

Business Update

The Legal Newsletter For Maine's Small Business Community

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The Health Care Crisis and the Law

By David Perkins, Esq.

In the next few years, we will all be hearing a great deal about bankruptcy and the health care industry. Nursing homes, hospitals, home health agencies, and health maintenance organizations/plans ("HMOs") are all suffering a governmental reimbursement system that will drive many of these organizations to insolvency.

As health care costs have grown, the federal government has responded by restricting reimbursement through Medicare and Medicaid. The Balanced Budget Act of 1997 requires a payment system that applies a fixed, per diem payment covering all costs. The system previously used a reasonable cost system that allowed much greater flexibility to the health care provider.

In Maine, the Department of Human Services does not allow those costs to be increased annually to reflect inflation and other cost increases (like increases in the cost of employee health care insurance).

While the reimbursement of costs has been restricted, the Government has also become much more aggressive with recovering overpayment. The Federal Government's 1999 budget contains \$2 billion over the next five years for attacking healthcare fraud and abuse. Double billing or failure to reimburse a former resident for a deposit can lead to disastrous consequences for facilities that are operating with very tight cash flows.

Medicare payments are provided to health care facilities pursuant to an interim system of reimbursement. The payments are usually estimated payments, so that the Government

can recover overpayment through an audit process. If the health care provider does not timely reimburse the Government, the intermediary making the Medicare payments can suspend or reduce future payments. Judging from the rising number of bankruptcies, the Government shows no mercy with closing down a facility that violates its reimbursement obligations.

Outside of Maine, bankruptcy filings for health care businesses are very common, and there is big money involved. Vencor, which is one of the country's largest nursing home operators (935,000 patients/128 facilities), filed for chapter 11 in Delaware last year. Sun Healthcare Group and its 84 nursing care facilities, with 60,000 US employees, also filed in Delaware in 1999. The current troubles of Blue Cross/Blue Shield of Maine, Jackson Brook and others are harbingers of approaching storm clouds in the Maine health care industry.

Bankruptcy reorganizations under chapter 11 allow a "fresh start" to troubled health care facilities. The bankruptcy filing can be used to resolve police actions by the Medicare enforcement entities. Financing arrangements that were arranged in happier times can be restructured or replaced by debt arrangements that permit survival in these challenging times.

Our firm is presently debtor counsel for one of the first nursing home chapter 11 filings in this new era. We look forward to helping physicians and care providers survive these difficulties.



As your business law counselors, we want to help you avoid liability/expenses from your business dealings. For that reason, this edition of our newsletter focuses on liability issues for business owners. Our hope is that these articles will prompt you to consult us *in advance* of problems.

INTELLECTUAL PROPERTY LAW Trade Secrets

By Richard P. Olson, Esq.

Among the great changes in the economy during the past few years has been the increasing importance and value of all forms of intellectual property. Patents, copyrights, trademarks and trade names have taken on more and more importance in the new economy and in the balance sheets of our clients. Each of these kinds of intellectual property can be protected under Federal Law.

In addition to these kinds of intellectual property, businesses have substantial capital invested in intellectual property which is protected under state law—trade secrets. Maine and a number of other states have adopted the Uniform Trade Secrets Act (the "UTSA"). Under the UTSA a trade secret is defined as follows:

Trade secret means information, including, but not limited to, a formula, pattern, compilation, program, device, method, technique or process, that:

(a) Derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons

continued on page 3

Perkins, Olson and Pratt, P.A. is now seven years old. We've grown from four to ten employees. With this passage of time and growth, our goal is still the same. We want to provide you with high quality, reasonably priced legal services that will add value to your business.

Richard Olson and David Perkins focus on business startups, reorganization and resolving financial difficulties and business disputes.

Don Perkins continues to focus on divorce involving substantial business assets, business law and estate work. Neal Pratt provides litigation services in areas ranging from construction law to employment disputes to criminal law.

Patrick Mellor has a keen interest in maritime law and litigation.

With this depth of talent we can help your firm prosper as well as resolve any difficulties that you may encounter.

Construction Contracts

by Neal F. Pratt, Esq.

