



DES Interprets its Rules

We recently represented a developer seeking to convert an existing multi-family property to condominium ownership. Although no physical change was proposed, DES initially required the conversion to be treated for septic purposes as a subdivision. Thus, DES ordered strict compliance with its subdivision regulations.

A year before the conversion, the developer replaced the existing substandard septic system with a DES-approved system for multi-family use. The minimum lot size required was determined based on residential use allowing the developer to reduce the minimum lot size. Initially, DES took the position that converting a residential multi-family property to a condominium was a commercial use and thus, the minimum lot size reduction was not available. Without the reduction, the property was too small to support the system.

After a hearing before the commissioner, the commissioner interpreted the rules differently. Under the rules, the developer need not comply with the lot size requirement. Rather, the developer need only show that the system meets appropriate design standards. This is done by citing an existing DES approval. If the system was built in accordance with the design, the minimum lot size requirement at the time of the condominium conversion has no bearing on the decision. According to the commissioner, it is "not legally relevant." The State did not appeal. Thus, for future condominium conversions, this decision establishes the appropriate DES review standard.

Time to File Tax Abatement Applications

The deadline for filing municipal tax abatement applications for the 2008 tax year is March 1, 2009. The date is fast approaching and the failure to file an application forfeits any claim for a tax abatement for that year. The purpose of the application is to provide the assessors with notice that you are challenging the assessment. If you are considering filing a municipal application and need assistance, please contact us.

Some Banks Deserve to Fail

In the perennial Christmas classic, *A Christmas Carol*, Ebenezer Scrooge complains before his redemption that the solution to the complaints of the poor and downtrodden is that they had better die "and decrease the surplus population." Mr. Scrooge, as we all know, was the only lender in town - the banker of his day. As a result, he extorted his clients by increasing interest rates, threatening repossession of inventory, and demanding fees and penalties.

As the economy has turned into the publicized financial crisis, modern day lenders should review their classic literature. We recently assisted a NH business owner who is feeling the impact of the recession. Despite the economy, he had an unblemished eleven-year relationship with a local lender. In better times, he had been wined and dined by the bank as a valued customer. When his obligations matured, the bank would routinely rewrite them. Documentation of the agreement was almost an afterthought.

This time things were different. Despite more than adequate security and a history of on-time or early payments, our client was no longer of any value to the bank. He was surplus population. The bank set forth its terms of more collateral, paying points and attorneys' fees, higher interest, personal guaranties, and a shorter term. There was no negotiation or rational thought. Although he was told he was a valued client, the offer was to sign the deal as presented or face workout.

As taxpayers, we are seeing these same lenders line up for their share of 700 billion dollars. No one knows where it is going, how it has been used, or whether it will help. We are told that this will solve the financial crisis and lead to better times. This will help the banks survive. Ebenezer Scrooge saw his future and changed his ways. He discovered that even in difficult times working with his clients served the common good. His clients would remain in business, buy goods and services, employ others, and contribute to the economy as a whole. This one local lender appears to be missing the bigger picture. Perhaps, some banks deserve to fail.

Is It OK to Slander the Landlord?

The owner of a 24-unit apartment building found out the hard way. A tenant-at-will began telling other tenants that the president of the corporate owner of the building had illegally entered her apartment and stolen her belongings. Although the tenant was current with rent, the landlord decided to evict her because of the statements. The landlord served the tenant with a notice to quit asserting the basis for the eviction as “other good cause,” which is authorized under the NH landlord and tenant statute.

At the District Court hearing, the tenant moved to dismiss. She argued that a landlord cannot evict a tenant for “other good cause” without first giving written notice stating future similar acts would constitute grounds for eviction. Thus, the landlord was required to send a letter stating “if you slander me in the future, that will be grounds for eviction.” Since the landlord admitted that no such letter was sent, the District Court dismissed the case.

On appeal to our Supreme Court, the landlord argued that the advance written notice requirement should not apply on the facts. The landlord argued that the point of the advance notice requirement was to give the tenant an opportunity to fix the problem. Since the landlord’s reputation had already been damaged, no purpose is served by requiring further notice.

The Supreme Court disagreed and concluded that the statute was plain and unambiguous. Advance written notice is required and whether the tenant could have corrected her behavior does not matter. Without that first written notice, the eviction could not proceed.

The landlord next argued such a reading of the statute was absurd. Under the statute, as the landlord read it, nothing would preclude sending both the advance notice and the eviction notice at the same time. The Supreme Court rejected that approach as well. According to the court, “a written notice warning the

tenant against certain actions serves no purpose if the landlord could immediately evict based solely upon those past actions.” Thus, the landlord must give the tenant an opportunity to correct behavior. On these facts, that means all 24 tenants in the property have a free pass to slander the landlord. Only if the landlord sends notice and the tenant continues the behavior can the action justify eviction.

The Supreme Court noted that certain conduct set forth in the statute does not require advance written notice. Substantial damage to the property, failure to comply with a material term of the lease, and behavior that adversely affects the health and safety of other tenants or the landlord fall on that list. However, each requires specific proof at trial. If the conduct does not fit squarely within the statute and is “other good cause,” advance written notice is required. Thus, based on this decision, it is acceptable to slander the landlord - at least once.

