



# LEGAL MATTERS

OCTOBER 2002

## *What is Tort Law?*

We have all seen lawyers' ads and commercials asking, "Have you been injured? . . . I can help." Some find those ads and commercials to be offensive. Everyone has heard of an outrageous example of a personal injury lawsuit. The Union Leader recently reported that a person sued his local grocery store because he overheated his Pop Tart and burned himself. However, the news is also filled with reports of lawsuits arising from drunk driving accidents, or extreme examples of medical negligence.

So what exactly qualifies as an "injury" for which you should seek legal advice? This area of law, known as personal injury, or tort law, is actually based on the violation of duties that one person owes to another. For example, we all owe each other duties to operate our vehicles reasonably and in accordance with the law. When an intoxicated person decides to get behind the wheel, that driver has made a choice. If someone is later injured, the driver is at risk for liability, not merely because someone was injured, but because the driver's unreasonable behavior devastated the injured party's life. Since the law cannot order the driver to repair the injured party's life, the only alternative is compensation.

If you have any questions regarding the components of a personal injury case, please contact our office for more information.

## **Words of Welcome**

Please join us in welcoming Joceline D. Champagne and Mia Tanella to the firm. Joceline is a life-long resident of Manchester. Joceline received her bachelor of arts degree in psychology from Providence College in 1994. After college, she served two years with the New Hampshire AmeriCorps Victim Assistance Program. She graduated from the University of Maine School of Law in 1999 and began her legal career as an Assistant County Attorney with the Hillsborough County Attorney's Office. Joceline brings her strong commitment to the local community and her trial skills to the firm.

Mia recently relocated to Bedford from Cincinnati, Ohio with her husband and three children. She received her law degree from Nova University School of Law in Fort Lauderdale, Florida in 1991. Her undergraduate degree is in economics from Smith College. After completing law school, she was admitted to practice law in Florida and worked in general practice law firms with a focus on estate planning. Although she is not currently admitted to practice law in New Hampshire, she brings her vast experience as a Florida attorney to the firm. Mia plans to take the New Hampshire Bar Exam early next year.

## *Case Notes*

A California jury recently awarded 10 million dollars in a "lemon laundering" case. "Lemon laundering" is a term that litigants have applied to the sale of cars that were returned by consumers due to mechanical problems and then resold by dealers without full disclosure of the prior purchaser's complaints.

In the California case the initial purchaser of a Ford Taurus experienced transmission problems. The problems could not be corrected to the consumer's satisfaction. The consumer then traded the car back to the dealer with about 10,000 miles logged. After additional repairs were performed, the dealer placed the car on the lot for sale.

Soon after the car was sold for the second time, the new purchaser experienced transmission problems. The consumer requested the service history, which the dealer did not provide. Eventually, the consumer requested that the dealer take the vehicle back. The dealer refused, offering only a \$1,500.00 owner appreciation certificate valid for the purchase of a new vehicle. The consumer rejected the offer and filed suit against the dealer and manufacturer. At trial, the manufacturer blamed the dealer for failing to disclose the history of the vehicle. The jury found the manufacturer responsible and awarded a 10 million dollar punitive damage verdict. The case is now on appeal.

## *Take a Hike!*

The phrase “due diligence” is a term of art used in many purchase and sale agreements. In commercial contracts, it is customary to dedicate entire sections solely to the definition of “due diligence.” The term describes the activities a real estate buyer may undertake between the time the contract is signed and the transaction is closed. Typical due diligence activities include an inspection of the building improvements, soil studies, percolation tests, title searches, boundaries, environmental studies, water quality tests and radon tests. The scope of due diligence also includes a review of all applicable zoning ordinances and governmental regulations.

Generally, buyers may retreat from the contract if the due diligence activities produce undesired information.

Many buyers are so focused on the buildings and other features of the property, they fail to tour the boundaries of the property they intend to purchase. A hike around the perimeter of the property may yield valuable information that will not be found in a title search or plot plan. It is always wise to request a copy of the deed early in the negotiations. With the deed in hand, find a point identified on the property and walk the boundary. Next, attempt to locate any easements or rights-of-way that may impair the

intended use of the property.

In taking a simple and inexpensive hike, you may find that your future neighbor is not skilled in matters of property maintenance. Perhaps you will find a pit bull terrier in a neighboring backyard! When hiking boundaries, it is not unusual to find encroachments of fences, garages and even swimming pools on the boundary line. Always remember that an empty lot abutting your property may be pretty and peaceful now, but it could become the site of an undesired use in the future.

When purchasing real estate, take a hike. It's easy, inexpensive and informative!

## *Auto Collisions and Insurance: What Does It All Mean?*

The majority of motor vehicle owners purchase insurance coverage. Often times the purchase of insurance coverage is required by the bank making the loan when the vehicle is purchased. Under the policy, the purchaser of an insurance policy and certain family members are referred to as “insureds.”

In an effort to bring meaning to the terms and conditions of auto insurance policies, we offer a summary of the various terms used in a standard auto policy issued in the State of New Hampshire. The standard policy is divided into several distinct areas. The classifications are:

DECLARATION provides a one page summary of the types and amounts of coverage included in your insurance policy.

