

Spring 2007
Volume I

HOT TOPICS

John Barr has been selected by Bank of America to be counsel to business lending on loans up to \$10 million.

John Barr is representing Painter's Union Council 51, Inc., in the quest to purchase a building in the Boston Properties Business Park and acquire financing on the property.

LEGAL BRIEFS

Residential sales have risen in the Baltimore metropolitan area for the first time in 16 months for the month of January, 2007. This is a good sign for spring housing market.

In January, there was an overall increase of 3.75 — the reverse of the double digit declines seen in several months, according to the Metropolitan Information Systems, Inc. — a Rockville firm that tracks home sales.

The ongoing availability of attractive mortgage rates combined with the regions ongoing job growth are optimistic signs for Maryland's Real Estate market this spring.

According to a report by June Arney, a Sun Reporter, it is predicted that the spring market will be brisk and still ample.

Preserving Our Civil Justice System

by Gabriel A. Riveros, Esq.

There is a war waging in this country that has gone ignored for the most part over the last century. Like any war, this is a war for power and money at one end and justice and accountability at the other. This war has been characterized by the insurance industry and those aligned with their interests as a movement for "tort reform", which seeks to erode the rights and liberties we are entitled to for just, fair and reasonable compensation.

Article 19 of the Maryland Declaration of Rights adopted in 1867 provides: *"That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land."* These rights were created as part of the social contract between government and people for a civil justice system where people could resolve their disputes without the resort to self-help and lawlessness.

With the advent of industrialism and the rise of capitalism at the turn of the 19th Century and in the early stages of the 20th Century, some law makers sought to balance and protect the interests of business with the rights of the public. As just one example, the worker's compensation system was a result of this compromise between industry and labor unions. The assignment of "fault", which is characterized with what a court of law usually decides, was eliminated in exchange for an administrative system that determines compensatable work related injuries and appropriate compensation benefits. Employers were sold on the idea of a known risk and cost of doing business [largely in the form of insurance premiums] versus the unknown costs and results of jury awards. Even back in the early part of the 20th century the insurance industry launched marketing campaigns to convince the minds of business and industry that jury awards were out of control and harmful to business. Sound familiar?

In this latest chapter and in just about every state and at the federal level, interest groups serving the insurance industry have worked hard to convince lawmakers to place illogical, arbitrary and unjust damages caps on claims for such things as personal injury or death as a result of negligence by doctors, automobile accidents, and product liability claims to name a few. The argument always advanced by the insurance industry is that juries are out of control and exorbitant judgments are causing doctors medical malpractice premiums to rise over 300% and the like. The alleged

Residential Subdivisions: Pitfalls for the Unwary

by Gabriel A. Riveros, Esq.

The history of residential subdivision disputes between land developers and land owners in Maryland is full of examples of how unsuspecting participants in these transactions can quickly find themselves a day late and a dollar short. This is especially true where "time" is not specified regarding final settlement and factors outside the immediate parties control carry what may have initially seemed like a great deal into the interstellar cosmos of what could have been. Should you be unfortunate (or fortunate) enough to be involved in one of these disputes, whether as land developer or land owner, navigating the ensuing legal battle to come will seem like a journey through "Back to the Future" should you be in violation of what is known in legal jargon as the "Rule Against Perpetuities."

The Rule Against Perpetuities

Exactly what is this arcane and cryptic sounding rule? This concept is well documented as particularly susceptible to ambiguity and uncertainty with regard to contracts, deeds, wills, trusts, or other legal instruments dealing with the conveyance of future interests in real property. Recently, the Court of Special Appeals of Maryland (CSA) gave it a go in the case of *Cattail Associates, Inc. v. Leonard Sass, Jr., et al.*, which involved a land developer (Cattail) suing several land owners (Sass et al.) demanding they honor a contract for the purchase of two lots entered into in 1995.

In discussing the Rule, the CSA reiterated that, "Under the common law Rule Against Perpetuities, no interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest. The Rule Against Perpetuities is not a rule that invalidates interests which last too long, but interests which vest too remotely. By voiding future interests that might vest too remotely, the Rule Against Perpetuities facilitates the alienability of property, helps prevent uncertain title, and encourages owners to make effective use of their property." In addition, "The Rule Against Perpetuities is applied to determine whether the interest could vest beyond the permissible period, based on the possibility of events, not actual events. A future interest is invalid under the Rule Against Perpetuities unless it is absolutely certain that it must vest within the period of perpetuities."

The contract at issue involved property in Anne Arundel County which Cattail intended to further subdivide. The contract expressly made settlement contingent upon

justification for damages caps is that by reducing the amount a jury can award, costs of insurance premiums can be stabilized and affordable.

Unfortunately, more and more lawmakers have bought into tort reform over the last decade. What the research and data is showing however in most states is that despite the imposition of caps, the rates of insurance have still continued to rise at an alarming rate and the insurance industry is continuing to rake in unprecedented profits despite so called "catastrophic losses" like Hurricane Katrina and a slew of hurricanes that hit the US coast in 2004.

