THE DEFENSE LINE

A Publication From The Maryland Defense Counsel, Inc.

Fall 2007

Table of Contents

Important Announcements

Mark your calendars now for the **Annual Crab Feast**
June 4, 2008
5:30 p.m.

Call 410.560.3895 or mddefensecounsel.org for details

The New First Party Failure to Act in Good Faith Laws

By Edward J. "Bud" Brown

I. Introduction

On October 1, 2007, the law in Maryland with respect to an insured's ability to bring an action for failure to act in good faith against its insurer changed dramatically as a result of changes in the prior law concerning unfair claims practices and a new statute authorizing an administrative and civil action. The General Assembly has amended the existing Unfair Claims Settlement Practices Act (Maryland Insurance Article Section 27-301, et seq.) (hereinafter "UCSPA") and enacted a new statute, Maryland Code Ann., Courts & Judicial Proceedings Article, Section 3-1701 ("CJ §3-1701"), which creates a new cause of action that an insured may bring against its insurer after pursuing (with certain exceptions) an administrative action before the Maryland Insurance Administration ("MIA"), pursuant to Section 27-1001 of the Insurance Article (INS. § 27-1001).

The new laws also empower the MIA to make coverage determinations, and to decide the fair value of claims. Thus, first party claims, such as property damage and uninsured/underinsured motorist claims, will now be subject to MIA review and initial disposition. Prior to the enactment of these laws, an aggrieved insured could only file a breach of contract and/or declaratory judgment action against its insurer. The General Assembly has created a third avenue of redress, and provided for damages significantly in excess of what was previously recoverable by an insured bringing a first party claim against his own insurer. Although the statute does not expressly state whether it will be applied retroactively, there is a possibility that it will be applied to any alleged acts by an insurer that occurred within the last three (3) years, which are not barred by the Statute of Limitations.

The Maryland Defense Counsel (hereinafter "MDC") has created a Task Force to address the many concerns raised by the new law, which will be co-chaired by Susan Smith, Kristine Crosswhite and Bud Brown. Anyone interested in joining the Task Force should contact Susan Smith. The Task Force will focus on monitoring filings at both the MIA and Circuit Court level to identify issues and patterns, monitor MIA decisions and analyze and address the anticipated battles concerning the extent of discovery, particularly the clear and present danger of discovery into privileged and quasi-privileged matters. Additional information on the Task Force and its findings will soon be available on the MDC website.

II. The Distinction Between "Failure to Act in Good Faith" as Defined by the New Statute and "Bad Faith" Under *State Farm v. White*

The language of the statutes address an insured's right to recover damages from an insurer who "failed to act in good faith". Additionally, the amendments to UCSPA Sections 27-303 and 27-304 make it an unfair claim settlement practice for an insurer to "fail to act in good faith" on first party claims. Indeed, the amended statute authorizes the MIA to impose penalties up to $125,000 for *each* violation.

"Good Faith" is defined as: "An informed judgment based on honesty and diligence supported by

Continued on page 8

President's Message

I don't hike. The last time I did, my wife and I set out to roam through the Shenandoah mountains to take in the fall foliage in all its glory. Several bug attacks and a constant gnat-barrage later, we fled back to our screened-in, log cabin porch, sipped tea, munched on scones, read books, and took in the beautiful fall colors from the comfort of our rocking chairs.

I don't camp-out, either. The last time I did was 25 years ago, and I learned the valuable lesson that it is always important to be upwind from wild animals (ask me at the next event, and I'll be glad to tell you the story).

Strangely, these experiences remind me of the beginning stages of the practice of law. Not my practice, of course, but of the practice of law in a general sense. Beginning your career can feel a bit like hiking and camping-out to a dyed-in-the-wool city slicker. You find yourself in a completely new world, which you (woefully inadequately) prepared for by reading and talking to others, but which can only be learned by doing, which is fraught with peril, and which is a long, seemingly unending journey.

Daniel P. Moylan, Esquire

Venable LLP

The first months practicing is reminiscent of the first time you find yourself lost in the woods; Hanzel and Gretel lost, in an old growth forest, miles from the nearest paved surface, not paused in a thicket of trees on the NCRR bike trail trying to remember how far back to your car it is. Bill Bryson nailed the feeling in his hysterical book *A Walk In The Woods* (read it if you have not). "Woods are not like other spaces. To begin with, they are cubic. Their trees surround you, loom over you, press in from all sides. Woods choke off views and leave you muddled and without bearings. They make you feel small and confused and vulnerable, like a small child lost in a crowd of strange legs. Stand in a desert or prairie and you know you are in a big space. Stand in a woods and you only sense it. They are a vast, featureless nowhere." (*A Walk In The Woods*, p. 44). Sitting at your desk, months or, sometimes, even years into your practice can conjure up these feelings. Although you are not forced to confront it before your eyes, you can't help but notice that you are surrounded by experienced lawyers, who know what they are doing and who know that you do not, and you are without any real sense of how you are going to become comfortable in this new place.

You also know that some—thankfully a great minority—of the more experienced lawyers will not be pleasant to deal with. To be sure, you have been (accurately) told that most in the profession are honorable, very few will take a swipe at you, and that you can't really be hurt by the limited number of attacks you will experience, but this is not that comforting when you first start out. It reminds me of the advice Bryson got when reading up on bear attacks. "'The typical black bear-inflicted injury [it is written] is minor and usually involves only a few scratches or light bites.' Pardon me, but what exactly is a light bite? Are we talking a playful wrestle and gummy nips? I think not. And is 500 certified attacks really such a modest number, considering how few people go into the North American woods? And how foolish must one be to be reassured by the information that no bear has killed a human in Vermont or New Hampshire in 200 years? That's not because the bears have signed a treaty, you know. There's nothing to say they won't start a modest rampage tomorrow." (*A Walk In The Woods*, p. 17). For a new lawyer, reassurances about how most of their colleagues will act are not always that reassuring. There is nothing to say that they will not run into one of the few among us who is less ethical than the rest of us.

Finally, there is the shear size of the task at hand. Fairly quickly, the intellectual understanding of the length of a career—40 years?—is internalized into a gut level understanding of what it means to practice, or do anything, for that long. "The hardest part was coming to terms with the constant dispiriting discovery that there is always more hill. The thing about being on a hill, as opposed to standing back from it, is that you can almost never see exactly what's to come. Between the curtain of trees at every side, the ever-receding contour of rising slope before you, and your own plodding weariness, you gradually lose track of how far you have come. Each time you haul yourself up to what you think must surely be the crest, you find that there is in fact more hill beyond, sloped at an angle that kept it from view before, and that beyond that slope there is another, and beyond that another and another, and beyond each of those more still, until it seems impossible that any hill could run on this long. Eventually you

Editor's Corner

This edition of *The Defense Line* features several interesting articles and case spotlights from our members. The lead article from Edward J. "Bud" Brown of McCarthy Wilson discusses the new "Failure to Act in Good Faith" legislation and its impact on insurance coverage in Maryland. Geneau M. Thames of Niles, Barton & Wilmer, LLP discusses a recent Court of Appeals opinion, *USAA v. Riley, et al.*, where Maryland's highest court permitted the stacking of certain liability policies. John M. Gilman of Goodell, DeVries, Leech & Dann, LLP discusses *Carroll v. Konits*, where the Court of Appeals addressed the requirements for a certificate of qualified expert in the context of medical malpractice cases.