Pay Attention To the Billing

Like most business owners, you find yourself a slave to the monthly cash flow. Even though business is good, juggling bills to maximize profits is a monthly chore. Who must be paid and who can wait? When deciding who must be paid, awareness of special rules that apply to certain bills can save unnecessary headaches and a lot of money.

If you are considering expanding your property or simply doing some modest remodeling, take careful note of Maine's "Construction Contracts" statute, 10 M.R.S.A. §§ 1111-1120. Unlike many other business expenses, the law imposes specific payment obligations on a property owner who hires a contractor to perform construction work. And if a dispute over the work arises, there are several potential traps for the unwary.

What Are a Property Owner's Payment Obligations?

The notion of "freedom of contract" is very much alive and well. Absent fraud or other unscrupulous conduct, parties can agree to whatever terms meet their fancy and the law will generally enforce them. In addition to these safeguards, a construction contract that contains express payment terms is accorded a greater level of protection. A property owner is statutorily required to strictly observe those terms, and failure to do so can have severe repercussions.

If the payment terms of an agreement are not written, the law permits the contractor to invoice the property owner for progress payments at the end of the "billing period," i.e., the calendar month within which the work is performed. Once the property owner receives the invoice, he or she has 20 days to make payment. If payment is not made within that time, statutory interest automatically begins to run on the 21st day and continues thereafter until payment is made in full.

Regardless of whether the contract payment terms are written, if the contractor takes legal action to obtain payment and substantially prevails in that effort, he or she is entitled to reimbursement from the property owner for reasonable attorney's fees.

What If the Work Was Not Done Properly?

Often times timely payment is withheld for reasons having nothing to do with cash flow. Due to the nature of the construction business, disputes frequently arise over such things as work quality, timeliness, and/or compliance with the property owner's instructions. When the property owner has a legitimate beef, the rules change somewhat. Payment to the contractor can be withheld subject to certain conditions.

First, the amount withheld must not exceed the value of the work in dispute. For example, if renovations are performed on several rooms in your building and a leaking problem arises that causes damage to only one of the rooms, withholding the entire contract price would be improper. Withholding an amount equal to the value of the damage and necessary repair work is authorized.

Second, decisions to withhold payment must be made in good faith. Who determines whether the property owner's claim was made in good faith? If the parties cannot settle their differences privately, that determination may well be made by the court or arbitrator. In cases where it is held that a property owner did not withhold payment in good faith, a court or arbitrator will award as a penalty an amount equal to one percent per month of all sums for which payment has wrongfully been withheld, in addition to all other damages due.

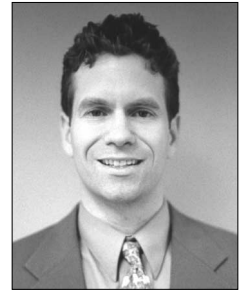
Third, litigation involves risks beyond the contract balance at issue and a potential penalty. Under the American system of justice, each party is ordinarily responsible for its own attorney's fees, unless there is a contractual or statutory provision to the contrary. In the case of construction contracts, the law provides that the "substantially prevailing" party be awarded reasonable attorney's fees incurred in connection with the dispute. Thus, even if a property withheld payment in good faith, he or she will be required to pay the contractor's reasonable attorney's fees if the contractor substantially performed under the contract.

As we all try to manage our day-to-day cash flow demands, bills for construction projects should be given a greater level of priority. And if a dispute arises with regard to the work performed, take care to make a good faith estimate of the actual damage value before withholding payment. You may be held accountable, and that can be an expensive proposition.

Patrick Mellor Joins Perkins, Olson & Pratt

We are pleased to announce that Patrick Mellor has joined our firm as an associate.

Patrick was born in Bangor, and raised in Thomaston, where he graduated from Georges Valley High School. Growing up, Patrick came to appreciate the Mid-Coast and the independent-minded individuals so prevalent in the region.



In 1987 Patrick entered Saint Michael's College in Winooski, Vermont, studying political science and philosophy. After graduating, he moved to Japan where he taught English at a private school to students of all ages, from college students and businessmen to elementary school children.

