

**Lex Loci**  
**Recent New Hampshire Supreme Court Decisions**  
by Charles A. DeGrandpre

The author's prolonged absence from these pages does not seem to have affected the members of the Supreme Court in any adverse fashion. The five justices appear to have done quite well without the barbs, witticisms; praise and oblique criticism often found in this column. However, the same cannot be said of the author. While prevented from taking up his bar journal pen while on another major authoring endeavor, his associates and partners have remarked on many occasion of his sullenness in having no one to pick upon. Therefore, in order to improve his own mental health (and that of his partners and associates), the author has decided to resume his column on a regular quarterly basis.

This column will start with a review of the significant and interesting cases decided by the Supreme Court during the past year ending October 31, 1988. In any such long period of time it is inevitable that there are many important cases, but an attempt will be made to draw upon cases that point to a trend or are of an interest to the average practitioner. This criteria leaves a lot of discretion to the author but it is the fun part of the job.

Probably the most single important case decided in the past 12 months is *Simoneau v. South Bend Lathe, Inc.*, decided May 13, 1988. This is a very important case concerning the "product-line" theory of successor liability. The Supreme Court had before it a question certified from the federal District Court of New Hampshire, on the issue of whether or not the successor corporation to a corporation which manufactured a product which injured the plaintiff succeeded to the products liability of a product manufactured by the predecessor corporation, as had been held in several other cases such as the California case of *Ray v. Alad*, 136 Cal Rptr. 574(1977). Basing its decision on New Hampshire's early cases adopting the doctrine of strict tort liability theory in this state which grounded the theory, not upon a sharing of fault theory but rather based the theory on common law principles of fault and responsibility, the Court held that New Hampshire "limit[s] the application of strict tort liability in this jurisdiction by continuing to emphasize that liability without negligence is not liability without fault".

The significant issue in this case for corporate lawyers is that there is no "piercing of the corporate veil" in the commonly encountered situation where one party acquires the assets of a business and continues to manufacture the same product. In such a situation the purchaser does not normally expect to acquire any liability rising up from the selling corporation and this case puts to rest the fear that such would be the case in New Hampshire based upon the earlier First Circuit case of *Cyr v. B. Offen & Co.*, 501 F.2d 1145 (1st Cir. 1974).

There have been a series of cases in the past year dealing with attorney conduct or, in some cases, misconduct. Two cases, *In re Estate of Kelly*, (decided August 8, 1988) and *Halstead v. Murrav* (decided July 8, 1988) deal with attorneys' settlement agreements. In the *Halstead Case*, an attorney for a defendant entered into a settlement agreement in writing with the attorney on the other side. The agreement related to an agreed-upon sale of land as a result of the settlement agreement and the defendant had second thoughts and refused to convey the land as agreed upon by his attorney, claiming that the Statute of Frauds made the contract unenforceable since he had not authorized his attorney *in writing* to make the settlement agreement. There was no dispute that he had orally authorized the settlement. The Supreme Court took a broad and liberal view of the Statute of Frauds (compare the author's futile attempt to get the Supreme Court to take a liberal view of the Statute of Frauds in *Blanchard v. Calderwood*, 110 N.H. 29 (1960)) and held that "because there is such a special relationship between the attorney and his client our Statute of Frauds does not require the client to authorize his attorney, in writing, to settle an action involving a land dispute through sale of the subject property". A strong dissent by Justice Thayer joined by Justice Souter argued strenuously that the majority opinion does an artful end run around the Statute of Frauds, which of course, it does.

