THE DEFENSE LINE

A Publication From The Maryland Defense Counsel, Inc.

Spring 2007

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Important Announcements

Mark your calendars now for the **Annual Crab Feast** June 6, 2007 5:30 p.m.

Call 410.560.3895 or mddefensecounsel.org for details

Undocumented Aliens: The Maryland Court of Appeals, The Commission and The *Lagos* Decision

By James R. Forrester

On September 12, 2005, Maryland's highest court handed down its decision in *Design Kitchen and Bath, et al. v. Lagos*, 388 Md. 718, 882 A.2d 817 (2005). The decision serves to, yet again, expand the class of persons included in the definition of "covered employee" under Md. Code Ann. Lab & Empl. § 9-202 ("LE § 9-202"). Previously, there was no Maryland statutory authority or case law that addressed the issue of an undocumented alien's right to workers' compensation benefits. Individually, insurers had their own policies regarding the administration of those claims. The *Lagos* Court held that an undocumented alien who is injured in the course of his employment is a "covered employee" under the Workers' Compensation Act and that the Immigration Reform and Control Act of 1986 ("IRCA") neither preempts, nor precludes, an award of workers' compensation benefits to undocumented aliens in the State of Maryland.

Facts

The Claimant, Diego Lagos, (the "Claimant") was a manual laborer employed by Design Kitchen and Baths, a company that built and remodeled residential kitchens and bathrooms. On August 20, 2001, the Claimant, while in the course and scope of his employment, cut his left hand while operating a table saw.

Included in the information provided on the Employee's Claim Form, the Claimant listed his social security number as "000-00-0000." At the Workers' Compensation Commission (the "Commission") hearing, the Claimant was instructed not to respond to questioning regarding his resident status and social security number. The Claimant's attorney admitted to the Commission that, at the time of the accidental injury, the Claimant did not have a valid social security number or other documentation evidencing a legal right to work in the United States. But for the Claimant's undocumented status, however, the claim was compensable. The Employer/Insurer did not raise any issues regarding the factual basis of the underlying incident, the medical treatment received or Lagos' entitlement to temporary total disability benefits.

Commissioner Rosenbaum found that the claim was compensable and awarded medical and indemnity benefits. The Employer/Insurer filed an appeal in the Circuit Court for Montgomery County. In order to streamline the proceedings, the parties agreed, for the purposes of the appeal, that the Claimant did not have a valid social security number or other documentation affording him the right to work legally in the United States.

As there was no factual dispute, each party filed a motion for summary judgment. After oral argument, the Circuit Court affirmed the Commission's decision. The Employer/Insurer appealed to the Maryland Court of Special Appeals. After the submission of the Employer/Insurer's brief, the Court of Appeals, of its own volition, granted *certiorari*.

The Arguments

The appeal focused on three main arguments: a) that the undocumented alien's employment was not contained in LE § 9-202 and the effects, if any, of other states' decisions on the subject; b) that Federal

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President's Message

In my President's Message last fall, I introduced our Board Members and Officers and discussed the projects and initiatives we were undertaking. As I write this, my last President's Message, I am excited to report to you the MDC's successes to date.

Programs/Events

Program Chair Jennifer Lubinski has again worked tirelessly in putting together programs for the MDC Members. By no means is this an exhaustive list of our programs, otherwise, this Message would take considerably longer for me to write and for you to read, but will allow me to hit some of the highlights.

Jennifer worked with Immediate Past President Sky Woodward in putting together our ASTAR event last Fall. This event, held at the Maryland Science Center, was kicked off by Court of Appeals Chief Judge Bell. The event Panel consisted of Judge Harrell from the Court of Appeals, Judge Hollander of the Court of Special Appeals, and Judges Berger and Cannon of the Circuit Court for Baltimore City. The Center's auditorium was filled to capacity and we marveled at the significant advances in technology and science in the past several years and the issues we face as Civil Litigation Practitioners in understanding and applying that science and technology. Any of you reading this message who attended, I hope, will concur this was a remarkable event and indeed kicked off a statewide "road show" to advance ASTAR throughout the State. The MDC's Annual Meeting and Crab Feast will take place again this year at Bo Brooks on June 6, 2007. New Officers will be elected at this meeting. In addition, the Annual Golf outing, which we jointly host with the MTLA, is scheduled for Monday, May 21, 2007 at Woodlands Golf Club. Please check our website for more details. Finally, the DRI Diversity Seminar is scheduled for June 14 and 15, 2007 at the Fairmont Chicago Hotel in Chicago, Illinois. Board Member, Toyja Kelley, is instrumental in coordinating this and would welcome as many of our Members and Organizations to attend as possible.

Joseph M. Jagielski, Esquire

Law Offices of Joseph M. Jagielski

Since my initial President's Message, there have been significant changes in the political and judicial landscape. Maryland has a new United States Senator in Senator Cardin, Maryland elected a new Governor and Lt. Governor in Gov. Martin O'Malley and Lt. Gov. Anthony Brown, and as a result of the November 2006 elections, we have many new Legislators in Annapolis doing the people's business. The MDC supported the Sitting Judges in contested elections throughout the State and we were pleased to see that the Maryland Electorate agreed that these Judges deserved to remain on the Bench. My thanks to John Sweeney, Susan Durbin Kinter and Dana Moylan for their leadership of the Judicial Selections Committee for 2006 and 2007. We would expect considerable activity in the next several years in the area of judicial selections since, as many of you know, several of our Appellate Judges face retirement due to the Constitutional requirement of retirement at age 70. At this writing, Judge Kenney and Judge Wilner have both retired and Governor O'Malley is beginning the important task of establishing his Judicial Nominating Committees. We in the MDC expect to continue to be involved at a high level, interviewing judicial candidates whenever possible to promote a highly qualified, experienced and diverse Bench.

As one might have expected following the Statewide Election, the 2007 Legislative Session was chock full of activity and intrigue. A multitude of Bills were introduced which could have a significant impact in our civil litigation defense practices. Most notably were Bills to extend the statute of limitations that significantly impact the way medical malpractice claims are litigated. Equally notable are present Legislative attempts to change Maryland substantive law from contributory negligence to comparative negligence. On this latter Legislative issue, we reached out to you as Members several times during the Legislative Session providing you with updates and asking questions as to your thoughts regarding our approach to address these Legislative issues. Of course, this was entirely consistent with the Message I conveyed in Fall 2006 to include you as Members even more so in the strategic decisions the MDC must make on a regular basis. We thank you for your interest, involvement, and your expertise in helping us travel the course. As of the writing of this Message, the House Bill 110, to change Maryland Law to comparative negligence has been withdrawn, and there was no vote in the Senate on Senate Bill 267, its Legislative counterpart. I would like to publicly thank Gardner Duvall, our Legislative Branch Liaison, Mark Coulson, Chris Boucher, and Laura Cellucci, our Legislative Chairs for their tireless efforts, not only on the Comparative Negligence Bill, but on the many other Bills introduced this Session which could have impacted our practices. Their yeomen efforts allowed me to sleep less fitfully during this exciting Legislative Session.

Legislative activities on the Workers' Compensation front were equally frenetic. Over 30 Bills were introduced in the House and Senate and Workers' Compensation Section Co-Chairs Ileen Ticer and Nancy Harrison also worked tirelessly on behalf of the MDC and our Statewide Defense Membership. I had the good fortune to see the MDC "in action" before the Senate in both the Civil Liability/Negligence arena and in the Workers' Compensation arena, and I only wish that you would have been able to see these MDC Members' advocacy for our system of justice.

Communication

We promised you in my President's Message that we would continue to communicate with you. I hope you have seen the updates to our website have made it more user friendly. Our sponsors are now much more easily accessible through the website and you can of course contact me or any of the Officers or, Executive Director Kathleen Shemer, or Sponsorship Chair, Nikki Nesbitt,

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for any additional information regarding our sponsors. The MDC also took the time and energy to, we hope, better craft our Message to internal and external audiences. You will note when you open the MDC website, you see that we are "Promoting Justice. Providing Solutions." As we "endeavor through political activism, judicial candidate interviews, and educational conferences" we wish to "attain equal justice for all, improve Maryland's Courts, strengthen the fabric of Maryland's economy and communities, and improve the defense of civil law suits." This is, by no means, anything other than a tall order. For example, shortly after the comparative fault legislation was introduced, the MDC posted on our website a position paper and provided that position paper to newspapers, interested individuals, our membership, and the Legislative Committees that would be hearing this legislation. My thanks particularly to Legislative Liaison Gardner Duvall for his efforts in crafting this important document on behalf of the MDC.

We have ratcheted up the use of email communication. We hope that you are eager and excited about the increased email communications you have received from us on legal developments and other topics. Through Mary Malloy Dimaio, we are working to create further resources to enhance our communication regarding proposed experts in Maryland Civil Litigation. I would be very remiss if I did not thank Matt Wagman, *Defense Line* Editor, and Michelle Dickinson, Assistant Editor, of *The Defense Line* for their work during this past term. I apologize to them for the fact they had to continually "nudge me" to complete my President's Message. I sincerely hope this Message meets with their approval.

I was also very excited over the past year to see increased activity in a more formalized process in our activities related to Appellate Practice. My thanks go out to Appellate Co-Chairs, Richard Flax and Dwight Stone, as well as the Firm of Miles & Stockbridge and the Firm of Lord & Whip in working with MDC Law Firms and Counsel on several Amicus Briefs in the Appellate Courts. We also believe our more formalized process in vetting potential Amicus opportunities will enhance our service to our member constituency.

Finally, I would like to thank all of our sponsors this year. Please visit our website frequently and, whenever possible, take the opportunity to use our Flagship Sponsor, Courthouse Copy Service, our Gold Sponsors, Clifton Gunderson LLP, Commercial Index Bureau Inc., The Daily Record, LexisNexis, Exponent, and Naden/Lean LLC, as well as our Silver Sponsors, Decision Quest, Gore Brothers, Ellin & Tucker Chartered, Litigation Graphics and Technologies, and Smart. They have committed their resources and support to the MDC; we can do nothing less than reciprocate.

