



LEGAL MATTERS

OCTOBER 2003

Who Should Pay?

Litigation is expensive. Often, the legal budget to resolve legitimate disputes makes moving forward with a case impractical. Even if the right to recover damages is completely certain, sound business judgment makes the decision difficult when the amount in dispute is relatively small. Although five or ten thousand dollars is a great deal of money, a complicated legal battle would not make financial sense. However, throwing away that sum of money is an equally disturbing decision.

Our courts follow what is known as the American Rule. This rule requires each side of a dispute to be responsible for the legal fees necessary to resolve the case regardless of who wins. Thus, in our example of a \$5,000 case, the prevailing party may obtain a complete win but be responsible for attorney's fees that are equal to or greater than the total amount of the victory. Although technically a victory, the money would have likely been better spent elsewhere.

This American Rule is subject to a number of exceptions including one which helps address this concern. Our courts routinely enforce contract provisions which shift the burden of a lawsuit to the loser in the litigation. Thus, all agreements should include a term which entitles the prevailing party to recover all costs incurred in the litigation, including attorney's fees. The ability to require the loser to pay makes the business decision to move forward a little easier to make.

Look What's New

Soon, when you call, a few things will be different. Thankfully, the same wonderful people will be answering the telephone and making sure that your concerns are handled as expeditiously as possible. However, we will be changing our name to Cronin & Bisson, P.C. With our new name, we renew our commitment to providing our valued clients with the legal services they expect and deserve.

We are also pleased to announce that Attorney Stephen Males, Jr. has joined the firm. Stephen has been practicing law in New Hampshire since 1978. In addition to being a lawyer, Stephen is a civil engineer and holds a Master's Degree in tax law. He joins us after spending the last ten years as a sole practitioner in Dover where he consulted for Fortune 500 companies, negotiating and implementing international business contracts in Europe and Asia. Prior to his Dover practice, Stephen was a partner in the firm of Cullity, Kelley & McDowell, in Manchester.

Case Notes

The N.H. Supreme Court recently issued an opinion answering the question "who is an employer under N.H. wage laws?" An employee of a "dot com" filed a claim for unpaid wages against his employer corporation and an officer of the corporation individually. The Department of Labor determined both the corporation and the officer were responsible under N.H. wage laws, ordering the payment of wages, liquidated damages and attorney's fees.

On appeal, The Supreme Court reviewed the statute requiring payment of liquidated damages if an employer "willfully and without good cause fails to pay an employee wages" that are due. "Willful" requires a showing of knowledge of the obligation and ability to pay. When the employer has a good faith basis to believe that no wages are due, the employer has not acted willfully.

Regarding the personal liability of the officer, the court reviewed the statute which provides that an officer of a corporation is liable if the officer "knowingly permitted the corporation to violate" the law. The officer in question was responsible for the company's day-to-day operations, including the amount necessary for payroll. Also, the officer directed the corporation to repay his personal loans first. Thus, this corporation acted "willfully" through its officer. The court concluded that both the officer and the corporation had violated the statute, subjecting both to an order to pay the wages, a liquidated sum as a penalty, and the employee's attorney's fees and costs.

The ABC's of LLC's

They seem to be everywhere - on business cards, the sides of trucks, signs and agreements. The three letters "LLC" seem to be overtaking the letters "INC" in business names throughout the state of New Hampshire. Most know that an "LLC" is a limited liability company. But what is a limited liability company?

Limited liability companies are relatively new in New Hampshire. Although a very common form of business, they were first authorized to be formed by the legislature in 1993. In the first four years after, 2,500 New Hampshire businesses were formed as LLC's. Since then the number of new limited liability companies has continued to increase at a dramatic pace. Perhaps the simplest justification is that the limited liability company was designed with the small business owner in mind.

As the name implies, a limited liability company offers its owners "limited liability." This means that as long as the owners follow the requirements of the statute, the owners' business risk is limited to their investment in the company. Thus, the owners are like corporate shareholders whose personal assets are generally not at risk. If a corpo-

ration like K-Mart fails, the shareholders lose the value of their investment. However, the shareholders are not responsible for corporate debts.

Although LLC's are identified as "companies," they are not "corporations." They are unincorporated business associations which have many characteristics of corporations. In addition to limited liability, LLC's, like corporations, can last indefinitely, can own real estate and conduct business in their own names, can have any number of owners, and the owners' interests may be freely sold like shares of stock.

The major difference between an LLC and a corporation is how it is treated by the Internal Revenue Service. Unlike a corporation, an LLC is not separately taxed. Corporate income is taxed in the hands of the corporation and then taxed again when distributed to shareholders as dividends. When an LLC has one owner, the IRS treats the LLC as a sole proprietorship, allowing the owner to report income or loss on the owner's tax return. If there are many owners, then the IRS treats the LLC as a partnership, allowing the members to report income and losses. Thus, an LLC

owner that reports losses may offset the losses against other personal income.

