



Litigation Newsletter

A Newsletter from the Litigation Practice Group

Winter 2011

The firm is pleased to introduce the third volume of our Litigation Newsletter. Primmer Piper Eggleston & Cramer is a full service business law firm with a deep and experienced litigation team recognized as among the best in Vermont. Our trial attorneys provide exceptional personalized service representing clients before state and federal courts throughout New England, New York and nationwide. We are actively handling matters in areas ranging from commercial litigation, insurance and banking to intellectual property, real estate, employment and torts. Our trial attorneys are skilled at both resolving tough disputes and building a winning case to present at trial.

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ADMINISTRATIVE LITIGATION CHANGES WITH NEW VERMONT GOVERNOR

For the first time in eight years, there has been a change of administration in Vermont's capital. Newly elected Democratic Governor Peter Shumlin replaced outgoing Republican Governor Jim Douglas. With this change of leadership in the Governor's office comes a change of leadership in the agencies that regulate and sometimes litigate against our business clients in administrative proceedings.

Attorney Stephen Kimbell was appointed by Governor Shumlin to serve as Commissioner of Banking, Insurance, Securities, and Health Care Administration ("BISHCA"). BISHCA regulates our financial services, traditional insurance, captive insurance, and health care clients. We represent our clients in regulatory investigations, market conduct exams, and contested hearings before each of the divisions of BISHCA. Commissioner Kimbell brings a wealth of experience to the position as one of the most respected lobbyists in Vermont. He will be hiring new enforcement attorneys, and replacing some Deputy Commissioners. We anticipate his team will take a pragmatic approach to all aspects of regulation and oversight that should afford regulated entities in Vermont a fair shake.

The Governor has also appointed Elizabeth Miller as the new Commissioner of the Department of Public Service. The DPS represents the public interest in public utility matters. We litigate eminent domain matters before the Public Service Board in Vermont. As a party to those proceedings, the DPS serves as an advocate for the general public interest in the necessity and fair compensation for a condemnation. Commissioner Miller is a former Burlington trial attorney. We anticipate that she will be even-handed in protecting the public interest, while understanding the necessity of eminent domain for the public good to ensure that Vermonters receive reliable utility services.

Democratic Attorney General Sorrell was easily re-elected, and has served since 1997. We consequently do not anticipate any changes in the Attorney General's office approach to matters relating to our clients. We represent Vermont and national businesses in Consumer Protection Division investigations.

CHANGES TO FORECLOSURE RULES IN 2010

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

In an effort to address the current foreclosure situation in Vermont, the Legislature passed H.590: An Act Relating To Mediation In Foreclosure Proceedings. The Act became effective July 1, 2010, and incorporated significant changes to Rule 80.1 of the Vermont Rules of Civil Procedure. Two key changes resulting from the Act are:

1. The Plaintiff must attach to the complaint copies of the original note and mortgage deed and proof of ownership thereof, including copies of all original endorsements and assignments of the note and mortgage deed. Further, the plaintiff must state in the Complaint that the originals are in the possession and control of the Plaintiff, or that they are otherwise entitled to enforce the mortgage note consistent with the Uniform Commercial Code.

2. The Act further established a mandatory mediation program to assure the availability of mediation and application of the Home Affordable Modification Program ("HAMP") requirements in actions for foreclosure involving primary residences. Although the Act's mandatory mediation program was intended to apply only to foreclosures involving HAMP subject loans, the Vermont Courts have taken a liberal approach by ordering mediation in nearly all non-commercial foreclosure actions.

The mandatory mediation program places additional burdens on mortgagees filing foreclosure actions. These include, among others, (1) an obligation to pay the costs of mediation, (2) to provide copies of a pooling or servicing agreement that prohibits loan modification, and (3) to use and consider, and provide documentation of all such consideration, of all available foreclosure prevention tools, including reinstatement, loan modification, forbearance, short sale, and HAMP calculation and assumption guidelines. Failure to comply with these new obligations may result in sanctions by the Court, including prohibiting the mortgagee from selling or taking possession of the property.

Finally, in December 2010, the Vermont Supreme Court issued an emergency amendment to Rule 80.1 affecting residential foreclosure actions. The amendment requires counsel for the Plaintiff to certify with the Court that a representative of mortgagee has personally reviewed the documents filed in the case and has confirmed the factual accuracy of the court filings and notarizations contained within the documents. In addition, an affidavit is required by a representative of the Plaintiff, and that representative will need to identify and document the source of his or her authority to act on the Plaintiff's behalf.