After leaving Japan, Patrick backpacked extensively throughout Asia and Europe, cultivating an interest in the civil structures and legal systems of foreign countries.

Upon returning to the United States, Patrick taught special needs children at the Saint George Junior High School in Tenants Harbor.

Patrick entered the University of Maine School of Law in 1995. He enjoyed staying in touch with the youths from his home area by participating in the EXCEL program, where law students bring their knowledge into classrooms across the state to help students gain a better understanding of the legal system. Patrick spent one semester studying international maritime law at L'Université Du Maine in Le Mans, France.

In his final year of law school, he was one of five third-year students chosen to serve as legal writing instructor. Patrick enjoyed the challenge of communicating the intricacies of legal writing and research to twenty, sometimes-frantic, first-year students.

In the summers during law school Patrick worked with the Portland firm of Monaghan, Leahy, Hochadel & Libby. He received his J.D. from the University of Maine School of Law in 1998. Upon graduating, Patrick honed his research and writing skills during a one-year clerkship for Judge James Z. Davis at the Utah Court of Appeals.

Patrick recently returned to Maine and joined Perkins, Olson & Pratt Where his primary areas of practice are maritime law, business law, civil litigation, and appellate work. His work as a legal writing instructor and as a law clerk have helped him become adept at getting to the heart of an issue and then developing a pragmatic resolution.

Patrick presently lives in Scarborough with his companion, Rebekah Smith. He enjoys soccer, snowboarding, hiking and kayaking.

who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

10 M.R.S.A. Section 1542.

A trade secret can be something like the formula for the best new cola drink ever which is not readily ascertainable by proper means and which you take reasonable efforts to keep secret.

If someone else can determine your formula through chemical analysis and does so, the UTSA does not protect you. If you whisper the formula to your friends at the local pub, the UTSA does not protect you. On the other hand, if you keep it in a safe and only share it with the plant supervisor, it is probably protected and she is not free to spill it to her next employer—that may even be true whether or not there is an express confidentiality agreement between you and that supervisor.

A person cannot reveal a trade secret where that person knew that his knowledge

of the trade secret was acquired under circumstances giving rise to a duty to maintain its secrecy or limits its use. 10 M.R.S.A. Section 1542(2)(B). Such a duty would clearly arise if there is an employment contract with a confidentiality agreement or a separate confidentiality agreement, but it may also arise through language in an employee handbook, company literature, oral understandings or a course of dealing.

Liability attaches not only to the former employee who might decide to share the formula, but also to the competitor who attempts to obtain it through improper means. Under the UTSA, improper means includes the obvious devices such as theft, bribery, misrepresentation and espionage, but it also includes inducement of a breach of duty to maintain secrecy.

Misappropriation under the statute includes obtaining the trade secret through disclosure by another person who has reason to know that the secret was acquired by improper means or even when you know that it has been acquired by accident or mistake.

Thus it is possible that just because I

happen to overhear you whisper the formula to your supervisor with my super-hearing, the UTSA might still prohibit me from using that formula.

The definition of trade secret is broad. It can be a method of doing business. It can be a marketing method, sales program, business plan, customer or vendor list.

The UTSA creates a strong tension between the rights of employees and the rights of employers to protect their trade secrets. There have been a number of cases litigated in other jurisdictions concerning the relative rights of employees and employers to customer lists.

For example, a salesperson joins a company and spends five or ten years growing not just the business, but the company's lists of customers and prospects. The customer list is kept on the computer and access is restricted. The employee handbook emphasizes the confidential nature of the identity of the company's customer list as well as its importance to the company. Only key personnel have access to this information, even

Trade Secrets, continued on page 4

Creating a Maritime Lien

by Patrick J. Mellor, Esq.

Because fisheries markets have been unpredictable in recent years, it has become increasingly important for counsel to marine related businesses or boat owners to understand the process of creating a maritime lien.

