

# Harvell and Collins, P.A., Quarterly Report

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*It is our pleasure to send you the September Edition of our **NEWSLETTER** for te year 2008.*

*This **NEWSLETTER** will concentrate on various legal concepts and we would suggest that you keep it with your important files to refer to from time to time.*

*For those of you who have not received our **NEWSLETTER** in the past and are new clients, our **NEWSLETTER** attempts to keep you informed of any new developments in local, state, and federal law that might affect your personal life or your business. The **NEWSLETTER** will advise you on these developments and, when appropriate, make suggestions that will help you deal effectively with these changes. Also, the **NEWSLETTER** will serve as a way to communicate with you. As always, if you would like to have us address a particular matter, please feel free to call or write, and we will address that issue in a future **NEWSLETTER**.*

***“The Right Advice at the Right Time”***  
***Visit us at [www.harvellandcollins.com](http://www.harvellandcollins.com)***

If you have not done so already, we encourage you to visit our website. The website serves as yet another way to render superior service to our clients. There is a wealth of information disclosed on the website, including important links to useful government agencies that will assist our clients in obtaining valuable information.

“About the Firm” presents the history and purpose of the law firm. “Staff Profile” introduces our lawyers and legal assistants. Contact information is provided for all employees. The website provides an extensive list of services offered by Harvell and Collins, P.A.

We are now archiving our Quarterly Newsletters and our weekly radio program on the website so that our clients may easily access this information once again by visiting our website at [www.harvellandcollins.com](http://www.harvellandcollins.com).

Please visit us at [www.harvellandcollins.com](http://www.harvellandcollins.com). We look forward to comments from our clients regarding our website.

### **Public Trust Areas and Riparian Rights: What Are They?**

Public trust areas are the coastal waters and submerged lands under those waters to which the public has rights. More specifically, public trust areas include ocean waters from the mean high tide line to a distance of three miles offshore and navigable natural bodies of water, such as sounds and rivers, up to the normal high water level. It is important to remember that the lands under such water are also considered public trust areas. Therefore, areas of the beach from the water line up to the mean high tide line are public trust areas. Areas of the beach above the mean high tide line are technically private property; however, tradition in most areas of North Carolina is to allow people to recreate on the beach as long as they stay below the base of the sand dunes. Rights to public trust areas include navigation and recreational activities.

Riparian rights are the legally protected rights of those who own riparian land. Riparian land is property that borders and touches water. Land that is separated from water by a public road is not considered riparian land. Riparian rights are considered part of a property owner's estate and are treated as property rights. Examples of riparian rights are the right, subject to certain conditions, to build a dock or to have access to deep water such as a navigation channel.

The balance between the private riparian rights of landowners and the public's right to public trust areas is a delicate one. The state seeks to balance the rights of both user groups while protecting the environment

### **How Do I Recover under My Insurance Contract?**

When you suffer a serious property loss or are badly injured by unforeseen circumstances, contacting your insurance company is sometimes the last thing you want to think about. However, it is important to do so, in order to make sure your insurance coverage is not voided due to a procedural technicality.

In many first-party and third-party liability insurance policies, there is something called a Notice of Loss provision. This provision requires the insured to give notice of the loss or accident to the insurance provider in a relatively short time. Basically you have to tell your insurer that you suffered a loss or injury by identifying the date, place, time, etc. of the loss or injury. This is done either orally or by presenting the insurer with a written statement. Which method is required depends on the specific language of your insurance policy. Will the failure to

provide a timely Notice of Loss preclude insurance coverage? The traditional view is that it will preclude coverage. Since the Notice of Loss is an express provision in the contract that triggers the insurer's duties of coverage, failure to provide that notice to the insurer results in a lack of coverage. A more modern view, and one that is followed by many state courts, is that the failure to provide Notice of Loss defeats insurance coverage only where the lack of notice has prejudiced the insurer's rights. In other words, unless the insurer's position has been adversely affected by the failure to provide notice, coverage will not be set aside on those grounds.

Another term found in many insurance contracts is a Proof of Loss provision. This requires the insured to produce a signed, sworn, written statement which specifies the cause of the loss, describes the nature of the loss, gives an inventory of the property lost or damaged, states all other possible insurance policies you might have, and lists all those with an interest in the property. Proof of Loss differs from Notice of Loss in that it is much more specific and requires the particulars of the loss, if not already provided by the Notice. It also differs in that it is a statement made under oath that may be used at trial, so it is important to be truthful and honest regarding the details of the loss so that it cannot be used against you later. Will failure to provide the insurer with Proof of Loss void your insurance claim (deny coverage)? Just like with the Notice of Loss, there are two views. The traditional view is that it will. The modern view, which is the trend in most courts, is that the insurer must show it was prejudiced by the failure to receive the Proof of Loss. As a general rule of thumb, the insurance carrier will be hard-pressed to show that its rights were prejudiced by failure to produce Proof of Loss as long as you provide a timely Notice of Loss.

