



Litigation Newsletter

A Newsletter from the Litigation Practice Group

Fall 2011

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 your best case to present at trial.

Litigation Practice Group

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KEEP YOUR SECRET SAUCE SECRET

The proprietary information of a business – a customer list, business method, formula or technique– is often its most valuable asset. Given the modern realities of the information age and a transient workforce, companies need to take great care to protect their “secrets.”

In general, trade secrets are defined as information that derives independent economic value from *not* being generally known to the public or competitors who would benefit from its disclosure. For a company to protect information as being a trade secret, the company must demonstrate that it owns the information and that reasonable steps have been taken to maintain its secrecy.

As a first step of protection, access to a company’s secret sauce should be restricted. For example, a trade secret should be on a restricted network or in a locked drawer, as opposed to freely available to all employees. If an employee is privy to important company information, they must be made to understand the confidential nature of what they are receiving. While it is not always necessary that the employee sign a non-disclosure agreement (NDA), even a general NDA may not be sufficient. Best practices dictate that your trade secret should be identified in writing with specificity. Sensitive information should be stamped “confidential” and/or accompanied by a written warning against unauthorized disclosure or use.

If an ex-employee misappropriates and uses a trade secret in a competing enterprise, the company will have to show that the ex-employee acquired the confidential information during the course of employment and did not already know it as part of his/her prior skill and experience. Courts are loathe to prohibit someone from gainful employment even in the face of a non-compete agreement. Therefore, it is often critical to establish that the employee’s knowledge is in fact information proprietary to the company. Without a written communication identifying the proprietary information, its confidential nature, and how and when it was developed, serious doubt could be cast over the company’s claim.

To avoid inadvertent loss of trade secrets, an internal audit of your company’s policies and practices regarding its secret sauce may be well worth the time and effort.

For more information about the Firm’s Intellectual Property practice, please feel free to contact Gary Franklin and Kevin Henry.

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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

Firm Practice Areas

Accounting Firms

Bankruptcy

Business Entity/Commercial

Captive Insurance

Employment

LEGAL RIGHTS AND PROTECTIONS UNDER THE SERVICEMEMBERS CIVIL RELIEF ACT

Given the current state of financial affairs in the United States, financial institutions must be mindful of the requirements of the Servicemembers Civil Relief Act ("SCRA"), 50 U.S.C. App § 501, *et seq.* ("SCRA") when lending to and servicing accounts for members of the military services. The key provisions related to interest rates and foreclosure issues are identified below.

Who Is Entitled to Legal Protection Under the SCRA? Servicemembers on "active duty" or "active service," or a spouse or dependent of such a servicemember may be entitled to protection and debt relief under SCRA, including: (a) Regular members of the U.S. Armed Forces; (b) Reserve and National Guard personnel who have been activated and are on Federal active duty; (c) National Guard personnel under a call or order to active duty for more than 30 consecutive days, for purposes of responding to a national emergency declared by the President and supported by Federal funds; (d) Active service members of the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration; and (e) Certain United States citizens serving with the armed forces of a nation with which the United States is allied in the prosecution of a war or military action.

Interest Rate Cap Under SCRA Section 527. Section 527 of the SCRA states that a debt incurred by a servicemember or spouse jointly, prior to entering the military service or being called to active duty, shall not bear an interest rate above six percent per year *during the period of military service*. Interest in excess of six percent during the period of military service shall be forgiven, not deferred. Protection under Section 527 is triggered when the servicemember sends written notice of being called into service to the lender.

Mortgage Foreclosure Stay Under SCRA Section 533. Section 533 of the SCRA applies to debt secured by real or personal property owned by a servicemember that originated before the period of the servicemember's military service, and for which the servicemember is still obligated, where the obligation is secured by a mortgage, trust deed, or other security in the nature of a mortgage. Section 533 provides the servicemember-mortgagor with the following protection: (a) Stay of proceedings or adjustment of the obligation; and (b) Prohibition on foreclosure absent a court order granted before such sale or by waiver. The protections apply for the period of military service or **within 9 months after**.

