

Maine Cases (Includes Tort & Insurance Law Developments)

Set forth below are brief summaries of leading Maine decisions in the areas of property and casualty insurance and tort law that have been rendered since 2000. While some of these cases were decided in favor of the defense and some in favor of plaintiffs, the Bureau does not discern trends arising from these cases that have adversely affected the market for homeowners and general liability insurance coverages. Acknowledgement is given to the Maine State Bar Association's Legal Year in Review materials for 2000, 2001 and 2002 as a resource for portions of this section.

Maine Cases — The Duty to Defend

At least a perceived expansion of the responsibility of insurer's duty to defend insureds against third party claims is frequently cited by insurers as a reason for nonrenewal of homeowners and liability insurance coverage. Determinations of a duty to defend even where a duty to indemnify is clearly excluded in cases such as *Elliot v. Hanover*, noted below, are one factor discouraging insurer's from maintaining coverage in force where excluded risks, such as businesses operated out of the home, are present.

Historically, a long line of Maine Law Court decisions dating back at least 30 years have indicated that a determination as to whether or not an insurer has a duty to defend its insured against claims of a third party is resolved by comparing the complaint with the terms of the insurance contract. If the allegations in the underlying tort action are within the risk insured against and there is any potential basis for recovery, the insurer must defend regardless of the actual facts on which the insured's ultimate liability may be based. *Gibson v. Farm Family Mutual Insurance Company*, 673 A.2d 1350 (1996)

In *Maine State Academy of Hair Design, Inc. v. Commercial Union Ins. Co.*, 699 A.2d 1153 (1997) it was alleged that a female employee of the Academy had been sexually harassed during her employment by two company officials. The Academy's CGL policy contained an exclusion for "bodily injury to an employee of the insured arising out of and in the course of employment by the insured". Even though the plaintiff's complaint didn't mention any sexual harassment outside the workplace, the Court found a duty to defend by focusing on what plaintiff might be able to show at trial.

York Insurance Group of Maine v. Lambert, 1999 ME 173, 740 A.2d 984 involved the question of whether a homeowner's insurer had a duty to defend the homeowner against the claim that he had interfered with the expectancy of an inheritance. It has been generally accepted law in Maine for a number of years that an allegation of emotional distress in a plaintiff's complaint creates a sufficient claim of bodily injury to trigger a duty to defend. In *Lambert*, a 4-3 decision, the Court found that an allegation of emotional distress was inherently contained in the claim of interference with the expectancy of an inheritance even though the plaintiff had not alleged emotional distress in pleadings. Thus the insurer was found to have a duty to defend the claim.

A critical discussion of the Law Court's apparent willingness, as illustrated by *Maine State Hair Academy* and *Lambert* cases, to go beyond the traditional comparison test in duty to defend cases

is “Wrestling with the Duty to Defend in Maine” by John S. Whitman, Esq. contained in the Maine State Bar Association’s “Are My Clients Covered?” continuing education seminar of March 2001, pp. 71-97.

Warren Elliot v. The Hanover Insurance Company, 711 A.2d 1310, 1998 ME 138 involved a situation wherein a homeowner’s insurer was held to have a duty to defend its insured, who was operating a scrap metal business from his home, against the bodily injury claim of a customer despite the presence of a business use exclusion in the policy.

In a June 2003 decision, however, the Law Court did find that an insurer had no duty to defend one count of a complaint because the plaintiff alleged conduct that fell with the scope of an intentional acts exclusion in a homeowners policy. *Korhonen v. Allstate Insurance Company*, 2003 ME 77, 827 A.2d 833. A mother, on behalf of a minor child, alleged in her complaint that a stepmother had negligently inflicted emotional distress on the child, first, by failing to learn that the father had engaged in sexual acts with the child and secondly by verbally blaming, admonishing, and degrading the child and accusing her of lying. The Law Court found these allegations to be allegations of intentional acts. Therefore Allstate had no duty to defend the stepmother because its’ homeowners policy contained an intentional acts exclusion. Allstate was found, however, to have a duty to defend the stepmother against a claim of negligent supervision of the child.