It has been an honor and privilege to serve as your President this year. The opportunity to lead an organization such as this, which is dedicated to the integrity and preservation of our system, fair and equal treatment under the law for all parties, as we promote justice and provide solutions in the context of Civil Litigation. I sincerely know that you will be as supportive to my dear friend Dan Moylan, when he assumes the Presidency at the June Crab Feast. I very much hope to see you at the Crab Feast and to thank you in person for your support of the MDC.

Editor's Corner

This edition of *The Defense Line* features an article from James R. Forrester of Semmes, Bowen & Semmes discussing a 2005 Court of Appeals decision, *Design Kitchen and Bath, et al. v. Lagos*, concerning undocumented aliens' rights to worker's compensation benefits. Kelli M. Rives of the Law Offices of Maher & Associates discusses changes in worker's compensation law and practice over the past five years. Christopher J. Lyon of Semmes, Bowen & Semmes discusses implied indemnity between co-defendants and the recovery of an indemnitee's attorney's fees. Bud Brown of McCarthy Wilson LLP discusses recent developments in claims-made law. Sky Woodward and Ben Homola of Miles & Stockbridge discuss the November 2006 MDC symposium on the Maryland judiciary's participation in the Advanced Science & Technology Adjudication Resources ("ASTAR") program. Plus, we have several interesting Spotlights from our members.

The Editors of *The Defense Line* want to remind readers that the MDC's annual golf outing (jointly hosted by MTLA) will take place on May 21 at Woodlands Golf Club. In addition, Defense Research Institute's Diversity Seminar which will be held June 14 and 15 at the Fairmont Chicago Hotel. Finally, the MDC's Annual Meeting and Crab Feast will be held on June 6 at Bo Brooks at Lighthouse Point.

The Editors continue to hope that our readers find *The Defense Line* to be of benefit to their practice. If you have any comments or suggestions, or would like to submit an article or personal spotlight for a future edition of *The Defense Line*, please feel free to contact the Editors, Matthew T. Wagman (410) 385-3859 or Michelle J. Dickinson (410) 580-4137.

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A Five-Year Restropective of Workers' Compensation Practice in Maryland

By Kelli M. Rives

The past five years have seen a multitude of changes for those who practice in the Maryland Workers' Compensation arena. Along with significant substantive changes in the law itself, there has been a revolutionizing of the Workers' Compensation Commission which has impacted the daily practice in this often overlooked and under-estimated area of the law.

The Active Judiciary

Although there have been some legislative amendments to the Workers' Compensation Act, the true transformations have come from the Courts of Appeals. As this article is only an overview, it does not give an exhaustive review of case law that has developed over the last five years, but will rather highlight three cases of significant interest to practitioners.

A. *Harris v. Howard County Board of Education*, 375 Md. 21 (2003).

Anyone who is even peripherally involved in the practice of Workers' Compensation law in Maryland is familiar with the Court of Appeals' June, 2003 opinion *Harris v. Howard County Board of Education*, warping the time honored definition of "accidental injury," by eliminating the "unusual activity" requirement.

Vernell Harris was a food service worker for the Howard County Board of Education. Her normal job duties included laundry. In January, 1999, she opened a 45 pound box of laundry detergent only to find it infested by insects. With the assistance of a co-worker, she managed to drag the box outside, and in the process, injured her back.

Ms. Harris filed a claim for workers' compensation benefits related to the event. The claim was contested on the basis that it did not arise from an unusual activity and was set for a hearing before the Workers' Compensation Commission. The Commission issued an order finding the claim compensable.

The Board appealed the decision. A Howard County Circuit Court jury overruled the Commission's order finding the claim was not compensable. Claimant Harris appealed the Circuit Court decision to the Court of Special Appeals, which affirmed the Circuit Court order in an unpublished opinion. Claimant then appealed to the Court of Appeals, which not only found the claim compensable but went further than either party had ever contemplated by sweeping away 85 years of case law.

Prior to this decision the Maryland appellate courts had interpreted the definition of an accidental personal injury, as defined in § 9-101 of the Labor & Employment Article of the Annotated Code of Maryland to require an "unusual activity or event" in order for the claim to be compensable. There have been no appellate decisions since *Harris* further exploring the language of that case. Despite the broadening of the definition of "accidental injury," employers and insurers have continued pressing the defenses that a compensable claim still requires that a specific work-related event take place and that the claimed injury be causally related to that specific event.

It has been nearly four years since *Harris*, and it is difficult to obtain a precise measure of its effect on Maryland claims since there are so many factors involved in the filing of claims and reasons for accepting or disallowing claims. After the opinion came out in 2003, however, the Workers' Compensation Commission was charged with conducting a study of the impact of *Harris*, the results of which are published in staff reports submitted in 2004 and 2005. (Both of which are readily available on the Workers Compensation Commission website at www.wcc.state.md.us/Gen_Info/Publications.html).

The Commission made four basic assumptions in its study, which could be indicators of the impact of *Harris*. Assumption 1) an increase in the rate of accepted claims (after factoring out growth in the increase); Assumption 2) an increase in the rate of initial claim filings in relation to reported work injuries (after factoring out growth in the increase); Assumption 3) a decrease in the rate of disputed claims; and Assumption 4) a decrease in the rate of disallowed claims.

The report of August 13, 2004 concluded that the cost of Workers' Compensation claims was increasing in Maryland but further data was needed to form a more specific conclusion. After that, a report on the study was submitted on March 23, 2005, which concluded that the *Harris* decision has had the possible effect of increasing the cost of Workers' Compensation claims in Maryland by as little as 0.5% or by as much as 2.4%.

B. *Del Marr v. Montgomery County*, 169 Md. App. 187 (2006), *petition for cert. granted*, 394 Md. 478 (2006).

This case revolves around the three tier system of payments established by the legislature in 1988. That system allows for injuries that result in permanency awards of less than 75 weeks to be paid at a lower compensation rate. If upon reopening, the award is increased to more than 75 weeks but less than 250 weeks, however, the carrier could not take a credit for the weeks previously paid at the lower rate, but rather had to pay all weeks at the higher rate, taking credit for the monetary amount of the prior award.

Claimant Paul Del Marr injured his lower back in a compensable accident while working for the Montgomery County Board of Education. After a hearing on the issue of permanent partial disability on April 18, 2002, the Workers' Compensation Commission issued an order (Order I) on May 2, 2002, finding that the Claimant sustained a 20% loss of use of the body, of which 10% was the result of the work accident and 10% was related to a pre-existing condition. The 10% award translated to payments of $114 per week for a period of 50 weeks under § 9-628 of the Maryland Labor & Employment Code Annotated.

Claimant filed a Petition for Judicial Review of that award on January 9, 2003. While that appeal was pending, the parties agreed on the following stipulation: the Claimant sustained a 24% loss of use of the body, of which 14% was the result of the work accident and 10% was related to a pre-existing condition. This Order ("Order

II") was payable at the rate of $114 for a period of 70 weeks. Thus, after the increase in the award, the case remained in the first tier and payments continued to be made at the lower tier level pursuant to § 9-628.

Subsequent to the stipulation, the Claimant filed a petition to reopen his claim alleging a worsening of his condition, pursuant to § 9-736. In response to the petition, the Commission issued an Order ("Order III") finding that the Claimant did have a worsening of condition and awarding him 33% permanent partial disability to the whole body, of which 23% was the result of the work accident and 10% was related to a pre-existing condition. This award moved the claim from the first tier to the second tier and provided that payments were to be made for a period of 115 weeks at the rate of $223, "subject to credit for payments made under Order dated May 2, 2002 and as amended under Order dated January 9, 2003."

Thus, Order III allowed the Board to take a credit for the dollars paid in Orders I and II, rather than the weeks paid. The significance of this can be seen in the following break down: under Order III, the Claimant was to be paid a total of $25,645 (115 weeks at $223 per week). The total dollars paid out under Orders I and II added up to $7,980 (70 weeks at $114.00 per week). Thus, under the Commission's Order, the Board received a "dollars credit," which entitled the Claimant to an additional sum of $17,665 ($25,645 less $7,980). Alternatively, had the Commission ordered a "weeks credit" (i.e., a credit of the 70 weeks of payments previously made on the claim), the Claimant would be entitled to 45 weeks (115 weeks less 70 weeks), which translates to $10,035 (45 weeks at $223) a savings to the employer of over $7,000

The Board, arguing it was entitled to a weeks credit rather than dollar credit filed a Petition for Judicial Review in the Circuit Court for Montgomery County. Both the Board and the Claimant filed Motions for Summary Judgment. The Circuit Court reversed the Commission finding and ordered that the Board was entitled to a credit for weeks paid rather than dollars paid.

Claimant filed an appeal to the Court of Special Appeals. The Court, relying primarily on a previous holding in *Ametek, Inc. v. O'Connor*, 364 Md. 143 (2001), affirmed the Circuit Court. In the *Ametek* case, a Claimant's permanent partial disability award was increased as a result of a Petition for Judicial Review. Under that circumstance, the court held that the increased award was subject to a credit for weeks paid rather than dollars. *Ametek* differed from the *DelMarr* case in two significant ways. First, it involved a modification of an award after a circuit court appeal, as opposed to a worsening of condition. Second, the increase took the award from the first tier to third tier rather than the second tier. Nonetheless, the Court applied the same rationale, as to do otherwise would be inconsistent with the prior interpretations of the Workers' Compensation Act.

I am pleased to report that just before this article went to print, the Court of Appeals affirmed the Court of Special Appeals' decision in its opinion issued on February 9, 2007. The Court of Appeals

confirmed that when a claimant's permanent partial disability rating goes from first tier to second tier, the employer and insurer are to receive a credit in the form of weeks rather than dollars. The opinion will apply regardless of whether or not the increase is due to a re-opening or a judicial review. This ruling will result in a more equitable payment of compensation awards.

C. *Mona Electric Services, Inc., et .al. v. Shelton*, 148 Md. App. 1 (2002).

Wade Shelton was working for Mona Electric Services, Inc. ("Mona") when he was involved in an automobile accident on August 30, 1991. He filed a workers' compensation claim for benefits. Mona and its insurer (collectively, the "Employer/Insurer") contested the claim and a hearing was set for September 17, 1992. On September 4, 1992, the Employer/Insurer wrote the Commission requesting that the hearing be continued since they determined that the claim would be compensable. The letter did not request that an order be issued. The hearing was continued to be reset on request and no award was issued at that time. The claim remained open and benefits were paid. Claimant received temporary total benefits for over three years until September 1994 when the Employer/Insurer notified the Claimant that benefits were stopped because he had reached maximum medical improvement.