The Maryland Defense Counsel has had a number of successful events since the Spring 2007 edition of *The Defense Line*, including the always-popular Past Presidents Reception and the recent dinner seminar at Aldo's Ristorante Italiano on the topic of race and gender in jury selections. The Editors want to remind readers about some upcoming events that are sponsored or co-sponsored by the Maryland Defense Counsel. On February 4, 2008, the organization is co-sponsoring a discussion on summary judgment in workers' compensation cases. Also, don't forget to save the date for the MDC's Annual Meeting and Crab Feast, scheduled for June 4, 2008 at Bo Brooks at Lighthouse Point! The Editors encourage our readers to visit the Maryland Defense Counsel website (www.mddefensecounsel.org/events) for full information on the organization's upcoming events.

The Editors sincerely hope that the members of the Maryland Defense Counsel enjoy this administration's first issue of *The Defense Line*. In that regard, if you have any comments or suggestions or would like to submit an article or case spotlight for a future edition of *The Defense Line*, please feel free to contact the members of the Editorial Staff.

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Joseph W. Hovermill, Esquire, of Miles & Stockbridge P.C., was named one of Baltimore's best and brightest business people under the age of 40 as one of the *Baltimore Business Journal*'s "40 Under 40" winners for 2007.

(PRESIDENT'S MESSAGE) *Continued from page 2*

reach a height where you can see the tops of the topmost trees, with nothing but clear sky beyond, and your faltering spirit stirs—nearly there now!—but this is pitiless deception. The elusive summit continually retreats by whatever distance you press forward, so that each time the canopy parts enough to give a view you are dismayed to see that the topmost trees are as remote, as unattainable, as before. Still you stagger on. What else can you do?"

The reality is, however, that with an experienced guide, the foreboding woods are revealed as a beautiful forest, the true risk of a bear attack and how to avoid one are quickly learned, and the sense of an unending forced march is replaced with the thrill at being able to discover wonder after wonder during a long, enjoyable hike. A good mentor can help you navigate your first years of practice and beyond. He or she can also quickly explain how the few lawyers who stoop to conduct unbecoming the profession actually help your case and hurt their own. Finally, an experienced hand can also reassure you that although, yes, your career will be long, you will treasure that time and the endless opportunities it affords.

So, how can you find or be such a mentor? Get involved in the MDC. Attend our functions and seminars, meet your colleagues and learn something valuable to your practice. Better yet, call me or any other Board member and let us know you want to help. Over the last twelve years, I have learned much from the lawyers I have labored with for the advancement of the MDC, and certainly taken more than I have given. I invite you to do the same. It's one of the reasons MDC is here.

Court of Appeals Issues Decision Addressing Requirements for Legally Sufficient Plaintiff's Certificate of Qualified Expert in Medical Malpractice Cases

By John M. Gilman, Esquire

Bottom Line

The Court of Appeals decision in *Carroll v. Konits*, 400 Md. 167, 929 A.2d 19 (2007), affirmed a decision of the Circuit Court for Baltimore City granting a motion to dismiss holding that a certificate of qualified expert filed pursuant to the Health Care Malpractice Claims Statute was legally insufficient because a certificate is a condition precedent and, at a minimum, must (1) identify with specificity the defendant(s) (licensed professional(s)) against whom the claims are being brought; (2) include a statement that the identified defendant(s) breached the applicable standard of care; and (3) include a statement that the departure from the standard of care was the proximate cause of the plaintiff's injuries.

What This Means

Significantly, the Court did not stop with its explicit holding. The majority opinion went on to assert that it was equally egregious that the certificate failed to define the standard of care owed to the plaintiff in this case, which health care provider owed the plaintiff a specific duty under that standard, and how that health care provider departed from the standard. Indeed, according to the majority opinion, the certificate did not even come close to complying with the statutory requirements for a proper certificate. Thus, the Court of Appeals affirmed the judgment of the Circuit Court dismissing the case. Underlying the Court's decision was its rationale of effecting the General Assembly's intent to create a process by which non-meritorious medical malpractice claims would be weeded out.

It cannot be disputed that the plain language of the Health Care Malpractice Claims Statute requires a legally sufficient certificate to state that there has been a breach in the applicable standard of care and that this breach was the proximate cause of the plaintiff's claimed injuries. Moreover, as the majority opinion reiterates, decisions of

Maryland courts analyzing the Health Care Malpractice Claims Statute have interpreted the Statute to require that a legally sufficient certificate specifically identify the defendant health care provider that departed from the standard of care.

However, the majority opinion suggests additional requirements for certificates beyond that stated in well-settled case law. In accordance with dicta in *Walzer v. Osborne*, 395 Md. 563, 911 A.2d 427, asserting that the attesting expert report attached to the certificate must explain how or why the physician failed to meet the standard of care, the majority opinion suggests that the certificate should also state how the identified defendant health care provider departed from the standard of care in the instant action. The majority opinion suggests that, in order to meet this and the other requirements for a valid certificate, the certificate must also necessarily define the standard of care owed to the plaintiff by the identified health care provider alleged to have breached that duty.

This decision by the Court of Appeals in connection with other recent decisions addressing the requirements for legally sufficient expert certificates and reports leads to the conclusion that the Court is strictly construing statutory provisions for the cause of effectuating the General Assembly's intent to weed out non-meritorious medical malpractice claims. Practically speaking, it means that the Court of Appeals is willing to dismiss seemingly meritorious claims for the failure to satisfy technical requirements.

Background

In *Carroll v. Konits*, the plaintiff filed a medical malpractice claim against two doctors. One of the named defendant doctors had performed a unilateral mastectomy on the plaintiff and, as part of the procedure, inserted a catheter inside the plaintiff's chest so that chemotherapy could be administered. The other named defendant doctor was the plaintiff's oncologist, who managed the plaintiff's course of chemotherapy. The Plaintiff's Complaint alleged that the two doctors were negligent in failing to communicate the need to have the catheter removed in a timely manner upon the completion of chemotherapy. The evidence demonstrated that the catheter was not removed until over nine months after the completion of chemotherapy.

In support of her claims, the plaintiff asserted that she was unaware of the placement of the catheter and that, therefore, she was unaware that the catheter was supposed to be removed within two months after the completion of chemotherapy. The plaintiff further asserted that the doctor who placed the catheter did not make a follow-up appointment to remove the catheter. The plaintiff claimed that she suffered pain, discomfort, a deep vein thrombosis, and chronic venous stasis of the right arm with chronic lymph edema as a result of the failure to timely remove the catheter.

Initially, the plaintiff filed her complaint with the Health Care Alternative Dispute Resolution Office (HCADRO). The claim

was subsequently transferred to the Circuit Court for Baltimore City. The Circuit Court granted the defendant doctors' motion to dismiss because, among other things, the plaintiff failed to submit a proper certificate of qualified expert in accordance with the Health Care Malpractice Claims Statute, Md. Code, § 3-2A-04(b) of the Courts & Judicial Proceedings Article. The plaintiff appealed to the Court of Special Appeals and, while the appeal was pending, the Court of Appeals issued a writ of certiorari to review the issue of whether the plaintiff's expert witness certification was legally insufficient.