There have even been proposals to limit victims of medical malpractice from access to the civil courts and towards a system similar to worker's compensation where claims are filed with a "health court" where many of the rights afforded civil litigants in a court of law simply don't exist. The unfortunate casualties of special interests ends up being health care providers who are squeezed for exorbitant medical malpractice insurance premiums, a health care system where medical decisions are indirectly being made not by doctors but by insurance bureaucrats and the consuming public whose lives and well-being are again like 100 years ago, the last consideration.

The Maryland Trial Lawyers Association has worked hard to educate the public about the importance of preserving our civil justice system and ensuring that lawmakers pass good law or block bad law. With the changing political climate in Maryland and in the US Congress, there is great hope that the erosion of our civil justice system will not only be prevented but reversed towards protecting the public. I submit to you that the days of "tort reform" are coming to an end and we are moving forward towards insurance reform."

In 2007, a recent Maryland bill allowing first-party insured's a cause of action against their insurance companies who act in bad faith has finally became law and is just one example of the turning tide to protect the public and even the playing field against the insurance industry. Similar versions of this law had come up many times in the past only to be shot down by the insurance lobby and legislators in their corner. This battle was won by the efforts of those seeking justice and supporting the dedicated efforts of legislators interested in preserving our civil justice system.

Cattail obtaining all successful approvals in the subdivision process from Anne Arundel County, State and/or Federal agencies that would be required in getting the green light on the subdivision project.

Cattail apparently made numerous attempts to obtain final subdivision approval over the next several years and all to no avail. Finally a settlement date was unilaterally set by Cattail nearly 8 years after the parties first entered the contract and removing all the contingencies including obtaining subdivision plan approval, however, the land owners did not play ball and had a different idea. Cattail sued the land owners for specific performance seeking to enforce the contract.

Among other arguments, Sass contended that the contract was unenforceable because it violated the Rule Against Perpetuities and the Circuit Court for Anne Arundel County agreed. It found that, because the contract provided for settlement only after certain conditions in the control of a third party are satisfied, the contract violates the Rule Against Perpetuities.

On appeal and reversal, the CSA held that *in the absence of a "savings clause" in the sales contract*, the contract for the sale of two lots, with settlement contingent upon Cattail receiving the necessary government approvals from the county, and possibly from other government agencies, for its residential subdivision plan, would violate the Rule Against Perpetuities since the granting of governmental approvals was beyond the control of the party's to the contract, and it could not be known with any certainty if and when settlement would take place.

The Savings Clause

Reference was made by the CSA that a "savings clause" could save the day in avoiding a violation of the Rule Against Perpetuities. In fact, Cattail presumably had legal counsel forward thinking enough to realize the potential violation of this rule, particularly with regard to residential subdivision projects that are inherently difficult to gauge with any accuracy when settlement is contingent upon government agency approvals. This isn't bashing government agencies involved by any means, rather it is just a reality that contingencies may and almost always do come up that make forecasting final subdivision approval a true art if not a science.

Although there is no magical language, a savings clause is really a matter of making the parties intent clear. The contract at issue in Cattail contained a savings clause which stated that: "In order to preclude any application of the Rule Against Perpetuities which would otherwise invalidate and nullify this contract, the parties agree that this contract shall expire, unless otherwise previously terminated, on the last day of the time period legally permitted by the Rule Against Perpetuities in the State of Maryland... ." This clause saved the day for Cattail and validated a contract over 10 years after it had

Think Before you Click!!!

by Fred L. Coover, Esq.

Otherwise, you could land yourself a criminal record, with a fine of up to \$500, imprisonment of up to one year or both! Maryland's E-Mail Anti-Harassment Law imposes criminal penalties if you are found guilty of using electronic mail with the intent to harass: (1) one or more persons; or (2) by sending lewd, lascivious, or obscene material. This law also defines "electronic mail" as "the transmission of information or a communication by the use of a computer or other electronic means that is sent to a person identified by a unique address and that is received by the person."

In this cyber-age that we are now living in, e-mail has become a standard mode of daily communication with our family, friends, employers, employees, co-workers and clients. From your computers, to text messaging on cell phones and e-mailing from Blackberries, the law regulating the manner in which we communicate with one another in cyber space has evolved to address certain wrongful cyber-conduct, including on-line harassment. Statistics regarding on-line harassment by far list e-mail as the number one method by which harassment-like conduct first begins and can even escalate to off-line harassment. Proving the "intent to harass" is a matter of degree and repeated, or even a single electronic communication, conveying "anger" may be sufficient to be charged under this law. When disagreements arise, it is often best to avoid using e-mail as a way of expressing any anger because such communications or statements are memorialized and can be used against you later in a court of law in support of charges that you had the "intent to harass" the recipient of your e-mail.

Employers should implement written policy guidelines regarding the use of electronic communications in the work place with a "zero" tolerance policy and methods by which employees can make management aware of potential violations, including prompt investigation to confirm and address on-line harassment. Employees who hold a supervisory position must be sensitive to the manner in which messages are conveyed to their subordinates to avoid the potential criminal and civil liabilities of on-line harassment. At Coover & Barr, LLC, our attorneys can advise and assist in the prosecution or defense of on-line harassment.

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