under the Financial Responsibility law in which the auto is rented. Star-3 provided that the coverage was primary with respect to the rentee or driver as an insured under an auto rental contract. The policy also contained another endorsement (Star-7) that provided that the insurance coverage under the policy was "subject to the terms, conditions, restrictions, and limitations contained in the rental agreement between [Ryder] and such rentee."

Warner claimed that Brown and Corlett were each entitled to the \$2 million in insurance coverage as endorsements Star-2 and Star-3 created an ambiguity as to coverage. Clarendon claimed that Brown and Corlett were entitled to \$25,000 in insurance coverage because this was the amount of liability coverage required by the financial responsibility statutes in both Idaho and NH.

The New Hampshire Supreme Court held that it need not address whether there was a contradiction between Star-2 and Star-3 because Star-7 was unambiguous and was determinative as to coverage. Under Star-7, insurance coverage was subject to the terms of the rental agreement and, the rental agreement provided that liability coverage would not exceed the minimum financial responsibility limits and/or minimum no fault benefits. The Court held that, even when Star-3 is read to require liability coverage up to the full policy limits, Star-7 does not render the policy ambiguous because it directly addresses the relationship between the policy and the rental agreement. The Court further held that the policy did not violate New Hampshire statute, RSA 264:14, II, which requires that an insurer provide notice of a reduction in coverage, because the policy was not issued in NH. The Court concluded that the trial court properly found that there was only \$25,000 in coverage available under the Clarendon policy and that this coverage was excess to any other insurance available to Corlett and Brown that cumulatively equaled that amount.

## **Maine Law Updates**

**by Michael Goldman, Lambert Coffin, PLLC**

In 2006, the Maine Supreme Judicial Court issued several opinions of considerable significance to civil litigation defense attorneys. *Smith v. Hawthorne*, 2006 ME 19, 892 A.2d 433, was a 4-3 decision on a constitutional challenge to the section of the Maine Health Security Act addressing the admissibility in subsequent court actions of findings made by Maine's mandatory medical malpractice pre-litigation screening panels. 24 M.R.S.A. § 2857(1) (B) provides that the findings of a medical malpractice panel are admissible in a subsequent court action by the claimant against the respondent if the panel findings as to both the standard of care and proximate cause are unanimous and unfavorable to the respondent, but section 2857(1)(C) provides that if any of the findings made by the panel are unfavorable to the claimant, they are admissible in a subsequent court action. In *Smith*, the panel unanimously concluded that although the physician's actions were negligent, those actions were not the proximate cause of the plaintiff's injuries. As such, the Court only admitted the finding that the physician's actions were not the proximate cause of the plaintiff's injuries and did not admit the panel's finding that the physician had breached the standard of care. The Court stated that "[w]hen there are findings favorable to both parties, the admission of only those findings favorable to one party distorts the jury's fact finding role." The Court added that the findings favorable to the plaintiffs, as well as those favorable to the physician, were highly probative and relevant to the jury as factfinder and that the "partial admission reduced the strength and persuasiveness of the [plaintiffs'] case to the jury and, at the same time, strengthened [the physician's] case, thereby significantly infringing upon [the plaintiffs'] right to have facts determined by a jury." The Court then concluded that section 2857 was unconstitutional as applied because "the asymmetrical admission of panel findings violated the [plaintiffs'] constitutional right to a jury trial." Three dissenting justices concluded, however, that the statute was a proper exercise of legislative authority as drafted in that the "regime governing the admission of the findings of the prelitigation screening and mediation panels and subsequent court actions... is designed to encourage both early resolution of [meritorious] claims prior to commencement of lawsuit ... and ... early withdrawal or dismissal of nonmeritorious claims."

