



LEGAL MATTERS

JULY 2003

Mind Your E's and Q's — EQ Ratios Plummet

Residential properties in most communities in New Hampshire have appreciated at much greater rates than commercial properties. As a result of the rapid residential real estate appreciation, commercial property owners may be entitled to tax abatements. It is important for all property owners to be aware that due to this dramatic appreciation, the equalization ratio in most communities has dropped significantly. For example, the equalization ratio for 2002 in Manchester is 76.6%. Similarly, the equalization ratio for 2002 in Nashua is 74.6%.

What does all this mean? The equalization ratio plays a significant role in determining whether a property is over assessed. The ratio demonstrates the relationship of market value of the property to the general level of assessment in the community or the property's assessed value. In some instances, the owner of a property worth \$2,000,000.00 will look at the tax bill and note the assessment is \$2,000,000.00. The initial instinct is to assume that an assessment equal to the market value is fair and reasonable. However, the property owner must continue to examine the equalization ratio. In Manchester, a property worth \$2,000,000.00 on April 1, 2002 should be assessed at 76.6% of fair market value or \$1,532,000.00. Thus, the assessment in this hypothetical situation should be reduced by \$480,000.00 and the taxes abated by almost

\$13,000.00.

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Also, if you filed a tax abatement application with your municipality for the 2002 tax year and it was not granted or not acted upon, you must file an appeal with the Superior Court or the Board of Tax and Land Appeals before September 1, 2003. Missing the date, by even one day, is fatal. We are available to review the assessments of your commercial properties to determine whether abatements are warranted.

Peter D. Wenger Retires from Law

All of us at Wenger & Cronin, P.C. wish Peter D. Wenger great success in his future endeavors. Effective July 1, 2003, Peter has decided to no longer engage in the practice of law. He has changed his status with the New Hampshire Bar Association to inactive as he devotes his energies to other ventures. He will be missed by us all.

Case Notes

In a July 24, 2003 decision, the New Hampshire Supreme Court issued a judgment in a case that we presented that shed new light on personal liability of corporate shareholders for obligations of the corporation. Our clients won a jury verdict against a New Hampshire corporation in 1996, one year after the corporation sold all of its assets and stopped doing business. When we attempted to collect the jury verdict, the corporation claimed it had no ability to pay. However, the shareholders were doing quite well.

Since all that remained of the corporation was an empty shell with no ability to pay the verdict amount, we filed an action against the shareholders of the corporation in 2002 seeking to hold them personally responsible for the corporate obligation. We alleged that the corporate shareholders structured the sale to benefit themselves over their corporate creditors. The corporation argued to the trial court that we had missed the statute of limitations and that we were too late. The trial court agreed and threw out the case.

Fortunately, the Supreme Court saw it differently. The Supreme Court decided that since our clients may enforce the jury verdict against the corporation for 20 years, they should have the same amount of time to seek to hold the shareholders personally liable. Thus, the Supreme Court sent the matter back for full consideration of whether the shareholders should be held accountable.

Is It Privileged?

Someone just got hurt; an employee is not living up to expectation; the business needs to expand. Difficult decisions must be made. Lawyers, consultants and others are involved. Most of the time, the matter is addressed without a problem. Unfortunately, on occasion, litigation is threatened. Sometimes suit follows. The adversary wants to know everything. Who said what to whom and when.

Generally, everything that is spoken between the primary parties can become evidence in a subsequent law suit. This rule covers the conversation between the agents and employees of the primary parties when the agents and employees are authorized to speak on behalf of the principals. Everything that is said can and will be used against you.

Conversations with attorneys are treated differently in the eyes of the law. They fall within the attorney-client privilege. The purpose of the privilege is to encourage full disclosure of all relevant information. Over a hundred years ago, the United States Supreme Court stated that the privilege "is founded upon necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely

and readily availed of when free from the consequences or the apprehension of disclosure."

The general rule is that a client has a privilege to refuse to disclose the substance of any confidential communication with the attorney provided that the communication was for the purpose of providing professional legal services to the client. This rule also allows the client to prevent the attorney from disclosing the information. A communication is "confidential" if not intended to be disclosed to third parties other than those to whom disclosure is made to further the professional legal services or those reasonably necessary for the transmission of the communication.

As with many legal rules, although this one seems clear, there are any number of factual situations that make application complicated. If the attorney is giving advice on how to build a deck that collapses, the privilege obviously does not apply. However, if the attorney is advising the client on the strengths and weaknesses of the contract between the parties, the privilege applies. If the attorney is providing general business advice not typically considered legal advice, application is less clear. However, because of the importance of the privilege to the free flow of information

between attorneys and clients, the Court generally interprets the privilege broadly.

When the client is a corporation, courts generally consider a number of factors with the goal of encouraging the free flow of information between attorney and client. The corporate employee must be speaking with the attorney at the direction of management regarding matters within the scope of employment. Corporate management must have retained the attorney. The attorney must be speaking with the employee to evaluate whether the employee's conduct has bound or could bind the corporation; to assess the consequences to the corporation of the employee's conduct; or to determine an appropriate legal response to events that may have occurred as a result of the conduct. If the conversation has little to do with the employee's employment, the conversation may not be protected.