In the other case involving an attorneys settlement agreement, *Estate of Kelly*, Justice Thayer wrote for a majority of the Court holding that the death of a party terminated her attorney's authority to settle the suit, which had been previously given to the attorney. The case is a peculiar one because it involved an estate settlement and not a conveyance regarding the sale of land, but the attorney, although not required by law to do so, insisted that the settlement agreement was subject to his obtaining his client's written authorization. Before he could get the authorization the client died, but the attorney waived the requirement of a written authorization and accepted the settlement, claiming the case had been concluded. The Supreme Court disagreed, basing its decision on contractual grounds, stating that the settlement was subject to a condition precedent imposed by the attorney that had not been met and the attorney was not free to waive the condition:

Although New Hampshire favors settlements of disputed claims, particularly those which are beneficial to the estate..., and although we have acknowledged an attorney's authority to make binding settlements for his or her clients..., we hold... that although the contract was formed on January 22, subject to a condition precedent, the settlement between the parties never became binding since the condition was not fulfilled.

*Wehringer's Case*, (decided August 5, 1988), presents an extraordinary case in which an attorney authorized to practice both in New Hampshire and in New York, improperly interjected himself into a domestic relations case in which each party already had representation. The attorney, although constantly passing himself off as serving in the role of a "mediator", actually represented only one of the parties to the proceeding whom he billed exclusively for his services. Indeed, the attorney dealt with the opposing party directly without the knowledge of her attorney, often casting

character and professional aspersions concerning the opposing clients attorney. The New Hampshire Supreme Court approved the attorney's disbarment in New Hampshire, finding that the attorney had violated at least eight disciplinary rules of the New Hampshire Code of Professional Responsibility. The Court appeared to hold attorneys to the very high standards required of fiduciaries!!:

A lawyer, because he or she is a member of a learned profession governed by a code of conduct reflecting human experience, may not be permitted to have ethical conduct measured against a lesser standard than that which this Court has recently applied to others. The affairs of *fiduciaries* are viewed by this Court against a narrow gauge. (Emphasis Added).

*Keenan v. Fearon*, (decided June 6,1988) is another unusual case in which an attorney, although not authorized to do so in writing or orally, continued to prosecute an action on behalf of a client to enjoin the construction of a building alleged to be in violation of the zoning laws after the client asked him to stop the action. Furthermore, the attorney persisted in continuing the case even after it came to the attention of the purported client who immediately asked that it be dropped. The Supreme Court understandably took a dim view of this type of "gratuitous ...litigation". Not only did the Court uphold the master's finding that the original action brought by the defendant was due to the attorney's "inexperience and lack of common sense", but stressed that the inexplicable appeal to the Supreme Court was made by the attorney in "complete disregard of the responsibilities imposed upon an attorney". As a result, the Supreme Court upheld an award of fees for the defendant's services in defending the lawsuit both in the trial court and on the appeal, requiring the fees to be paid directly *by the offending attorney himself*.

Another strict interpretation by this Court of an attorney's failure to meet required standards of conduct is *Henderson's Case*, (March 7, 1988). The Court imposed a three-month suspension from the practice of law of an attorney who engaged in misconduct described as "a neglect of his client's interest". The facts indicated that, because of personal and family difficulties, the attorney involved failed to communicate with his client in a pending matter and failed to take proper action to protect his client's interests until he was at last discharged by his client (a town) who then brought a complaint against the attorney before the Professional Conduct Committee. The attorney argued that the three month suspension was too severe a penalty, but the Court pointed out that the attorney had previously received two private reprimands from the Conduct Committee for similar conduct and a third reprimand for similar conduct arising after the date of the present case. The Court held that the letters of reprimand "show a pattern of neglectful conduct", rejected the respondent's argument that public censure was sufficient, and specifically rejected his claim that "suspension is too harsh a sanction for the particular misconduct" involved in this case.

The moral of these cases is that the Supreme Court is taking a very tough and rigorous look at attorneys' obligations to meet their professional standards and a

failure to meet those standards, although slight in the attorneys' eyes, will result in suspension or disbarment in appropriate cases.