A properly formed and operated LLC offers its owners the best of both worlds. Owners can limit the risk of liability and reap the benefit of favorable partnership or sole proprietor tax treatment. In addition, owners can address specific concerns regarding the operation of the company. The owners can include restrictions on the transfer of ownership interest and provide for continuity of the company in the event of death or divorce. Under the authorizing statute, owners have a number of opportunities to adapt the LLC to meet their particular needs.

All Points Bulletin

The Tax Bills Are Coming!

The final tax bills for 2003 will be issued in the next couple of months. The mailing of the final tax bills triggers the Taxpayer's right to file a municipal abatement. If any Taxpayer believes an abatement of taxes is warranted, a municipal tax abatement application must be filed by March 1, 2004.

Please pay particular attention to your assessment. In Manchester and Nashua, the increase in value of residential properties has caused the equalization ratio to plummet. If your assessment is more than 75% of the market value of the property as of April 1, 2003, an abatement may be warranted.

If you have any questions about your assessment and your abatement rights, please contact us.

Manchester Revaluation Postponed

The City of Manchester was scheduled to undergo a general revaluation effective April 1, 2004. Due to the significant appreciation in residential and multi-family properties, a revaluation will likely result in increases in assessments.

Recently, the City of Manchester requested, and received, permis-

sion from the Department of Revenue Administration to postpone the general revaluation. Reportedly, the tentative date for completion of the revaluation is now April 1, 2006.

Taxpayers with favorable assessments will benefit for a few more years!

Listing Agreement - Protect Your Commission!

The active real estate market has spawned a new generation of commission disputes. Real estate professionals, like other service providers, make their businesses successful by developing relationships. All too often, the scope of the relationship and the expected compensation are not discussed and documented when a property is listed. Instead, a form listing agreement is pulled off the shelf, the blank lines are completed and the parties sign the agreement without reading and understanding the scope of the contract. After signature, the executed form is placed in the file and is not seen again unless there is a commission dispute.

Since the listing agreement will govern any commission dispute, it

is important to modify the standard listing agreement to fit the particular property and the scope of the relationship. In commercial listings, the contract language should provide the Broker with compensation if the property is either leased or sold. Provisions should be made for an appropriate commission structure if the property is leased with an option to purchase. Another important clause that is absent from many listing agreements is one that provides the Broker with the right to recover its legal fees and costs if litigation is required to recover a commission.

In commercial transactions, the written agreement should also provide the Broker with the ability to secure payment. Under the new

Broker Lien Law, the Broker faced with a commission dispute has the opportunity to record a lien against the property. A clause providing this right would be helpful.

If a commission dispute is litigated, the Court will apply a rule of construction requiring that any ambiguities in a contract be interpreted against the drafter. Since the Broker is usually responsible for drafting the listing agreement, this rule of construction could hinder a recovery if the language is ambiguous. If you want to avoid commission disputes in general and the "Broker squeeze" at closing, carefully review your listing agreements to confirm the language regarding the scope of employment and the terms for payment are clear and concise.

The Switch Is On . . .

In 1988 the owner of two apartment buildings in the Town of Henniker applied for subdivision approval to convert the buildings' 14 rental units to condominiums. At the time the application was made, the buildings did not satisfy the current zoning requirements for minimum lot size and frontage. The Planning Board subsequently voted to deny the application based on these deficiencies. The denial was challenged and the case made its way to the New Hampshire Supreme Court in Cohen v. Town of Henniker, 134 N.H. 425 (1991). In a unanimous decision, the Court reversed the denial and thereby clarified the rights of property owners to convert their rental properties to condominiums.

The Henniker apartment buildings enjoyed non-conforming use status since they were in existence when the frontage and lot size ordinances were enacted. The New Hampshire constitution recognizes a property owner's right to continue a non-confirming use. The use, however, cannot be changed or substantially expanded without bringing the property into compliance with current standards. In Cohen, the Court held that conversion to condominiums is not a change in use unless the impact on the land is affected. State law provides that municipalities may require property owners to obtain approval prior to a conversion. However, the approval may not be denied where there is no actual effect on the use of the land.

Aside from local approvals, there are other things to keep in mind as you consider converting to condominiums. All condominiums must be properly registered with the New Hampshire Attorney General's Office Consumer Protection Bureau. You will also need to obtain State subdivision approval through the Department of Environmental Services if the property does not have municipal sewer access. Once the conversion is complete, municipalities will likely increase the assessed value of the property, thereby increasing the overall property tax burden. Prior to the sale of the units, the property owner would be responsible for the increased taxes. No doubt, the conversion process can be complicated and there are many factors to weigh and consider as you decide whether to convert your property. It can, however, be a profitable option for the right property.