In a surprising 3-2 decision addressing an employer's vicarious liability for an employee's involvement in a vehicle collision while driving home from work, a majority of the Court, in *Spencer v. V.I.P., Inc.*, 2006 ME 120, 910 A.2d 366, vacated a summary judgment that had been entered in favor of the employer. The Court concluded that genuine issues of material fact remained as to whether the hourly employee was acting within the scope of his employment at the time of the collision with the plaintiff's vehicle because the employee was on his way home after volunteering at a promotional event sponsored by the employer, the employee had received a T shirt and \$25 in cash that was intended to cover gasoline costs and other expenses, and because there was testimony that hourly employees could also receive mileage reimbursement if they traveled more than two hours to reach the event, but that salaried employees could only receive mileage reimbursement and not the \$25 payment. The court concluded that a jury could find the employer to be vicariously liable to the plaintiff because the testimony supported a finding "that the travel was part of a task [the employee] was employed to perform." Citing numerous decisions from Maine and other jurisdictions, two dissenting justices argued that "a person who is going to or coming from work is responsible for his or her own actions," and expressed concern that the majority's decision "may ultimately cause employers to become the insurer for all harm caused on the highways by their employees while driving to or from work."

The Law Court's declaratory judgment in *Patrons Oxford Ins. Co. v. Harris*, 2006 ME 72, 905 A.2d 819, is an important decision for defense counsel and insurers when defending a client pursuant to an insurer's reservation of rights. In an underlying personal injury action, Patrons Oxford defended Harris under a reservation of rights because there were questions about whether Harris was authorized to drive an insured's vehicle at the time Harris injured the plaintiff. Harris later agreed to file a stipulation of judgment in exchange for the plaintiff's promise only to collect the judgment from the insurer through Maine's reach and apply statute, 24-A M.R.S.A. § 2904, if coverage were established. In the subsequent declaratory judgment action by the insurer, coverage was established, and the plaintiff could therefore collect the judgment from the insurer. On appeal, the Law Court affirmed, holding that "an insured being defended under a reservation of rights is entitled to enter into a reasonable, noncollusive, nonfraudulent settlement with a claimant, after notice to, but without the consent of, the insurer." As was the case in *Patrons Oxford*, a subsequent declaratory judgment action to establish coverage will determine whether the insurer is bound by the settlement agreement.

In *Mitchell v. Kieliszek*, 2006 ME 70, 900 A.2d 719, a medical professional negligence case, the plaintiff sought to question a physician during his deposition regarding the physician's interpretation of mammogram films. Because the physician had no recollection of seeing the films, the Law Court affirmed the trial court's refusal to allow the testimony at deposition and trial because the opinion required specialized knowledge and the plaintiff had not designated the physician as an expert. Notably, in a concurring opinion, a single justice concluded that it had been improper for defense counsel to instruct the physician not to answer deposition questions about the mammogram films because the relevance of the discovery went to the physician's credibility, not his expertise, and defense counsel's tactics, therefore, violated M.R. Civ. P. 30(d)(1), which governs objections in depositions.

In 2006, Law Court also reaffirmed its prior decisions concerning the breadth of the Maine Health Security Act. In *Saunders v. Tisher*, 2006 ME 94, 902 A.2d 830, the plaintiff sued a psychiatrist for supporting his involuntary commitment to a mental hospital. The Court held that "[t]he actions of a psychiatrist in determining whether a person should be involuntarily committed pursuant to 34-B M.R.S.A. §§ 3861, 3863 constitute the treatment of the mentally ill, and therefore, the provision of health care services." The Court concluded that the action was time-barred by the three-year statute of limitations set forth in the Maine Health Security Act, 24 M.R.S.A. § 2902, because the plaintiff filed his complaint about six years after the psychiatrist supported his involuntary commitment.

