NORMAN, HANSON & DETROY, LLC

newsletter

Current developments in Maine law
Summer 2003
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Accidents with multiple offenders –

The relationship between underinsured motorist and liability insurers

BY JAMES D. POLIQUIN

In accidents with multiple tortfeasors, one uninsured or underinsured and another fully insured, the issue arises as to who must step to the plate to satisfy the plaintiff's claim. The dispute between underinsured motorist and liability insurers on this issue arises most often when the claimant's injuries are not greater than the combined coverages. If the injuries are greater than all available coverages, the issue of allocation of responsibility is moot. Should the plaintiff's injuries be fully satisfied from either the UIM coverage or the liability coverage available from the fully insured tortfeasor, the fair allocation of financial responsibility, however, is essential to a satisfactory resolution.

The Maine Supreme Judicial Court, in its recent decision ***Peerless v. Progressive***, 2003 ME 66 (May 5, 2003), held that the final allocation of responsibility falls solely upon the liability insurer of a tortfeasor and not on the claimant's UIM insurer. In this case, everyone agreed the claimant's damages were $70,000, that one tortfeasor was uninsured and another tortfeasor had $100,000 in liability coverage from Progressive. Progressive and Peerless, the UIM insurer, also agreed that the uninsured tortfeasor was 75% responsible and the insured tortfeasor 25% responsible. Peerless argued that the entire $70,000 owed to the plaintiff should be paid by Progressive, as the liability insurer of a jointly and severally liable tortfeasor, and that Peerless should pay nothing. Progressive argued that Peerless should pay the proportion of loss consistent with percentage fault of the uninsured tortfeasor. The Law Court ruled that Progressive owed the entire sum, and was not entitled to have its exposure as a jointly and severally liable tortfeasor reduced by available UIM coverage.

JAMES D. POLIQUIN

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Significant issues exist as to how this decision interacts with the decision eleven years earlier in *Tibbetts v. Maine Bonding and Casualty Co.*, 618 A.2d 731 (Me. 1992). In Tibbetts, the Law Court held that a UIM insurer was not entitled to reduce its limits by the amount paid to a claimant from a fully insured tortfeasor, and that Section 2902(4) of Title 24-A giving UIM insurers subrogation rights did not apply to rights against other fully insured tortfeasors. In contrast, the Court in *Peerless v. Progressive*, held that section 2902(4) was unambiguous and provided Peerless with rights against other responsible parties. The decision in *Peerless* does not fully explain these apparent contradictory statements about the scope of Section 2902(4).

The major distinguishing feature between the decisions in *Tibbetts* and *Peerless* is that in Tibbetts the claimant could not be fully compensated by the payment from the liability insurer, whereas in *Peerless* the liability coverage was more than enough to fully compensate the claimant. Although this dis-

tinction may be grounded in sound public policy, nothing in Section 2902(4) suggests that application of that section hinges on that fact. For this reason, there is now a tension between the holdings in *Tibbetts* and *Peerless*.

Uninsured motorist insurers should not interpret the Peerless decision as granting UIM insurers the right to withhold all payment until a claimant pursues other individuals the UIM insurer believes may be tortfeasors. If a claimant is injured by someone who is clearly an uninsured tortfeasor, the UIM insurer's obligation to respond to a claim is not suspended until the claimant has sued, and either won or lost against other tortfeasors.

Typically, at the time a demand is made on a UIM insurer, it is not known whether other individuals are, in fact, tortfeasors, as there has been no determination of those issues. The UIM insurer's suspicion or belief that others may be responsible is generally not enough to withhold payment. However, if the UIM insurer pays a claimant because of a clear uninsured tortfeasor exists, the *Peerless* decision will support the UIM insurer's assertion claims against responsible parties other than the uninsured tortfeasor. □

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is published quarterly to inform you of recent developments in the law, particularly Maine law, and to address current topics of discussion in your daily business. These articles should not be construed as legal advice for a specific case. If you wish a copy of a court decision or statute mentioned in this issue, please e-mail, write or telephone us.