The Health Care Malpractice Claims Statute

The Health Care Malpractice Claims Statute establishes exclusive procedures for filing a civil action, in excess of a certain amount, against a health care provider. The Court of Appeals has consistently interpreted the Health Care Malpractice Claims Statute as an attempt by the General Assembly to limit the filing of frivolous malpractice claims by mandating that such claims be screened and first substitute an arbitration process prior to the filing of a lawsuit. In 1986, the Health Care Malpractice Claims Statute was amended to require that a plaintiff file a certificate and an attesting expert's report in addition to a complaint to maintain an action against a health care provider in circuit court. Importantly, the penalty for failing to file the required certificate and report is dismissal without prejudice. As Maryland case law has recognized that the arbitration process is a condition precedent to the filing of a claim in circuit court, and that the arbitration process cannot occur without the filing of a certificate, the Court of Appeals has logically concluded that the filing of a proper certificate operates as a condition precedent to filing a claim in circuit court. Therefore, if a proper certificate has not been filed, the condition precedent to maintain the action in circuit court has not been met and dismissal is required.

Section 3-2A-04(b)(1)(i)1 of the Health Care Malpractice Claims Statute requires that a plaintiff file a certificate of qualified expert attesting to two separate conditions: (1) that there was a departure from the standards of care, and (2) that the departure was the proximate cause of the plaintiff's alleged injury.

Plaintiff's Certificate of Qualified Expert

In relevant part, the plaintiff's amended certificate of qualified expert stated that the plaintiff "suffered complications arising from having the catheter in place for longer than what is standard treatment" and that the plaintiff "suffered injury secondary to below standard of care received in regards to removal" of the catheter after chemotherapy.

Majority Opinion of the Court of Appeals

The Court of Appeals stated that the language in the plaintiff's amended certificate arguably may have satisfied the requirement that a certificate attest that the defendant health care provider(s) departed from the standard of care because the certificate stated that the catheter was in place for "longer than what is standard treatment" and that the treatment that Carroll received was "below standard of care."

However, the Court of Appeals found unsatisfied the second requirement for a valid certificate, an attestation that the departure from the standard of care was the proximate cause of the plaintiff's alleged injury. In fact, the Court determined that, at no point, did the certificate state that the alleged departure from the standard of care was the proximate cause of the plaintiff's injuries. According to the Court of Appeals, the assertion in the certificate that the plaintiff "suffered injuries secondary to below standard of care" failed to state, with clarity, that the treatment the plaintiff received or failed to receive was the proximate cause of her claimed injuries. Rather, the Court of Appeals interpreted this statement only to mean that the treatment given to the plaintiff fell below the standard of care.

The Court of Appeals further stated that the certificate was incomplete because it failed to specifically identify the licensed health care provider(s) against whom the certifying expert's opinions applied. The plaintiff's certificate included the names of five different physicians, only two of whom were named defendants in the case. Furthermore, the Court of Appeals read the certificate as stating very generally that "there was no clear communication to the patient." In addition to citing to case law in support of the proposition that Maryland law requires that the certificate explicitly name the defendant licensed health care provider who is alleged to have breached the standard of care, the Court of Appeals found this requirement consistent with the General Assembly's intent of enacting the Health Care Malpractice Claims Statute for purpose of weeding out non-meritorious medical malpractice claims. It further found the requirement for explicit identification of the defendant health care provider reasonable because, without identification of the allegedly negligent party, neither the opposing party, HCADRO, nor courts could possibly evaluate whether a health care provider breached the standard of care, rendering the certificate useless. Consequently, the Court of Appeals determined that the certificate failed to state with sufficient specificity which physician(s) breached the standard of care and which physician(s) was allegedly responsible for the plaintiff's alleged injuries.

Ultimately, in affirming the Circuit Court's decision to dismiss the plaintiff's case for failure to satisfy the condition precedent of a proper certificate, the Court of Appeals held that the certificate was incomplete because it (1) failed to specifically identify the licensed professional(s) who allegedly breached the standard of care and (2) failed to state that the alleged departure from the standard of care, by whichever doctor(s) the expert failed to identify, was the proximate cause of the plaintiff's injuries.

Mr. Gilman is an associate with Goodell, DeVries, Leech & Dann, LLP. He practices in the areas of medical malpractice and employment law.

Expert Information Inquiries

The next time you receive an e-mail from our Executive Director, Kathleen Shemer, containing an inquiry from one of our members about an expert, please respond both to the person sending the inquiry and Mary Malloy Dimaio (mary.dimaio@aig.com). She is compiling a list of experts discussed by MDC members which will be indexed by name and area of expertise and will be posted on our website. Thanks for your cooperation.

Stacking of Liability Policies Permitted in Maryland

By Geneau M. Thames, Esquire
Jeffrey A. Wothers, Esquire — Managing Partner

Maryland's highest Court, has recently ruled in *USAA v. Riley et al.* that certain insurance policies' limits of liability can be "stacked" together. Stacking is best defined by this example: An insurance company has issued four (4) insurance policies covering four (4) policy periods. Each policy has a Limit of Liability of $300,000. Under Maryland's recent opinion an insurer who has issued four insurance policies spanning four policy periods would now face potential liability amounts of $1,200,000 when evidence is presented that the bodily injury potentially spans the four policy periods. The Maryland Court held that the following commonly used Limit of Liability provision of an insurer's policy is ambiguous:

> *"Limit of Liability. Our total liability under Coverage E for all damages resulting from any one occurrence will not be more than the limit of liability for Coverage E as shown in the Declarations. This limit is the same regardless of the number of insured's claims made or persons injured. All bodily injury and property damage resulting from any one accident or from continuous or repeated exposure to substantially the same general harmful condition shall be considered to be the result of one occurrence."*

The Maryland Court went on to restate the policy's definition of occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in bodily injury or property damage." Furthermore, the Court noted that although the term "policy period" was not a defined term in the policy, each of the insurance policies at issue seemed to define the term "policy period" on its Declarations page by the dates that each respective policy covers. The Court then opined that since it appears from the language of the insurance policy that occurrences that happen during a policy period are covered, a reasonably prudent person could also read the policies to mean that each separate policy is implicated by a continuing occurrence.

This issue is encountered with injuries caused by lead paint, mold or oil spills. Often, during these types of cases expert testimony is offered which states that the Plaintiff's injuries were caused by continuous or repeated exposure to substantially the same general harmful condition over an extended period of time. Where an insurance carrier has issued several policies spanning numerous policy periods, the Plaintiff seeks to multiply the limit of liability of *each* policy by the number of policy periods, thereby increasing an insurer's potential coverage amount and exposure.

It is noteworthy that the Court found that no ambiguity existed when the Limit of Liability provision of the policy made it clear that liability was limited regardless of the number of policies implicated. It supported policy language cited in *Hiraldo v. Allstate Insurance Company* 778 N.Y.S. 2d 50 (N.Y. Sup. Ct. 2004) which states "[r]egardless of the number of insured persons, injured persons, claims, claimants or policies involved, our total liability…coverage…" Unlike the Limit of Liability provision indicated above, this provision clearly indicates that liability is limited regardless of the number of policies implicated. Therefore, stacking is not permitted.

