

# NEWSLETTER



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COUNSELORS-AT-LAW



### Promissory Notes, Loans and Mortgages

When an individual sells property for a mortgage and/or promissory note, there are new and stringent requirements. The instrument must be "actuarially sound," which means it must be repaid over the individual's life expectancy. The payments must be in equal amounts with no deferral and no balloon payments. The instrument cannot include a cancellation on death provision. If the note, loan or mortgage doesn't meet these requirements, the full value of the outstanding balance will be deemed available for the Medicaid applicant.

DRA makes Medicaid planning more difficult but it is still possible to protect assets for long term care needs.

Now it is more important than ever to consult an elder law specialist, and to plan ahead for your needs.

### CONGRESS MAKES CHANGES TO MEDICAID LAW

By Lillian M. Jacquard, Esq.

On February 8, 2006 President Bush signed into law the Deficit Reduction Act of 2005 (DRA). This law contains the most significant changes to Medicaid law since the Omnibus Budget Reconciliation Act of 1993 (OBRA 1993). The following is a summary:

#### Increased Look Back Period

DRA increases the look back period to five years for all transfers. This is a change from a three year look back for outright transfers and a five year look back for transfers to trusts.

#### Change in Beginning Date for Transfer Penalties

Under the old rules, a transfer penalty begins to run in the month the transfer is made. For example, if Mr. Smith gives his son \$50,000 in August of 2005, there is a seven month period of ineligibility for Medicaid. It begins on August 1, 2005 and ends on March 1, 2006. If Mr. Smith meets all the other eligibility criteria he can qualify for Medicaid on March 1, 2006. Under the DRA the penalty period doesn't begin to run until Mr. Smith is (1) living in the nursing home; (2) applies for Medicaid; and (3) is otherwise eligible. That means Mr. Smith needs Medicaid and is out of money. The old rules will continue to be applied to all transfers made before February 8, 2006.

### Treatment of Annuities

DRA requires that all annuities must be disclosed on a Medicaid Application (as they are now), but then requires that the State be named as a beneficiary for at least the amount of medical assistance provided to the annuitant. The State may notice an issuer of annuities that it has standing as a remainder beneficiary and may require an issuer to provide notice of any change in beneficiary designations.

### Application of Income First Rule

In some states, such as Rhode Island, when a community spouse has very low income, he or she can qualify to keep additional assets in order to increase income and prevent the impoverishment of the community spouse. These states are known as "Asset First" states because they allow the community spouse to keep assets before allocating the income of the nursing home spouse. Under DRA this will no longer be available. A community spouse will only be able to keep additional assets when the combined incomes of both spouses is below the minimum established levels.

### Home Equity Limited

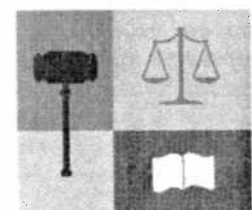
DRA limits the amount of home equity an individual can own and qualify for Medicaid. The DRA limit is \$500,000, but each State has the option to raise that amount to \$750,000. Home equity limits do not apply if there is a spouse, a minor child, a blind or disabled child living in the home.

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- Corporate and Business Law
- Real Estate
- Commercial Transactions
- Litigation
- Personal Injury
- Employment Law
- Family Law and Divorce
- Estate and Medicaid Planning
- Wills and Trusts
- Construction Law
- Contract Law



# FROM JERRY'S KITCHEN

*Here's a great recipe for your summer picnics and barbeques!*

## Millie's Potato Salad

5 lbs. potatoes  
1 medium Vidalia onion - diced  
2 carrots - chopped fine  
3 eggs - hardboiled  
1/4 cup mayonnaise  
1 tsp. white vinegar

Cut potatoes into large cubes and boil in water with vinegar until they are cooked but still firm.

Drain potatoes and add onion, carrots and mayonnaise (you can add more mayonnaise if it seems a little dry), then salt to taste.

Cut the eggs in halves and sprinkle with paprika. Use the eggs as a garnish.

Keep refrigerated until ready to serve.



## **Are All Risk Insurance Policies As Good As They Sound?**

By Jessica L. Papazian-Ross, Esq

On a commercial construction project, if an owner has an all risk builder's insurance policy, do you as the general contractor and/or subcontractor on the project feel financially more secure regarding property damage losses that might occur during the project. Unless you have been provided with a copy of the owner's insurance policy and can read the perils excluded and the specific provisions of the policy, feeling secure may be a little premature. First, there is no standard form for builder's risk insurance policies. The policy language in each form is different and careful attention should be given to the language used. Of particular importance is the language used relative to the peril exclusions governing

defective workmanship and consequential losses.

