



Litigation Newsletter

A Newsletter from the Litigation Practice Group

Fall 2009

The firm is pleased to introduce the first volume of our Litigation Newsletter. Over the last year our litigation team greatly expanded with the additions of Greg Clayton and Greg Eaton in Littleton, New Hampshire, and Leo Bisson and Jeff Marlin in Montpelier, Vermont. We now boast over 175 years of collective trial experience spanning New England and New York giving our clients a significant advantage over their competition.

Litigation Practice Group

Gary Karnedy
gkarnedy@ppeclaw.com

Gary Franklin
gfranklin@ppeclaw.com

Leo Bisson
lbisson@ppeclaw.com

Greg Clayton
gclayton@ppeclaw.com

Greg Eaton
geaton@ppeclaw.com

Gary Barnes
gbarnes@ppeclaw.com

Alexa Bolanis
abolanis@ppeclaw.com

Andrew Braley
abraley@ppeclaw.com

Kevin Henry
khenry@ppeclaw.com

Jeff Marlin
jmarlin@ppeclaw.com

Cassandra LaRae-Perez
claraperez@ppeclaw.com

ENFORCEMENT OF LOST PROMISSORY NOTES

By: Kevin Henry

In today's economic climate, many lenders have been forced to bring actions against borrowers to enforce the terms of promissory notes in default. One situation that arises more often than you might think is where the original promissory note has been lost by the lender. The loss of the original note might be the result of it being transferred several times. Whatever the reason, the loss of the original note must be properly handled in order to successfully enforce the terms of the note against the borrower. There are two basic issues: the entitlement to enforce the note and the terms of the note.

Because a promissory note is a negotiable instrument which can be assigned to another party, the law recognizes the danger that a borrower might be faced with having two or more parties suing him on the same note and thus a borrower might challenge a lender's right to enforce the note. For this reason, possession of the original note is often important to establish the right to enforce the note simply because there cannot be two originals. Thus, if a note is made payable to Bank A, and Bank A is in possession of the original, then Bank A is the "holder" of the note and entitled to enforce its terms against the borrower. If Bank A is not in possession of the original, it raises the question of whether the note was assigned to another bank or person, who may also pursue the borrower. The law also recognizes, however, the practical reality that notes are sometimes lost and borrowers should not get the benefit of a windfall if they are lucky enough to have their lender lose the original note.

The Vermont Uniform Commercial Code specifically deals with this situation. Section 3-309 provides that a lost or destroyed note may be enforced provided that three circumstances are present. First, the lender must have been in possession of the note and entitled to enforce it when it was lost. Second, the loss of possession was not the result of a transfer or a lawful seizure. Third, possession of the note cannot be obtained because it was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of a person who cannot be found or is not amenable to service of process. In addition to these requirements, a court cannot enter judgment against a borrower unless it finds that the borrower is protected against the possibility of having to pay a second party on the same note.

Litigation Practice Areas

Alternative Dispute Resolution

Commercial Litigation

Employment Litigation

Environmental Litigation

Insurance Coverage Litigation

Intellectual Property Litigation

Products Liability Litigation

Professional Liability Litigation

Probate Litigation

Tort Actions

The requirements of Section 3-309 are often established with the use of a "lost note affidavit" from the entity or person who was in possession of the note when it was lost. A lost note affidavit must establish each of the three requirements and should contain as much detail as possible with regard to the circumstances regarding the loss of the note. With respect to the requirement that the court be satisfied that the borrower is protected from subsequent claims, this requirement can most easily be satisfied by the lender agreeing to indemnify him against any such claims.

In addition to establishing the right to enforce the note pursuant to Section 3-309, a lender must also prove the terms of the note. Generally, the lender will have a copy of the note which will be sufficient to establish the note's terms absent any evidence that the copy is not legitimate. Even without a copy, however, the terms of a note can be proven with any competent evidence such as testimony and other transaction records. For example, a lender might prove the terms of a \$100,000 note by showing evidence that the \$100,000 was credited to a borrower's account on a particular date and that the borrower had made payments in a certain amount on a monthly basis. From these transaction records, a lender can likely establish the principal amount of the loan, the interest rate, and the repayment terms as agreed upon by the borrower.

Regardless of the likelihood of default, those in the business of lending money or purchasing notes of any kind would be wise to review their files to make sure that they contain the original notes and, if not, to obtain a lost note affidavit from the appropriate person to supplement the file. It is impossible to know for certain when and if a note will go into default and, as time passes, the difficulty of establishing the requirements of Section 3-309 increases.

CASE NOTES

- In *Insurance Company of the State of Pennsylvania v. Johnson*, 2009 VT 92, the Vermont Supreme Court ruled that excess liability policies – generally known as "umbrella" policies – issued in Vermont must provide uninsured or underinsured motorist coverage. This decision has far-reaching consequences for insurers issuing umbrella policies that provide coverage for liability arising out of the ownership, maintenance or use of a motor vehicle, even if the policy does not expressly provide for uninsured or underinsured motorist coverage.

The case concerned the tragic death of a state trooper who was struck and killed by a motorist while laying spikes across a highway in order to stop the motorist's car, which was engaged in a high-speed police chase. The trooper's estate made an underinsured motorist claim against two umbrella policies issued to the trooper's employer, the State of Vermont. The insurers denied the claim on the grounds that the policies did not provide for underinsured motorist coverage and the Vermont uninsured motorist statute applied only to primary policies, and not umbrella policies.

The Court ruled that the uninsured motorist statute applied to any policy – whether primary or umbrella – that provides coverage for liability arising out of the ownership, maintenance or use of a motor vehicle. Thus, even if the umbrella policy does not expressly provide uninsured or underinsured motorist coverage, that coverage will be read into the policy.