Insurers who write liability policies in Maryland should make certain that the language in their Limit of Liability Section of the policy makes it *clear* that the liability limit is limited to a particular amount regardless of the number of policies implicated to prevent this sort of "stacking" of policy limits in the future. The language cited in *Hiraldo* above should be your guide.

United Services Automobile Association v. Rita Riley, et al. 2006 Md. LEXIS 331

Geneau Marie Thames is a mid-level associate in the litigation department of Niles, Barton & Wilmer, LLP. She practices in the areas of general liability, property insurance law, related first party insurance coverage disputes, employment law and commercial litigation. Ms. Thames co-chairs the firm's Women's Committee and is a member of the firm's Hiring Committee and Diversity Committee. Ms. Thames is admitted to practice in Maryland. www.niles-law.com/Bio/GeneauThames.asp.

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For further information, or a copy of this case, please contact Jeffrey A. Wothers (jawothers@niles-law.com), or Geneau M. Thames (gmthames@niles-law.com) of Niles, Barton & Wilmer, LLP.

ND: 4851-5937-3057, v. 1

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(GOOD FAITH LAWS) *Continued from front cover*

evidence the Insurer knew or should have known at the time the Insurer made a decision on a claim." (See CJ 3-1701(a)(4) and INS. 27-1001(a).) This definition is similar to the term "bad faith", as it has developed via the case law in the context of bad faith failure to settle third party claims, set forth in *State Farm v. White*, 248 Md. 324, 236 A.2d 269 (1967). However, the new statute does contain the additional language: "supported by evidence the Insurer knew or should have known at the time the Insurer made a decision on a claim."

State Farm v. White is generally viewed as the seminal third party bad faith case, as it addresses the elements of an insurer's bad faith failure to settle a third party claim. In *White*, the Court made clear that there is not one distinct test for bad faith and that, in the third party context, a finding of dishonesty, misrepresentation, deceit or fraud is *not* required to find bad faith. Rather, the following factors can support a finding of third party bad faith: the severity of the plaintiff's injuries giving rise to the likelihood of a verdict greatly in excess of the policy limits, lack of proper and adequate investigation of the circumstances surrounding the incident, lack of skillful evaluation of plaintiff's disability, failure of the insurer to inform the insured of a compromise offer within or near the policy limits, pressure by the insurer on the insured to make a contribution to a compromise settlement within the policy limits as an inducement to settlement by the insurer, and/or any actions which demonstrate a greater concern for the insurer's monetary interest than the financial risk attendant to the insured's predicament.

Although not all of these factors are readily applicable to a first party action, it is foreseeable that the MIA and the Courts will consider the following factors to evaluate an alleged "lack of good faith": the severity of the plaintiff's injuries or damages, the lack of proper and adequate investigation, and/or the lack of skillful evaluation of plaintiff's claims. Additional potential factors which might be considered are: the failure of the insurer to make a timely and/or reasonable compromise offer, any actions which demonstrate a greater concern for the insurer's monetary interest than the legitimate loss suffered by the insured or the contractual obligations of the policy, the information available to the insurer at the time a claims decision is made, and/or the nature and finality of the claims decision, including the need for further investigation into the circumstances of the claim.

Of course, until there is a track record of MIA and/or Court rulings, it is impossible to define the difference(s) which may result in the application of an "absence of good faith" vs. a "bad faith" standard. However, the MIA has given presentations on the new laws, and it appears that an emphasis will be placed on the issue of what the insurer *should* have known at the time of the final decision. The Legislature has provided clear guidance as to the role that delay may play as a factor, at least when an insurer complies with statutory or regulatory time limits, as CJ 3-1701(f) and INS. 27-1001(e)(3) both state that "An Insurer may not be found to have failed to act in good faith under this section solely on the basis of delay in determining coverage or the extent of payment to which the Insured is entitled if the Insurer acted within the time period specified by statute or regulation for investigation of a claim by an Insurer."

It must be noted that the Legislature intentionally changed the language of the new statute from "Bad Faith" to "Failure to Act in Good Faith". It is the opinion of the Maryland Attorney General's Office that the change will make it easier for a claimant to prevail on a claim under this new statute. Thus, a letter from the Attorney General's office of March 6, 2007, confirms that "the lack of good faith also encompasses actions that would not amount to bad faith." Curiously, however, the March 6 letter does not address "bad faith" as defined by *State Farm v. White*, but references the concept as it relates to other contexts (e.g. contract and employment disputes, defamation, etc.). Thus, there appears to be some conflict as to whether the *State Farm v. White* definition of bad faith would apply to the failure to act in good faith, or whether a less strenuous standard will apply.

The effect of the additional requirement that the claims decision be "supported by evidence the Insurer knew or should have known at the time the Insurer made a decision on a claim" is not yet known. The MIA has suggested that this will be a distinctly different test than the "supported by the known evidence" measure used in other MIA claims. This added language may impose a greater duty for the insurer to investigate the facts surrounding a claim, and to document that investigation and to be prepared to articulate facts upon which the decision is based.

III. Lack of Good Faith as an Unfair Claim Settlement Practice Under Maryland Insurance Article Section 27-301

The new failure to act in good faith bill not only creates a new cause of action against insurers, but also alters the administrative review procedures by the MIA, and establishes that failure to act in good faith constitutes an unfair claim settlement practice, subjecting insurers to various penalties if a violation is found. The intent of the Unfair Claim Settlement Practices subtitle is to provide an additional administrative remedy to a claimant for a violation of this Act or related regulations. It provides administrative remedies only and does not create or prohibit any private causes of action, nor does it prohibit a claimant from seeking redress in law or equity for otherwise actionable conduct of an insurer.

The 2007 amendments introduced lack of good faith as unfair claims settlement practice, adding at § 27-303(9), a violation if the insurer fails "to act in good faith, as defined under § 27-1001 of this title, in settling a first-party claim under a policy of property and casualty insurance." It is important to note that this subsection does *not* apply to health insurance or other first party policies, but *only* to claims under property and casualty policies. Section 27-304 of the UCSPA prohibits a general business practice of acting without good faith: "It is an unfair claim settlement practice and a violation of this subtitle for an insurer … when committed with the frequency to indicate a general business practice, to: (18) Fail to act in good faith, as defined under § 27-1001 of this title, in settling a first-party claim under a policy of property and casualty insurance."

Section 27-305 of the UCSPA creates enhanced penalties for committing an unfair claim practice by acting without good faith. Thus, the Commissioner may impose a penalty:

> *(1) not exceeding $2,500 for each violation of § 27-303 of this subtitle or a regulation adopted under § 27-303 of this subtitle; AND*
>
> *(2) not exceeding $125,000 for each violation of § 27-303(9) of this subtitle or a regulation adopted under § 27-303(9) of this subtitle.*

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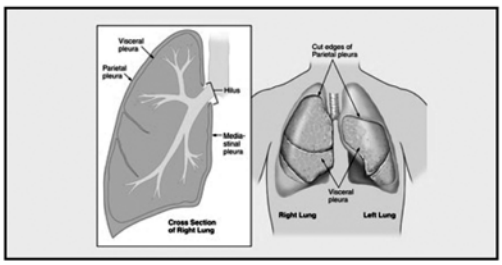

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In addition to the significant penalties, the MIA may also order restitution which "may not exceed the amount of actual economic damage sustained, subject to the limits of any applicable policy." For a violation of § 27-303(9) of this subtitle, the Commissioner may require restitution to an insured for: "actual damages, which actual damages may not exceed the limits of any applicable policy, expenses and litigation costs incurred by the insured in pursuing an administrative complaint under § 27-303(9) of this subtitle, including reasonable attorney's fees, and interest on all actual damages, expenses, and litigation costs incurred by the insured computed: (1) at the rate allowed under § 11-107(A) of the Court's Article; and (2) from the date on which the insured's claim would have been paid if the insurer acted in good faith."