CASE NOTES

- The firm recently prevailed in an action for the release of public records filed on behalf of the Caledonian-Record, a daily newspaper distributed throughout Vermont. In *Caledonian-Record Publishing Co. v. Town of St. Johnsbury*, Docket No. 689-9-10, the Washington County Superior Court ruled after a hearing that Vermont's Public Records Act requires the Town of St. Johnsbury to release copies of the resumes and other application materials submitted by the three final candidates for the position of Town Manager. In a decision dated December 21, 2010, Judge Geoffrey Crawford concluded that a balancing of the applicants' privacy interest against the public's interest in the information favored disclosure. The Court ordered disclosure of the application materials, with redaction of the names and other identifying information of two unsuccessful candidates, and full disclosure of the present Town Manager's application materials. Gary Karnedy and Alexandra Edelman represented the

<p>Firm Practice Areas</p> <p>Accounting Firms</p> <p>Bankruptcy</p> <p>Business Entity/Commercial</p> <p>Captive Insurance</p> <p>Employment</p> <p>Environmental and Land Use</p> <p>Estate Planning and Probate</p> <p>Financial Services/Banking</p> <p>Government Relations</p> <p>Health Care</p> <p>Insurance</p> <p>Intellectual Property and Technology</p> <p>International</p> <p>Litigation</p> <p>Mediation and Arbitration</p> <p>Public Utilities/Regulatory Assistance</p> <p>Real Estate</p> <p>Taxation</p>	<p>Caledonian.</p> <ul style="list-style-type: none"> In March 2010, PPEC secured a significant victory on behalf of Nancy Alden, her estate, and her two children in connection with a long standing dispute regarding the administration of a family trust. Mrs. Alden was married to William C. Alden who died in 1980. Mr. Alden had three children from a previous marriage and two children with Mrs. Alden. A trust was established to provide for Mrs. Alden and the five Alden children. Mrs. Alden was a trustee of the trust along with two other independent trustees. Two of Mr. Alden's children from his previous marriage alleged that Mrs. Alden breached various fiduciary duties and committed fraud in connection with the administration of the trust and the appointment of a trustee to replace one of the independent trustees. <p>The allegations by Mr. Alden's children raised many complex factual and legal issues relating to actions dating back to 1982. The parties filed cross-motions for summary judgment at the trial court and a lengthy oral argument was heard on December 30, 2009. On March 5, 2010, the trial court issued a 38 page opinion granting Mrs. Alden's motion for summary judgment on all counts. The court's decision is the first to consider and apply Vermont's newly enacted Trust Code. The decision was appealed to the Vermont Supreme Court where oral arguments were heard on January 12, 2011.</p> <p>For more information about this case or PPEC's trust and estate litigation practice please contact Jon Eggleston or Kevin Henry in the Burlington office at (802) 864-0880.</p> <ul style="list-style-type: none"> <i>Schonbeck v. Chase, 2010 Vt. 91.</i> The Vermont Supreme Court recently issued a ruling in favor of the firm's client securing important commercial property rights threatened by neighboring property owners. On appeal, the firm was successful in reversing the trial court's finding that plaintiff's possessed a 12 foot wide prescriptive easement for general pedestrian and vehicular access that effectively cleaved defendant's property in half. The appeal was handled by Gary Franklin. <p>The firm's client is a long-time owner of commercial property in the central business district in Burlington, Vermont. The property consists of retail and parking space. To secure its parking area, defendants built an approved fence along its lot line to the rear.</p> <p>Subsequent to the erection of the fence, plaintiffs purchased an adjoining property which has a rear door exiting into a common alley way that in part borders defendants' fence. Because of the fence, plaintiffs knew that the emergency access from the rear door was restricted and did not conform to fire safety codes. Accordingly, to develop the adjoining property, plaintiffs were required to build an internal egress corridor to meet building and fire safety codes when defendants did not meet demands to remove the fence.</p> <p>Plaintiffs sued claiming that it possessed a prescriptive easement across approximately 30 inches along the border of defendants' parking area for emergency egress from the rear of its building requiring removal or relocation of the fence. At trial, plaintiffs provided historical evidence of deliveries of fuel oil to the rear of the building and occasional use of the back door for trash removal, transport of miscellaneous items, and sporadic pedestrian traffic. The trial court found that not only did the cumulative effect of these activities establish a prescriptive easement for emergency egress, of which there was no evidence, it established the right to a 12 foot easement for general pedestrian and vehicular access right down the center of defendants' property.</p>
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Defendants argued that the evidence failed to establish a systematic and continuous use of its property for emergency egress. Further, the rear door on plaintiff's building opening into a common alley way was blank with no hardware to open the door from the outside, no signage and no improvements of any sort that would indicate its use or provide notice to defendants of a prescriptive claim.

