

## *Is There a Hole in Your Umbrella?*

Since opening our practice, we have often urged our clients to purchase “umbrella” insurance coverage. An umbrella policy generally stands behind other insurance such as automobile or general liability coverage. After coverage under the first policy is exhausted, the limits of the umbrella coverage are available.

In New Hampshire, there is no compulsory insurance required to operate a motor vehicle. Many drivers elect not to purchase automobile insurance. If they have limited assets, they are “judgment proof.” A common way to protect motorists from an uninsured or underinsured operator is to purchase an umbrella policy. For example, if you are involved in a motor vehicle collision with an uninsured driver, you may recover for injuries caused in the collision from your own insurance policy.

Recently, we have heard that certain insurers are excluding uninsured and underinsured claims from umbrella policies. This new exclusion creates a significant hole in umbrella policies. Currently, a bill is pending that will close the hole and require that all umbrella policies include uninsured and underinsured motorist claims.

Until an appropriate bill is passed, we recommend that you write to your insurance carrier and agent to request written confirmation that your umbrella includes uninsured and underinsured motorist coverage. Do not wait until after an accident to plug the hole in your umbrella coverage.

### ANNOUNCEMENT

We are proud to announce that Attorney John Cronin will be hosting a National Business Institute continuing legal education seminar titled *Legal Aspects of Condominium Development and Homeowners' Associations* on June 26, 2007 at the Radisson Hotel in Manchester, New Hampshire. The program deals with strategies to overcome condominium development and homeowners' association challenges. Contact us for information on how to register!

### *CASE NOTE - Life Safety Kills Property Owners*

In an alarming trend, municipalities are strictly enforcing the provisions of the Life Safety Code against existing buildings. It is well settled in the common law that the majority of new laws cannot be enforced retroactively. From that concept surfaced the term “grandfathering.” For example, many older buildings were built very close to the street. Since those buildings were constructed, municipalities have adopted zoning regulations that establish minimum set back requirements. Due to the concept of grandfathering, the existing buildings are not required to comply with the setback requirements.

In the case of the Life Safety Code, the Supreme Court recently found that new provisions of the code may be applied to existing buildings. The Court reasoned that any law rationally related to a health or safety concern can be applied retroactively. This decision is likely to have a dramatic impact on property owners. You can expect that whenever an owner seeks to sell a property, the buyer will conduct a life safety code inspection. The inspection may include a request from the code enforcement officer of the municipality, typically the Fire Chief, for a compliance letter. This request could trigger an inspection that results in a compliance order. Since most pre-existing buildings do not comply with all provisions of the Life Safety Code, the property owner is likely to be confronted with substantial expense to comply, and a retreating buyer. An informed buyer is unlikely to purchase a property prior to full compliance. This decision will have an immediate impact on property values.

Property owners should anticipate a Life Safety Code inspection and undertake a preemptory analysis of their property to determine what repairs are required for compliance. Buyers should include a condition in their purchase and sale agreement for Life Safety Code compliance. We have handled a number of Life Safety Code cases in the past few years and expect the number of cases to increase dramatically, as this decision will empower local officials to increase compliance efforts.

## ***Lead Paint Legislation***

The N.H. Senate recently conducted public hearings on Senate Bill 176-FN. The bill, proposed by Freshman Senator Betsy DeVries from Manchester, seeks to reduce the level of lead discovered in blood tests of building residents necessary to compel lead paint removal or abatement. Currently, the level of lead required for a positive result is 20 micrograms per deciliter. The proposed legislation seeks to reduce that to 10 micrograms per deciliter. In addition, the proposed legislation provides that the commissioner may

inspect all apartments in a multi-family building if one unit is deemed to have a lead hazard. Reportedly, the new law, if passed, will substantially increase the number of apartments requiring comprehensive lead abatement.

The hearing was well attended and the law was vigorously debated. Many property owners attended and expressed their concerns about the negative impact the legislation will have on owners of multi-family properties. The bill will be reviewed by a legislative committee

to determine the fiscal impacts of the bill. It is expected that the bill will eventually be directed to the House of Representatives for consideration. We encourage any owner of rental property to monitor the legislation, contact their Representatives and attend the hearings at the House of Representatives. If you are willing to get involved in the legislative debate, please contact Attorney John G. Cronin. You will find contact information for your local Representative on-line at [www.gencourt.state.nh.us/house](http://www.gencourt.state.nh.us/house).

## ***Do Not Call***

Recently, one of our clients received a hefty package of documents which threatened a federal lawsuit for a violation of the Telephone Consumer Protection Act (TCPA). The documents threatened action under the TCPA for failure to maintain a proper Do Not Call list. The author of the letter, a self described "consumer rights advocate," accused our client of violations of federal law for failure to place the author's name on a Do Not Call list. Mr. Advocate offered a "generous" reduction on the amount of his claim to avoid the horrible costs of litigation in federal court in the mid-west. He also offered to consult with our client for a charge to avoid further Do Not Call list claims.

Upon review, we discovered that the TCPA authorized the FCC to adopt regulations which have come to be known as the "Do Not Call" regulations. These regulations allow consumers to place their names on Do Not Call lists for any business engaged in telemarketing. The definition of telemarketing under the Act is far broader than commonly understood. If any part of a business involves telephone contact with consumers for the purpose of soliciting business, the TCPA likely applies. Any business engaged in telemarketing must maintain a "Do Not Call" policy which explains the rights of consumers to be placed on the list. A consumer who asks to be on the list has the right to verify compliance with the federal regulations. There are significant penalties for failure to follow the regulations.