Although the administrative remedies are essentially identical to remedies permitted in Courts Article § 3-1701 and Insurance Article § 27-1001 (discussed below), in addition to restitution awards, the MIA now has authority to impose significant fines and revoke insurance privileges for violations. Furthermore, it appears that under the new statutes, there is nothing prohibiting the MIA from proceeding with administrative proceedings against an insurer for alleged unfair claims practices related to a single claim, while the claimant is also pursuing a claim under Courts Article § 3-1701 or Insurance Article § 27-1001.

IV. Complaints to the Maryland Insurance Administration for Failure to Act in Good Faith in Handling First Party Claims

An insured who wishes to pursue a civil action against an insurer must first pursue an administrative complaint before the MIA (with three exceptions, discussed below), before filing a lawsuit against the insurer based on CJ § 3-1701. Thus, pursuant to INS. § 27-1001, a complaint stating a cause of action under CJ § 3-1701 shall first be filed with the Administration.

The Complaint shall:

> *Be accompanied by each document that the insured has submitted to the insurer for proof of loss;*
>
> *Specify the applicable insurance coverage and the amount of the claim under the applicable coverage, and*
>
> *State the amount of actual damages, and the claim for expenses and litigation costs described under subsection (e)(2) of this Section.*

There are quite specific and detailed requirements for what must be contained in the Complaint filed with MIA. (The MIA has established procedures which are set forth at COMAR 31.08.11.01.) Once an MIA Complaint is filed, the MIA will forward the filing to the insurer, pursuant to INS. 27-1001(4).

Within 30 days after the date the filing is forwarded to the insurer, the insurer must:

> *File with the Administration, **except for good cause** shown, a written response together with a copy of each document from the insurer's claim file that enables reconstruction of the insurer's activities relative to the insured's claim, including documentation of each pertinent communication, transaction, note, work paper, claim form, bill, and explanation of benefits form relative to the claim; and*
>
> *Mail to the Insured a copy of the response and, except for good cause shown, [the same documents]*

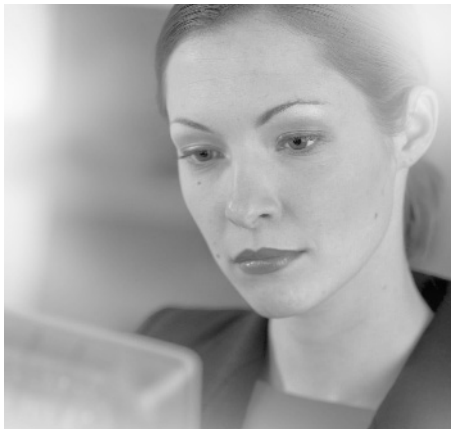
During this 30 days, the insurer must not only evaluate what documents are sufficient to "reconstruct" the insurer's activities on the claim, but also make critical determinations as to whether "good cause" exists for not filing every document from its claim file, and then a separate "good cause" determination as to whether documents sent to the MIA need not be sent to the insured. COMAR 31.08.11.04.B(4) defines "Good Cause Shown" as "the assertion of a privilege or doctrine recognized by statute or other law in the State as a basis on which to refuse to produce a document in response to civil discovery requests." Thus, any diary note, letter, or communication that is protected by attorney-client privilege, was made in anticipation of litigation and/or could be considered proprietary information, will be protected by the good cause exception. Maryland law has long recognized the quasi-privileged nature of statements made in settlement negotiations, and thus careful consideration needs to be given to disclosure of this information as well. Although revisions to the original COMAR provisions regarding the manner of protecting privileged documents are the subject of ongoing review, COMAR 31.08.11.06.C. and D. *et seq*. sets forth the manner for providing the equivalent of a privilege log.

The issue of the disclosure of SIU/ISS related information is particularly problematic. Approximately 10 years ago, in response to rising concerns regarding insurance fraud, the Legislature mandated that each insurer increase its fraud prevention and detection efforts. Presumably, the existence of a fraud investigation, and certainly an ongoing inquiry will not need to be disclosed. At a minimum, the COMAR reference to utilizing the test which would apply to a refusal to produce a document in response to a discovery request in a civil action would indicate that a *Shenk v. Berger*, 86 Md.App. 498, 587 A.2d 551 (1991) rationale would be applied. Thus, the insurer would not have to disclose the investigation or other impeachment type evidence, unless it is to be used as substantive evidence, and then disclosure would not occur until *after* the claimant was deposed.

The requirement is not to produce all documents, but rather only those non-protected documents "that enables reconstruction of the insurer's activities." This suggests that not every non-privileged document from the claim file need be produced.

Following the insurer's submissions, the MIA will decide the matter within 90 days, *without a hearing*. Section 27-1001 (e)(1)(i) states:

> *Within 90 days after the date the filing was received by the Administration shall issue a decision that determines:*
>
> *1. Whether the insurer is obligated under the applicable policy to cover the underlying first-party claim;*
>
> *2. The amount the insured was entitled to receive from the insurer under the applicable policy on the underlying covered first-party claim;*
>
> *3. Whether the insurer breached its obligation under the applicable policy to cover and pay the underlying covered first-party claim, as determined by the Administration;*
>
> *4. Whether an insurer that breached its obligation failed to act in good faith; and*
>
> *5. The amount of damages, expenses, litigation costs, and interest, as applicable and as authorized under paragraph (2) of this subsection.*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Significantly:

(ii) The failure of the Administration to issue a decision within the time specified in subparagraph (i) of this paragraph shall be considered a determination that the insurer did not breach any obligation to the insured.

Thus, the MIA now possesses the authority to make coverage decisions upon first party claims. It can also decide the value of the claim. The MIA initially decides whether the insurer breached its contract by not covering and/or paying the amount owed. Once these initial determinations are made, the MIA then decides whether the insurer failed to act in good faith. If a lack of good faith is found, the MIA then determines the amount of attorneys' fees and litigation costs, discussed in further detail below.

Indeed, the MIA can now award damages even if it *only* finds a breach of coverage obligation, but does *not* conclude that the decision was made without good faith. If no decision is issued within 90 days of receipt of the Complaint, it is treated as if MIA found for the insurer for purpose of appeal.

One important question is whether the statute authorizes the MIA to make *liability* determinations, even though the insurer has not denied its coverage obligation. For example, in an underinsured motorist case wherein the insurer does not raise any coverage issue, but defends the liability aspect of claim (e.g., based upon the absence of negligence on the part of the underinsured motorist, or the insured's contributory negligence), can the MIA evaluate the liability? Traditionally, this has not been viewed as a coverage obligation and neither the statutes nor the COMAR regulations suggest that this situation would fall within the MIA's purview.