Accordingly, if a lender files a legal action to enforce a mortgage obligation, such as a foreclosure action, Section 533 permits the courts to postpone the proceedings until the servicemember is available to attend, extend the mortgage maturity date to facilitate lower monthly payments, grant foreclosure subject to the action being re-opened if the servicemember challenges it, and extend the period during which the servicemember can redeem the property by paying the mortgage.

Unlike the cap on interest rate protection, there is no requirement under SCRA for the servicemember to provide a written notice or a copy of his or her military orders to the lender in connection with a foreclosure proceeding. Accordingly, lenders and their foreclosure counsel should inquire about the military status of a person by searching the Department of Defense's Defense Manpower Data Center's website, contacting the servicemember, and/or examining their files for indicia of military service, prior to commencing a foreclosure or debt enforcement action.

Environmental and Land Use	<p>As a result of the HERA and the Helping Heroes Keep Their Homes Act of 2010, HUD updated its SCRA Notice Disclosure to include all extended time periods. The notice must (1) be sent to all homeowners who are in default on a residential mortgage, whether a conventional mortgage or insured by HUD, (2) include the toll-free Military OneSource number to call if servicemembers or their dependents require further assistance, and (3) be sent within 45 days from the date a missed payment was due, unless the homeowner pays the overdue amount before the expiration of the 45-day period. For a copy of the Notice, please contact us.</p> <p><u>Civil Liability.</u> In October 2010, with the passage of the Veterans' Benefits Act of 2010 (VBA), a private cause of action was created for servicemembers for SCRA violations. The relief available includes damages, injunctions and attorneys' fees. The Fourth Circuit Court of Appeals recently held that the right to a private cause of action under the VBA could be applied retroactively in Virginia. Other circuits may soon follow suit.</p> <p>VERMONT SUPREME COURT LIMITS RECOVERY OF ATTORNEYS' FEES IN CONSUMER FRAUD CASE</p> <p>In a January 31, 2011 decision, <i>Anderson v. Johnson</i>, the Vermont Supreme Court narrowed the scope of recovery for attorney fees under the Vermont consumer fraud statute. Typically when Plaintiff's attorneys file lawsuits claiming violations of our consumer fraud statute, they use the threat of the Defendant having to pay their attorney fees as a negotiation chit in settlement discussions, even when there are little if any actual dollar damages. In the <i>Anderson</i> decision however, the Court found that an award for attorney fees is not proper "where the verdict granted plaintiffs no relief, vindicated no significant legal rights, and advanced no broader policy interests". Consequently if the Plaintiff cannot show actual dollar damages, and the Court does not find that there is some public policy benefit in his cause, even if he nominally wins the case, then his attorney fees will not have to be paid by the Defendant. This decision should make weak consumer fraud cases less attractive to Plaintiff's attorneys in the future.</p>
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	

CASE NOTES

- PPEC received a favorable decision from the New Hampshire Supreme Court in the matter of *The Willowdale Place Cooperative v. Joyce Towle Varney*. This case involved compliance with statutory procedures creating a right of first refusal for tenants in connection with a \$1 million sale of a mobile home park in Littleton, NH. At issue was whether a 1% closing adjustment in the price, which was contemplated in the conditional purchase and sale agreement distributed to all the tenants, constituted a material change that triggered an obligation to re-notify tenants of the terms of the sale. Gregory S. Clayton won the case at the trial level in Grafton County Superior Court and Cassandra LaRae-Perez handled the appeal before the Supreme Court, which affirmed the Superior Court decision, securing a victory for our clients.
- The firm recently obtained a favorable settlement on behalf of a client in the direct marketing business accused of misappropriation of trade secrets, unfair competition and copyright violations. The charges were brought in federal court by a business competitor alleging that its website and marketing strategy were mimicked and that its secret business methods were wrongfully obtained through the hiring of the competitor's former CEO. The firm was able to develop a potent defense through strategic discovery and motion practice, and negotiate a settlement that fully protected the client's business interests allowing it to proceed in the market unrestricted. For more information about the firm's litigation practice in this area please contact Gary Franklin or Kevin Henry.
- Greg Eaton recently obtained a defense verdict in a commercial premises liability case following a jury trial in Lancaster, New Hampshire. Greg represented a truck stop in Colebrook, New Hampshire. The