In one of several timber trespass cases addressed by the Court last year, *Fuschetti v. Murray*, 2006 ME 100, 903 A.2d 848, the defendant cut trees from the plaintiff's land in an effort to improve his own view. The Court concluded that the trial court erred in awarding damages to the plaintiff pursuant to both common law and statutory trespass. According to the Court, 14 M.R.S.A. § 7552, which addresses trespass to land, forest products, or agricultural products, was intended by the Legislature "to occupy the field entirely" and provides remedies in the form of damages for the value of lost trees, the loss in the overall value of the property, or the statutory forfeiture value of the trees, but does not allow for recovery of costs for replanting and restoring the trees. One notable change in the Maine Revised Statutes is set forth in Maine's uninsured motorist law, 24-A M.R.S.A. § 2902(1), which the legislature amended in response to *Butterfield v. Norfolk & Dedham Mut. Fire Ins. Co.*, 2004 ME 124, 860 A.2d 861. In *Butterfield*, the Law Court addressed a father's uninsured motorist claim with his insurer after his daughter—who was not a named insured under the father's policy—was killed in a collision where the vehicle in which the daughter was riding and the driver of the other vehicle were both uninsured. Maine's then-existing uninsured motorist statute required that insurance policies issued in Maine include "protection of persons insured thereunder who are legally entitled to recover damages from . . . uninsured, underinsured or hit-and-run motor vehicles, for bodily injury." The Court concluded that the father's policy, which attempted to limit liability to injuries sustained by named insureds,

violated section 2902. In 2006, however, the Legislature responded to Butterfield by amending section 2902(1) to require insurance policies to provide “protection of persons insured under the policy who are legally entitled to recover damages from owners or operators of uninsured, underinsured or hit-and-run motor vehicles, for bodily injury, sickness or disease, including death, sustained by an insured person.” P.L. 2006, ch. 591, § 1 (emphasis added). In the summary statement following the public law, the legislature explained that the “bill clarifies that an insurance policy may limit uninsured motorist coverage to the recovery of damages by an insured person under the policy for bodily injury, sickness or disease, including death, sustained by that insured person.”

Notable decisions by the United States District Court for the District of Maine included *Ludden v. Sprague Energy Corp.*, 2006 U.S. Dist. LEXIS 2381 (D. Me. Jan. 23, 2006), and *Piche v. Nugent*, 436 F. Supp. 2d 193 (D. Me. 2006). In *Ludden*, the court made clear that vicarious liability will not attach to an employer when an employee has not sought to serve the employer through his or her tortious conduct. The *Ludden* court dismissed the plaintiff’s vicarious liability claims against the employer where the employee allegedly unzipped his pants, exposed his genitals and urinated in front of the plaintiff because the plaintiff’s allegations were insufficient to support an inference that the employee was employed by the employer to expose himself to the plaintiff or that the employee sought to serve the employer through his conduct. As such, the court concluded that the employee was not acting within the scope of his employment.

*Piche* discussed a motorcyclist’s failure to wear a helmet as grounds for the affirmative defense of comparative negligence. In *Piche*, the plaintiff’s wife was killed in a collision when she was riding a motorcycle without helmet and was struck by the defendant’s vehicle. In support of his comparative negligence argument, the defendant offered the helmet defense, asserting that the wife’s death “might have been avoided had she worn a helmet.” In light of the fact that the First Circuit had previously “given the nod to the helmet defense in the context of Maine’s comparative negligence statute,” the judge disagreed with the plaintiff’s assertions that the helmet defense should not be recognized under Maine law. Nevertheless, the court granted the plaintiff’s motion for summary judgment on the defendant’s comparative negligence defense because his only evidence on the issue—expert testimony on whether a helmet would have saved the wife’s life—was inadmissible on the grounds that it was speculative and would not have been helpful to the jury.

Finally, several other decisions deserving a brief mention include: *Creamer v. Bishop*, 2006 ME 95, 902 A.2d 838, in which the Law Court concluded that a trial court’s grant of a motion to compel arbitration is an interlocutory order that is not immediately appealable to the Law Court; *Graves v. S.E. Downey Registered Land Surveyor, P.A.*, 2005 ME 116, 885 A.2d 779, in which the Court explained that the standard of care for a land surveyor is the same as that applied in any other professional negligence case such as medical malpractice or legal malpractice: “The duty of care a land surveyor is obligated to provide is that degree of care that an ordinarily competent surveyor would exercise in like circumstances.”; and *Maddocks v. Whitcomb*, 2006 ME 47, 896 A.2d 265, concluding that summary judgment was properly granted in favor of a ski area where the plaintiff snow tuber was injured on the grounds that the ski area had complied with the statutory duty to post warning signs pursuant to 32 M.R.S.A. §15217 and because neither the statutory nor common law imposes a duty on a ski area to instruct skiers or snow tubers on safety measures.