Similarly, it is not clear as to whether the Legislature intended to exclude those cases which do not involve a determination of the existence of coverage, as opposed to the insured's compliance with terms and conditions of the policy (e.g., prompt notice).

The MIA has a wide range of damages it can award, depending upon whether it finds a breach of the obligation, or a breach that occurred due to the absence of good faith. Pursuant to Section 27-1001 e(2), the award can include:

(i) If the Administration finds that the insurer breached an obligation to the insured, the Administration shall determine the obligation of the insurer to pay:

1. Actual damages, which actual damages may not exceed the limits of any applicable policy; and

2. Interest on all actual damages incurred by the insured computed:

A. At the rate allowed under Section 11-107(a) of the Courts Article; and

B. From the date on which the insured's claim should have been paid; and

(ii) If the Administration also finds that the insurer failed to act in good faith, the Administration shall also determine the obligation of the insurer to pay:

1. Expenses and litigation costs incurred by the insured, including reasonable attorney's fees, in pursuing recovery under this Subtitle; and

2. Interest on all expenses and litigation costs incurred by the insured computed:

A. At the rate allowed under Section 11-107(a) of the Court Article; and

B. From the applicable date or dates on which the insured's expense and costs were incurred.

The key provisions are that the MIA determines the applicable damages, but these damages may not exceed the policy limits. The interest on actual damages, at the applicable legal rate of interest (10% per year), starts from the date on which MIA determines that *the claim should have been paid*. It is unclear how MIA will determine this. In a UIM case, for example, it appears that the MIA is being asked not only to determine the fairness of settlement negotiations, but also to determine the date upon which the insurer should have offered a greater amount (including the pain and suffering component).

There is no guidance given as to how issues of settlement strategy and communications, many of which are subjective and intimately related to the very communications during the negotiation process, will be evaluated from a paper file.

If there is a finding of lack of good faith, then attorney's fees (as set forth below) and expenses and costs can also be awarded, as well as interest related to these items. The "litigation costs" are not all costs and fees related to the first party claim, but rather are limited to those incurred by the insured in their pursuit of the MIA action or the CJ action or both. Thus, expert fees, public adjuster fees, and other costs traditionally incurred during the claim investigation time period, are *not* recoverable.

Since the statute states that the MIA "shall" determine the obligation of the insurer to pay these extra damages, there is a question as to whether it has discretion, once it makes a finding of a lack of good faith, to exclude these non-actual damages from its award. It is also clear that a prevailing claimant is not automatically entitled to one-third for its counsel's fees. Rather, the one-third amount is *a limit* on attorney's fees, as the amount of the attorney's fees determined to be payable to an insured may not exceed one-third of the actual damages payable to the insured.

It is foreseeable that there will be significant dispute over the interest triggering date, identified as the "date on which the insured's claim would have been paid if the insurer acted in good faith." Interest is *not* only due on the actual damages, but *also* on the expenses and litigation costs.

Once the MIA has ruled, either party may request an administrative hearing, or appeal directly to the Circuit Court. With respect to the administrative proceeding, Section 27-1001(f) states:

(1) If a party receives an adverse decision, the party shall have 30 days after the date of service of the Administrations' decision to request a hearing.

(2) All hearings requested under this section shall:

(i) Be referred by the Commissioner to the Office of Administrative Hearings for a final decision Under Title 10, Subtitle 2 of the State Government Article

(ii) Be heard de novo*;*

(iii) Result in a final decision that makes the determinations set forth in subsection (e) of this section.

(3) If no administrative hearing is requested in accordance with paragraph (1) of this subsection, the decision issued by the Administration shall become a final decision.

If an administrative hearing is not requested in accordance with paragraph (1) of this subsection, the decision issued by the Administration shall become a final decision. If a party is dissatisfied with the MIA decision, it may request a hearing, which is then

referred to an Administrative Law Judge and heard *de novo*. Such hearings are handled under the Rules governing administrative proceedings. The Judges issue scheduling orders with strict time limits for exchanging documents, filing exhibits and witness lists, and then setting a hearing before the Judge under those procedures. It is unclear what an "adverse decision" means, but presumably each party (or both parties) can decide if the MIA decision is sufficiently adverse to warrant appeal.

If both parties consider the decision adverse (e.g., a coverage obligation is found but the award is lower than the one desired by the claimant), and one party wishes to pursue an administrative appeal and the other party wants to appeal to the Circuit Court, the case is directed to Circuit Court for a *de novo* proceeding.

With respect to the appeal to the Circuit Court:

> *(g)(1) If a party receives an adverse decision, the party may appeal a final decision by the Administration or an Administrative Law Judge under this section to a Circuit Court in accordance with Section 2-215 of this Article and Title 10, Subtitle 2 of the State Government Article.*
>
> *(2)(i) This paragraph applies only if more than one party receives an adverse decision from the Administration.*
>
> *(ii) If a party requests a hearing before the Office of Administrative Hearings and another party files an appeal to a Circuit Court:*
>
> *1. Jurisdiction over the request for hearing is transferred to the Circuit Court;*
>
> *2. The request for hearing, the Administration's decision, and the Administration's case file, including the Complaint, Response, and all documents submitted to the Administration, shall be transmitted promptly to the Circuit Court; and*
>
> *3. The request for hearing shall be docketed in the Circuit Court and consolidated for trial with the appeal.*
>
> *(3) Notwithstanding any other provision of law, an appeal to a Circuit Court under this Section shall be heard* de novo.

V. Court Proceedings Under CJ 3-1701

Section § 3-1701 of the Courts & Judicial Proceedings Article sets forth a cause of action that an insured may bring against his insurer. This is a new cause of action which previously did not exist. Prior to the enactment of this statute, an aggrieved insured was limited to a breach of contract and/or declaratory judgment action against his insurer. This new cause of action creates a third avenue of redress, and provides for damages significantly in excess of what was previously recoverable by an insured bringing a first party claim against his own insurer.

The lawsuit against the insurer is tried "de novo." A trial *de novo* is one in which the rulings and findings in the preceding action, in this case the MIA proceedings, are not binding, are not being reviewed for their correctness, and do not carry with them a presumption of correctness. Thus, the *de novo* trial should be conducted as if the prior proceeding had not occurred.

An insured may not bring a CJ action without first obtaining a final decision before the MIA, with three (3) exceptions: 1) a claim within the small claim jurisdiction of the District Court, 2) if the insured and the insurer agree to waive the MIA proceeding, or 3) if the claim is presented under a commercial insurance policy with respect to which the applicable limit of liability exceeds $1,000,000.

Claims for $5,000 or less are not subject to the requirement that the claims must initially be brought before the Maryland Insurance Administration ("MIA"). Thus, the insured may proceed directly to Court against the insurer. However, the countervailing protection is that this action, just as any small claims action, is subject to a de novo appeal.