In 1997, three years after the last temporary total payment, Claimant sought authorization for treatment in the form of surgery. That request was denied, and Claimant filed issues for an emergency hearing. The parties, however, resolved that dispute before the hearing and once again, the Commission did not issue an order.

On November 1, 1999 (approximately 5 years and 2 months after the last temporary total payment date) Claimant filed issues for "nature and extent of permanent disability to the body as a whole (back)" contending that the Claimant was permanently totally disabled. At a hearing on that issue, the Commission found that the claim was barred under § 9-736(b) which gives the Commission jurisdiction only for five years from the date of last compensation paid.

The Claimant appealed the Order to the Circuit Court for Calvert County. The Circuit Court held that the claim was not barred under § 9-736(b) because there had never been a Workers' Compensation Commission "award" in the case.

The Employer/Insurer appealed to the Court of Special Appeals, which affirmed the Circuit Court's judgment. The Court relied in part on the rationale set forth in the United States Supreme Court decision, *Intercounty Construction Corp. v. Walter*, 422 U.S. 1 (1975), which involved a Federal Workers' Compensation claim with very similar facts.

The practical result of the *Mona* case is that the five year statute of limitations for reopening does not begin to toll unless there is an order from the Workers' Compensation Commission. In light of this decision, it is important for employers and insurers to protect themselves by ensuring that the

Commission issues an order regarding compensability at the outset of the claim.

Workers Compensation Commission Practices

The Workers' Compensation Commission has made great strides in updating customer access to their agency, through both technological advances and revamping of customer related services.

A. Web-enabled File Management System ("WFMS").

The Maryland Workers' Compensation Commission has made great strides on the electronic front. The Commission's website now enables any attorney who is admitted to practice before the Commission access to claims online at no charge. To access this service, attorneys simply need to obtain a password from the Commission. The website also gives attorneys the ability to file the most popular workers' compensation forms electronically. Electronic filing has many advantages, including postage savings and real time filings with date stamped copies. All claims at the Commission can be accessed with either the Commission claim number or the claimant's social security number. Even non-attorneys can access the system for filing certain forms, including employee claim forms, employer's first reports, and verifying employer insurance coverage. The website also provides sample forms and access to important case law.

B. Regional Hearing Sites

Prior to 2000, the Commission often operated in borrowed meeting rooms, school auditoriums, recreational centers, and county council rooms. Many of these were not handicapped accessible and did not provide an atmosphere conducive to the gravity of the cases being tried. In an effort to correct these problems, during the 2000 legislative session the Workers' Compensation Commission obtained authority to open permanent regional hearing sites. The Commission opened the first of these sites in Abingdon on April 1, 2003. Over the course of the next two years, three additional regional sites opened in LaPlata, Beltsville, and Cambridge. The last and final of these regional hearing sites opened on North Market Street in Frederick on July 24, 2006. Adding these sites to the Baltimore City location, the Commission now has a total of six permanent hearing sites throughout the State.

Though problems may still remain regarding what site should handle which cases, there can be no doubt that the regional hearing sites have been a welcomed addition.

New Members

John S. Bolesta	*Sandra J. McLelland*
Christopher R. Daily	*Casey L. Moore*
Greg Garrett	*David C. Numrych*
Jesse B. Hammock	*Stephen J. Orens*
Leianne S. Helfrich	*Elliott D. Petty*
April Hitzelberger	*Abby M. Ross*
Timothy Hurley	*Angela W. Russell*
D'Ana E. Johnson	*Anna M. Schultz*
Marianne R. Koch	*Thomas C. Sova , IV*
Sarah Koop	*Michelle E. Stanfield*
Orlando Mayo	*Rebecca D. Willens*

C. Interpreter Services

In 2002, §10-1103 of the Maryland State Government Code was enacted. This section required state agencies to "take reasonable steps to provide equal access to public services for individuals with limited English proficiency." *State Government*, § 10-1103(a). It further required that the Workers' Compensation Commission implement the provisions on or before July 1, 2003. As a result, the Workers' Compensation Commission began providing free interpreter services to all witnesses with limited English proficiency. COMAR 14.09.01.27.

Any witness who wishes to testify with the assistance of an interpreter need only contact the Interpreter Program Office at the Commission with a request for an interpreter within ten days of the hearing notice. As long as the proper request is made, an interpreter will be provided at no cost to the witness. A witness may elect to bring his/her own interpreter to a hearing, but that cost would not be assumed by the Workers' Compensation Commission.

This service is widely used and requests have continued to increase each year since the program was implemented, with interpreters provided in over 1200 cases in 2006. Although the vast majority of the interpreters were for translations in Spanish, the program provided interpreters in 40 different languages in 2006.

D. Fraud Reporting

In 2004, the Workers' Compensation Commission took steps, pursuant to regulations issued under § 9-310.2(a) of the Labor and Employment Article, to implement a procedure by which persons suspected of committing fraud in relation to a Workers' Compensation claim are referred to the Insurance Fraud Division of the Maryland Insurance Administration. If a party suspects someone of committing fraud, he/she can file a "Request for a Hearing for Referral to Maryland Insurance Fraud Division." The Commission then will schedule a hearing. If the party making the allegation proves by a preponderance of the evidence that the person named "knowingly affected [sic] or knowingly attempted to affect [sic] the payment of compensation, fees, or expenses under Title 9 of the Labor Law by means of fraudulent representation," the case is sent to the Maryland Insurance Fraud Division.

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case law (*Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 122 S.Ct. 1275, 152 L.Ed. 2d 271 (2002)) and the IRCA preempted the award of benefits; and c) the public policy effects of denying benefits to this class of individuals.

a) Who is a Covered Employee under the Maryland Workers' Compensation Act?

In Maryland, a claimant seeking workers' compensation benefits bears the burden of proving that he or she is a "covered employee" under the Maryland Workers' Compensation Act (the "Act"). Specifically, the claimant must prove that he/she falls within the definition of one of the categories of employees set forth in Chapter 2 of the Act. With respect to illegal or unlawful employment, minors enjoy the rights derived from being considered a "covered employee." Workers' compensation law specifically identifies a laundry list of other classes of employees, such as distributors, newspaper sellers, domestic servants, farm workers, jockeys, jurors, and maintenance workers. Undocumented aliens are not included among the other occupations classified as a "covered employee."

There was no dispute that the Act was silent with regard to illegal or undocumented aliens and any potential benefits they may be entitled to pursuant to the Act. The Employer/Insurer argued that the language of LE § 9-202 was plain and unambiguous, thereby negating any need to look beyond the language of the statute to ascertain legislative intent or to provide deference to the Claimant. The Claimant, however, argued that the silence in the statute was tantamount to the argument of "less is more." The Claimant rhetorically argued that there was no specific language in LE § 9-202 to find that left handed employees were in fact "covered employees." In fact, this is some of the very language adopted by Judge Bell, writing for the majority.

The Employer/Insurer argued that if LE § 9-202 were ambiguous and in need of revision, it should be a creation of the Maryland General Assembly, not created through judicial activism. In support of this contention, the Employer/Insurer turned to the Commonwealth of Virginia and their recent encounter with the same issue. In 1999, the Supreme Court of Virginia was faced with the same factual scenario. In *Granados v. Windson Development*, the Supreme Court of Virginia declined to classify an illegal alien as an employee under the Virginia Workers' Compensation Act (the "Virginia Act"). Shortly after the Virginia Supreme Court's decision in *Granados*, the Virginia Legislature amended the statutory definition of the term "employee." Language was added to the Virginia Act, specifically designed to include illegal aliens and unlawful contracts of employment. Appropriately, it took an act of the Virginia Legislature, not an act of the judiciary, to amend the statutory definition of "employee."

b) Federal Law v. State Law, the Question of Preemption.

The conflict is evident: Congress explicitly recognized a compelling government interest in removing the incentive for illegal immigration, while the benefits of workers' compensation adds an incentive for illegal aliens to gain employment in the United States.

In response to the vast tide of illegal immigration in the United States, Congress created a comprehensive scheme to reduce the flow of undocumented aliens by removing the employment "magnet" that drew them into the country. As a result, the IRCA provided that "it is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States an alien, knowing the alien is an authorized alien with respect to such employment." See 8 U.S.C.A. §1324a(1)(a).

In *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), the Supreme Court held that the federal immigration policy expressed in the IRCA prevented the National Labor Relations Board ("NLRB") from awarding back pay to undocumented aliens. The Court noted that awarding back pay would belittle the enforcement of immigration law as well as condone and encourage future violations. More importantly, the Court acknowledged the entanglement of federal labor and immigration policy in observing that, "[u]nder the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies."

The Employer/Insurer argued that preemption was necessary based upon the fact that a state level agency should not be permitted to override Federal law and Congressional policy. The Claimant's argument focused on the proposition that there was no real Federal workers' compensation law to preempt the Maryland system.

c) The Public Policy and its Effects.

The Claimant argued that denying benefits would serve to undermine public policy. Specifically, the sanctioned denial of benefits would only serve to embolden unscrupulous employers. A denial of benefits would somehow encourage those employers to hire more undocumented workers and simply cast them aside once they were deemed damaged goods; however, there were absolutely no facts or figures to support this argument.

The Claimant further argued that the denial of workers' compensation benefits would leave them two options for redress: file suit in tort or do nothing. The Court found this argument rather persuasive, as they questioned both parties regarding the effect of contributory negligence on a system based on a no-fault standard. The remaining option, for nothing to happen at all, in the Court's view, was totally unacceptable and completely contradictory to the benevolent purpose of the Act.

What the Court Said

Writing for the majority, Chief Judge Bell indicated that the "clear and unambiguous language of [LE § 9-202] encompasses undocumented aliens" and that "any uncertainty in the law should be resolved in favor of the claimant." Allowing this author a moment of levity, to this date my contemplation continues—how does clear and unambiguous language contain uncertainty?

Next, the Court turned to the legislative intent for further guidance, an activity that gave rise to Judge Harrell's dissent. Reviewing the committee notes from the recodification of the Act, the Court concluded that there was nothing in the legislative history indicating that the Legislature intended for undocumented aliens to be exempted from the benefits provided by the Act. Accordingly, the Court held that since there was nothing to indicate expressly that undocumented aliens should be exempted, they should be included.