As the name implies, a builder's all risk policy covers "all risk" unless a specified peril is excluded. Under many all risk policies, the damages resulting from defective workmanship is covered but the corrective work to repair the defective construction is excluded. Under such instances where there is an exclusion for faulty materials, improper workmanship and/or errors in design or specifications coverage may still be provided if the jury and/or the fact finder determines that the work performed was not defective and/or that some other cause contributed to the property loss, perhaps an intervening cause negating the defective work as being the proximate cause for the loss.

Most builder's risk policies exclude property damage arising out of latent defects and exclude consequential losses which generally involves lost profits but not overhead expenses in performing the repair work. Under all risk policies, there are procedural mandates that must be adhered to which could affect the insured's claim under the policy. For instance, there may be a provision in the policy requiring the insured to immediately safeguard the property to prevent further loss and to minimize the damage to the insurer. The insured is obligated to take this corrective action to stabilize the site and to perform salvage work under a typical "sue and labor" clause under builder's risk policies.

Builder's risk policies are "occurrence" policies that require prompt notice of the loss to the insurer. As an "occurrence" policy, the damage must occur during the policy period, otherwise there is no coverage. This is distinguished from a claims-made policy wherein the claim must be made during the policy period but the damage can occur at a

different time.

The procedural requirements that an insured should be aware of under a builder's risk policy are the following:

1. Submitting the proof of loss form;
2. Submitting to an examination under oath;
3. Obtaining an appraisal of the property damage loss;
4. Audit of books and records; and
5. One year statute of limitations.

After the insurance carrier has been notified of the loss, the company will require the insured to submit a written proof of loss within a specified period of time which requires the insured to itemize the property damage loss and the cost to repair the damage. This may be hard to accomplish in the standard ninety (90) day period and a written request to extend the time period would be advisable, with an explanation of the good faith efforts being undertaken to obtain the estimates and/or appraisals required. It is recommended that the insurance representative handling the claim dates and signs the approval of the written extension.

If the insurance company disputes the written appraisal, there is generally an appraisal process whereby the insurer and the insured each select an appraiser and the two (2) appraisers select a third appraiser. The third neutral appraiser will determine the value of the loss, which is separate and apart from whether the loss is covered under the insurance policy. The appraisal process simply determines what the value is assuming coverage can be established.

The insurance company is allowed to audit the contractor's books and records, especially when the premium is based on the value of the

*See "Risk" - Continued on page 3*



**YOUR LEGAL LIFEBOAT:  
NAVIGATING THE COMMERCIAL  
LOAN PROCESS**

By Amy E. Stratton, Esq.

Buoyant dreams of expansion? Fishing an upgrade? Sinking profits? A commercial loan can be a great tool for a business to invest in its future and meet its business goals. Your lawyer can guide you through the often turbulent commercial loan process.

*Cruising Through the Application Process*

Your attorney can help you navigate the application process and increase the likelihood of an approval. When considering a commercial loan application, a lender will review the five "C"s of credit: character, cash flow, collateral, conditions, and capitalization. Your

lawyer can help you provide the appropriate information for each one of the five "C"s, thus anticipating a lender's concerns and presenting the most favorable loan application possible. Particularly in the context of a small business, lenders often use a numerical credit scoring system, grading each response on a completed loan application. Thus, it is important to present an impressive loan application package from the outset. Generally, such information includes close coordination with your accountant to compile your financial statements and to cure or explain any problems.

In addition to financial information, your attorney can also help you prepare a comprehensive business plan to be submitted with the loan application. The business plan can act as a sales brochure for the lender, setting forth pertinent background information, as well as its future goals. For example, the business plan can include how long the business has

existed, the individuals or entities involved, the amounts invested by individuals and entities, the nature of the business, and identification of competition. The business plan can also identify the intended use for the funds and how the funds will be repaid, as well as a disclosure of existing problems, in order to be forthright with the lender. A comprehensive business plan can determine whether a loan application will sink or swim, so to speak.