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Claim for plaintiff's medical bills limited to Medicare's actual payment

BY AARON K. BALTES

Medicare, the federal program that provides health insurance to the elderly and to low-income individuals, typically pays health care providers much less than their initial charges. Under federal law, doctors and others that accept payments from Medicare must write off the unpaid portion of their charges, and the patient has no legal obligation to pay the written-off charges.

At trial, regarding the damages a plaintiff may recover for medical expenses, Maine courts provide the jury a standard instruction:

The *reasonable value, not exceeding actual cost to the plaintiff*, of examination and care by doctors and other medical personnel, hospital care and services, medicine and other medical supplies shown by the evidence to have been reasonably required and actually used in treatment of the plaintiff, plus a sum to compensate the plaintiff for any medical care, medicines and medical supplies which you find are reasonably certain to be required for future treatment of the plaintiff caused by the defendant's negligence. *(emphasis added).*

Judge David Cohen of the U.S. District Court for the District of Maine recently ruled in ***Allaire v. Donnelly***, 02-162-P-H, a garden variety motor vehicle accident case, that a plaintiff was limited to the amount that Medicare actually paid to satisfy his medical bills. The plaintiff claimed the amount his health care providers charged, $75,879.21, as damages. Judge Cohen granted the defendant's pretrial motion to limit the amount of the plaintiff's claimed damages to the money Medicare actually paid, $36,661.49. The court order proved a catalyst for the subsequent settlement that was significantly less than the amount of the initial medical charges.

Judge Cohen followed the rationale of a number of other courts that have prohibited plaintiffs from presenting as evidence the initially-billed charged from medical providers, where those charges have been satisfied by Medicare or Medicaid. These courts concluded that measuring a plaintiff's cost recovery by the amounts Medicare or Medicaid paid is consistent with the tort system's underlying purpose of "compensating the plaintiff for injury suffered, i.e., restoring him as nearly as possible to his former position," as opposed to punishing the defendant. *Suhor v. Lagasse*, 770 So.2d 422 (La. Ct. App. 2000) *Hanif v. Housing Authority of Yolo Cty.*, 200 Cal. App. 3d. 635 (1988).

The Maine Supreme Judicial Court has not previously considered the issue of measuring a plaintiff's recovery for medical expenses paid by Medicare. However, its decision in *Werner v. Lane*, 393A.2d 1329 (Me. 1978), the Court did adopt the collateral source rule, allowing a plaintiff who had been provided free medical services to recover the " reasonable value" of those services. In *Allaire*, the defense successfully argued that the Werner decision was distinguishable, and that the "reasonable value" of the plaintiff's medical bills was the amount paid by Medicare.

Whether the Law Court will agree remains an open question. Also left unanswered by the Allaire case is whether a plaintiff may recover monies written off pursuant to payments by private health insurers. Until the Law Court answers these questions, however evidence at trial regarding medical expenses should reflect monies actually paid, rather than the initial charges of health care providers. □

Superior Court decision expands defense of waiver of subrogation

By David P. Very

In a recent Superior Court decision, Justice Paul Fritzsche held that a waiver of subrogation clause in the contract of the general contractor applies to a subrogation action against the materials supplier the general contractor used during the project.

On August 31, 2000, a catastrophic fire occurred, completing destroying the First Parish Congregational Church in Saco, Maine. The careless smoking of an employee of Knowles Industrial Services allegedly caused the fire. Knowles was using a paint stripper manufactured by Nutec Industrial Chemical, Inc. to remove 200 years of paint from the Church. The Church, in its suit against Knowles, Nutec, and others, alleged total damages exceeding $16,000,000. Four different property insurers also brought suit against Knowles for negligence, and against Nutec, asserting the theories of strict liability, negligence, breach of warranty, and claims under the Federal Hazardous Substances Act. The contract between Knowles and the Church contained a provision that stated, "The owner and contractor waive all rights against each other, separate contractors, and all other subcontractors for damages caused by fire or other perils to the extent covered by builders' risk or any other property insurance…" Both Knowles and Nutec filed motions for summary judgment on all claims covered by property insurance.