Plaintiff claimed she slipped and fell on ice while using the gas pumps. Plaintiff underwent arthroscopic surgery on her knee and presented testimony that she would require a knee replacement as a result of her fall. In closing argument, Plaintiff's counsel asked the jury to award over \$60,000 in past and future medical bills in addition to pain and suffering. At trial, Greg presented evidence regarding the owner's frequent and systematic maintenance practices, as well as the Plaintiff's own negligence in causing the accident. After deliberating for three hours, the jury returned a verdict in favor of Greg's client.

- Alex Edelman and Doug Wolinsky recently secured significant real estate tax reductions for branches of a large regional bank located in Brattleboro, Alburgh and Middlebury, Vermont. In each case, they successfully challenged the 2011 real estate taxes assessed by the local Board of Listers, arguing that: (1) the subject property had been assessed in excess of its fair market value; and (2) the subject property had been assessed in excess of comparable properties elsewhere within that town. With the use of comparable sales data and an opinion of value from a local real estate broker, they established that the 2011 assessments for the properties were inflated and required reduction. In each case, the Board of Listers agreed and reduced the tax assessments for 2011.

- In our last edition, we reported on PPEC's 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 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. 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 trial court's decision was appealed to the Vermont Supreme Court and on July 8, 2011, the Court, in a unanimous decision, affirmed the trial court. The case is *In re Estate of Nancy B. Alden v. Julia Dodge Alden Dee and Todd Howard Alden*, 2011 VT 64. For questions about this case or other fiduciary litigation matters please contact Jon Eggleston or Kevin Henry.

- PPEC prevailed against a Plaintiffs' class action appeal to the 2nd Circuit Court of Appeals. The Federal Court affirmed the complete dismissal of a class action lawsuit against PPPEC clients American Skiing Company, S-K-I, Ltd., and Killington, Ltd. The Court agreed that ski passes for over 1,200 class members had expressly and unambiguously expired at the time of the sale of the Killington Ski area assets, and found that our clients faithfully honored their contractual obligations. Gary Karnedy argued the case for Primmer.

Team News

PPEC is pleased to announce that Thomas Getz has joined the firm as an associate. Tom will practice primarily in the area of commercial litigation. Prior to joining PPEC, Tom practiced in the San Diego office of the multinational law firm Latham & Watkins, and most recently at a small litigation firm in Jackson, Wyoming, where he was a medalist in the Best Lawyer category of the JH Weekly's 2011 Best of Jackson Hole awards.

In June 2011, Greg Eaton and Jeff Marlin presented on mediation strategy and negotiating tactics to the Vermont Claims Association on June 15th in Waterbury.

In June 2011, Kevin Henry attended an eight day trial advocacy program put on by the National Institute of Trial Advocacy (NITA) in Boulder, Colorado. NITA is the premier provider of trial advocacy training in the United States, and its faculty are some of the most experienced trial attorneys and trial court judges from around the country. This intensive program is designed for practitioners with a wide range of experience and provides a unique opportunity to enhance all aspects of trial skills including jury selection, opening statements, direct and cross examination, and closing arguments.

In September 2011, Gary Karnedy and Laurie Noyes served as part of a Panel hosting a roundtable discussion on the Effective Utilization of Paralegals during the 133rd Annual Meeting of the Vermont Bar Association held at the Lake Morey Resort in Fairlee, Vermont.

Leo Bisson and Jeff Marlin were presenters for the Year-in-Review Insurance Law Update at the Vermont Bar Association Annual Meeting on September 23, 2011 at the Lake Morey Resort in Fairlee, VT.

Greg Eaton and Jeff Marlin will conduct a workshop on "What Does an Adjuster Need to Settle a Case" at the 25th annual Vermont Claims Association Seminar on October 6, 2011 at the Sheraton Hotel in Burlington, VT.

PPEC is pleased to announce that three of its associates Tom Getz, Alex Edelman, and Logan Baker, have recently passed the Vermont Bar Exam.

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