Maine Insurance Cases

Homeowner’s Insurance-Intentional Acts Exclusion

Royal Insurance Co. v. Pinette et al., 2000 ME 155 756 A.2d 520. This case affirmed a Superior Court judgment determined that Royal Insurance Company was not obligated to indemnify the estates of three persons shot and killed by Sabato Raia, Royal’s insured, due to the intentional acts exclusion of the homeowners policy Royal had issued to Mr. Raia. This case had been submitted to the Court upon a set of stipulated facts including the stipulation that Mr. Raia intended or expected to a practical certainty that death or serious bodily injury would result when he shot the three decedents.

Insurance-Binders

Pine Ridge Realty Inc. v. Massachusetts Bay Insurance Co. 2000 ME 100 752 A2d 595. A property insurance loss occurred after a binder had been issued but before a policy was issued. The Court held that coverage is subject to all of the terms of the insurer’s policies mentioned in the binder. Therefore the insurer properly was able to rely upon an applicable policy exclusion in denying coverage despite the lack of mention of exclusions in the binder.

Insurance-Employee Dishonesty Coverage, *Acadia Ins. Co. v. Kaiser Industries, Inc.* 202 ME 57, 793 A.2d 495. The insured company’s President was found by the Board of Directors to have engaged in misconduct, but was not discharged by the company. The insured provided no notice to the insurer about the President’s actions. A year later the President was found by the Board to have continued to engage in misconduct. A proof of loss was filed by the company for

all sums. The Law Court held that coverage was cancelled as of the time of the Board's first discovery of misconduct. Furthermore, by failing to give timely notice of the claim upon first learning of the misconduct, the Board had prejudiced Acadia's ability to recover against the President, who by then had dissipated his assets.

General Liability Insurance-Assault and Battery Exclusion

Douglas Mallar v. Penn-America Insurance Company 2003 ME 143. Insurer of a pub was held to have no duty to indemnify a pub patron who had witnessed a shooting in the pub and had been sprayed with the blood of the bartender due to an "assault and battery" exclusion in the general liability policy issued to the pub.

Insurance-Fraudulent Misrepresentation by Insurer

St. Francis de Sales Federal Credit Union v. Sun Ins. Co. of New York, 2002 ME 127, 818 A.2d 995. Insurer insured an armored car company for certain losses related to the armored car company's business. The policy excluded coverage for theft from lock boxes by persons who gained access to the lock boxes without a key. Nevertheless, the insurer certified to the plaintiff credit union that it insured the armored car company for loss of property of its customers "from any cause". The lock box was subsequently broken into by a thief. The Law Court concluded that there were sufficient facts to allow plaintiff's fraud claim to go to the jury and to allow the resultant compensatory damage award, but not a punitive damage award stand.

Insurance-Knowledge of Agent Binding on Insurer

County Forest Products, Inc. v. Green Mountain Agency, Inc. et al. 2000 ME 161 758 A2d 20. Surplus lines insurers for commercial coverage upon a sawmill were held liable for negligent acts of an insurance agent in failing to secure increased policy limits and for bad faith claim handling.

Insurance-Cause of action for nonpayment of claims

Lavoie v. Middlesex Mutual Assurance 2002 US Dist. LEXIS 6411 (D. Me Apr. 12, 2002). The U.S. District held that an insured's proper cause of action for a homeowners insurer's failure to pay a claim lay in breach of contract, not in tort. The duty of good faith and fair dealing was viewed as an element of the insurer's contractual duty to the insured.

Insurance-Effective Date of Policy Amendments

In *Gilbert v. Gilbert v. Hanover Insurance Company*, 2002 ME 67, 796 A2.d 57, certain coverages of a homeowners policy had been increased by Hanover. The amended declarations page that Hanover issued stated that the changes were effective on June 29, 1998. Mr. Gilbert unsuccessfully attempted to have the increased coverages applied to losses arising out of a fire that occurred on May 31, 1998.

Insurance-Late payment of claims

Rankin v. Right On Time Moving & Storage, 2002 U.S. District LEXIS 8151 (D. Me. Mar. 25, 2002). The U.S. District Court, among addressing many other issues in this case, rejected an insurer's argument that under Maine's late payment of insurance claims statute, 24-A M.R.S.A. §2436, could not apply in circumstances wherein an insurer does nothing upon receipt of a proof of loss.