In ***First Parish Congregational Church, U.C.C. v. Knowles Industrial Services Corp. et al.***, Docket No. CV-01-289, May 21, 2003, the Superior Court first granted summary judgment to Knowles. The Court rejected the property insurers' arguments that Knowles made fraudulent and material misrepresentations in inducing the Church to enter into a contract, that the policy allowing subrogation rights to be waived should not be enforced when one is dealing with a historic landmark, and that waivers of subrogation are not applicable for claims of willful and wanton misconduct or breach of warranty. The Court held that two entities with equal power and sophistication freely entered into the contract, and there was no compelling reason not to enforce it.

The Court then addressed the issue of whether Nutec, the manufacturer of the paint stripper that allegedly ignited causing the fire that destroyed the Church, could be fairly characterized as a subcontractor when it exclusively or primarily provided a product, rather than the type of services typically provided by a contractor or subcontractor from a building trade. The property carriers argued that the waiver of subrogation clause did not state that the owner waived rights against a "material supplier" or "supplier." Both those terms were contained in other provisions in the contract but did not appear in the waiver of subrogation clause. The Superior Court held that as both labor and materials are necessary for a contractor or subcontractor to perform the required work, there is no reason to distinguish between a contractor who provides only materials, and one who applies labor or labor and materials.

The Court also rejected the property insurers' argument that the waiver of subrogation clause did not apply to claims for implied warranty or strict liability claims, stating that waiver of subrogation clauses are to be liberally construed.

Finally, the Superior Court held that, since Knowles is to receive the benefit of the waiver of subrogation provision, that benefit would be illusory if Nutec did not receive the same benefit and could recover from Knowles on crossclaims for the amounts that Knowles could not be required to pay directly.

Therefore, the Superior Court granted partial summary judgment to both Knowles and Nutec on all damages covered by any property insurance. The Court also granted the same judgment to the retailer and distributor of the paint stripper.

Norman, Hanson & DeTroy's David Very and Lance Walker represented Nutec in this suit. □

New Justice appointed to U.S. Federal District Court in Maine

Maine lawyer John A. Woodcock, Jr. has been appointed a judge in the Federal District Court for the District of Maine, based in Bangor, and was sworn in on June 27, 2003. Judge Woodcock is a graduate of Bowdoin College and the University of Maine School of Law. He holds a graduate degree from the London School of Economics and was a member of a Bangor law firm.

Policy holder convicted of arson may sue insurer

By Lance Walker

Merle Crossman purchased a standard homeowner's policy in 1999 from Middlesex Mutual Assurance Company that included coverage for fire damage. The policy excluded coverage for intentional loss from an act committed by the insured with intent to cause the loss. Less than a month after Crossman purchased the policy, a fire broke out at his property. After the insured filed a claim under the policy, the State Fire Marshall's office concluded that the fire was intentionally set. Middlesex denied the claim, and Crossman was indicted by a grand jury in May, 2002. He pled *nolo contendere* during that proceeding. At trial, the court accepted that plea, sentencing the insured to six years, with all but 18 months suspended.

Prior to Crossman's sentencing, he filed suit against Middlesex for breach of contract for its refusal to pay his claim. Crossman contended that a party to a civil suit may not use a *nolo* plea as an admission against an accused (in this case the insurer), therefore a *nolo* plea does not create an estoppel. The insurer moved for summary judgment, arguing that plaintiff's conviction for arson collaterally estopped him from litigating the issue of whether he intentionally caused the fire at his insured property.