Judge Bell wrote that "this result [statutory interpretation] is consistent with, and indeed furthers, the purpose of the Workers Compensation Act, to protect employees, employers, and the public alike." Finding that the public policy objectives of the Maryland Workers' Compensation Act were enhanced by the decision, Judge Bell opined that the inclusion of undocumented aliens as "cov-

ered employees" serves to protect employees by providing indemnity and medical benefits; protect employers from the "unpredictable nature and expense of litigation;" and protect the public from assuming the responsibility of their care. In all, the benevolent purposes of the Act will extend to this class of persons for the good of the parties concerned.

With respect to the federal question, the Court held that the *Hoffman* case differs sufficiently from the instant case. As such, distinguishing the cases served as the platform for the Court to rule that the Federal statute and case law did not preempt the Maryland Workers' Compensation Act. To this end, the Court cited the majority of other states that have dealt with this very issue and managed to side step any problems regarding entanglement with the federal system.

The Dissent

Judge Harrell, the only judge to dissent, opined that the majority had addressed only the content of sub-section (a) of the statute, thus, ignoring the sub-section (b) in its analysis. Viewed in this light, Judge Harrell wrote that the majority "so renders sub-section (b) superfluous and nugatory." Furthermore, he finds that the majority has "created an interpretation reflecting an intent that is not evidenced by the legislature's chosen language."

Finally, Judge Harrell cautioned that the Court "is not in a legitimate position to revise the statute by judicial fiat... To do so is inconsistent with our more modern cases and extends the Court's reach beyond limits presumably we would respect in a case with less compelling social and policy implications."

What's Next

Where do we go from here? Intervention from the Maryland Legislature? Apparently not. Though several legislators called for a change to the statutory language, no serious legislation was introduced during the 2006 General Assembly Session.

What about vocational rehabilitation? For example, how will the Maryland appellate courts rule when presented with an order from the Commission mandating that an employer/insurer provide vocational rehabilitation benefits, specifically in the form of job placement? Do the employers/insurers expose themselves to potential civil and criminal penalties when they, via a vocational benefits vendor, work towards returning an undocumented alien to gainful employment? What about the vocational rehabilitation vendor, will they face civil or criminal penalties for their role in the vocational rehabilitation process? Is there potential exposure for employers to render vocational service for the claimant in their home country?

As America continues to be flooded with the tide of illegal immigration, these issues likely will be faced by appellate courts not only in Maryland, but across the country.

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MDC First Specialty Bar Association to Host ASTAR Symposium

By Sky Woodward and Ben Homola

On November 15, 2006, MDC became the first specialty bar association to host a symposium ("Symposium") on the Maryland judiciary's participation in the Advanced Science & Technology Adjudication Resources ("ASTAR") program. The Symposium provided MDC members a unique opportunity to learn what and how Maryland judges are being trained in the ASTAR program. Chief Judge Robert M. Bell, current Chair of the ASTAR Board of Directors, opened the Symposium, and Court of Appeals Judge Glenn T. Harrell, Jr. moderated scientific presentations by professors Chin Van Dang, M.D., Ph.D, and John Gearhart, Ph.D from Johns Hopkins University and a question and answer session with current ASTAR participants, Judge Ellen L. Hollander from the Court of Special Appeals and Judges Evelyn Omega Cannon and Stuart R. Berger from the Baltimore City Circuit Court. (See sidebar for background information on the ASTAR project).

The Symposium could be considered an informal celebration of the first class of 23 state jurists who graduated as ASTAR Science and Technology Fellows from the yearlong program consisting of more than 120 hours of study. (See sidebar for list of "Current Maryland ASTAR Resource Judges"). The Symposium was also an effort to update the Maryland bar on the status of the ASTAR program, the science and technology education that Maryland judges are receiving, and the judges who had participated and will participate in the program.

Symposium Highlighted Scientific Fraud and Stem Cell Research

Symposium attendees were given a valuable, but limited taste of the types of courses that the ASTAR judges engaged in during their training. First, Chin Van Dang, M.D., Ph.D, Vice Dean for Research and Professor of Medicine, Oncology, Pathology, and Cell Biology from the Johns Hopkins University School of Medicine presented a lecture addressing "Scientific Fraud." Dr. Van Dang provided a primer on the scientific method, peer review publications, and scientific integrity. His review of the scientific method discussed theories of falsification (advancement of science through falsifiable hypotheses), empiricism (systemic gathering of data and its limitations), the analysis and interpretation of data (including resolution, reproducibility and statistical variations), support and rejection of hypotheses (highlighting the multitude of studies necessary to support a hypothesis and the ability of a single experiment to destroy a hypothesis), reductionism (studying individual components of complicated systems), and theories of emergence (systems being more complicated than the sums of their parts).

Dr. Van Dang then discussed peer review and scientific publications, highlighting the academic ladder and the pressure to publish in peer reviewed, top-tier "impact journals." Impact journals are journals that are recognized in the relevant scientific community for their scientific integrity and adherence to accepted rules and regulations governing research. Recognition in the academic community varies from journal to journal and, as it is a consideration in the relevant scientific community, should be relevant consideration for assessing the reliability and integrity of experts and testimony in the context of litigation. Dr. Van Dang used this background as a jumping off point for addressing fraud (intentional deception) and carelessness (mistakes) in scientific research. Although the scienter of fraud and carelessness are distinct, both result in unreliable and inaccurate data that may serve as a diversion, distraction, waste in resources, or delay in ongoing scientific research. Dr. Van Dang also pointed out that scientific fraud could result in unjustifiable risks of harm for human subjects. Dr. Van Dang's presentation helped to remind Symposium attendees of the necessity of ensuring that experts—for either the plaintiff or the defense—must be properly vetted, supported, and/or challenged to ensure that the scientific evidence presented in the courtroom is reliable and is not the result of fabrication, falsification, or carelessness.

After Dr. Van Dang's presentation, Dr. Gearhart presented a "Stem Cell Primer" to Symposium attendees. Dr. Gearhart's presentation included a discussion on the science of stem cells, advancements in stem cell technology, current stem cell research emphases, and some of the ethical considerations associated with human embryonic stem cells. Dr. Gearhart explained the stem cell's capacity for unlimited self-renewal and its "totipotential." Totipotential is any single stem cell's ability to produce all of the estimated 220 stem cell types. Dr. Gearhart discussed the wide variety of applications for human embryonic stem cells, which include fundamental discoveries in human biology (e.g., gene function), studies on human disease, drug development, building organs, and cell-based interventions (e.g., therapies for paralysis). The ultimate but extremely difficult goal of current stem cell research is to develop the capacity to instruct stem cells to become the types of cells necessary to be successfully applied in each of these applications.

Dr. Gearhart provided attendees with basic information on the current emphases in stem cell research. Those emphases include: (1) sources of stem cells, (2) contrasting and comparing the potency, plasticity and molecular properties of stems cells from various sources, (3) molecular definition of a stem cell, or "stemness," (4) stem cell niche, in vivo and/or in vitro, (5) development of high-efficient differentiation protocols, (6) authenticity of derived cell types, (7) stem cell lines—characterizations, quality control and genomic and epigenomic alterations over time, (8) reprogramming of cells to be stem cells, (9) politically correct human embryonic stem cells, and (10) proof of the stem cell principle. Dr. Gearhart presented a video demonstrating "proof of the principle," in which symposium attendees observed a paralyzed mouse regain use of its hind legs through stem cell therapy. Dr. Gearhart's presentation demonstrated to Symposium attendees the rapidly increasing

complexity of modern science and reminded attendees of the necessity of the bar's active engagement with the science that is and will be a permanent fixture of the modern scientific and legal landscape.

Question and Answer Session with Maryland ASTAR Judges

Judge Harrell, Judge Hollander, and Judges Cannon and Berger offered their individual perspectives on the ASTAR program and fielded questions from Symposium attendees. Each judge lauded the ASTAR program and indicated that they found it to be a personally and professionally satisfying learning experience. Judge Harrell commented that the training had reminded him that "black box" answers do not always exist because science is not a perfectly precise machine that simply digests data and provides exacting results. He stated that this imprecision of science demands that judges diligently engage the science at issue in their courtrooms. Judge Harrell further provided that ASTAR does not teach outcomes, rather it focuses on making the judge more comfortable in dealing with the science, which helps judges better exercise their gatekeeping authority. Judge Hollander echoed this sentiment, providing that the ASTAR program has helped hone her skills in detecting and dealing with junk science in the courtroom.

Several Symposium attendees questioned the judges on the impact of the ASTAR program on the admissibility of scientific evidence and, more specifically, on the continued application of the *Frye-Reed* analysis, as opposed to *Daubert* and its progeny, in the Maryland courts. Assumedly recognizing the complicated legal and political factors associated with the application of *Frye-Reed* and the admissibility of novel scientific evidence, the judges stopped short of stating that the ASTAR program had or will have a direct effect on the application of the *Frye-Reed* analysis. Rather, the judges reiterated that the ASTAR program had better equipped them to deal with complicated science and fulfill their role as judicial gatekeepers.

Judge Cannon, while declining to specifically comment on *Frye-Reed*, provided as the Baltimore City judge in charge of the civil docket that she would attempt to assign cases based on complicated scientific and technical issues to judges with some scientific or technical training. Judge Cannon encouraged parties to request special assignment before ASTAR-trained judges in complicated scientific and technical cases. She further provided that in requesting special assignment, parties should send *motions in limine* to her so that she could properly assign the case. Although special assignment before an ASTAR judge is limited currently by the number of ASTAR judges on the court, the ASTAR program hopes to make this less of an impediment by continually seeking to train additional Maryland judges.

Supporting and Relying Upon ASTAR Resource Judges

The Symposium demonstrated that at the heart of the ASTAR program is an attempt to protect the integrity of the judicial system. The judicial system cannot effectively adjudicate cases with complex scientific and technical issues unless the judges hearing those cases are equipped with the resources necessary to adequately address and manage the science at issue. The need for ASTAR judges in Maryland is becoming increasingly important as the state solidifies its position as a national leader in biotechnology and medical sciences. The ASTAR program and support for the program by specialty bar associations like the MDC will be essential in ensuring that the Maryland judiciary can effectively adjudicate the increasingly complicated cases presented in the Maryland courts. Litigators should be aware of current Maryland ASTAR Resource Judges in their jurisdiction and should consider requesting special assignment if a case will be better served if heard before an ASTAR judge.