A “Business Court”

As many may know, the court system, particularly in New Hampshire, is not the most dynamic organization. The system of District Courts, Superior Courts and one Supreme Court has been the norm for decades. A few years ago discussions about creating an intermediate appeals court lead to the implementation of a new system at the Supreme Court to address all appeals. However, the process and the impact on the general public were not significant in how disputes are addressed and resolved.

In the summer of 2008, before the full impact of the current economy was felt, Governor Lynch signed a bill to create a specialized business docket in the Superior Court. Although structurally the law is similar to the scheduling changes made at the Supreme Court in recent years, the creation of this docket has the potential of creating marked change in how business disputes are addressed in our New Hampshire courts. Anyone who has been through a lawsuit can likely share a story or two about a particular decision. Win or lose, sometimes a decision appears to stretch reason and participants are left asking “how did the judge make that decision?”

Judges in New Hampshire are generally ethical, intelligent, and hard-working women and men. However, they have diverse backgrounds and experience. Unfortunately, a judge being asked to decide whether a subcontractor is entitled to a mechanic’s lien or how the assets of a limited liability company should be split between owners may not have significant experience on which to base a decision. Thus, the judge is left to “get up to speed” with the assistance of an inexperienced law clerk under significant time pressure. Despite the best intentions, decisions sometimes leave us all scratching our heads.

The idea of the business court is to appoint a judge with general experience in business matters. Presumably, the judge would come from the ranks of lawyers who have built their practice in business counseling and advocacy. Although the involvement of the courts in business disputes should remain a choice of last resort, a specialized court should increase the efficiency of the dispute resolution process. With the right judge at the helm, there may also be less head scratching. With the budget issues facing New Hampshire, the selection of the judge may be delayed. However, it appears that the business docket remains on track as a priority of our courts.

Your Money in Our Trust

How safe is your money held by your attorney? Many may have heard the term IOLTA trust account. The acronym stands for "Interest on Lawyer's Trust Accounts." These accounts are generally designed for attorneys to hold money for the benefit of others. A retainer paid, but not yet earned or funds for the closing of a real estate transaction are common examples. Funds held in these accounts are subject to strict legal and ethical guidelines. As attorneys, we are fiduciaries because we are holding other people's funds. IOLTA accounts earn interest. However, the interest earned does not flow back to the account holder. Rather, the interest earned on all attorney trust accounts is pooled and is used for legal related charitable purposes.

With the failure of Indy Mac Bank, concerns at Citigroup, Bank of America and others, there have been increased concerns raised

about the safety of these funds in various institutions. The total combined balance in our firm trust account is rarely below the FDIC coverage limits on interest-bearing deposit accounts. In October, as the economic situation began to materialize, the insured limit was temporarily raised from \$100,000 to \$250,000. However, concerns remained about how the increased limit impacted the security of the funds?

Each client with funds in a trust account is insured up to the maximum coverage. As long as each client's funds are below the limit of coverage, the FDIC would insure the entire account if the bank were to fail. However, if the client had additional funds in the same bank, the client's total coverage could not exceed the maximum coverage. If a client had \$50,000 in the attorney trust account and \$300,000 in other deposits at the same institution, the

FDIC would insure no more than \$250,000. Obviously, this policy even in light of the higher limits, would be difficult for individual depositors to monitor. Thus, in November, the FDIC announced that it would include IOLTA accounts in a temporary program providing unlimited coverage for depositors at least through December 31, 2009. Although we all hope that our New Hampshire banks are secure, it was not that long ago that a number of them failed. It's your money, in our trust.

Property Rights Advocate

Our friend, J. Albert Lynch, has been selected an Honorary Fellow of the New Hampshire Bar Foundation for his ongoing support and advocacy for the protection of property rights.

Congratulations!

Condominium Association Receivables

Managing condominium and homeowner association receivables appears to be an increasing challenge. For some unknown reason, some association members appear to view the monthly assessment as discretionary. To this select few, association fees do not bear the same import as the mortgage, utilities, cell phone and internet bills, or car payments. Consequently, members who may have never missed a boat payment are routinely late with association assessments. When association receivables mount, the pressure on the budget can be overwhelming. With smaller associations, one problem owner can seriously impact proper management of the property.

Proper management of the collection of association fees is critical. Successful collection requires a plan, perseverance and potentially legal process. Unfortunately, the person charged with monitoring collection activity is often stretched thin and focused on other issues at the property. However, without the money to fund the property's needs, the association will soon be in crisis.

Especially in difficult times, a pre-existing collection plan is crucial to the success of the association. We have all either faced difficult times or have known others who have. Every story can be compelling. Unexpected unemployment, serious illness, and divorce can all impact the ability to manage finances and pay assessments. When one chooses to own property in an association, every other owner has a right to rely on prompt payment regardless of personal circumstance. With a detailed collection plan, collection activity becomes automatic regardless of the individual story. When an account reaches a certain level of delinquency, the plan should set forth the collection process which could include collection letters, credit agency reporting, liens, collection of rents, suspension of common area privileges and services, legal action, and sheriffs' sales. A planned and thoughtful approach avoids delay and insures equal and fair treatment of all members.

Once the plan is in place, perseverance is required. No one wants to collect money from neighbors and friends. However, the association, acting through its Board of Directors, owes all owners the duty to properly manage the property. This can only be done with adequate resources. By following through with the plan, the association can educate its members that the monthly assessment is no longer optional.



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Cronin & Bisson, P.C. is committed to crafting creative, cost-effective solutions to satisfy our clients' individual needs.

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