DAMAGE TO YOUR AUTO provides coverage for damage to the insured's auto due to collision, theft, vandalism, fire, explosion, windstorm and breakage of glass.

LIABILITY provides coverage for bodily injury and property damage caused to others due to the fault of the insured. This coverage also requires the insurance company to hire and pay for a lawyer to defend the insured if an injured party brings a legal action as a result of a collision.

MEDICAL PAYMENTS provides coverage for medical bills and expenses arising from an accident, regardless of fault, to any person considered to be an insured.

UNINSURED MOTORIST provides coverage to an insured if the insured is injured or property is damaged by the operator of an uninsured or underinsured auto. Uninsured motorist coverage is a very important benefit provided by auto insurance policies.

MISCELLANEOUS coverages are available for towing and rental car usage while the insured's vehicle is being repaired.

Unlike many of our neighboring states, New Hampshire does not

require drivers in the State to carry liability insurance coverage. That means in the event of an accident that is not your fault, there is a risk that the other driver will not have insurance. You can address this risk by carrying your own coverage in appropriate amounts.

## *UPCOMING SEMINARS*

- John Cronin will be presenting a National Business Institute seminar entitled “Property Tax Law in New Hampshire” on December 13, 2002.
- John Bisson will be assisting in the certification training for National Apartment Leasing Professionals sponsored by the New Hampshire Multi-Family Housing Association on November 6, 2002.

## *Internal Revenue Service Section 1031 Exchanges*

The real estate market in New Hampshire has seen extraordinary increases in value in the recent past. In some communities, the appreciation is staggering. If you are considering the sale of investment property, you have probably thought about the consequences of capital gains taxes and how payment of the taxes affects the bottom line. Unfortunately, a number of investment property owners are unaware of the benefits available in the Internal Revenue Code.

Code Section 1031 allows a taxpayer to defer recognition of the taxable gains on the sale of an investment property by rolling the gain into a replacement property. When the replacement property is eventually sold, the capital gains tax will be due without any interest or penalty. The taxpayer could invoke the benefits of Section 1031 again and continue to roll the gain into a replacement property. If the taxpayer dies and passes the property to heirs, the value of the property at the date of death will be used to determine the gain when the property is eventually sold. The value at death will include the deferred gain that the taxpayer rolled into the purchase. Thus, if the heirs sell the

property shortly after inheritance, the capital gains tax will be determined based on the higher value at death and the deferred gain may be avoided entirely.

Section 1031 allows a taxpayer to exchange any property held for productive use in a trade or business or for investment purposes with another of equal or greater value. The capital gains tax is deferred indefinitely even if the first property has increased substantially in value since it was purchased. In order to qualify for an exchange, the replacement property must be what the code calls "like kind." Surprisingly, the Internal Revenue Service regulations have interpreted "like kind" very broadly. For example, current regulations would permit undeveloped property held for investment to be exchanged for a parcel improved with a retail shopping mall. In addition, a number of small properties could be exchanged for a single property of significantly greater value. Joint owners can replace commonly held property with individually held investment properties.

To complete a Section 1031 tax deferred exchange, the taxpayer must follow the strict requirements

of the tax code. The sale agreement for the property to be exchanged must indicate that the buyer will cooperate with the Section 1031 exchange by signing an assignment of the purchase and sale agreement to a qualified intermediary. This step is required because the tax code prohibits the taxpayer from having control of the proceeds of the sale of the property at all. Thus, the intermediary is used to hold the proceeds of the first sale until the proceeds can be rolled into the exchange property. The code also requires that the exchange be completed within strict time limits with absolutely no exception. If missed by even an hour, the exchange fails and the taxpayer must recognize the gain from the sale.

Despite the stringent requirements of the tax code, Section 1031 provides a detailed road map for the completion of the tax deferred exchange. The benefits of deferring the taxable gain in this real estate market are likely worth the transactional costs related to the exchange. In any event, if the sale of an investment or income producing property is on the horizon for you, consider the Section 1031 tax deferred exchange.

### *Eminent Domain: Whose Land Is It?*

A recent United States Supreme Court case may impact certain landowners who wish to build, but are being told by their municipality that they will have to wait . . . and wait. In this case, a local government enacted a three-year ban near Lake Tahoe, Nevada so that the regional planning agency would have time to design new plans to control growth. During that time, approximately 400 landowners were prohibited from building their retirement and vacation homes on vacant lots they had purchased. The Court held that the temporary ban on all land development was not considered a "taking" under the U.S. Constitution and, therefore, landowners were not entitled to compensation.

This latest decision enables towns and cities to utilize temporary bans on development if the ban is based on the importance of planning, and if the municipality acts in good faith. The test for whether a ban is temporary focuses on the economic impact on the landowner, as well as the character of the government action. If the ban is temporary under this test, the municipality is excused from paying compensation. This standard is usually very difficult for landowners to overcome.

In the most recent ruling, the Court found that because the temporary ban did not permanently deprive the property of all value, the landowners were not entitled to be paid.