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Current Maryland ASTAR Resource Judges

Maryland judges conferred as ASTAR Science and Technology Fellows in October 2006 include Judge Harrell, Judge Ellen L. Hollander on the Court of Special Appeals, and the following Circuit Court Judges: Brett W. Wilson (Dorchester County), W. Newton Jackson, III (Wicomico County), Thomas G. Ross (Queen Anne's County), Ruth Ann Jakubowski (Baltimore County), Michael M. Galloway (Carroll County), Emory A. Plitt, Jr. (Harford County), James L. Sherbin (Garrett County), John H. McDowell (Washington County), Julie Stevenson Solt (Frederick County), John W. Debelius, III (Montgomery County), Michael D. Mason (Montgomery County), Sean D. Wallace (Prince George's County), Cathy H. Serrette (Prince George's County), Kaye Allison (Baltimore City), Stuart R. Berger (Baltimore City), Evelyn Omega Cannon (Baltimore City), Diane O. Leasure (Howard County), Paul A. Hackner (Anne Arundel County), Ronald A. Silkworth (Anne Arundel County), and Philip T. Caroom (Anne Arundel County).

Each of these 23 Maryland jurists, along with 25 jurists from Ohio, satisfied the "Platform A Program," which is the first stage of ASTAR training and is intended to ground judges in the foundation of science and technology basic to gatekeeping duties required in State and Federal courts. Under the 2006 Platform A Program, the jurists focused on bioscience and biotechnology and attended multiple courses that covered biogenetic research foundations of human genetics, environmental biology, nanobiotechnology and synthetic biology, agricultural sciences and animal science management technologies, and law enforcement and national security bioforensics. In 2008, additional Platform A Programs for new jurists will include training on information sciences and communication technologies and training on materials and energy sciences and related technologies.

These judges who have been conferred as ASTAR Science and Technology Fellows are now eligible to participate in Platform B Programs, which include more in-depth training on select scientific and technology issues. Platform B Programs for 2007 and 2008 include hands-on agricultural biotechnology, genetic frontiers of human disease, nanobiotechnology/synthetic biology, energy science and technology, synthetic agrobiology and healthcare case adjudication. *See* ASTAR Platform Programs, available at www.einshac.org/platformB.htm for additional information.

New Class of Maryland ASTAR Judges for 2007–08

A new class of additional Maryland judges has been selected to undergo ASTAR training during 2007–08. These judges include Judge Lynne A. Battaglia on the Maryland Court of Appeals, Judge Deborah Sweet Eyler on the Maryland Court of Special Appeals, and the following Circuit Court Judges: David A. Boyton (Montgomery County), Terrence J. McGann (Montgomery County), Joseph A. Dugan, Jr. (Montgomery County), Donald E. Beachley (Washington County), Judith C. Ensor (Baltimore County), Lenore R. Gelfman (Howard County), William Mulford II (Anne Arundel County), M. Brooke Murdock (Baltimore City), Lynn K. Stewart (Baltimore City), John P. Miller (Baltimore City), and Michael J. Stamm (St. Mary's County).

The ASTAR curricula for this new class of judges include the following: (1) Language of the Life Sciences (April 19–21, 2007), (2) Neuroscience and Behavioral Technologies (October 5–7, 2007), (3) Adjudication of Health Care Cases (March 13–15, 2008), and (4) Population Genetics (Predisposition, Susceptibility, and Risk) and Biology of Addictive

Disorders (October 10–12, 2008).

Background on ASTAR Project

ASTAR was developed as an offshoot of the decade-long effort by the Einstein Institute for Science, Health and the Courts, which was established to raise judicial consciousness about the impact of the human genome project on the dispute resolution process. ASTAR is a nonprofit organization that is comprised currently of a consortium of the Maryland, Ohio and Washington State judiciaries. This consortium of judiciaries participates in a common project to identify, recruit, train, deploy and evaluate not fewer than 700 science "resource judges" in the United States and foreign jurisdictions by this decade's end. "Resource judges" are jurists who have acquired advanced bioscience and biotechnology skills, along with a repertoire of adjudication-related skills, through the ASTAR training program. A number of other states, including New York, Illinois, and North Carolina, have participated in ASTAR training activities as invited guests.

The objective of ASTAR is to prepare judges to be better and more effective adjudicators when they encounter cases presenting scientific and technical evidence and issues. ASTAR does not aim to create judicial experts; rather the program focuses on increasing judges' comfort levels and ability to effectively deal with the increasingly complex scientific and technical issues presented by litigants in the modern courtroom. ASTAR judges also aspire to use their training to further the appropriateness of ADR, consultation with non-ASTAR judges confronted with science and technology issues, liaisons between the bar and law schools, the preparation of scholarly articles, and promoting science and technology education for other judges. *See* www.eihshac.org for more information.

Case Studies Considered in April 2006 ASTAR Training

During the April 2006 in-state ASTAR conference, Maryland judges considered and discussed the following fact patterns:

CASE 1. Pathogen source tracking from plant foods found to be contaminated with human pathogens (a case of forensics based on biotechnology tools).

Law enforcement agencies require tracing back the infectious agent obtained from clinical samples to the contaminated foods and even further back beginning with the distribution chains to farms. The presence of pathogens in foods, either intentional or accidental, is a great public health concern. The Centers for Disease Control ("CDC") has created a national digital repository of DNA-based fingerprints of foodborne pathogens. The DNA fingerprint patterns of strains obtained from disease outbreaks at various locations can be compared to determine their relatedness. Current CDC protocols, although successful in determining "exclusion" events, have proved to be of limited use in "inclusion" events.

Real-life examples of DNA fingerprints of the foodborne pathogen, *Listeria monocytogenes*, obtained during routine surveys of ready-to-eat foods will be presented with examples of exclusive and inclusion identifications. The website www.about-listseria.com/ sponsored by the law firm of Marler Clark indicates that Listeria causes approximately 1,600 cases of listeriosis annually, resulting in 415 deaths.

CASE 2. A car lot of non-GMO grain is suspected if being contaminated with some percentage of genetically engineered grain.

Scientific Issues:

1. Are there visual inspection methods to detect GMO grain?
2. What are the procedures that are used to detect GMO grains? ELISA tests for specific GMOs? Other tests (PCR) for more general detection of GMOs?
3. What are the levels of detection (i.e., what level of contamination must be present in order to allow detection)?
4. Is there some way to identify the source of the contaminating grain vs. the remainder of the shipment?

Possible Legal Issues:

1. Can the shipper be held responsible if the contamination arose from mixing lots of grain that were purported to be non-GMO?
2. Is the producer or elevator operator responsible for identifying GMO grain they are producing and/or shipping?

CASE 3. Farmer A is producing organic corn, soybean or alfalfa on contract and is required to produce his crop using carefully defined procedures that do not permit the use of chemical fertilizers, herbicides, or insecticides, etc. His costs are extremely high but the value per unit is also quite high. His neighbor, Farmer B, is growing transgenic corn, soybean or alfalfa in an adjacent field. He uses standard and universally accepted cultural practices. When Farmer A sells his crop, it is determined that it has a low level of contamination with a transgene. Farmer A can not sell his crop as "organically grown" and therefore suffers economic loss.

Scientific Issues:

1. How to test for the presence of GMO.
2. How to determine if the contamination actually came from Farmer B's field.
3. How likely is the spread of a transgene (pollen) from corn vs. soybean vs. alfalfa?
4. Are there differences between these species in terms of pollen dissemination?

Legal Issues:

1. Is Farmer B required to inform his neighbor of his intent to grow a genetically engineered crop?
2. Is Farmer B liable for the pollen contamination assuming it actually did come from his field?

CASE 4. A case centered around real or assumed dangers of clones of transgenic plants:

Scenario: Company A develops and sells transgenic alfalfa seeds for use in growing alfalfa for animal feed; the transgene enhances protein content of alfalfa in laboratory and field tests. (Company A may or may not patent the transgenic plant.) Company B buys and plants the seeds to produce marketable quantities of seed for sale. Company B then sells the transgenic seeds to (several?) seed-producing companies who proceed to produce and sell large quantities of transgenic seed to farmers in several different states, including Maryland. The farmers plant the seeds to grow alfalfa that they sell to dairy farmers to feed their cows. The milk produced by the cows that eat the transgenic alfalfa is then sold and distributed throughout the eastern U.S., including Maryland. A year after the first milk is produced and sold by dairies using the transgenic alfalfa, it is discovered (or claimed) that the milk produced by the cows that were fed the transgenic alfalfa causes (has been causing) severe allergic reactions in children who (one year ago and before) showed no reaction to milk produced by cows that were not fed transgenic alfalfa.

Issues:

1. Who is liable? Are the dairies liable for injury to the children? Are the farmers liable? To the dairies? To the children directly? Are the seed companies liable? To the farmers? To the dairies? To the children directly?
2. Should the milk have been labeled as having been produced by cows that were fed transgenic alfalfa?
3. Should the milk have gone through testing, for example FDA clinical trials, prior to marketing? Or did the dairies have a legal obligation to perform some kind of safety testing prior to marketing the milk?

CASE 5. Pharma Plant-based Recombinant Vaccine Scenario (A true case)

A biotechnology company has genetically engineered corn to produce an oral "edible" vaccine against a pig virus which causes a highly contagious, severe, acute diarrhea of newborn piglets. Piglets under 2 weeks of age that have the virus have high mortality rates. A synthetic version of one of the proteins of the virus (which would have the vaccine property) was engineered into corn plants and "optimized" for the corn so that the vaccine protein is produced only in the corn seed, not in other parts of the corn plant. When corn seed expressing the "vaccine" was fed to piglets, partial protection against the virus was induced, indicating that the protein is capable of inducing antibodies when eaten that will help with fighting off the virus.