An interesting Miranda warning decision is *State v. Torres*, 130 N.H. 340 (1988). In this case, a unanimous Supreme Court reversed a marijuana conviction because the defendant had not validly waived his Miranda rights before confessing. The facts showed that the defendant had been advised of his rights, and asked by the police if he understood his rights to which he replied in the affirmative. The police interrogated the defendant a couple of hours later. At no time did the police ask the defendant if he wanted to waive his rights; *i.e.*, there was no express waiver. The general law is that *Miranda* does not require an express waiver. In fact, *Torres* repeats this principle and makes clear that an express waiver is not required. The Court expressed itself as being "perplexed by the actions of the law enforcement personnel who, in making this arrest after a lengthy and professional investigation, failed to make a timely request of the defendant that he waive his rights in writing or orally."

What is interesting about the opinion is the Court's failure to discuss *State v. Noel*, 119 N.H. 522 (1979). In *Noel*, on very similar facts - defendant advised of his rights, asked if he understood, he did not reply, no express waiver - the Court held the waiver valid. Although *Noel* speaks in terms of a defendant's understanding his rights, the two cases appear to be quite similar, although reaching opposite results. Certainly *Torres* raises a serious question about the continuing validity of *Noel*. It appears that a strong argument could be made that the *Noel* Case is no longer good authority, although it is clear that the Court did not meet the matter head on. Perhaps it is only that the passage of time and a different Court gives a different emphasis to these types of constitutional rights issues.

In *Keeton v. Hustler Magazine, Inc.*, (September 23, 1987) the Court had before it the long running battle of a plaintiff who claimed to be libeled by Hustler Magazine. The case had already been through the New Hampshire and the Ohio Courts on different occasions and was presently in the Circuit Court of Appeals which certified to the New Hampshire Supreme Court certain questions of law relating to libel and conflict of law issues. The facts showed that the plaintiff claimed to be defamed by an article in a Hustler magazine issue that was distributed nationwide. The New Hampshire distribution of the article was between 10,000 and 15,000 copies, or about 1% of its total circulation. 1

The plaintiff began her action in Ohio, but the case was dismissed there due to lack of compliance with the Ohio statute of limitations, by which time all other statute of limitations nationwide had run out except New Hampshire and the plaintiff promptly brought suit here. An appeal to the U.S. Supreme Court followed and then the case was remanded for a jury trial in the Federal District Court of New Hampshire where the plaintiff received a \$2 million dollar verdict against Hustler. Upon appeal to the First Circuit, the Circuit Court certified to the New Hampshire Supreme Court questions whether New Hampshire followed an interstate single publication rule in

libel cases (thereby allowing the plaintiff to recover in this one action her total damages for the publication and not just damages for the publication in New Hampshire) and whether the New Hampshire statute of limitations was a procedural matter or a substantive matter. If procedural, then the New Hampshire statute of limitations allowing the suit to go forward applied, but if substantive, the statute of limitations of another state would apply, thereby barring the action.

The New Hampshire Court adopted for the first time the majority rule of the Restatement (Second) of Torts providing for a "single publication" rule under which only one action for damages can be maintained for an alleged libelous publication, covering all damages suffered in all jurisdictions by the libelous article. Under this rule, a judgment bars the plaintiff from any other actions for damages between the same parties in other jurisdictions". The New Hampshire Supreme Court held that the single publication rule was the preferred modern rule, as distinguished from the old common law rule of multiple publications that allowed a libel victim to bring suits in multiple jurisdictions to recover damages. The purpose of the single publication rule "is to include in single suit all damages resulting anywhere from the single aggregate publication". On the statute of limitations question, the Supreme Court was divided. The majority held that New Hampshire generally "treats statute of limitations as procedural." As such, under traditional conflict of law rules, New Hampshire would generally apply its own statute of limitations thereby allowing the suit to proceed. Because of the attack by the dissenters, the majority went on to also test their holding under our modern conflict of law rules which applies "a balancing test composed of five choice-influencing considerations", and found that these tests were met and that New Hampshire had sufficient contact with the matter to apply its own statutes of limitations.

1. One wit has pointed out that this circulation substantially exceeds the proportion of New Hampshire's population to that of the country as a whole, and asks "What does this say about conservative New Hampshire?"