The scope of the CJ action is substantially the same as the MIA claim, as it is limited to claims where *coverage* is at issue and/or the amount of payment is disputed (See CJ § 3-1701(d). Thus:

This section applies only in a civil action:

> *(1) (i) To determine the coverage that exists under the insurer's insurance policy; or*
>
> *(ii) To determine the extent to which the insured is entitled to receive payment from the insurer for a covered loss;*
>
> *(2) That alleges that the insurer failed to act in good faith; and*
>
> *(3) That seeks, in addition to the actual damages under the policy, to recover expenses and litigation costs, and interest on those expenses or costs, under subsection (e) of this section.*

Thus, as discussed above, claims that are denied for non-coverage reasons, such as policy condition compliance and/or fact-based liability disputes in the UM/UIM context, do not appear to fall with the Act.

Although the types of damages recoverable are substantially similar to the MIA proceeding, in the CJ proceeding the Court or jury may *only* award damages upon a finding of an absence of good faith. CJ § 3-1701(e) states:

> *Notwithstanding any other provision of law, if the trier of fact in an action under this section finds in favor of the insured and finds that the insurer failed to act in good faith, the insured may recover from the insurer:*
>
> *(1) Actual damages, which actual damages may not exceed the limits of the applicable policy;*
>
> *(2) Expenses and litigation costs incurred by the insured in an action under this section or under § 27-1001 of the Insurance Article or both, including reasonable attorney's fees; and*
>
> *(3) Interest on all actual damages, expenses, and litigation costs incurred by the insured, computed:*
>
> *(i) At the rate allowed under § 11-107(a) of this Article; and*
>
> *(ii) From the date on which the insured's claim would have been paid if the insurer acted in good faith.*

As with the MIA proceeding, the CJ statute expressly protects an insurer from accusations of untimeliness, when the insurer complies with statutory and/or regulatory time requirements. Thus, § 3-1701(f) states:

> *An insurer may not be found to have failed to act in good faith under this section solely on the basis of delay in determining coverage or the extent of payment to which the insured is entitled if the insurer acted within the time period specified by statute or regulation for investigation of a claim by an insurer.*

It is clear that the MIA will be accumulating data with respect to insurers' actions. Thus, § 3-1701(h) requires that: "The Clerk of the Court shall file a copy of the verdict or

any other final disposition of an action under this section with the Maryland Insurance Administration."

Additionally, COMAR 31.08.11.07.D also obligates an insurer to notify the MIA when an action that is not originally prosecuted before the MIA is served upon it. Presumably, the data collection efforts of the MIA will correlate Court or ALJ findings of good faith (i.e., findings in favor of the insurer), with any finding against the insurer that resulted from the initial determination made by the MIA without a hearing. It is presently unknown whether the MIA will be tracking claimants' firms who are repeatedly filing unsubstantiated actions and/or misusing the process simply as a means to obtain discovery.

With respect to the "other final disposition" of this action to the MIA, it is not clear as to whether a settled case, which is settled prior to trial, which will result in a stipulation of dismissal, will fall within the definition of "final disposition." To the extent that the reporting requirement seems to imply that the MIA will be keeping track of the number of times any insurer is found to have been acting without good faith, the utilization of consent judgments in those cases wherein the insured is willing to settle *and* admit that the insurer had indeed acted in good faith, may be advisable.

It is clear that the new laws do not limit the insured's *or* the insurer's traditional methods of resolving first party claim disputes, as CJ § 3-1701 (j) states: "This section does not limit the right of any person to maintain a civil action for damages or other remedies otherwise available under any other provision of law." Thus, the parties' rights to pursue theories and/or seek declaratory relief still exist. Furthermore, any party to the CJ action may elect to have the case tried by a jury.

The trial of the CJ action presents several disturbing problems. If, for example, the Plaintiff combines this action with a UIM action, it is extremely likely that the Court would need to sever the actions. There is a fundamental unfairness in allowing the jury that is attempting to decide tort liability and compensatory damages to also simultaneously receive evidence of an alleged absence of good faith by the defendant insurer. In a typical UIM action (assuming that policy compliance and/or coverage is not an issue) the jury simply hears the facts of the accident and the extent of the damages, but not a detailed presentation of the adjusting and settlement process. It is difficult to imagine how a jury would not be influenced by evidence of alleged unfair treatment of the insured during the claim handling process. The adverse impact on the alleged tortfeasor's right to a fair trial is also quite obvious. For example, the non-insurer co-defendant cannot be subjected to attempting to prove that he was not negligent and/or the injury was not causally related, at the same time the same jury is being told the UIM carrier's offer of $200,000 is so low that it lacks good faith!

The need for the Court to sever this action is analogous to the negligent entrustment case law (e.g., *Kahlenberg v. Goldstein*, 290 Md. 477 (1981)), which recognizes the unfairness of allowing prior bad driving acts of the driver to come into a trial simply because a negligent entrustment count exists against the vehicle owner, whereas typically this evidence never is presented to the jury who is determining negligence *vel non*.

Section 5-118 of the Courts & Judicial Proceedings Article which allows: "For the purposes of this subtitle, the filing of a complaint with the Maryland Insurance Administration in accordance with §27-1001 of the Insurance Article shall be deemed the filing of an action under §3-1701 of this Article."

Once the insured files an MIA action, it appears that the statute of limitations for the CJ action is tolled. Thus, an insured who files an MIA action two years and eleven months after the alleged act committed without good faith by the insurer, does not need to bring an action in Court before the three years expires, even if the MIA has not decided the case before the three years expires.

VI. Conclusion

Although many questions remain unanswered, it is clear that the sweeping changes in the first-party claims law raise significant issues for MDC's clients and counsel. These issues, most notably the absence of a provision for an insurer to obtain reimbursement of its costs and expenses when the insured proceeds without good faith, will need to continue to be pursued before the Courts and the Legislature.

Edward J. "Bud" Brown is a partner with McCarthy Wilson LLP in Rockville, Maryland.

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Neuroscience & Bio-Behavioral Technologies

2007 ASTAR National Judges' Science School

By T. Sky Woodward

Surrounded by judicial colleagues from across the United States, including Alaska, Puerto Rico, and Guam, twenty-eight Maryland judges recently participated in "classroom" instruction in the fields of neuroscience and bio-behavioral technologies. Additionally, from March 13–15, 2008 these judges will attend the National Judges' Medical School at Indiana University/Purdue University Schools of Medicine, Law, and the Center for Health Law focusing on "Adjudication of Health Care Cases." Also, in October 2008, these Maryland judges will attend the Bioscience Symposium at the National Institutes of Health in Bethesda, Maryland and Washington, D. C. The title of the symposium is "Population Genetics (Predisposition, Susceptibility, and Risk) and Biology of Addictive Disorders." Judges participating in the 2007-08 ASTAR curricula will be recognized as ASTAR Fellows following the October 2008 symposium.

Maryland Judiciary's 2007–08 ASTAR Participants

Judges from Maryland's Court of Appeals, Court of Special Appeals and Circuit Courts, and the U. S. District Court for the District of Maryland, make up the ASTAR "Class of 2008."

Judges completing the current ASTAR curricula include:

United States District Court:
The Honorable Marvin J. Garbis
Maryland Court of Appeals:
The Honorable Lynne A. Battaglia
Maryland Court of Special Appeals:
The Honorable Deborah Sweet Eyler
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The Honorable Donald E. Beachley (Washington County), The Honorable David A. Boynton (Montgomery County), The Honorable Joseph Aloysius Dugan, Jr. (Montgomery County), The Honorable Judith C. Ensor (Baltimore County), The Honorable Lenore R. Gelfman (Howard County), The Honorable Terrance J. McGann (Montgomery County), The Honorable John Philip Miller (Baltimore City), The Honorable William C. Mulford, II (Anne Arundel County), The Honorable M. Brooke Murdock (Baltimore City), The Honorable Michael J. Stamm (St. Mary's County), and The Honorable Lynn Kellene Stewart (Baltimore City).