Yet another contractual mechanism we see in contracts of insurance is a modification of the Statute of Limitations. This applies only to first-party insurance contracts where you are the insured. What you might see is a provision that says something along the lines of "all claims between the insured and insurer must be filed within one year of insured's loss". Would failure to file the claim within one year void coverage? Some jurisdictions say that only if the insurer was prejudiced by the failure to file within the contractually modified limitations period, would coverage be lost. The more popular view is yes, your claim will be barred by failure to comply with the limitation on claims provision found in your insurance contract. The purpose of such provisions is to bar the filing of stale claims, and as a result, these provisions must be strictly complied with.

There are other things that can void coverage under an insurance policy as well. Nothing will do it as surely as failing to keep up with your premium payments. Also, if the insured materially or fraudulently misrepresents or conceals important facts when dealing with the insurance carrier, the policy will be void on those grounds. It is important to remember that both the insurer and the insured have a duty to act with the utmost good faith under the insurance contract. This means that both parties must do everything in their power to treat the other fairly and equitably. You want to make sure you do everything on your end to ensure you are covered under the policy. This means keeping up with payments, being honest in response to questions asked on the insurance application, disclosing information which you know or reasonably should

know would be material to the insurance contract, and refraining from any act that would void coverage on your end.

The issues mentioned above do not involve coverage provisions within the contract itself, and it is, of course, necessary that you be covered under the insurance policy to successfully pursue your insurance claim. The good news here is that North Carolina follows a doctrine called *Contra Proferentum* which means that ambiguities in contracts are interpreted against the drafting party (insurer) and in favor of the non-drafting party (insured). Put into terms of insurance contracts, it means that we read contractual provisions seeking to provide coverage broadly in favor of the insured, and we read contractual provisions seeking to limit or deny coverage narrowly against the insurer. This is something to keep in mind if an insurer denies your claim. As always, the lawyers at Harvell and Collins, P.A. are ready to assist you should you have issues in this area.

### ***Incompetency and Guardianship***

An incompetent person is a person who lacks the capacity, mental or otherwise, to manage his or her own affairs and to make or communicate important decisions concerning his or her person, family, or property. Many different situations can result in a person becoming incompetent. However, people with dementia, Alzheimer's, mental illness, or a developmental disability; stroke victims; and persons who have been seriously injured in motor vehicle accidents frequently become incompetent.

A guardian is a person who is appointed to, and has the legal authority to, make decisions for an incompetent person. A guardian of the person has the authority to make decisions regarding the incompetent individual's health care, nutrition, living situation, and other general matters. A guardian of the estate has the authority to make decisions regarding the incompetent individual's finances. A general guardian has the authority to make any and all decisions regarding the incompetent individual including their health care and finances.

Any time a person is found to be incompetent, a guardian of the person, guardian of the estate, or general guardian must be appointed. A general guardian or guardian of the person typically has authority to make all decisions regarding the incompetent person's care. However, an increasing number of cases utilize limited guardianships. A limited guardianship allows the incompetent person to retain legal rights over matters the Clerk of Court feels them to be capable of managing. The Clerk of Court will enumerate the matters over which the incompetent person retains legal authority.

In order for a person to legally be considered incompetent, a Petition for Adjudication of Incompetence and Application for Appointment of Guardian must be filed with the Court in the County where the individual lives. The respondent is the person whose competency is being determined. The petitioner is the person requesting determination of the respondent's competency. The respondent's family members are often the petitioner(s). After the Petition is

processed by the Court, a hearing will be scheduled before a Clerk of Court. In some counties the hearing occurs before the elected Clerk of Court and in other counties it occurs before an Assistant Clerk of Court.

In some cases, a jury trial with the Clerk of Court acting as judge takes place instead of a hearing before the Clerk of Court. A jury trial occurs if the respondent requests a trial instead of a hearing before the Clerk of Court. The Clerk of Court can also request a jury trial for determination of the respondent's competency. If the respondent is found competent, the hearing or trial concludes. However, if the respondent is found incompetent, the respondent has the right to an appeal. Appeals are heard in Superior Court of the County in which the Petition was filed.

When the respondent is found incompetent there must be a hearing in which a guardian is appointed for the respondent. In cases where incompetency was determined by hearing, the appointment of a guardian is done in a separate part of the same hearing. When incompetency was determined by jury trial the appointment of a guardian is done in a new hearing before the Clerk of Court.

In the case of developmentally disabled children, incompetency proceedings and the appointment of a guardian become necessary before the child's eighteenth birthday. The proceedings become necessary at such time because after a child turns eighteen (18) years old his or her parents no longer have legal authority to make decisions for him or her.