The dissenters, (Justices Souter and Thayer) disagreed on the application of the five choice-influencing criteria, holding that there was not enough contact between the parties in the matter to apply the liberal New Hampshire statute of limitations rule. The difference between the justices really revolved around whether the distribution of 10 or 15,000 copies of Hustler magazine, consisting of about 1% of the publications distribution nationwide was a sufficient contact with New Hampshire. The majority held that although the plaintiff had never been in New Hampshire prior to trial, the publication and distribution of 10 to 15,000 copies of a libelous publication clearly injured her here in New Hampshire. The dissenters described the case situation as "provocative" because a "non-resident plaintiff as availed herself of a forum in New Hampshire to collect damages from non-resident defendants for libel in 50 states and the District of Columbia even though more than 99% of the libelous magazines were circulated outside New Hampshire in jurisdictions whose statutes of limitations, if applied, would all have barred litigation as untimely".

*McAlpin v. McAlpin*, 129 N.H. 737(1987) contains an excellent review of the rules and considerations governing property settlement in domestic relations matters. The Court, in an excellent opinion by Justice Johnson, reviewed the power of the trial court in such situation to divide property between warring domestic relations parties and stated the modern view of the Court in these cases. The Court pointed out that the trial court has broad discretion in such situation to make "what it deems an equitable distribution after considering the parties property in its entirety and special circumstances recognized by this Court has bearing on such division". "Despite its broad discretion and its power to order an unequal distribution in the interest of equity, the trial court must nevertheless satisfy certain requirements in rendering its decision. Thus 'in the absence of any such special circumstances the distribution should be as equal as the Court can make it, [and] [i]f, in a particular case, the Court concludes that an unequal distribution of property is warranted it should state its reasons and make specific findings and rulings supporting its decision". The Court pointed out that the special circumstances which may justify an unequal distribution "include, among others, 1) a marriage of short duration; (2) the exclusive premarital possession of an asset by one party that continues after marriage; (3) the recent acquisition of an asset by one party through family relationship; (4) one party's need to provide a home for minor children; (5) the assurance of each party's future security; and (6) the fault of either party."

*New Hampshire Donuts, Inc. v. Skipitaris*, 129 N.H. 774 (1987) involved enforcement by court ordered injunctive relief which required the removal of a structure in violation of a restrictive covenant contained in a deed of land benefiting a neighboring parcel. The Supreme Court upheld the trial court's order requiring the removal of the structure, taking a very broad view of restrictive covenants, stating that "the modern viewpoint [is] that 'the former policy of strictly construing restrictive covenants is no longer operative'... and that restrictions on the use of land by private parties have been particularly important in our century, when the value of property maintaining the character of the neighborhood within which the property is situated." The Court rejected the defendant's argument that the trial court's order requiring the removal of the property was excessive, the court stating that "[t]he days of narrowly construing restrictive covenants are long past." The Court went on to hold that the plaintiff's delay in bringing the action did not bar his right to relief because of the doctrine of laches because the defendant was found to have been "a conscious wrongdoer", guilty of "egregious conduct".

*White v. Wolfeboro*, (decided September 23, 1988) was artfully styled by Justice Batchelder as "a case about land and some of the consequences of a failure to pay real estate taxes on a timely basis". A petitioning taxpayer sought to retrieve his land that had been sold and deeded to the town for failure to pay taxes after the expiration of the time period. The Supreme Court described the tax sale as "an event [which] is significant for the owner since, assuming the validity of the tax sale, its effect is the changing of a continuing inchoate lien for municipal taxes to an asserted lien of record for a specified amount upon which a higher level of statutory interest begins to

run. In addition, the statutory clock starts to run against the time when the owner may lose the title to the land itself to the municipality or to another entity or person who 'buys the taxes' at the collector's sale". The evidence showed that the town bought the entire piece for less than \$400 worth of taxes at a time when the property was assessed at over \$21,000 and worth far more. The Court held that the town could only have taken title to that portion of the property as necessary to pay the taxes, stating the rule as follows:

We hold that when a tax sale is conducted by the collector, only that portion of the estate may be sold, as an undivided interest in common with the person to whom the property is-taxed, as the amount of the tax, interest and charges bears to the value of the property in the tax year in question, computed by dividing the assessed evaluation by the equalization ratio for the municipality used to equalize evaluations.