Maryland Judiciary graduates of the 2006 ASTAR program also attended the in-state conference, many serving as panelists, moderators, and convenors of mini-seminars and chat sessions. These judges included The Honorable Glenn T. Harrell, Jr., The Honorable Ellen L. Hollander, The Honorable Kaye A. Allison, The Honorable Stuart R. Berger, The Honorable Philip T. Caroom, The Honorable Michele D. Hotten, The Honorable W. Newton Jackson, III, The Honorable Diane O. Leasure, The Honorable Michael D. Mason, The Honorable Emory A. Plitt, Jr., The Honorable Cathy Hollenberg Serrette, The Honorable Ronald A. Silkworth, and The Honorable Sean D. Wallace.

For a complete list of judicial attendees, please contact MDC's Executive Director, Kathleen Shemer.

Sky Woodward is a Member at Womble Carlyle Sandridge & Rice, PLLC.

SPOTLIGHTS

Goshen v. Waldorf Volunteer Fire Department, Inc.—On May 4, 2007, **Joanne Dicus** and **Sean Edwards** of Semmes, Bowen & Semmes obtained a defense verdict in the Circuit Court for Charles County on behalf of the Waldorf Volunteer Fire Department (WVFD). Plaintiff filed suit against WVFD as a result of an accident in which plaintiff claimed serious injuries including multiple fractures. Plaintiff was making a left hand turn across Rt. 301 on a green arrow at night when the WVFD emergency vehicle approached on southbound Rt. 301 with its lights and sirens activated. Plaintiff claimed she did not see the emergency vehicle until just before it struck her. Through expert testimony and eyewitness testimony, Ms. Dicus and Mr. Edwards were able to demonstrate that Plaintiff's line of sight to the approaching emergency vehicle was at least between 500 to 1000 feet, and that had she looked, she would have seen the approaching emergency vehicle. Ms. Dicus and Mr. Edwards were successful in having the jury find that the Plaintiff was contributorily negligent in causing the accident.

Sean P. Edwards. Joanne Dicus is a Principal and Sean Edwards is a Senior Associate at Semmes, Bowen & Semmes, P.C. Both practice in a wide range of insurance defense areas.

Goodell, DeVries, Leech & Dann Successfully Defends Doctor in Malpractice Case Arising From a Rare Gynecologic Condition

Craig Merkle and **Nichole Nesbitt** obtained a defense verdict on behalf of their physician client after a jury trial in the Circuit Court for Anne Arundel County on April 27, 2007. The case, *SBL v. Annapolis Ob/Gyn Associates, P.A., et al.*, involved a patient who sustained vaginal and perineal lacerations in the course of childbirth. Although the lacerations were repaired at the time of delivery, the patient alleged that she experienced pain in the immediate post-partum period. The defendant obstetrician-gynecologist saw the patient five days following delivery and again ten days later and determined that the lacerations were healing and that the patient's pain was improving. When the patient returned for her regularly-scheduled post-partum visit four weeks later, a portion of her labia had agglutinated, or fused together, over the vaginal opening, which required corrective surgery. The patient claims that she developed Post-Traumatic Stress Disorder as a result of the agglutination and that she still experiences chronic pelvic pain. She alleged that the obstetrician-gynecologist failed to appropriately follow her post-partum course and prevent the agglutination from occurring. The defense argued that the post-partum care was appropriate and that the formation of an agglutination in a post-partum patient is exceedingly rare and could not have been predicted. The jury concluded that the doctor met the standard of care in the treatment of the patient and therefore was not liable for her alleged injuries.

Craig Merkle is one of the founding partners of Goodell, DeVries, Leech & Dann, LLP and concentrates primarily on the defense of professional liability cases. K. Nichole Nesbitt is an associate at Goodell, DeVries, Leech & Dann, LLP, focusing on medical malpractice defense and commercial litigation.

On July 30, 2007, an Anne Arundel County jury rendered a defense verdict in favor of the clients of **Craig B. Merkle** and **Marianne DePaulo Plant** of Goodell, DeVries, Leech & Dann, LLP and **Thomas L. Doran** of DeCaro, Doran, Siciliano, Gallagher & DeBlasis, LLP. *Hayes v. CWC, et al.* was a medical malpractice action brought against two obstetrician/gynecologists and their practice group, involving a post-partum patient who developed a breast infection caused by methicillin-resistant staphylococcus aureus (MRSA). The patient alleged that over a course of weeks, she phoned the defendant physicians five times about her condition, and that she came to the office twice seeking treatment for her developing infectious process. The patient reported to the physicians that her newborn son had been hospitalized with a staph infection in the week prior to her onset of symptoms. The physicians diagnosed mastitis, and empirically prescribed an antibiotic to which the infection was not sensitive. It was alleged that the defendant doctors failed to seek details regarding the child's infection, and that had they done so they would have learned that he, and their patient, had a resistant strain of staph that required a different antibiotic to be effectively treated. It was further alleged that the physicians failed to ensure a timely surgical consult was obtained. Ultimately, the patient required breast surgery involving an extensive excision of tissue as a result of the infection. She claimed the painful and disfiguring surgery should have been avoided with a timely diagnosis of her condition. After a week-long trial, the jury concluded that the doctors met the standard of care in the patient's treatment and therefore were not liable for her claimed damages.

— Marianne DePaulo Plant

***Randy Sweitzer v. Rush Excavating, Inc.*, Circuit Court for Garrett County, Case Number 11-C-06-009783.**

Christopher J. Lyon, an associate at Semmes, Bowen & Semmes, successfully represented Rush Excavating, Inc. in a two day bench trial before the Honorable James Sherbin in a case alleging $80,000 in property damage. The Plaintiff alleged a multitude of damages stemming from work Rush Excavating, Inc. performed on a plot of land Plaintiff was developing in Garrett County. Rush Excavating, Inc. was hired to (1) widen a driveway entrance to meet County sight distance and drainage requirements; (2) install a septic system; (3) level the plot of land for a building site; (4) install electric conduit for electric lines; and (5) bury 70-75 treestumps. Plaintiff alleged problems with all of the work, asserting both a negligence claim and a breach of contract claim.

After Plaintiff's case, Judge Sherbin granted Rush Excavating, Inc.'s Motion for Judgment with respect to the negligence claim

based upon the economic loss doctrine. At the close of all the evidence, Judge Sherbin entered a verdict in favor of Rush Excavating finding no breach of contract. The Judge found that Plaintiff was directing how the work was to be performed. Moreover, the evidence highlighted proof issues in light of work performed on the property by other excavators after Rush Excavating, Inc.'s work was complete. The Judge also entered an award in favor of Rush Excavating, Inc. on its counterclaim.

Christopher J. Lyon is an associate at Semmes, Bowen & Semmes in its Baltimore office. He is a member of the firm's litigation department, and his practice includes representation of construction and excavating companies.

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