Rescission of Coverage for Misrepresentation

In *York Insurance Company v. Bowman*, 2000 ME 27, 746 A.2d 906, the Law Court vacated and remanded a Superior Court judgment in favor of an insured. The Court held that the material misrepresentation prong of 24-A M.R.S.A §2411 was too narrowly determined by looking only at whether the misrepresentations related to the cause of a subsequent loss. The appropriate query was whether or not a reasonable insurer would have accepted or rejected the risk of entering into an insurance contract or would have fixed a higher premium or a different coverage amount.

Subrogation

In *Acadia Insurance Company v. Buck*, 2000 ME 154, 756 A.2d 515, the Law Court found that an insurance procurement clause in a construction contract created an implied waiver of subrogation. Many construction contracts also contain a waiver of subrogation clause. This was the first time that Maine's Law Court had considered an insurance procurement clause absent a waiver of subrogation clause.

North River Insurance Co. v. Snyder, 2002 ME 146, 804 A.2d 399. In reply to a certified question from the U.S. District Court, the Law Court, in a split decision, held that a residential tenant is not liable in subrogation to the landlord's insurer for damages paid as a result of a fire, absent an express agreement in a written lease. In so doing, the Court adopted the "implied co-insured doctrine" already recognized in other jurisdictions. This implied waiver of subrogation was valid even though the lease expressly provided that the "tenant must promptly provide full reimbursement to the landlord" for losses to the landlord caused by the tenant. The Court expressly reserved judgment on whether or not the principle set forth in this case would control in a commercial context.

Maine Cases—Tort Cases

Bad Faith

In *Stull v. First American Title Insurance Company*, 2000 ME 21, 745 A.2d 875 the Law Court held, in accordance with precedent, that in order to recover compensatory damages for emotional distress and punitive damages for breach of an insurance contract, the plaintiff must prove that the insurer engaged in tortious conduct independent of the breach of contract itself.

Damages

In *Snow v. Vilacci*, 2000 ME 127, 754 A.2d 360, the Law Court held that future lost earning opportunities could be compensable in negligence case subject to certain criteria.

Newbury v. Virgin, 2002 ME 119, 802 A.2d 413. Finding plaintiff's evidence insufficient, the Law Court upheld the Superior Court's setting aside of that portion of a jury verdict of \$52,000 for lost profits and earnings. The Law Court did conclude that plaintiff was entitled to \$1,050 for lost profits under the facts of the case. A \$25,000 punitive damage award was allowed to stand.

Defamation

Rice v. Alley, 2002 ME 43, 791 A.2d 932. The Law Court reversed a lower court decision which had allowed compensatory damages to a plaintiff in a defamation action. Plaintiff was suspected of manipulating prizes in Bingo games run by the ladies auxiliary of an Elks Club. The ladies auxiliary considered the investigation of this matter. Defamatory statements allegedly made by defendant in closed door meetings of the auxiliary were considered "conditionally privileged" and actionable only if made outside of normal channels or with malicious intent.

Intentional and Negligent Infliction of Emotional Distress

Bryan R. v. Watchtower Bible and Tract Society of New York, Inc., 1999 ME 144, 738 A.2d 839, involved a situation in which plaintiff alleged that a sexual abuser was a member of a church congregation and that church officials were aware of that member's past. The Law Court, following an earlier decision, upheld a dismissal of emotional distress claims, finding that allowing plaintiff to bring them would inappropriately interject the Court into ecclesiastical matters.

In *Carter v. Williams*, 2002 ME 50, 792 A.2d 1093, the Law Court considered the question of claims for negligent infliction of emotional distress in the context of Maine's Wrongful Death statute. This case involved a situation where a 5 year old child was killed by rocks flying off defendant's truck and breaking the windshield of the following car. The child's mother was driving the car and the father and the 5 year old's sibling were passengers. The Court held that the parent's claim for negligent infliction of emotional distress were included within amounts which the parents recovered under the Wrongful Death statute and couldn't be maintained separate from that statute. The sibling, however, was entitled to a recovery on her emotional distress claim as she was not an eligible beneficiary under the Wrongful Death statute.