Logically, maritime jurisdiction is a prerequisite to a claim asserting a maritime lien against a vessel. Therefore, the issue of maritime jurisdiction often coincides with the issue of whether a maritime lien exists. The first question to address is whether the services or equipment that benefited the vessel were procured by an individual with actual or presumptive authority to incur liens against vessels. Under federal maritime law, those individuals include the owner, the master, a person entrusted with the management of the vessel at a port of supply, or an agent of one of the above-listed parties. Essentially, the owner of a vessel should be aware that any crew member given the authority to purchase equipment or services for the boat is capable of creating a maritime lien against that boat. In order to establish maritime jurisdiction,

however, the equipment or services must fit within the sometimes amorphous definition of "necessaries" that courts have crafted over the years.

Under maritime law, any person furnishing repairs, supplies, towage, wharfage, use of a drydock or other necessaries, to any vessel, may establish a lien on that vessel for the portion of the services or supplies that was left unpaid. The general rule regarding services rendered in or upon a vessel is that such services must be related to the repair or improvement of the vessel in order to be considered maritime in nature.

In addition, it is common practice for businesses to make loans to boats in order for the boat to procure necessaries such as traps, rope, bait, nets, gear – or a host of other vessel-related items. If the boat owner is then unable to repay the loan, the lender would then be able to create a maritime lien against the vessel.

Importantly, a maritime lien is an in rem proceeding against the boat itself, not against the owner or crew. However, a concurrent in personam claim against the person or persons in arrears can be brought in the event that the vessel itself does not have enough equity to cover the in rem maritime claim. The

Supplemental Rules for Certain Admiralty Claims within the Federal Rules of Civil Procedure establish the protocol for such in rem actions.

It is interesting, and essential, to note that the order of priority for maritime liens is reverse chronological order. That is, the most recently created lien has priority over previously created liens. This rule stems from the age-old notion that "moneys are not usually loaned to strangers, residents of distant and foreign countries, without security." The *Emily Souder*, 84 U.S. 666, 671 (1873). At a time when word traveled only as fast as the next wind-powered vessel, it was essential that those who provided services for seagoing vessels did not have to concern themselves with possible liens created at previous ports. Obviously, such concerns would only serve as a deterrent to a provider of equipment or services and hinder the flow of cargo and information. Therefore, one who rendered a service or provided equipment for a vessel established an immediate first priority lien on that vessel.

Our firm serves as counsel for marine-related businesses as well as boat-owners and looks forward to assisting others in need of maritime-related legal needs.

Trade Secrets, continued from page 3
though they may maintain portions of it on their company-owned laptops, their address books, or even in their memories.

The salesperson is terminated and sets up or joins a competing firm. Remember that these are customers that the salesperson knew and dealt with on a regular basis. These are customers who are, by the nature of their business, identifiable as potential customers of a competing business.

On similar facts, a California appellate court upheld an injunction that prohibited the salesperson (and his new employer) from soliciting any business from any entity that did business with his former employer prior to his departure if the former salesperson obtained any knowledge of that customer during the course of his employment (presumably including the period when the salesperson was frantically copying the

customer list just prior to making his departure).

While the UTSA provides potentially powerful protection to business owners, it is important to remember to comply with its requirements to take reasonable steps to maintain confidentiality. You cannot simply say information is confidential, you need to treat it as such, and properly document the steps you take to protect it.

For employees, the UTSA presents a potential trap for the unwary. If you bring a customer list or book of business to your new employer, does it become part of the new employer's confidential information? What rights will you have to those customers as well as new customers if you are fired without cause?

In the information age it is essential for all parties to understand their rights in the information they work with to ensure that their expectations will be protected in the event of a dispute.

Difficult Case? Let us help.

Difficult cases, complex legal and factual disputes, irreconcilable differences—these represent a sizable part of our practice. We have a history of working with other lawyers, accountants and businesspeople to reach positive solutions for our clients. Neal Pratt has brought to us a wealth of experience in handling complex matters involving business, construction, employment, product liability and tort cases.

David Perkins and Richard Olson have been involved in the resolution—both judicial and non-judicial—of numerous complex business disputes.

Don Perkins played a key role in the resolution of Maine's Native American land claims disputes.

We welcome the opportunity to work with other counsel on either a referral basis or as co-counsel in such matters. Give us a chance to provide you with a fresh and sophisticated perspective on a difficult problem.



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