In ***Crossman v. Middlesex Assurance Co.***, C.V 01-67, March 17, 2003, Superior Court Justice Andrew Mead denied the insurer's motion for summary judgment. However, it appears that the Court was generally inclined to agree with the argument for collateral estoppel. The Court observed that, although the purpose of a *nolo contendere* plea is to allow the accused to resolve the criminal matter without admitting guilt, the Court is not permitted to accept such a plea unless there is a factual basis for the charge. Courts apply nonmutual collateral estoppel "on a case by case basis" if it serves the ends of justice.

Justice Mead observed that although the Law Court has held that a *nolo* plea cannot be used as an admission against an accused in a civil suit, Middlesex was not attempting to prevent Crossman from defending himself, since he was the civil plaintiff.

Crossman had had a full and fair opportunity to litigate the matter during the criminal proceedings.

LANCE WALKER

The Superior Court concluded that summary judgment may be appropriate because, as the Law Court has not previously applied collateral estoppel to *nolo* pleas, the more prudent route would be to allow the matter to proceed to trial. □

Workers' compensation – Law Court decision

By Stephen W. Moriarty

Discrimination claims

Employers are often reluctant to take employment action (such as discipline and termination) against workers' compensation claimants for fear of triggering a possible discrimination claim. Section 353 broadly prohibits any type of discrimination against an employee for having testified or for having asserted any claim under the Act. In the past, the Law Court had liberally construed the term "claim" to include the assertion of any right implicit in the structure of the law, including the right to recover from an injury. *Lindsay v. Great Northern Paper Company*, 532 A.2d 151 (Me. 1987). However, recently the Court underscored the limits of the anti-discrimination section in circumstances in which employees with occupational injuries are treated equally with individuals with non-occupational restrictions.

In ***Laskey v. Sappi Fine Paper***, 2003 ME 48, 820 A.2d 579, the employee injured his back in 1984 and had been placed on permanent limitations. For many years his restrictions were accommodated without adverse impact on the employer. In 2001, the employer reduced its work force, and advised its remaining employees that it would no longer accommodate any individual with restrictions, regardless of whether the restrictions were occupational or non-occupational. As a result, the claimant was terminated.

The parties filed Petitions for Review and the employee was awarded ongoing benefits for 77% partial. The employee also filed a Petition to Remedy Discrimination, on the grounds that his termination arose from limitations caused by an occupational injury. The presiding Hearing Officer denied the petition and the employee appealed.

The critical issue, as phrased by the Law Court, was whether an act of discrimination takes place when an employer terminates an individual who is subject to work restrictions as part of an overall reduction in force, when the reduction makes no distinction regarding the source of the limitations. In affirming the decision of the Board, the Court found that the employee had not been terminated for having asserted a right under the Act. The Court rejected the argument that termination on the basis of occupational limitations was discriminatory, and observed that such an interpretation "would make any employment action due to a work restriction arising from a work-related injury a prohibited discrimination." The Court affirmed the Board's conclusion that the termination resulted from a neutral policy decision to terminate all individuals working with accommodations. The Court implied, however, that the employee might have had a remedy under the Maine Human Rights Act.

In summary, the *Laskey* decision reduces the potential for workers' compensation discrimination claims in cases in which adverse employer action is unrelated to the assertion of a claim, and applies to all workers with occupational and non-occupational restrictions. □

Two recent decisions from the Law Court

By David P. Very

What constitutes an "obvious" dangerous condition?

In 1995, William Grover, a sales engineer, was visiting the Boise Cascade's Rumford paper mill. One of his tasks was to determine the cause of shadow markings that were appearing on the paper. He entered the basement, which was not brightly lit, using a flashlight. While keeping his eye on the vacuum line of a paper machine, he stepped backward up a set of steps onto a small platform. The sides of the platform were guarded with safety chains that could be latched and unlatched. As he ascended the steps, Grover saw that the chain on his right was attached and assumed it was attached on his left. While stepping up onto the platform, he attempted to step around a protruding valve stem, tripped, and fell to his left. The safety chain was not latched on that side, and he fell off the platform and was injured.

