



# LEGAL MATTERS

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## *What is a Conduit?*

To an electrician, a conduit is a hollow channel used to run wires and other electrical connections. To a real estate investor, a conduit is a “non-recourse” mortgage loan facility available to fund a purchase or refinance transaction. Conduit lenders originate commercial mortgage loans that are segmented and sold in the Wall Street Capital Markets. Conduit lenders create pools of large loans. Once pooled, the loans are sold to a Real Estate Mortgage Investment Trust (REMIC) or to a Financial Asset Securitization Investment Trust (FASIT). The REMIC or FASIT then segments the loan for sale in the public securities markets as commercial mortgage backed securities (CMBS).

The terms for conduit loans are typically five to ten years. Unlike traditional loans issued by banks and mortgage companies, conduit loans are typically “non-recourse” to the borrower and do not require personal guaranties. Except for fraud and other limited circumstances, the lender will look only to the property in the event of a default. The interest rates on conduit loans are often lower than conventional loans. The interest rate bears a relationship to the rates paid on Treasury Bonds.

The trade offs for the “non-recourse” benefit are prepayment penalties and higher closing costs. Since the loans are sold as fixed income securities, borrowers must pay a prepayment penalty, yield maintenance, or defeasance fee if the loan is paid off early. In addi-

tion to usual closing requirements, conduit lenders require surveys, engineering studies, deferred maintenance escrows, and vacancy and fit-up escrows. Brokers charge an up-front fee to place a conduit loan. Consequently, the closing costs of “non-recourse” conduit loans are significantly more than for traditional loans.

When considering the acquisition of a new property, or thinking about refinancing a loan on an existing property, you should consider whether a conduit loan will satisfy your financing needs.

## **It's Official!**

If you have called our office lately, then you already know the news . . . we have changed our name to **Cronin & Bisson, P.C.** We are working on a website where you can learn about all of us, browse the areas of law we practice, and view our Newsletter archives. Look for us in the coming months at [www.croninbisson.com](http://www.croninbisson.com). We welcome your comments as we continually strive to improve our level of service to you.

## *Case Notes*

The New Hampshire Supreme Court recently issued an opinion addressing the criteria for “employee” status under the New Hampshire Workers’ Compensation Law. The law provides that “any person . . . who performs services for pay for an employer, is presumed to be an employee.” However, the law also provides that if the following five criteria are met, the presumption of employment may be rebutted: (1) the person possesses a federal employer identification number or social security number or has agreed in writing to carry out the responsibilities imposed on employers by the Workers’ Compensation Law; (2) the person has control over the means and manner of her work performance; (3) the person has control over when the work is performed; (4) the person holds herself out to be in business for herself; and (5) the person is not required to work exclusively for the employer.

The intent behind the Workers’ Compensation Law is to prevent abuse by employers that classify employees as independent contractors in order to avoid the obligation to insure against injury and to compensate individuals injured on the job. If an individual is hurt on the job and challenges her status to obtain workers’ compensation benefits, the *employer* would bear the burden of proving that all five criteria listed above are met. Once over that hurdle, the *employee* bears the burden of proving differently.

Many businesses use the services of independent contractors. Those who do should be aware of the five criteria. Violations of the Workers’ Compensation Law have significant consequences.

## *Should You Liquidate Damages?*

The answer to the question is, like many answers from lawyers, “it depends.” In order to understand why “it depends,” an understanding of the concept of liquidated damages is helpful. Although the common meaning of the term “liquidate” is to convert assets to cash, when used alongside “damages” the concept changes significantly.

Liquidated damages are most often discussed in real estate purchase and sale agreements. There is often a contract section which describes the buyer and seller’s rights to all deposits paid in connection with the agreement. The section usually provides that in the event of a breach of the agreement by the buyer, the seller is entitled to retain all deposits as seller’s sole and exclusive remedy and as liquidated damages. Sometimes, but not always, the buyer’s remedies are limited to a specific sum of money. Most often, if the seller breaches the agreement, the buyer has more options. The buyer is entitled to seek the return of all deposits, to force the seller to convey the property, and to seek actual damages. These somewhat lopsided list of remedies appear to entitle the buyer to much more than the seller.

Liquidated damages are used in this type of application because when the transaction is analyzed, the positions of the parties upon the breach of the other are dramatically different. After the agreement is in place, the buyer has the expectation of obtaining title to a piece of property with all of its unique characteristics. Whether the property includes a single family residence or a commercial office park, the property is unique and there is no other parcel exactly like it. Thus, in the eyes of the law, money damages

alone will not compensate the buyer if the seller breaches. The buyer should have the right to force the conveyance of the one-of-a-kind piece of property.

On the other hand, if the contract is performed, the seller will receive a specific sum of money. One stack of cash is no different from another, provided that the total is the same. This does not mean that the seller suffers no damage if the buyer breaches. For example, if the transfer fails, the seller may lose a bigger and better opportunity to invest the proceeds of the sale. An opportunity to purchase some other one-of-a-kind property may be lost. There may be tax consequences. There are very likely carrying costs, expenses, and legal bills. However, the seller continues to own the property and presumably can sell it to someone else.