## Traps For the Young Lawyer to Avoid in Defending A Deposition

- **Know the standard stipulations in your respective state.** It is on the front page of all depositions. In NH, all objections except as to form are preserved. Therefore, when defending a deposition, you must be cautious to object any questions that would violate attorney-client privilege and instruct your client not to answer. Any questions that call for legal conclusions as to fault should be objected to as well as questions that have your client assume facts though these can be answered after the objection is made.
- **Prepare your witness.** As nervous as you may be defending your first few depositions, your client is likely more nervous. Meet with them. Explain they are giving testimony under oath so they should be honest but they need only answer the question posed and not provide additional commentary. Let them know they have the right to tell the other attorney that they do not understand a question. Tell them it is not a conversation. The other attorney has a goal to obtain information and view them as a witness and they should keep their composure.
- **Listen to the questions as well as take notes.** This is a skill that comes with time. Remember that you are there to not only report to the senior partner or insurance company but also to protect your client...so be vocal.

## Calendar of Events

**March 22 & 23, 2007**

***Vermont Mid-Year Bar Meeting***

Burlington, VT - Sheraton Hotel  
For more information, go to [www.vtbar.org](http://www.vtbar.org)

**May 4 - 6, 2007**

***DRI Northeast Regional Meeting***

Manchester, VT - Equinox  
For more information, contact Matt Cairns at [matt@ranspell.com](mailto:matt@ranspell.com)

**May 17 - 18, 2007**

***Solo & Small Firm Gala***

Vergennes, VT, - Basin Harbor Club.  
For more information, go to [www.vtbar.org](http://www.vtbar.org)

**May 30, 2007, 9:00 a.m. - 1:15 p.m.**

***N.H. CLE—First Party Homeowner's Insurance Claims***

Location: N.H. Bar Foundation.  
Contact: [cmoore@nhbar.org](mailto:cmoore@nhbar.org)

**June 22 - 24, 2007**

***N. H. Bar Annual Meeting***

Location: Balsams Grand Resort Hotel  
Contact: [nbarinfo@nhbar.org](mailto:nbarinfo@nhbar.org)

**DRI Events**

***Life, Health, Disability and ERISA Claims***

**March 28 – 30, 2007**

Renaissance Chicago – Chicago, IL  
For more information call: 312-795-1101

***Insurance Coverage and Claims Institute***

**April 11 – 13, 2007**

Westin Chicago River North – Chicago, IL  
For more information call: 312-795-1101

**DRI – Electronic Discovery**

April 19 - 20, 2007  
Renaissance Washington Hotel, D.C. Washington  
For more information call: 312-795-1101

**PESI Seminar “WV Evidence”**

April 20, 2007  
Charleston, WV  
For more information call: 715-836-9700

**PESI Seminar “WV Evidence”**

April 27, 2007  
Morgantown, WV  
For more information call: 715-836-9700

**Employment Law**

May 2 - 4, 2007  
Westin Kierland – Scottsdale, AZ  
For more information call: 312-795-1101

**Drug and Medical Device**

May 10 - 11, 2007  
San Francisco Marriott – San Francisco, CA  
For more information call: 312-795-1101

**NBI Seminar**

**“Human Resource Policies That Prevent Lawsuits”**

May 16, 2007  
Charleston, WV  
For more information call: 800-930-6182

**The Likeable Lawyer Seminar**

**“The Trusted Lawyer”**

May 31, 2007  
Charleston, WV  
For more information call: 800-524-2396

**Young Lawyers Seminar**

June 6 - 8, 2007  
San Diego Marriott Hotel – San Diego, CA  
For more information call: 312-795-1101

**October 10 - 14, 2007**

**DRI Annual Meeting**

**Washington, D.C.**

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