Grover sued Boise Cascade and, after extensive discovery, Boise Cascade filed a motion for summary judgment arguing that the dangerous condition that caused Grover's injury was "obvious" as a matter of law. The Superior Court granted Boise's motion for summary judgment and the plaintiff appealed.

In the appeal of ***Grover v. Boise Cascade Corp.***, 2003 ME 45 (April 2, 2003), the Law Court observed that Section 343A(1) of the Restatement of Torts provides, "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." The Court noted that Boise had argued that the dangerous condition of the paper machine was both known to Grover and obvious. "In order for the rule of Section 343A to apply, the Court declared, "it is the dangerous condition that caused the plaintiff's injury that must be known or obvious, and the condition that caused Grover's injury was the unlatched safety chain that allowed him to fall to the floor."

If "both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment," stated the Court, "a dangerous condition is 'obvious.'" The Court held that taking the facts and their reasonable inferences in the light most favorable to the plaintiff, a genuine issue of material fact existed as to whether the unlatched safety chain would have been apparent to a reasonable person in Grover's position and whether, if it were apparent, such a person would have recognized the risk of injury it posed. The Court noted that while a jury could rationally conclude that the danger was obvious, on the record before it, it could not say that it would be compelled as a matter of law to do so.

Boise also argued that the facts demonstrated an absence of proximate cause, as they show that the plaintiff's conduct was the only cause of his injury. The Court declared, however, that from the facts viewed most favorably to the plaintiff, a jury could find that Boise was negligent in not discovering or remedying the unlatched chain, and Boise's conduct was a substantial factor in causing the plaintiff's injury.

The Law Court vacated the summary judgment and remanded the case to the Superior Court for further proceedings.

DAVID P. VERY

Negligent supervision and employer's vicarious liability

On December 5, 1998, Frederick Linfield was operating a tractor trailer on Route 9 headed to New Brunswick from Bangor. The Mahar family sedan approached Linfield's flat bed truck and drove behind him for several miles. Linfield turned on his rear-facing flood lights inducing the Mahars to flash their headlights to show Linfield that their high beams were not on. This sequence of events repeated periodically until Linfield suddenly stopped his truck to block the road. He exited the truck with a three to four foot long pipe and threatened the Mahars. The driver of another truck began yelling at Linfield, thereby allowing the Mahars to continue traveling on Route 9. Linfield caught up to the Mahars and followed them closely for approximately 50 miles until a local police officer pulled Linfield over.

As a result of his conduct, Linfield was convicted of three misdemeanors: disorderly conduct, criminal threatening, and driving to endanger. The Mahars then sued Linfield and his alleged employer, StoneWood Transport, a trucking company, seeking damages against StoneWood for the negligent supervi-

sion of an employee/independent contractor, and vicarious liability for Linfield's actions. The Superior Court granted summary judgment in favor of StoneWood on all claims and the Mahars appealed.

In ***Mahar v. StoneWood Transport***, 2003 ME 63 (May 1, 2003), the Law Court first stated that it has not yet recognized the independent tort of negligent supervision of an employee or independent contractor. Without ruling whether it would adopt such a tort, the Court stated that the facts of this case did not support such a cause of action. The Mahars had argued that StoneWood had notice of Linfield's propensity for erratic behavior based on prior complaints about his dangerous driving. StoneWood had placed him on probation for six months as a result of these complaints.

The Law Court observed that Linfield's prior actions did not involve acts of violence and would not support a finding that StoneWood should have foreseen his assault on the Mahars. Although Linfield misused the vehicle to threateningly follow the Mahars for 50 miles, the Court stated that the Mahars' cause of action against StoneWood was based on the totality of Linfield's conduct to include his assault. Since the Mahars made no attempt to separate the claim of threatening pursuit from the claim of the pipe assault preceding it, the Court held that the Superior Court correctly entered summary judgment for StoneWood on the claim of negligent supervision.