Curtis v. Porter, 2001 ME 158, 784 A.2d 18. Plaintiff was a pizza delivery person who was assaulted and robbed of her pizza by two men. Defendant Gagne was present when the robbery was planned but did not participate in it. Plaintiff sued the two men and Gagne. The Law Court held that plaintiff had pleaded sufficient facts for her claim against Gagne of intentional infliction of mental distress to survive a motion for summary judgment, but upheld a grant of summary judgment for defendant Gagne on a negligent infliction of emotional distress claim. The court noted that there is no general duty to avoid causing emotional harm to others except in limited circumstances not present in this case. .

Negligence and Premises Liability

In *Young v. Libby*, 1999 ME 139, 737 A.2d 1071, a lead paint poisoning case, the Law Court upheld a jury verdict which had found that a landlord had no duty to warn tenant of a hidden defect or had no knowledge of the potential exposure where the lead paint had been coated by two coats of non-lead paint and there was a favorable report from a housing authority inspector.

Budzko v. One City Center 2001 ME 37, 767 A2d 310. The question was whether the owner of an office building had a duty to take precautions to make the premises safe during a snow and ice storm. The Court found such a duty to exist and upheld a verdict in the plaintiff's favor.

Mastriano v. Blyer 2001 ME 34, 779 A2d 951 The Law Court found that a taxi driver did not have a duty not to drop off an intoxicated customer near the customer's car. The Court declined to expand Maine law to include an *in loco parentis* type of responsibility on the taxi driver to intervene in the intoxicated passenger's life to ensure that the passenger did not harm himself or herself after the driver had given the passenger a safe exit from the taxi.

Chiu v. City of Portland, 2002 ME 8, 788 A.2d 183 presented the Law Court an opportunity to consider the rule that a landlord is not liable to a tenant for personal injuries caused by a defective condition in the portion of an apartment building under the tenant's exclusive control in the context of a situation wherein tenant's child fell through a window which had been previously cited by the building inspector and with respect to which the tenant had previously complained to the landlord. The Law Court found windows to be analogous to the exterior of a building and not within the exclusive control of the tenant.

In *Stewart v. Aldrich*, 2002 ME 16, 788 A2d 603 the Court considered plaintiffs' claim that a landlord had breached a duty to ensure that the leased premises did not contain any dangerous conditions. Plaintiffs were parents of a 7 year old child who had been bitten by a dog owned by another tenant. The same dog had previously attacked another child. Superior Court had granted summary judgment in favor of defendant. The Law Court upheld the summary judgment ruling that the tenant who owned the dog, not the landlord, had exclusive control over the leased premises.

Negligent Supervision

In *Napieralski v. Unity Church of Greater Portland*, 2002 ME 108, 802 A.2d 391, the Law Court was presented with an opportunity to consider the tort of negligent supervision, heretofore unrecognized in Maine. The Court declined to either accept or reject the existence of this tort, deciding the case on other grounds. A dissent by Chief Justice Saufley joined by Justice Dana suggested that discovery should have been allowed to proceed in the underlying case before motions to dismiss were considered by the trial court. But see *Korhonen v. Allstate Insurance Company*, 2003 ME 77, 827 A.2d 833 (2003), a June 2003 decision in which the Law Court held that Allstate had a duty to defend its insured against a claim of negligent supervision of a child .

Proximate Cause

In three 2000 decisions, the Law Court found that plaintiff's had not provided sufficient evidence that defendant's conduct was the proximate cause of the plaintiff's injuries. *Merriam v. Wanger*,

2000 ME 159 , ___A.2d ____, *Crowe v. Shaw*, 2000 ME 136, 755 A.2d 509, and *Cyr v. Adamar Associates Ltd. Partnership*, 2000 ME 110, 752 A.2d 603.

Maine Property Insurance Cancellation Control Act Appeals

The Maine Property Insurance Cancellation Control Act, 24-A M.R.S.A. §§3048-3056, provides the ability for insureds who receive notices of cancellation or nonrenewal of homeowners insurance to request a hearing before the Superintendent. 24-A M.R.S.A. §3054. Maine law further provides that Decisions made by the Superintendent in these hearings may be appealed to Superior Court pursuant to Rule 80C of the Maine Rules of Civil Procedure. Seven such appeals have been filed by insurers since 1992. Brief descriptions of each of these cases are set forth below. In four of these cases, the Superintendent's Decision has been upheld by the Court and in three instances it has been reversed.