In reversing the trial court, the Supreme Court noted that the nature and scope of the use of the property during the prescriptive time period establishes the general outlines of the easement. Accordingly, the trial erred in amalgamating varying independent uses to establish a general easement. Further, the grant of an unlimited prescriptive easement was in error as the evidence established nothing more than intermittent uses of land for specific purposes. Moreover, plaintiff's predecessor had long ago abandoned any easement for the delivery of fuel oil. The prior owners conclusively and unequivocally relinquished any such easement for fuel oil delivery by permanently encasing the fuel oil tank in 1990, long before plaintiffs acquired the property. Finally, and importantly, the Supreme Court took issue with the implication that the mere existence of a back door that opens into a common alley way can establish a prescriptive easement.

- Leo Bisson and Joslyn Wilschek successfully represented Vermont Mutual Insurance Company at the Vermont Supreme Court where the Court held that a landlord's liability insurance policy does not cover a tenant's claim for breach of the implied warranty of habitability *Vermont Mutual Insurance Company v. Parsons Hill Partnership, Willard Group, Poulin Group and Adrien nee Fortin*, 2010 VT 44. The coverage litigation involved a contaminated water supply with over 100 individual claimants.

The client had the following to say about the decision:

"It is with ineffable pleasure that I advise you that the Vermont Supreme Court has unanimously vindicated our coverage position -- a position that has been assailed by the other parties in the coverage litigation for over a decade. This result could not have been obtained without the outstanding legal services by Leo and his associate, Joslyn. On behalf of our Board of Directors, management and other policyholders, they deserve our heartfelt gratitude."

Team News

PPEC is pleased to announce that Alexandra E. Edelman has joined the firm as an associate. Her primary area of practice is commercial litigation. Prior to joining PPEC, she practiced in New York and New Jersey. Alexandra will be based in our Burlington office.

In February 2010, Gary Karnedy conducted a seminar on Eminent Domain: Key Trial Tactics in 2010. The firm litigates condemnation and other easement-related issues on behalf of utilities in large construction projects across the State of Vermont.

On March 6, 2010, Greg Clayton was inducted as a Fellow of the American College of Trial Lawyers (ACTL) at their semi-annual meeting in Palm Desert, California. Fellowship in the ACTL is by invitation only and is restricted to 1% of the attorneys in each state.

In June 2010, litigation paralegal Laurie S. Noyes, achieved the esteemed PACE Registered Paralegal® designation through the National Federation of Paralegal Associations. She is one of only seven PACE

Registered Paralegals® in the State of Vermont. PACE® (Paralegal Advanced Competency Exam) is a proficiency-based voluntary exam designed to test the competency level of experienced paralegals.

On October 6, 2010 Associate Cassandra LaRae-Perez was awarded the Victor J. Garo Public Service Award in recognition of her dedication to pro bono legal services. The award was established in 2007 to honor Mr. Garo's heroic 30-year commitment to representing a wrongly convicted client and is given each fall to a Boston University School of Law graduate whose life reflects the perseverance and dedication to pro bono work demonstrated by Mr. Garo. The Public Service Committee of BU was impressed by Ms. LaRae-Perez's exceptional and long-standing commitment to pro bono work, the quality of her work and its impact on the community.

In December 2010, Gary Franklin volunteered to judge appellate advocacy arguments at the Vermont Law School.

The firm has once again been recognized by Chambers USA for its top tier litigation team.

On Jan. 7 Leo Bisson participated on a panel seminar entitled *Making the Most of Mediation* sponsored by the Vt. Assoc for Justice (think trial lawyers) at the Sheraton. The program was based on a mock mediation acted out by the participants, including Jim Spink, Michael Marks, Art Frank, Robin Curtiss and Carey Rose. Discussion of selected critical points in the mediation process followed each portion of the mock mediation. The program was well attended and sparked considerable audience participation as some of Vermont's most regular mediators described their approach to issues arising on the route to resolution. Leo has been a panel member in three recent such programs and makes mediation and arbitration a substantial part of his practice.

The firm defends consumer fraud investigations and litigation in Vermont and New Hampshire. Please visit the following links on our website for a summary of recent changes in Vermont and New Hampshire consumer fraud law:

http://www.ppeclaw.com/docs/New_Hampshire_Consumer_Protection.doc

http://www.ppeclaw.com/docs/Vermont_Consumer_Fraud.doc

http://www.ppeclaw.com/docs/VT_Update.doc

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