The Mahars next argued that the Superior Court erred in finding that Linfield was an independent contractor. The Law Court agreed that the lower court had erred in holding that Linfield was an independent contractor as a matter of law. The Court noted StoneWood's ability to continually assign work to Linfield; approve, reject or terminate any assistant Linfield hired; require Linfield to check in on a regular basis; require Linfield to follow their rules and regulations; require Linfield to attend safety seminars; and place Linfield on probation. Linfield was also operating equipment partially owned by StoneWood.

The Law Court, however, held that the Superior Court's error was harmless as Linfield was acting outside the scope of his employment when assaulting the Mahars. A master may reasonably anticipate a servant's minor crimes in the carrying out of the master's business, the Court stated, but serious criminal activity is unexpected and different from what is expected from servants in a lawful occupation. The Court held that an assault against and threatening of a family is serious criminal conduct that is unanticipated, and is very different from conduct that StoneWood would reasonably expect from Linfield. Moreover, the Court found that Linfield's motive for assaulting and harassing the Mahars was unrelated to any interest of StoneWood. The Court further held that

the Mahars did not demonstrate that Linfield's tortious conduct was aided by the existence of his relationship with StoneWood.

Accordingly, the Law Court affirmed the grant of summary judgment and upheld the award of costs to StoneWood.

Justices Alexander and Levy dissented on the issue of whether Linfield acted outside the scope of his employment while driving StoneWood's truck. The dissenters stated that negligent and improper acts do occur in the course of driving within the scope of a professional driver's employment. The majority had acknowledged that acts relating to work and done in the workplace during working hours, even if done negligently, are acts within the scope of employment. The majority also acknowledged that an employer may reasonably anticipate, and thus be civilly liable for, an employee's minor crimes committed in carrying out the employer's business. The dissenters argued that Linfield's 50 mile pursuit and criminal threatening fell within the category of minor crimes, crimes the employer could reasonably anticipate happening in the course of employment.

The dissent also took issue with the majority's opinion that summary judgment would be appropriate even if liability were established for some of Linfield's activities. The Mahars had failed to distinguish the damages from Linfield's activities for which there might be liability, that of following too closely for 50 miles, from the damages arising from activities for which there is no liability, his criminal assault. The dissenters asserted, "The Court appears to be saying that an employee's committing a first tortious act outside the scope of employment renders the employer immune from liability for subsequent tortious acts that may be within the scope of employment, unless the plaintiff assumes the burden of differentiating the damages attributable to those subsequent tortious acts."

The Court's position, the dissent argued, that the plaintiff must differentiate damages for events for which there is liability, from damages for events for which there is no liability, or forfeit the entire claim, changes the law and is a significant departure from the law stated in cases such as *Lovely v. Allstate Insurance Company*, 658 A.2d 1091 (ME. 1995). □

Briefs/Kudos

PETER DETROY in May took a brief hiatus from law, and completed an extraordinary trip to India, first meeting his son in New Delhi. They traveled north, then hiked through the foothills of the Himalaya Mountains, spending time in village of McCleod Ganj, the large exile community of people from Tibet.

DAVE VERY will address an in-depth seminar, Insurance Law in Maine, on July 25 in Portland at the Holiday Inn. The seminar will cover recent developments in bodily injury and property damage cases, and David will focus on the recovery issues in the incidents of uninsured and underinsured motorist coverage.

SERVING THE NATION – **DAVID NORMAN'S** son, Michael, a member of the United States Marines, sailed home safely last month from Iraq. **PATTE O'DONNELL's** son, Ryan, is a Sergeant in the U.S. Army serving as a tank gunner in Western Iraq near the Syrian border.