The Bureau would note the York Insurance Company case involving Mr. and Mrs. Wood and Mr. and Mrs. Hallman which is currently on appeal to the Law Court. If the Superior Court's view of the role of the Bureau with respect to hearings to consider nonrenewals is upheld on appeal, the legitimacy and usefulness of the hearing process would, in the Bureau's view, be subject to serious question.

With respect to commercial property and liability insurance policies, current Maine law provides insureds an opportunity to request hearings before the Superintendent with respect to mid-term cancellations, but not with respect to nonrenewals. There have been no Rule 80C appeals of Decisions of the Superintendent involving cancellation of commercial policies.

Vermont Mutual Insurance Company v. Maine Bureau of Insurance et al

Superior Court (Kennebec) Docket No. CV-92-408 (Mills, J.)

Homeowners Nonrenewal based on prior claim history—

Superintendent's decision in favor of homeowner reversed on appeal.

Superintendent determined to have acted arbitrarily and capriciously in ignoring much of insurers evidence

“It is the insurer's concept of insurability, the acceptability of this particular risk by this particular insurer, which controls.”

Prudential Property and Casualty Insurance Company v. Atchinson and Theresa Solak-Eldert,

Superior Court (Kennebec) Docket No. CV-95-514 (Alexander, J)

Superintendent's Decision in favor of insured upheld on appeal in a summary decision

Homeowners nonrenewal based on alleged laxness of insured's son in keeping bicycle locked and chained.

National Grange Mutual Insurance Company v. Superintendent et al, Superior Court (Kennebec)

Docket No. AP-98-86. (Atwood, J)

Superintendent's Decision in favor of insured upheld on appeal

Homeowner's nonrenewal based on dog bite.

Court upheld Superintendent's decision that there was no increased risk as the insured no longer owned the dog

Foremost Insurance Company v. Superintendent, Superior Court (Kennebec) Docket No. AP-00-77 (Studstrup, J)

Superintendent's Decision in favor of insured upheld on appeal
Mobile home insurance policy nonrenewal based on two claims.
The Court affirmed the Superintendent's decision that the statement of reason for nonrenewal in the company's notice was not sufficiently explicit.

Commercial Union York Insurance Company v. Superintendent et al Superior Court (Cumberland) Docket No. AP-01-031 (Warren, J)

Superintendent's Decision in favor of insured affirmed on appeal.
Homeowners nonrenewal —reasons in nonrenewal notice relating to specific losses conceded by insurer at hearing to not be a basis for non-renewal.
Duty to defend argument disallowed by the Court as it was not raised at the administrative level; Court noted, however, that it was an "extremely strong argument".
Company failed to meet its burden of proof that it faced increased risk due to business on premises notwithstanding a business use exclusion in its policy.

York Insurance Company v. Maine Bureau of Insurance, Donna Wood and Gregory Wood, Superior Court (Cumberland) Docket No. AP-02-59; *York Insurance Company v. Maine Bureau of Insurance, Dori Hallman and Carl Hallman*, Superior Court, (Cumberland) Docket No. AP-02-65 (Crowley, J)

Consolidated Order on two appeals
Superintendent's Decision in favor of insureds reversed on appeal.
Homeowners nonrenewals of properties with daycare business' on the premises;
Nonrenewal based on perceived risk of duty to defend despite business use exclusions in policies and the existence of separate commercial insurance policies with respect to the daycare businesses.
Court noted "It is not the province of the Superintendent ... to determine the level of acceptable risks for an insurance company. ... The purpose of this Act was not to conscript the insurance companies conducting business in Maine and commandeer their autonomous underwriting procedures and principles...".
The Superintendent has appealed this Decision to the Law Court where it is currently pending

Middlesex Mutual Assurance Company v. Maine Superintendent of Insurance and Leon and Pamela Baker, Superior Court (Kennebec) Docket No. AP-02-80 (Marden, J.)

Superintendent's Decision in favor of insureds reversed on appeal.
Homeowners Nonrenewal based on two heating devices venting into the same flue
Decision cited favorably 1993 Vermont Mutual Decision wording, "It is the insurer's concept of insurability, the acceptability of this particular risk by this particular insurer, which controls" and found that the insurer met its burden of presenting a rationally related reason for nonrenewal.