This case is a significant victory for equity in the rather archaic real estate tax and assessment procedure currently used in New Hampshire.

*Smith v. Liberty Mutual Insurance Company*, 130 N.H. 117 (1987) is a surprising extension of the recent trend of the New Hampshire Supreme Court to extend coverage under insurance liability policies. The present rather conservative Court surprisingly took the position that the *Trombly Rule*, (120 N.H. 164 (1980) [that an ambiguity in an insurance policy is to be construed in favor of the insured and against the insurer] "should not be restricted to terms that reasonably and actually give rise to a disagreement between the contracting parties, but should include all terms about the meaning or application of which reasonable disagreement between the contracting parties is possible". The adoption of this objective standard in the *Smith Case* was a reversal, in part, of the *Commercial Union Case* (118 N.H. 469 (1978)) which had held that a clause was ambiguous when the contracting parties reasonably differ as to its meaning. In the *Smith Case* the insurer and the insured both agreed of what the clause meant, but the Supreme Court still found that there was an ambiguity and applied the *Trombly Rule* against the insurance company.

*Nelson v. Lewis*, 130 New Hampshire 106 (1987) is significant because it is an interpretation at some length of a patient's right to assert the doctor-patient privilege in a medical malpractice action. New Hampshire, of course, recognizes a physician-patient privilege as established by RSA 329:26. The Court noted in the *Nelson Case* that the "privilege is meant to encourage the patient to disclose relevant facts fully so as to receive complete and appropriate treatment. The privilege parallels the Hippocratic Oath in recognizing that much of what a physician learns from his patient may be both embarrassing and of little real consequence to society". Surprisingly, New Hampshire had not previously to the *Nelson Case* recognized specifically that the patient partially waives her right to confidentiality by putting her medical condition at issue in a suit for medical negligence. However, the patient's waiver of the privilege in a medical malpractice is "only partial. It extends not to all information given in the course of treatment, but only to what is relevant to the plaintiff claim". Following this line of reasoning, the Court chose between two divergent lines of authority and opted for the

more protective one by holding that a defendant in a medical malpractice case was not entitled to interview the patient plaintiffs treating physician ex parte, although of course he could depose the doctor in the presence of the patient's attorney.

In *re Sanborn* (decided May 6, 1988) appears to mark a trend of a retreat by the Supreme Court from an earlier series of decisions imposing a reasonable doubt burden of proof in various civil cases. The beyond a reasonable doubt standard is normally considered a criminal standard, but the Court began to introduce it into civil matters several years ago. The *Sanborn Case* reverses the Court's 1977 case of *Proctor v. Butler*, 117 N.H. 927, and holds that in a civil commitment hearing under RSA 135-C:34, the burden of proof is a clear and convincing evidence burden and not the higher burden of proof beyond a reasonable doubt. The *Sanborn Case* raises the issue whether the Court will continue to require the use of the higher burden of proof beyond a reasonable doubt in termination of parental rights cases as it did in the case of the *State v. Robert H.*, 118 N.H. 713 (1978): The reasoning of the *Sanborn Case* appears to be fully applicable to termination of parental rights proceedings and it will be interesting to watch this development in the law.

*Phelps v. Kingston*, 130 N.H. 66 (1987) involves New Hampshire's long arm jurisdiction statute over individuals, RSA 510:4,1. In this case the Supreme Court took its customary broad view of jurisdiction issues and held that there was sufficient minimal contacts to subject to suit in New Hampshire a dentist who lived and practiced Maine, and whom the plaintiffs saw for treatment at his office in Maine. The Court found sufficient that the defendant dentist held a New Hampshire license, had previously been a resident of New Hampshire and continued to advertise extensively in New Hampshire telephone yellow pages, his office being in a Maine city bordering New Hampshire. The Court held that "it was reasonably foreseeable that the injuries allegedly resulting from his care would ultimately become apparent" in New Hampshire.