The biotechnology company contracted with local growers for raising the corn in test plots approved by the Animal Plant Health Inspection Service of USDA. The corn was harvested from the field in the year it was planted. In the following year, the growers planted soybean in the same plot. The farmers did not remove "volunteer" corn plants that grew from seed remaining in the soil from the previous planting of the engineered crop. Some 500,000 bushels of harvested soybeans were contaminated with small amounts of the engineered corn. The contaminated soybean crop was quarantined.

Issues:

1. Who is liable for the soybean crop damage if it cannot be sold? Can it be sold?
2. If the soybeans are "cleaned" (the corn mechanically removed), can it be sold?
3. Did the company adequately protect the grower with guidelines for harvesting the corn and treating the field for residues? Should it have? Should the grower have known that corn seed would "volunteer"?

Talking Points:

1. Is the steak I am eating from a clone or a trans-

genic? Does it matter?
2. Why doesn't my clone of Betsy look like or perform as well as Betsy?
3. Why isn't my cow as good as the genetic test says she is?
4. Is the test that says Bongo is not Ono's father accurate?
5. Will clones or transgenics make my normal animals sick or unhappy?
6. If I allow my animals to be genetically tested, is my competitor, Farmer Brown, going to use the results against me?
7. If I allow my animals to be genetically tested, are the results going to tell me something I don't want to know?

Implied Indemnity Between Co-Defendants:

It is "very doubtful" that attorney's fees are an element of the indemnity, but if so, the allegations of the tort plaintiff's lawsuit determine whether attorney's fees are recoverable.

By Christopher J. Lyon, Esq

A Canton pub sells a t-shirt upon which is printed a quote from Benjamin Franklin: "Beer is living proof that God loves us and wants us to be happy." On March 11, 2004, Chad Burger, at a different pub blocks away, probably would have disagreed.

The Burger Lawsuit

The complaint alleged that Mr. Burger became ill after drinking a beer at Max's on Broadway ("Max's"), a popular pub in Baltimore's historic Fell's Point known for its wide selection of malt-based beverages. Mr. Burger filed his lawsuit in the Baltimore City Circuit Court against Max's (Case No. 24-C-05-005996). He alleged that Max's was negligent by (1) serving him "a beverage that contained a harmful substance"; (2) failing to "properly inspect, maintain and clean its facilities and equipment"; (3) hiring "incompetent and negligent contractors to inspect, maintain and clean its facilities and equipment"; (4) failing to supervise the contractors it hired; and (5) being otherwise negligent.

Mr. Burger also sued A.C. Beverage, Inc., the company allegedly hired by Max's to clean Max's "beer lines" (i.e., tubing that carries beer from a beer keg to a tap where the beer is dispensed). He alleged that A.C. Beverage "failed to properly inspect, maintain and clean the equipment at Max's on Broadway, including, but not limited to, the beer lines."

The *Burger* lawsuit settled out of court. The case against both Max's and A.C. Beverage was dismissed with prejudice.

Max's lawsuit for Indemnity

After the dismissal of the *Burger* lawsuit, Max's and its insurers filed a lawsuit against A.C. Beverage and its insurer. Max's sought reimbursement of the attorney's fees incurred on its behalf while defending the *Burger* lawsuit. Max's alleged that A.C. Beverage "was solely responsible for [Mr. Burger's] injuries." It alleged that this was evident because "A.C. [Beverage] paid the full settlement amount to [Mr. Burger.]" Therefore, it argued, A.C. Beverage and its insurer ought to indemnify Max's for Max's attorney's fees.

A.C. Beverage and its insurer filed a motion to dismiss Max's lawsuit. The motion argued that there was no basis for Max's indemnification claim. It pointed out that there was no express indemnification agreement between Max's and A.C. Beverage and that Mr. Burger's Complaint contained allegations of active, negligent conduct on Max's part leading to Mr. Burger's injuries.

Max's argued that if its conduct was negligent at all, its conduct was merely passive in nature, unlike A.C. Beverage's conduct, which Max's asserted was active. Therefore, Max's contended it was entitled to implied indemnity, which should include its attorney's fees. Max's argued that a trial was necessary in order to determine the relative degree of conduct of both parties.

The Honorable M. Brooke Murdock granted A.C. Beverage's motion and Max's appealed. The Court of Special Appeals affirmed the dismissal in a published opinion, *Max's Of Camden Yards v. A.C. Beverage*, __ A.2d __, 172 Md. App. 139, 2006 WL 3771826 (Dec. 26, 2006).

What the Court of Special Appeals did not hold, but suggested

The Court's opinion began with a general overview of implied indemnity. It moved then specifically to implied indemnity premised upon the active/passive negligence distinction. It explained, "This right to implied indemnity exists when there is a disparity between the levels of fault of each tortfeasor that produces an unjust result, and the less culpable tortfeasor, said to be passively or secondarily negligent, pays or is held liable for damages which are properly attributable to the conduct of the more culpable co-defendant, who is primarily or actively negligent." 2006 WL 3771826, *4.

The Court next considered whether indemnity implied from a given set of circumstances would include payment of the indemnitee's attorney's fees. It suggested, without deciding, that attorney's fees would not be recoverable in such an action.

The Court recognized that "[t]he general rule is that, if an implied indemnity action lies, fees and costs are includible, particularly when the indemnitor was on notice of the underlying claim and was offered the opportunity to defend the indemnitee in the underlying claim." *Id.* at *5 (citing 42 C.J.S. Indemnity § 42; 41 Am. Jur.2d Indemnity § 30). However, short of an outright rejection of the general rule, the Court stated that it would be "very doubtful" under Maryland law whether attorney's fees could be an element of recoverable damages in any implied indemnity action. *Id.* Moreover, it suggested that it would be "highly doubtful" under Maryland law whether attorney's fees would be recoverable in an implied indemnity action premised upon the active/passive negligence distinction. *Id.* "Generally, an alleged tortfeasor has no duty to defend another alleged tortfeasor." *Id.*

What the Court of Special Appeals held

Although suggesting that attorney's fees would not be recoverable in an implied indemnity action, the Court nonetheless assumed for purposes of its decision that "attorney's fees and costs incurred in defense of the underlying tort claim may be available as an element of recovery under certain circumstances." *Id.* at *6. It then turned to the question that would lead to its holding: "[W]hether (1) the right to indemnity [for attorney's fees] is determined by the allegations in the underlying complaint, or (2) determined by findings of fact . . . ." *Id.* It

decided that the former controlled the determination.

> The Court held:
> *[W]hen the implied indemnity claim is for counsel fees and costs, fees are unrecoverable when the tort plaintiff's complaint alleged primary or active negligence, in whole or in part, against the alleged tortfeasor seeking indemnity, and the underlying case was dismissed prior to any factual findings.*

Id. at *7. The Court supported its conclusion citing to *Boatel Industries, Inc. v. Hester*, 77 Md. App. 284, 550 A.2d 389 (1988), which "held indemnity [of attorney's fees] inappropriate when a party incurs fees in successfully rebutting claims of *its own active negligence*, and when a fact finder has not determined it to be a tortfeasor." *Id.* at *9 (emphasis added).

The Court expressed concern with the alternative option, which would require findings of fact to determine whether fees could be recovered. It noted the artificiality of the issues that would be presented during such a trial. Namely, the party seeking indemnification would have the burden to prove that its own conduct was negligent, though only passive in nature. *See id.* at *9. Had the underlying suit actually gone to trial, one could imagine a different trial tactic taken by the potential indemnitee.

The utility of the Court's holding is evident. A co-defendant's tender of defense (based upon implied indemnification) typically comes at the beginning of a lawsuit before much discovery has taken place. By keeping the focus on the allegations of the underlying complaint, rather then on findings of fact coming much later in the process, a co-defendant receiving a tender is better able to determine a course of action.

Further, the decision promotes settlement and finality in settlement. Picture two defendants at the settlement table. The lawsuit alleges active claims of negligence against each. However, one of the co-defendants has been insisting, since the beginning of the lawsuit, that the other accept the tender of its defense (based upon implied indemnification). If factual findings were necessary to determine whether a defense is owed, rather then looking to the allegations in the underlying lawsuit, then settlement of the underlying suit might be more difficult to achieve. The co-defendant to whom the defense was tendered might think twice about settling if a second trial for indemnification (on the very issues in the underlying suit) was a real possibility. Also, the co-defendant tendering the defense might leverage its position with the possibility of a second trial and thereby balk at contributing to the settlement.

Again, however, the Court's decision is conditioned upon the assumption that attorney's fees are even recoverable as an element of damages in an implied indemnity action. In the Court's words, that assumption is "very doubtful."

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Mutual v. Ackerman: Dwelling Policy Exclusion for Vandalism Does Not Include Arson

BY SCOTT D. NELSON

In *Mutual Fire Ins. Co. v. Ackerman*, 162 Md. App. 1, 872 A.2d 110 (2005), the Court of Special Appeals considered whether a house was used "principally for dwelling purposes," and whether the vandalism exclusion in the dwelling section of the insurance policy applied to damage caused by arson.

Mutual Fire issued a one-year "Dwelling Property" insurance policy, which included coverage for loss of a house caused by fire. During the policy period, the house was extensively damaged by a fire that was intentionally set by unknown individuals. Mutual denied coverage on two grounds: because the house was not "used principally for dwelling purposes" as required under the policy, and because arson was a form of vandalism, which was specifically excluded from coverage under the policy. The house on the insured property had been rented out for many years. There was evidence, however, that for the two years prior to the loss, the house had been vacant.

The Court of Special Appeals held that the mere fact that the tenants had moved out, the property needed repair, and the utilities were turned off, would not, alone, have been sufficient for denial of coverage by Mutual Fire. However, there was also evidence that: the insured admitted that the house was "uninhabitable;" there was evidence that the building was used as a drug dealing location; the property was going to be converted for use as a commercial property; and the neighborhood as a whole had gradually made the transition from residential to commercial. When taken as a whole, the Court of Special Appeals held that these facts were sufficient to permit a finder-of-fact to infer that, at the time of the fire, the house was not being used for "dwelling purposes."