For our client, we were not able to verify any contact with Mr. Advocate or locate any request he made to be placed on a Do Not Call list. We did verify that Mr. Advocate is all over the internet informing others how to make money off of federal legislation by baiting unsuspecting businesses into technical violations of federal law. Although we informed Mr. Advocate that he had no claim, we advised our client to implement a Do Not Call list and policy to avoid any other opportunist in the future.

## ***What Time Is It? Time to Start Active and Substantial Development.***

As the market changes, developers are more cautious about starting construction based on speculation that market demand will support the project. Recently, we have encountered situations where developers obtained approvals but did not start construction. In such instances, the developer must weigh the risk of starting construction in a flat or depreciating market against the risk that the approvals for the Project will lapse. According to the current statutory scheme, approvals will lapse if "active and substantial" construction is not started within one year of the date the approvals were granted, unless another time period is stated in the approvals. Active and substantial development is usually defined in the municipal planning regulations. With a growing number of regulations and a lengthy appeal process, you could lose approvals (that took years to obtain) in one year. Whenever you are seeking approvals, we recommend that you request that the one year period be extended as part of the approval process. Otherwise, make certain you attempt to extend the one year time period before it lapses.

## *The Value of Lawyers*

We recently finished a civil jury trial in Hillsborough County. Fortunately, I can report that we achieved a successful result. Although it is often hard to measure success in this business, the jury awarded almost three times as much as the insurance company offered before the trial. Setting aside the stress on our client of the trial process, the statistical analysis comparing the jury verdict with the last settlement offer provides us with an objective measuring stick for grading our performance.

As we prepared for the trial, we found one witness' testimony somewhat funny. Our case involved an accident in an area of a building open to the public. The facility manager did not have an office in the building. In a deposition before trial, I asked how maintenance issues at the property were addressed.

For example, who changes the light bulbs? The witness reported that she needed to check with the facilities manager. I asked "who actually does the work?" The response, "she has an attorney that comes in and checks the bathrooms." A little surprised by the response I said "I think you said an attorney." She replied "I did. I did say that." Needing to be sure, we said "really." The answer was "yes."

So what does this have to do with our value as lawyers? Unfortunately, much of what we do does not lend itself to objective analysis. Did the jury award more money than we were offered before trial? Are the bathrooms clean?

The work that we are privileged to do for our clients oftentimes has no measuring stick. Many times we are asked to help in times of crisis when even the best result is a bad

result. In those instances, we try to limit the consequences. At other times, we are involved in working toward a measurable goal like a purchase or subdivision of real property. When asked at family reunions to describe what I do, I often begin by saying, "we try to help people solve problems."

Although the measurement of ultimate success in a given matter may be hard to define, there are certain questions that we ask you to keep in mind. Did we set reasonable expectations for how your matter would proceed? Did we accurately describe your financial investment? Did we keep the matter on track and moving appropriately? Were we as responsive as you envisioned? Did we keep you informed? Did we bring value? How would you grade our performance? We would like to know.

## *The Trading Game - "In Lieu" Wetlands Mitigation*

In recent years, environmental groups have placed more importance on the preservation of wetlands than protection of property rights. Although most environmental laws have a legitimate public purpose, land owners are now confronted with a system that will spare no expense to preserve a defined wetland that others may call a mosquito breeding ground. Unfortunately, groups promoting environmental regulation are not inclined to purchase property to achieve their goals. Rather, they prefer to satisfy the objectives with onerous regulations. The regulations often shift the burden of preservation to private property owners without compensation. In some cases, private property owners learn that due to ever increasing regulations, their properties have limited development potential.

New Hampshire statutory law requires that any property owner seeking to dredge or fill a wetland, obtain a permit. In order to obtain a permit, a property owner must prove that the project will not adversely impact wetlands and any wetland disturbance that cannot be avoided must be mitigated. In mitigation, the property owner creates new wetlands in other areas to compensate for the wetlands disturbance. Often, the amount of wetlands required to be established is substantially greater than the area disturbed. In connection with the Airport Access Highway, the State of New Hampshire is providing 800 acres of wetlands to mitigate 11.57 acres actually disturbed. The mitigation ratio is an alarming 690 percent.

As of August 18, 2006, a small ray of hope beamed through the legislature for private property owners. The hope comes in the form of a new law known as the Aquatic Resource Compensatory Mitigation Act. The Act provides a new mitigation option for property owners. Instead of providing substitute wetland, the private property owner may elect to pay a fee to obtain a wetlands permit when traditional wetland mitigation is impracticable. The catch is the option is available when the disturbed land area is less than one acre. If you are eligible for "in lieu" mitigation, it will come at a price. The fee is based on the costs that would have been incurred to establish a similar wetland (base price of \$65,000 per acre) adjusted by the actual amount of land disturbed and the price of land in the area where the impact is occurring, plus an administrative fee of five (5%) percent.

Although options are always welcome, some may say we appreciate the effort, but no thanks!

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**Cronin & Bisson, P.C. is a civil practice law firm serving the needs of business, association, and individual clients.**

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