*Smooth Sailing to Closing*

In addition to the application, your attorney can also help you close a commercial loan transaction efficiently. The closing process can be choppy, unless your attorney is involved with the lender from the start, beginning with a prompt review of the commitment letter. The commitment letter is important, as it sets forth all of the pertinent terms for the transaction. Thereafter, your attorney can request a written agenda or closing document list to determine who will be responsible to obtain, review, and finalize the necessary documents.

The documents will be reviewed by your attorney to determine whether the terms are in your best interest. If everything is agreed upon in advance, it should be smooth sailing to closing.



**Risk**

*continued from page 2*

project, and is allowed to examine the insured under oath which would be a pre-litigation deposition to inquire as to the underlying facts regarding the loss and to inquire as to the damages sustained.

The statute of limitations to pursue a lawsuit against the insurer may be limited to one (1) year from the date the loss or damage occurred. Depending on the circumstances, an "equitable tolling" argument may be utilized to postpone the running of the one (1) year statute of limitations.

Needless to say, the wording of the policy must be carefully evaluated to determine if the all risk builder's policy covers the "risks" that are likely to occur on the construction project being undertaken. Reading the policy terms and exclusions will help you avoid paying a premium for a policy that does not protect your company.



*If we had no winter,  
the spring would not be so  
pleasant; if we did not  
sometimes taste of adversity,  
prosperity would not be so  
welcome.*

**-Anne Bradstreet**



# CONTRACTORS' ALERT

By Girard R. Visconti, Esq.

## Contracts Time is of the Essence

The Rhode Island Supreme Court in the matter of *Fracassa v. Doris*, 814 A.2d 357 (RI 2003) has held that contract provisions relating to time do not by their mere presence in an agreement make time of the essence, so that the breach of the time element will excuse nonperformance by the other party. However, the Supreme Court does recognize the indisputable right of parties to make time of the essence of their contracts and when those terms are present the time fixed for performance is the material part of the contract and is applicable to the obligations of both parties.

Like any other provision to a contract, time is of the essence may be waived by express agreement or impliedly by conduct that contributes to the delay and performance.

If there is a provision in the contract declaring "time is of the essence", construction contracts as to completion, etc. will be strictly enforced. If time is of the essence is not indicated in a contract provision, the court will imply a reasonable time to complete work, i.e. substantial completion, etc.

## Incorporation by Reference

Many construction documents, which include contracts between the owner and general contractor (or construction manager), subcontracts and purchase orders include the phrase "incorporation by reference". That phrase usually refers to documents that are not included in the bid package or the contract. For example, contracts referred to general conditions, supplemental conditions, special provisions, documents, geotechnical information, site information, etc.

The courts have held generally that it is not an excuse if the person signing the contract did not have a chance or did not review the referred document. Therefore, it is imperative to review any documents that are not in the bid package or the particular construction contract. Otherwise, the entity signing the contract could be bound to those documents notwithstanding no review or obtaining a copy.

## When You Are Sued

In the event that there is a "claim", in writing or otherwise, one should always send a copy of the "claim" to your various insurance companies, whether automobile, homeowners, business, etc. Without proper notice under the insurance policy the carrier may claim it was prejudiced and disclaim coverage under the policy.

Therefore, when a complaint and summons is served upon the insured, the insured should immediately send a copy of the complaint and summons, by certified mail, to the insurance carriers. The insurance carrier must review the complaint to determine whether or not there is a duty to defend. As long as one of the claims of a lawsuit fall within coverage, the insurance company must defend all of the allegations.

On occasion, the insurance carrier may notify the insured that they are defending under a "reservation of rights", which means that the insurer has not decided whether or not coverage is provided under the policy, due to policy exclusions. In that case, the insured, in Rhode Island, is entitled to select its own attorney, to protect their interest, at the expense of the insurance company. Likewise, the carrier can select an attorney to protect its interest in the lawsuit.

In the event that there is coverage, but coverage is denied by the insurance company, the insured may file a Declaratory Judgement Action against the insurance company and ask the Court to determine whether or not there is coverage under the policy. In addition, the insured may have an action for breach of contract and bad faith against the insurance company, which may result in fees and costs to the insured.



## Contributors

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Girard R. Visconti is the founder of the firm and brings over 32 years of legal experience to the practice. He practices in all areas of litigation and business law with particular emphasis on construction consulting and litigation, business and commercial litigation, arbitration and mediation, and matters at trial and appellate levels including employment, construction, and commercial litigation.

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