The Court of Special Appeals then addressed the issues of whether arson falls within the definition of vandalism and whether the damage caused by the arson was excluded under the policy's vandalism exclusion. Given the fact that Mutual Fire's policy did not define vandalism, the Court determined the ordinary meaning that a reasonably prudent layperson would give to the term. After examining multiple dictionary definitions of the term "vandalism," the Court was left with the broad definition of "deliberate mischievous or malicious destruction or damage of property." The Court of Special Appeals, however, declined to accept such a broad definition and, instead, followed the rationale of its counterpart court in New Mexico. See *Battishill v. Farmers Alliance Ins. Co.*, 136 N.M. 288, 97 P.3d 620 (2004), *cert. granted*, 136 N.M. 492, 100 P.3d 198 (2004). Following that court's rationale, the Court of Special Appeals noted that, without any recognizable justification, "many, if not most, ordinary citizens and reasonable insureds ... think of arsonists and vandals, and arson and vandalism, as distinct actors and acts." As a result, given the fact that the Court of Specials Appeals felt that a reasonably prudent layperson **could** consider arson to be separate from, and not included in, the term of "vandalism," summary judgment was not appropriate. The Court also noted that this finding was consistent with the Criminal Law Article of the *Maryland Annotated Code* which treats arson and malicious destruction differently.

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Rausch v. Allstate: Doctrine of Implied Co-Insureds Rejected

By Ronald W. Cox, Jr.

In *Rausch v. Allstate* Insurance Company, 388 Md. 690, 882 A.2d 801 (2005), the Maryland Court of Appeals considered whether a subrogation action by a landlord's insurer against a tenant who allegedly caused a fire loss is permitted in Maryland and, if so, under what circumstances. Some courts outside of Maryland have ruled that such actions are barred because a tenant is an implied co-insured under a landlord's policy, and, under the "anti-subrogation rule," a subrogation action is not generally permitted against one's own insured or co-insured.

The Court of Appeals rejected the doctrine of "implied co-insureds" and, instead, adopted a middle-of-the-road approach, requiring a case-by-case analysis of the parties' relationship under the applicable lease and other relevant evidence. It offered some guiding principles: (1) a clear lease provision imposing liability on the tenant for damage caused by the tenant's negligence, including a subrogation claim, is enforceable; (2) there is no right of subrogation unless the tenant would otherwise be liable to the landlord for negligence; (3) no subrogation claim is permitted if, and to the extent that, the lease relieves the tenant of liability for fire loss; (4) if, under the lease or some other commitment, the landlord has communicated to the tenant an agreement to maintain fire insurance on the premises, absent some compelling provision to the contrary, a court may properly conclude that their reasonable expectation was that the landlord would look only to the policy, and not to the tenant, for compensation for fire loss; and (5) if the leased premises is a unit within a multi-unit structure, absent a clear, enforceable contrary provision, a court may properly conclude that the parties reasonably anticipated that the landlord would maintain fire insurance covering the entire building, and with respect to damage caused by the tenant's negligence to parts of the building beyond the leased premises, would look only to the policy, to the extent of coverage, for compensation.

After *Rausch*, subrogation claims in Maryland by an insurer of rental property against the insured's tenant remain viable; however, their success ultimately will depend on the court's construction of the landlord-tenant relationship under the parties' lease and other relevant evidence. A prudent insurer will review the applicable lease, and any subsequent modifications or renewals to it, before issuing or renewing a policy of fire insurance on rental property to ascertain what the reasonable expectations of the parties are with respect to liability for loss caused by fire. The Maryland General Assembly has not yet chosen to prohibit, limit or condition subrogation actions by landlords' insurers against tenants, although the Court of Appeals noted that this may be an area for legislative action.

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Maryland Appellate Courts Resist Temptation to Distinguish Commercial Policies

The Maryland appellate courts have recently had occasion to address some issues involving commercial auto insurance. In two cases, Plaintiffs' attorneys argued that public policy considerations or legislative intent required that a commercial policy be treated differently than a family auto policy. So far, the courts have resisted the temptation to agree with their argument.

In *Nationwide v. Wilson*, 167 Md. App. 527, 893 A.2d 1177 (2006), Maryland's intermediate appellate court addressed an effort to declare invalid a "fellow employee" exclusion in a commercial policy. In that case, the plaintiff was riding in a company vehicle that was being driven by a co-employee, who allegedly fell asleep at the wheel and caused an accident that seriously injured the plaintiff. Since his employer could not be sued because of Workers' Compensation immunity, the plaintiff sued his co-employee, who then sought the benefit of the $1,000,000 policy limits of his employer's liability coverage on the vehicle.

The Nationwide policy contained an exclusion for coverage for claims for bodily injury to any fellow employee of the insured arising out of and in the course of the fellow employee's employment. The exclusion by its terms did not apply to liability coverage up to $20,000—the minimum amount required by Maryland law. The Court of Special Appeals held, consistent with case law under family policies for such things as the household exclusion, that as long as the minimum limits were provided, the exclusion was valid for amounts in excess of the minimum limits. Maryland's Court of Appeals recently granted a petition to review this decision.

A commercial auto policy was also at issue in *Harleysville v. Zelinski*, 393 Md. 83, 899 A.2d 835 (2006). A tort plaintiff attempted to issue a writ of garnishment against a commercial auto policy, and the court sided with the insurer, which had disclaimed coverage under a named-driver exclusion. As the court explained, a septic service business maintained a commercial policy on its trucks. The insurer subsequently learned that the driver's license of the owner's son had been suspended. Rather than cancel the policy, the owner agreed to a named excluded driver endorsement, just as is found under family auto policies.

While the exclusion was in place, the son drove the vehicle and had an accident injuring the plaintiffs. The insurer filed a declaratory judgment action asking the court to declare that there was no coverage for the driver or owner under the policy exclusion. The trial court, and the Court of Appeals, agreed that the named excluded driver endorsement was valid and enforceable under a commercial auto policy.

Recent Developments in "Claims-Made" Law

By Edward J. "Bud" Brown

Although claims-made policies have been widely used in Maryland for three decades, the Courts are still grappling with, and delivering interesting rulings upon, the issues related to these policies. Several recently reported and unreported opinions highlight how the Maryland courts view some of the key issues that are unique to these policies. Although unreported opinions do not carry precedential value, they do provide an indication as to how the courts view the factors involved in claims-made policy issues.

I. History

In 1986, the Maryland Court of Appeals performed a comprehensive overview of the difference between claims-made policies and occurrence policies. *See Mutual Fire, Marine & Inland Ins. Co. v. Vollmer*, 306 Md. 243, 508 A.2d 130 (1986). The Court explained that, "[g]enerally speaking, '"occurrence"' policies cover liability inducing events occurring during the policy term, irrespective of when an actual claim is presented. Conversely, '"claims made"' (or '"discovery"') policies cover liability inducing events if and when a claim is made during the policy term, irrespective of when the events occurred." *Id.* at 252, 508 A.2d at 134 (citation omitted). The Court also noted the various hybrids, including "discovery" policies, which only provide coverage for acts if they are discovered and brought to the attention of the insured during the policy term. The Court further explained the common variation of a retrospective reporting period, which allows, under certain circumstances, the claim to be made within a specified amount of time after the actual policy period.

As observed by the Court of Appeals, claims-made policies are intended to deal with situations wherein the error, omission or negligent act is difficult to pinpoint and/or may have occurred over an extended period of time (particularly in the context of professional malpractice cases). *See Medical Mutual Liability Insurance Society of Maryland v. Goldstein*, 388 Md. 299, 879 A.2d 1025 (2005). Despite the goal of minimizing disputes and/or eradicating confusing timing issues, recent case law demonstrates that claims-made policies give rise to many complex and nuanced issues.

II. Cross-claims and Third-party Claims

One issue that the Maryland Courts have addressed only recently is the interpretation of claims-made policies with respect to claims made not just by the claimant, but by another defendant in litigation. In *Goldstein, supra*, the plaintiff filed a malpractice action against Dr. Barrett Goldstein and Dr. Montague Blundon in 1995. The Health Claims Arbitration Panel found in favor of Dr. Goldstein, but it awarded $500,000 against Dr. Blundon. The Circuit Court for Montgomery County confirmed the Panel's determinations. Dr. Blundon appealed the rulings against him to the Court of Special Appeals but was unsuccessful. Dr. Blundon never pursued a cross-claim against Dr. Goldstein in that action.

In 2002, Dr. Blundon filed a lawsuit against Dr. Goldstein, seeking contribution for half of the $500,000 judgment against him. When the first lawsuit was filed in 1995, Dr. Goldstein had been insured by PIE Mutual Insurance Company ("PIE"), which subsequently became insolvent. In 2002, when the contribution action was filed, Dr. Goldstein was insured by Medical Mutual Liability Insurance Society of Maryland ("Medical Mutual"). Medical Mutual denied coverage for the claim, maintaining that it was first made in 1995, and therefore was not covered by its policy. Dr. Goldstein filed a declaratory judgment action against PIE (in actuality, PCIGC, a state created property and casualty guarantee corporation with alleged responsibility for PIE's obligations). The Court ruled that the Medical Mutual policy did not provide coverage to Dr. Goldstein because the policy's controlling date was when the first claim arising out of the incident was made.

The Medical Mutual policy provided:

> *We will pay, on behalf of an insured, those sums that the insured becomes legally obligated to pay as damages because of a "claim" caused by an "incident" occurring in the "coverage territory" and arising out of "professional services." This insurance only applies to "claims" first made against any insured during the policy period for "incident" occurring after the Retroactive Date specified in the Declarations. It does not apply to any "incident" occurring or "claim" first made against any insured after the termination of the policy period. All "claims" with damages arising out of any one "incident" will be deemed to have been made at the time the first of those "claims" is first made against any insured. This insurance is subject to all terms, conditions, and exclusions included in this policy.*

The policy defined "claims" as "a suit or other request for compensation, made by or on behalf of an injured party, because of alleged 'bodily injury', 'property damage' or 'personal injury' to which this insurance policy applies." 879 A.2d at 1034-1035.

The Court rejected Dr. Goldstein's argument that the contribution claim constituted an entirely new action. It emphasized that Dr. Blundon elected to file a separate action, even though he could have filed a cross-claim in the main suit. This, of course, was critical to Dr. Goldstein's interest, as the PIE policy, which would have provided him with a defense against the cross-claim if it had been pursued during the plaintiff's suit, no longer possessed any value. Interestingly, it appears that the PIE policy might have covered this later cross-claim if PIE was still solvent. However, the guarantee corporation's obligations were not as broad as PIE's. In its review, the Court of Appeals focused upon the policy language, which stated that, "all 'claims' for damages arising out of any one 'incident' would be deemed made at the time the first of those 'claims' were first made against any insured." The Court then found that the claim clearly arose from the same incident, to wit, the injury to the plaintiff.