A liquidated damages clause attempts to establish the seller’s damages in advance with the agreement of the buyer so there is little debate and the parties can move on to other transactions. When asked to enforce a liquidated damages clause in an agreement, Courts generally consider three factors. First, are the seller’s damages in the event of the buyer’s breach uncertain and difficult to prove? Second, did the parties to the agreement intend to liquidate the seller’s damages in advance? Third, is the agreed upon amount reasonable and proportionate to the seller’s presumed damages?

In the example of the failed real estate transaction, the seller’s damages are difficult, although not impossible to prove. Presumably, the seller could explain where the proceeds of the sale would have gone. However, when considering lost opportunity, damages are somewhat

speculative. Including a liquidated damages section in the agreement shows the intent of the parties to address the speculative nature of the seller’s damages. Finally, as long as the agreed upon amount falls within the broad concept of “reasonableness,” the parties’ agreement to the amount in advance would likely be enforced by the Court.

Liquidated damages serve an important function for the seller in this example. However, liquidated damages do not fully address the buyer’s concerns. Thus, should you liquidate damages? If you are the seller, probably yes. If you are the buyer, maybe not.

### *Announcement*

Joceline D. Champagne was recently elected to the Board of Directors of the New Hampshire Chapter of Community Associations Institute (CAI). Founded in 1973, CAI is the only national organization dedicated to fostering vibrant, responsive, competent community associations. It is a multi-disciplinary non-profit alliance serving all stakeholders in community associations. CAI provides education and resources to America's 250,000 residential condominium, cooperative, and homeowner associations, and to the professionals and suppliers who serve them. CAI's mission is to assist community associations in promoting harmony, community, and responsible leadership.

Joceline is looking forward to serving on the Board and sharing CAI's resources with our clients. Contact us for more information regarding CAI and how it might benefit you or your community.

## *Oh Well! Water, Water “NOWHERE”*

There are few things in life more exciting than moving into a new home. Without careful planning and detailed contract specifications, the experience can quickly turn into disaster. Take, for example, the recent case of a young family looking for a new home with an in-law apartment. While attending an open house in one community, a real estate broker directed the family to a new subdivision in another community that allowed in-law apartments in residential zones.

The broker, recognizing the family was excited about the property and the prospects for a new home, quickly completed a standard form contract. The contract included few details. However, allowances for cabinets, lighting and the well were included. In this case, the contract price included a \$4,500.00 allowance for drilling a well and installing a water system.

The family knew very little about wells and the costs of installation. Eager to get the project started, the family signed the contract without legal review, assuming the allowances were sufficient. Little did they know that by signing the contract they assumed the risks for all costs related to the well in excess of the allowance.

The family then secured financing and construction started. Aside from lengthy delays and a host of other problems, the “well” did not go so well. The contractor elected to drill the well near the end of construction. With the project already three months behind schedule and the family living in a temporary apartment, the well company started drilling. What is usually a two-day job turned into weeks. The search for water became “Mission Impossible.” After drilling thousands of feet, hy-

drofracking and blasting, a source of water was found. The cost for the well exceeded the allowance by \$36,500.00! With all of the family resources committed to the down payment, and financing maxed out, the family could not afford to close the transaction. However, due to other problems created by the contractor during construction, we were able to negotiate a favorable resolution to the problem.

The moral of the story is it is wise to have any contract reviewed by a lawyer prior to inking your signature. If you go it alone without the assistance of a lawyer, make certain that allowances for items with unknown costs are “capped” so that you can control the final contract price. The contractor is in the best position to assume and manage the risks related to unknown cost items such as wells, septic systems and ledge removal.

### *Collecting Judgments*

The trial is over and you have won. The defendant is obligated to pay damages in an amount that the Court decided will make you whole. What happens next? What if the defendant is unwilling or unable to pay?

One available option, after all appeal periods have passed, is to return to Court and ask the Court to order the defendant to pay. This process, called a periodic payments hearing, sounds easy, but obtaining an order that results in full payment in your lifetime is often difficult. Despite all the preparation and planning invested in the trial, the ability of the defendant to pay the eventual judgment may not have been the focus of much investigation. Even if you tried to examine the defendant’s finances before trial, the defendant’s ability to pay the judgment is not relevant until after liability is established. Thus, preparation for the periodic payments hearing is critical.

Unless you have evidence of a secret pile of cash, the defendant may simply plead poverty. Although the Court requires the defendant to complete a financial affidavit, the defendant may easily list expenses that exceed monthly income. Many defendants assert that expenses exceed income by hundreds of dollars each month. Once the defendant completes the affidavit and swears that it is accurate, the burden is yours to convince the Court that the defendant has the ability to make some payment. Unless you can present some evidence that the affidavit is incorrect, the Court has no ability to order the defendant to make payments.

This result underscores the importance of considering the defendant’s ability to pay long before trial. Although you have suffered real financial damage and all the evidence is on your side, litigation may be a losing investment. The costs of the trial, legal bills, expert witness fees and your time and energy may be better spent elsewhere. If the defendant establishes little or no ability to pay, you may leave the court with an order of \$50 per month on a \$10,000 judgment. Sixteen years is a long time to wait.