- The firm has been defending a class action lawsuit filed against owners and former owners of the Killington ski area in Killington, Vermont. 1,234 skiers claim that they are entitled to ski at the area for the rest of their lives based on a certificate that entitles them to free use of ski lifts at the ski resort only so

long as Killington, Ltd. operated the lifts under a lease with the State of Vermont. However, following the sale of all of its assets comprising the ski resort in May, 2007, Killington, Ltd. no longer operates the lifts. Consequently the ski passes expired by their express terms. Gary Karnedy, a director of the firm, is defending the case for American Skiing Company, Killington, Ltd., and S-K-I, Ltd.

The first step in class action litigation is to determine whether the Plaintiffs have common claims that justify certifying that they may represent a large class of individuals in a case. The case is then decided largely on the merits of the representative plaintiffs' claims. Since this case involves the simple reading of an unambiguous pass certificate, we expect that it will be dismissed by the Judge in advance of any jury trial, based on motions we will file upon the completion of discovery.

Team News

Gary H. Barnes recently completed an advanced program of instruction at Harvard Law School's Mediation Workshop. Gary serves as a neutral mediator of business and financial disputes, in all three states in which he is licensed to practice: Vermont, Massachusetts, and Florida. Gary is on the American Arbitration Association's national roster of neutrals, and is experienced in working with insurance coverage and professional liability disputes.

In April of this year, the firm obtained a favorable jury verdict in Federal Court upholding its client's termination of a contract based on the other party's failure to meet certain performance criteria. The firm's client, a book publisher, licensed digital production rights which the licensee failed to adequately exploit. The jury rejected the licensee's argument that it could simply pay a minimum guarantee to maintain its contract rights. The case is on appeal to the Second Circuit. Gary Franklin is handling the matter.

On March 25, 2009, Greg Eaton, Gary Karnedy and Gary Franklin presented a full day seminar entitled *Insurance Coverage Litigation*. The seminar walked practitioners through typical coverage problems and examined the anatomy of a coverage claim from triggers of coverage to pre-litigation maneuvering to bad faith claims and common ethical issues faced by coverage attorneys.

Governor Jim Douglas appointed Gary F. Karnedy to a six year term on the Vermont Labor Relations Board. The Vermont Labor Relations Board is a state administrative agency that governs labor relations primarily for public sector employers and employees, and also small private operations. The Board determines appropriate bargaining units, conducts union representation elections, adjudicates unfair labor practice charges and arbitrates grievances.

In *Vermont Mutual Insco v. Parsons Hill Partnership*, et al., the firm obtained summary judgment in Washington Superior Court (now pending on appeal to the Vermont Supreme Court) in a ruling by Judge Pearson holding, for the first time in Vermont, that the Vermont Pollution Endorsement provides exclusive coverage for all pollution-based claims for "personal injury" as well as bodily injury and property damage claims. The decision further holds that a breach of implied warranty of habitability claim fails to enjoy coverage under the pollution endorsement because it alleges neither bodily injury or property damages. This coverage action, managed by Leo Bisson, arises from claims of 98 tenants at a housing complex operated by our client's insured.

In *Daley v. Vermont Mutual*, Leo Bisson defended an uninsured motorist claim in a one week trial in Washington Superior Court. Plaintiffs claimed significant closed head injuries and seven figures in special damages alone. Liability was conceded. The jury returned a favorable verdict for the defense limiting damages to past and future medicals only, amounting to under \$100,000.00.

In *Preston v. M.K. Richardson Agency, Inc., et al.*, the plaintiff husband sustained an injury after he fell on an icy driveway while working on the defendants' property in Chelsea, Vermont. Subsequently, his wife injured her back assisting her husband into bed while he was recovering at home. The wife claimed that the landowner was independently liable to her, as well as her husband. In a July 24, 2009 ruling the Superior Court (Judge Teachout) entered summary judgment for the defendants on the wife's claims because her injuries occurred outside the landowner's property and were not reasonably foreseeable. Even if the husband's injuries were foreseeable, the Court held that foreseeability did not extend to care by an elderly and physically challenged spouse. Defendants were represented by Jeff Marlin.

In *Smalley v. Stowe Mountain Club*, the firm obtained summary judgment in a ruling by the Lamoille County Superior Court that a portion of a newly built golf course at Spruce Peak violated a restrictive covenant favoring our client. If upheld on appeal, the golf course will have to be moved. Collaborating on the matter were Leo Bisson and Gary Barnes from the Litigation Team, and Steve Reynes and Jesse Moorman from the Environmental Team.

Firm Practice Areas

Accounting Firms, Bankruptcy, Business Entity/Commercial, Captive Insurance, Employment, Environmental and Land Use, Estate Planning and Probate, Financial Services/Banking, Government Relations, Health Care, Insurance, Intellectual Property and Technology, International, Litigation, Mediation and Arbitration, Public Utilities/Regulatory Assistance, Real Estate, Taxation

Locations

Vermont:

Burlington: 150 S. Champlain Street, Burlington, VT 05401, PH: (802) 864-0880, FAX: (802) 864-0328

Montpelier: 100 E. State Street, Montpelier, VT 05601, PH: (802) 223-2102, FAX: (802) 223-2628

St. Johnsbury: 421 Summer Street, St. Johnsbury, VT 05819, PH: (802) 748-5061, FAX: (802) 748-3978

New Hampshire:

Littleton: 106 Main Street, Littleton, NH 03561, PH: (603) 444-4008, FAX: (603) 444-6040

Website: www.ppeclaw.com