Incompetency proceedings and the appointment of a guardian are necessary for the protection of an incompetent person's legal rights, health, and assets. Therefore, in most instances it is necessary to file a Petition for Adjudication of Incompetence and Application for Appointment of Guardian and have the person declared incompetent. However, if a durable power of attorney or a health care power of attorney already exist, incompetency proceedings and appointment of a guardian are not always necessary. This is because the person holding the power of attorney already has the authority to make decisions with the incompetent person's best interest at heart. If a durable power of attorney or health care power of attorney already exists and is being abused by the person holding the power of attorney, a Petition for Adjudication of Incompetence and Application for Appointment of Guardian should be filed. The Clerk of Court will then appoint a guardian who has the best interest of incompetent person, at heart. The guardian can then revoke the power of attorney to ensure that the incompetent person's interests are protected.

**Ocean Shoreline Erosion Control Activities:**  
**Available Options under the Coastal Areas Management Act**

To understand how erosion control activities are regulated, one must first understand the role state agencies play in the regulation of coastal resources. The North Carolina Department of Environment and Natural Resources (DENR) is the administrative agency responsible for protecting and preserving the State's Resources. Within DENR is the Division of Coastal

Management (DCM). DCM is responsible for protecting, conserving, and managing the State's coastal resources. Additionally, DCM is responsible for carrying out the State's Coastal Areas Management Act (CAMA).

CAMA was passed in 1974 in an effort to establish a plan for the management of the State's coastal areas and resources. CAMA includes provisions that control building and land use in certain areas, known as areas of environmental concern, of the State's coastal counties. Ocean shorelines and beaches qualify as areas of environmental concern. Therefore, CAMA includes rules governing the use of erosion control activities in those areas.

By governing the use of erosion control activities, CAMA seeks to protect the public's right to use ocean beaches while protecting the private property rights of the people who own oceanfront properties. In furtherance of those goals, CAMA prohibits the use of all permanent erosion control structures. Bulkheads, seawalls, revetments, jetties, groins, and breakwaters are all classified as permanent erosion control structures.

Acceptable erosion control activities include dune establishment and stabilization, beach re-nourishment, beach bulldozing (a practice that involves moving natural beach material from any point seaward of the first line of stable vegetation to create a protective sand dike), and the use of temporary erosion control structures such as sandbags. Exceptions to these provisions exist and include the use of other activities to protect bridges providing the only existing road to barrier islands and protection of navigation channels in certain situations.

This article is meant only as a brief overview of the erosion control activities that are allowed under CAMA. CAMA's rules are complex and should be closely examined before engaging in any erosion control activities or other building related activities in areas of environmental concern. In addition, engaging in any erosion control activities or building related activities in an area of environmental concern requires a CAMA permit which must be obtained before commencement of any work.

### **Law Clerks**

As our firm continues to grow, we are pleased to welcome Russell C. Alexander and Andrew P. Flynt to the team.

Russell C. Alexander. Russell is a native of Morehead City. Russell graduated from the University of North Carolina in 2006 with a B.A. in History and second major in Peace, War and Defense, and is a third year law student at Campbell University's Norman Adrian Wiggins School of Law. He will graduate in May 2009 and is interested in General Civil Practice with a particular interest in Real Property Litigation.

Andrew P. Flynt Andrew is a native North Carolinian from Clemmons, near Winston-Salem. Andrew graduated from North Carolina State University in May of 2007 with a

B.S. in Natural Resources Marine and Coastal Concentration and a minor in Biological Sciences and currently attends the University of North Carolina School of Law. He will graduate in 2010 and is interested in practicing in environmental law, particularly as it relates to marine and coastal resources. For three summers during Andrew's undergraduate studies, he worked at the N.C.S.U. Center for Marine Sciences and Technology in Morehead City.

**“Let’s Talk Legal”**  
**Radio Station: WTKF - 107.1 FM**

As many of you know, Harvell and Collins, P.A., presents a talk radio program each and every Tuesday at 7:30 a.m. The purpose of the live radio program is to present to the listening audience legal information and allow the listeners to call in and ask questions. We have thus far discussed the following topics:

- Estate Planning
- Elder Law and Medicaid Planning
- Litigation in all Courts
- Estate Administration
- Real Estate Transactions
- Corporate and Business Transactions
- Family Law and Domestic Relations

If you have suggestions for a topic to be discussed, or if you have a question, give us a call. Or, call in during the show at 1-800-818-2255. Please join us on Tuesday mornings, bright and early on the talk station at WTKF - 107.1 FM.

We are now archiving our weekly radio program on the website so that our clients may listen once again to the program by visiting our website at [www.harvellandcollins.com](http://www.harvellandcollins.com).



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**Postscript**

This writing is intended to generally familiarize you with various legal issues. The scope of this document is necessarily limited, and consultation with your attorney or tax advisor should always precede taking any action.