*Home Gas v. Strafford Fuels, Inc.* 130 New Hampshire 74 (1987) is an interesting interpretation by the Supreme Court of an agreement that was intended by the parties to be an agreement not to compete. However, the particular paragraph, although captioned "Covenant Not To Compete", did not directly prohibit the defendant from competing, but rather prohibited it from engaging in certain prohibited acts. The Supreme Court, looking at the phraseology very carefully, decided that the defendant was not prohibited from competing directly with the plaintiff, although the defendant could not engage in certain prohibitive acts, such as using customer lists acquired from the plaintiff, or acquiring an interest in competitors. However, the defendant itself could compete directly with the plaintiff. The lesson here is that non-competition agreements are going to be given close scrutiny if they ever come to court and the draftsman should be very careful in choosing precise language.

*Panto v. Moore Business Forms, Inc.*, (August 5, 1988) is an important business law case involving the growing tide of litigation concerning the termination of at-will employees. Here, in a question certified from the U.S. Federal District Court for the District of New Hampshire, the Supreme Court was confronted with a situation where

corporate employer, anticipating lay-offs, issued to its employees, most of whom were at-will employees, a statement of Intent concerning their rights in the event of a layoff. The statement indicated that a laid off employee was entitled to three months pay and to certain insurance and pension plan benefits for three months after termination. The plaintiff was not laid off as expected, but many months thereafter. He claimed the benefit of the statement of intent but the company argued the policy only applied to the earlier lay-off. The New Hampshire Supreme Court held that "an employers unilateral promulgation to present at-will employees of a statement of intent to pay and provide such economic benefits may be recognized under New Hampshire law as an offer to modify there existing relationship by means of a unilateral contract, which offer is subject to such an employee's acceptance by continued performance of his duties". The Court hinged its decision on the fact that the consideration for the defendants policy (which was considered to be a unilateral offer to the employees) was the employees continued employment with the defendant corporation. The moral of the story again is that if you have at-will employees, be very careful what you say or offer them because the employer may be inadvertently creating enforceable rights in his employees. It may be better to say nothing at all in many circumstances. The case also contains a very helpful review of the series of recent cases of the rights of employees created by employee handbooks and should be reviewed for that purpose by itself.

Finally, *Lempke & a. v. Dagenais*, decided August 8, 1988 is a case to warm the hearts of unreconstructed bleeding heart liberals (presently so out of style) who believe in that chimerical concept called justice. This case is an important one affecting many ordinary clients. The Court had before it the issue "whether a subsequent purchaser of real property may sue the builder/contractor on the theory of implied warranty workmanlike quality for latent defects which cause economic loss, absence privity of contract". The Court, in a decision by Justice Thayer, surprisingly extended the law by answering the stated issue in the affirmative, even though it had to overrule an earlier case only two years old (*Ellis v. Morris* 128 N.H. 358 (1986)). The Court found that earlier New Hampshire cases had "generally disfavored privity" in particular situations and found that the *Ellis Case* had been an aberration. The Court recognized that a large number of jurisdictions (perhaps a majority) favored an alternate rule, but found that "policy and economic reasons convince us that a privity requirement in this situation is unwarranted". The Court also allowed the injured plaintiff to recover "for purely economic harm, which generally is that loss resulting from the failure of the party to perform to the level expected to the buyer and is commonly measured by the cost of repairing or replacing the product". On this issue, the Court described an implied warranty action as one of contract rather than tort, and allowed the recovery of such losses, although it imposed some very slight restrictions on recovery. Justice Souter, dissented based upon the earlier *Ellis* holding. This case is a good example of a Court determined to reach a desired (and presumably, just,) result without regard to prior law or the prevailing view in other jurisdictions.