A new Marjerison has arrived! **TOM MARJERISON** and his family were delighted to welcome a blithe daughter, Amelia, born this spring at a generous 9 lb.13oz. Amelia joins her toddler brother, Sam.

The 10K Peoples Beach to Beacon race will be held Saturday, August 2, beginning in Cape Elizabeth and coursing along the waters of the Maine Coast. Founded by Olympic Gold Medalist Joan Benoit Samuelson, runners from around the world and almost every state will compete. The 2003 beneficiary of the race proceeds will be the Seeds of Peace, a Maine organization promoting tolerance and understanding among youth from the world's troubled regions.

Ten fleet-foot runners from NH&D will compete, entering as a Corporate Challenge: **AARON BALTES, BETH BRANSON, PAUL DRISCOLL, DAN EDWARDS, TED KIRCHNER, BILL LACASSE, TOM MARJERISON, STEVE MORIARTY, ROD ROVZAR,** and **CAROLINE WORMELL.**

ANNE CARNEY and **BOB BOWER** of the NH&D Employment Group held an informative seminar in June for Human Relations and Occupational Health professionals within the MaineHealth and Synernet systems. The program focused upon the "direct threat" standard of the Americans with Disabilities Act, as it applies to new hires and employees transferring within an organization.

Norman Hanson & DeTroy recently sponsored high school students from Carrabec Valley High School in northern Maine in an evening of competition, World Quest, sponsored by the World Affairs Council of Maine. Four attorneys joined the students to make up a team. Each team was challenged on its knowledge of international events, politics, cultures and religions. Lending their experience and knowledge to team students in the event were **AARON BALTES, DORIS V.R. CHAMPAGNE, ADRIAN KENDALL**, and **LANCE WALKER**.

Adrian Kendall also took part in a recent panel discussion at Maine's Greely High School, Cumberland on the value of foreign languages in students' careers. Panelists included Catherine Lee, President of Lee International, and Richard Coyle, President of Maine International Trade Center.

Adrian continued his focus on education by speaking to students from across the state at a Blaine House awards ceremony for high school students. Featured speakers were Governor Baldacci and Deputy Consul General Gunter Wehrmann of the German Consulate in Boston. □

FEDERAL DISTRICT COURT OF MAINE WILL MAKE CASE FILES AVAILABLE ON INTERNET

The U.S. District Court for the District of Maine is in the process of making case files available electronically, which will allow attorneys to file and retrieve documents from any location over the Internet. The Electronic Case Files service will provide 24-hour desktop access to case files, and immediate email notification to counsel of case activity. The Court intends to go "live" with ECF sometime this fall, and will be offering extensive training classes, both in the courthouses and off-site.

The Clerk's Office is scanning the pleadings in all cases commenced in 2003 for inclusion into the ECF database. Congress, in anticipation of the electronic availability of case file information, has enacted the E-Government Act of 2002, and the United States Judicial Conference has adopted a privacy policy concerning Electronic Case Files. The Judicial Conference policy requires that, unless otherwise ordered by the

Court, the filing attorney shall modify certain personal data identifiers in pleadings and other papers as follows:

(1) Minors' names: Use of the minors' initials only;

(2) Social security numbers: Use of the last four numbers only;

(3) Dates of birth: Use of the year of birth only;

(4) Financial account numbers: Identify the type of account and the financial institution, but use only the last four numbers of the account number.

The E-Government Act provides that a party wishing to file a document containing the personal data identifiers specified above may file an unredacted document—one not made available for electronic filing—under seal. This document shall be retained by the court as part of the record.

In addition, counsel are to use caution when filing documents that contain the following:

(1) Personal identifying numbers, such as driver's license number;

(2) Medical records, treatment and diagnosis;

(3) Employment history;

(4) Individual financial information; and

(5) Proprietary or trade secret information.

Attorneys are being urged to share this notice with all clients so informed decision about the inclusion of certain materials may be made. □

Aaron Baltes

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Return service requested

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