Whenever employees are asked to speak with attorneys, careful thought should be given to the extent of the involvement. If possible, corporate management should act as a filter through which the employee's conversation must pass. Management should obtain the necessary facts and speak freely with the attorney before allowing employees to speak with the attorney.

Exculpatory Clauses

One legal dictionary defines "exculpatory clause" as "a contract clause which releases one of the parties from liability for his or her wrongful acts." This relatively simple concept is apparently difficult to translate into reality. There are hundreds of cases where a party to an agreement which includes an exculpatory clause sues the other party for damages. If the clause is

enforceable, there should be no lawsuit.

An exculpatory clause is commonly found in a lease agreement. The landlord generally seeks to be excused from any responsibility to the tenant including acts of the landlord's own negligence. Thus, if the tenant somehow is damaged as a result of the landlord's negligence,

the tenant has no recourse to the landlord.

Another common place to find an exculpatory clause is in the form documents that we are asked to sign before we rent heavy equipment or conduct some risk laden activity. Sometimes the language is on the back of our lift ticket at the ski resort or in the agreement that we sign

Exculpatory Clauses continued . . .

before we send our children to horse back riding lessons. If we look, the clauses are everywhere.

Often, the language sounds intimidating and appears to leap off the page in bold print and in all capital letters - **I HEREBY RELEASE, WAIVE, DISCHARGE AND COVENANT NOT TO SUE THE PROMOTER OF THIS EVENT, ANY SANCTIONING ORGANIZATION OF ANY SUBDIVISION THEREOF, OWNERS AND LESSEES OF PREMISES USED TO CONDUCT THIS EVENT FROM ALL LIABILITY TO THE UNDERSIGNED FOR ANY AND ALL LOSS OR DAMAGE, AND ANY CLAIM OR DEMAND THEREOF ON ACCOUNT OF INJURY TO THE PERSON OF THE UNDERSIGNED, INCLUD-**

ING DEATH, WHETHER CAUSED BY THE NEGLIGENCE OF THE RELEASEE OR OTHERWISE. If we sign and then fall on the slopes, is this language enforceable?

These clauses attempt to balance two competing legal rights. First, our legal system seeks to hold negligent parties responsible for the consequences of their negligence. To the contrary, our law supports freedom of contract. Parties should be allowed to contract freely about their affairs. So, if we agree not to sue the ski resort, should we be able to change our mind after an injury?

Generally, New Hampshire courts do not like these clauses. However, courts will enforce them if they satisfy three requirements. First, the clause cannot violate pub-

lic policy. For example, the parties must have been relatively equal in their ability to negotiate and no legal special relationship could exist. Second, the signing party must have understood the importance of the clause. Finally, the signing party's claim must have been within the contemplation of the parties at the time of the signing. A fall on the slopes is one thing; the collapse of the chair lift another.

If a party is injured and an exculpatory clause exists, it will be raised in the litigation that follows. When the parties negotiated freely and were aware of the risk, there is a strong likelihood that the clause will be enforced. Next time you see the bold face all capital lettered warning, do not skip over it. It may affect you later.

Getting Connected: Regulating the Installation of Satellite Antennas

The telecommunications world is ever expanding. In particular, the numbers of people getting connected by installing satellite and direct television antennas is increasing as people are lured by the promise of never ending channels to surf. As a direct result of this increase, condominium and homeowners' associations are increasingly faced with issues involving the installation of satellite dishes and antennas by members of the community.

In 1996 at the direction of Congress, the Federal Communications Commission ("FCC") adopted the Over-the-Air Reception Devices Rule to address governmental and non-governmental restrictions on viewers' ability to receive video programming signals from satellites and antennas that are less than one meter in diameter. The rule prohibits most restrictions that: (1) unreasonably delay or prevent installation, maintenance or use of an antenna; (2) unreasonably increase the cost of installation, maintenance or use of an antenna; or (3) preclude reception of an acceptable quality signal. The rule only applies, however, to viewers who place antennas on property that they own or rent that is *within their exclusive use or control*. This includes condominium owners and tenants who have an area within their exclusive use, such as a balcony or patio. The rule further requires that the antenna or dish be wholly within the area of exclusive control.

An association has some ability to restrict where antennas are installed. Restrictions may be enforced when the restriction does not impair the installation, maintenance or use of the antenna. For example, a rule may require that a dish be painted a certain color so long as the painting is not costly and does not interfere with reception. Restrictions that are needed for safety and historic preservation are also allowed. Installation on the common areas is also subject to restriction because these are areas not under the owners' exclusive control. Depending on the community, common areas likely include the roof or external walls of the buildings. Where a common antenna is available, an association may restrict the installation by individuals if the common antenna provides the same desired service at the same cost.

All associations should have rules or a policy regarding the installation of antennas and satellite dishes. A board may also require that owners register the installation of an antenna and have the location approved prior to installation. Since this technology is here to stay, a proactive approach will help to avoid future problems.