The Court did not, however, closely examine the language that required that the

claim be "made by or on behalf of an injured party." Arguably, a claim for contribution is not made "by" the injured party; thus, there appears to be an implicit interpretation that it was made "on behalf of an injured party."

The *Goldstein* cross-claim situation suggests the further complexity that could occur with respect to a third-party claim. Thus, although Dr. Goldstein was an original co-defendant and thereby had notice of the claim in its early stages, it is easy to imagine the case wherein a plaintiff brings a claim against only one defendant, who then waits until the expiration of the insured's policy period to file a third-party claim. Even worse, as with Dr. Blundon, the defendant could lose the case and appeal, and then years later bring an independent action against a third-party. Although the language of the Medical Mutual policy would probably protect such a third-party defendant, as the issue is the first claim made against any insured, the length of delay by the original defendant in pursuing the third-party claim and/or an independent action may trigger a problem with the retroactive date, which serves as a cutoff based upon the time of the occurrence.

Another troubling scenario arises if the insured is named as a defendant in the original case, but is dismissed prior to the service of the suit. In that situation, an argument might be raised that the first claim occurred at the time of the filing of the suit, even though the insured was unaware of it and was not actually pursued until months or years later by the non-victorious remaining defendant. The *Goldstein* case suggests that insureds in these situations may find little relief from the Courts, even though the conduct of those bringing the claims is outside of their control.

III. Claims Made and Reporting Policies

One variation found in claims-made policies is that the reporting of the claim must be made within a specified time period after the insured is aware of the claim. Thus, the question arises as to whether a failure to timely report may result in a loss of coverage, even without proof of prejudice.

Claims-made policies including this condition are more accurately described as claims-made and reporting policies, as they require that the claim be made against the insured **and reported to the insurer** during the policy period. (Some policies do include or make available endorsements that provide an extended reporting period). The reporting requirement is, in its essence, a notice requirement. Thus, the provisions of Section 19-110 of the Insurance Article of the Annotated Code of Maryland arguably could be invoked.

Section 19-110, "Disclaimers of Coverage on Liabilities Policies" states:

> *An insurer may disclaim coverage on a liability insurance policy on the ground that the insured or a person claiming the benefits of the policy through the insured has breached the policy by failing to ….giv[e] the insurer required notice only if the insurer establishes by a preponderance of the evidence that the lack of …notice has resulted in actual prejudice to the insurer.*

Very recently, the United States Court of Appeals for the Fourth Circuit, in an **unpublished** opinion, held that the prejudice requirement does not apply to the specified reporting time limit in claims-made and reporting policies. In *Janjer Enterprises, Inc., v. Executive Risk Indemnity, Inc. (Chubb Group)*, 97 Fed. Appx. 410 (4th Cir. 2004) (unreported), the appellate Court relied on two United States District Court opinions, *Maynard v. Westport Ins. Corp.*, 208 F. Supp. 2d 568 (D. Md. 2002) *aff'd*, 55 Fed. Appx. 667 (4th Cir. 2003) (unpublished), and *Rouse Co. v. Federal Ins. Co.*, 991 F. Supp 465 (D. Md. 1998).

In *Janjer*, the Executive Risk insurance policy required that notice of the claim be given "'as soon as practicable and in no event later than sixty … days after such Claim is first made.'" 97 Fed. Appx. at 412. The Court noted that the policy itself considered the notice "'a strict condition precedent to coverage.'" *Id.* Thus, the Court affirmed the U.S. District Court's holding that the prejudice provisions of section 19-110, which generally apply to liability policy notice provisions, did **not** apply when the parties had expressly contracted under a claims-made and reporting policy, and specifically required that notice within a specified reporting period was to serve as a condition precedent to coverage. It is interesting to note that the United States Court of Appeals commented that the Maryland Insurance Administration shared its view, having also concluded that Executive Risk's denial of coverage based on the non-timely reporting (without, apparently, a showing of prejudice) was not a violation of Maryland law or the policy's terms.

IV. The "Knew or Should Have Known" Condition

An integral part of the claims-made policy coverage is the typical limitation that excludes coverage for liability for any potential claim of which the insured is aware or reasonably should have been aware on the issue date of the policy (regardless of whether the claim had actually been made or reported to any insurer). The obvious purpose of such a provision is to prevent an insured, who has suspicion that a claim is about to be presented, from quickly obtaining a claims-made policy.

In *Ball v. NCRIC, Inc.*, 120 Fed. Appx. 965 (4th Cir. 2005) (unreported) the United States Court of Appeals for the Fourth Circuit distinguished between the retroactive date and the knew or should have known condition. The retroactive date under the claims-made policy establishes a firm cutoff for occurrences, based upon the date of the occurrence, even if the claim is made during the policy. In *Ball*, NCRIC issued a medical malpractice policy to Ball, which included a retroactive date of March 19, 1987; however, the policy was not issued until May 21, 1987. Ball's patient filed a medical malpractice claim against him. NCRIC denied coverage for several reasons, including that Ball knew of the potential claim against him when the policy was issued. Ball tried to argue that, because the issue date was not a defined term of the policy, the insured's knowledge of claims should be measured by the retroactive date. The United States Court of Appeals rejected the ambiguity argument, concluding that, even though the policy did not define the term "issuance date," the declarations page had a clear and unambiguous issuance date. The Court then addressed the "knew or reasonably should have known" exclusion. The Court viewed evidence that, by the issuance date of the policy, the insured had improperly injected the claimant with drugs, sexually assaulted the claimant, and been informed of the claimant's addiction to the drugs and/or hospital stay for treatment for the addiction. Even though the claimant had not yet sued or even made a complaint against the insured, the Court ruled that any reasonable person in the insured's position would have known that a potential claim existed.

The Court also rejected the insured's claim that, because the claimant's treatment

continued beyond the issuance date, some portion of the claim should be covered. The NCRIC policy defined a medical incident as "all related acts or omissions in the furnishing of" services to any one person. The Court held that the acts before and after the issuance date were related, and therefore, constituted one incident. Thus, the Court affirmed the grant of summary judgment in the insurer's favor. *See*, *Ball v. NCRIC, Inc.*, 174 F. Supp. 2d 361 (D. Md. 2001).

V. Conclusion

Although the cases discussed above shed a great deal of light into the Maryland courts' reasoning and analysis when addressing claims-made policy issues, perhaps the cases better serve as proof that the jurisprudence surrounding claims-made policy issues is still evolving, and that the goal of providing certainty and freedom from confusion with respect to the timing of coverage trigger issues remains a goal that is easier promised than performed.

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A Motion to Dismiss Without Prejudice, Filed on Behalf of a Minor, May Be Analyzed the Same as Any Other Voluntary Dismissal Motion

By Leianne S. Helfrich

In *Aventis Pasteur, Inc. et al. v. Skevofilax*, No. 15, 2007 WL 49659 (Md. Jan. 8, 2007), the Court of Appeals (J. G. Harrell) held a motion for voluntary dismissal filed on behalf of a minor by a next friend, absent conflict of interest, fraud or neglect, should be analyzed in the same manner as any other voluntary dismissal motion. In so holding, the Court reversed the Court of Special Appeals' decision that the Circuit Court for Baltimore City improperly applied the pertinent legal factors when denying Respondents' motion for voluntary dismissal without prejudice.

Respondents, the Skevofilaxs, individually and as next friends of their minor son, filed suit in Circuit Court in September 2003 against several manufacturers of pediatric vaccines claiming their son's autism was directly caused by toxic levels of thimerosal used in the vaccines. Following three amended scheduling orders and almost eleven months of discovery, Respondents' sole expert witness on specific causation, prior to rendering any expert opinion, withdrew from the case. Respondents filed a motion for dismissal without prejudice, and Petitioners filed a motion for summary judgment. The Circuit Court denied Respondents' dismissal motion based, largely in part, on the significant efforts and costs expended throughout discovery, and granted Petitioners' motion for summary judgment holding that "[w]ithout any expert testimony on the issue of specific causation, the Court must grant the motion for summary judgment as a matter of law." On appeal, the Court of Special Appeals reversed, stating that the Circuit Court had failed to properly apply the appropriate legal factors when denying Respondents' motion because, based on the court's customary protection of the legal rights of minors, the fact that the motion was filed on behalf of a minor should have weighed heavily in favor of voluntary dismissal without prejudice.

Under the Maryland Rules of Civil Procedure § 2-506(b), the granting of a motion for voluntary dismissal is within the court's discretion. In determining whether a plaintiff is entitled to voluntary dismissal without prejudice, courts analyze the following non-exclusive factors: "(1) the non-moving party's effort and expense in preparing for litigation; (2) excessive delay or lack of diligence on the part of the moving party; (3) sufficiency of explanation of the need for a dismissal without prejudice; and (4) the present stage of the litigation." The Court of Appeals held that, based on the record, the trial court properly considered the necessary factors and, because a reasonable person could agree that a motion for voluntary dismissal was inappropriate, the trial court did not abuse its discretion. Of particular note, the Court held that, while traditionally the courts have a special duty to protect the rights of minors represented by a next friend to ensure their rights are not prejudiced, absent conflict of interest, fraud, or neglect by the representative, a motion for voluntary dismissal filed on behalf of a minor should be analyzed in the same manner as any other voluntary dismissal motion. In so holding, the Court reversed the Court of Special Appeals and found that summary judgment in favor of Petitioners was proper.

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SPOTLIGHTS

On December 14, 2006, the Court of Appeals of Maryland issued its decision in *J.P. Delphey Limited Partnership v. Mayor and City of Frederick*, affirming the decision of the Court of Special Appeals of Maryland and the Circuit Court for Frederick County concerning the City's eminent domain authority and the propriety of its procedures. Christopher J. Heffernan, a partner at Niles, Barton & Wilmer, LLP, represented the City of Frederick at trial and on appeal to both appellate courts. The Court ruled that the City Aldermen's vote to condemn the Delphey property for the construction of a public parking deck and City offices constituted a proper exercise of the City's condemnation authority, that no ordinance or legislative act specific to the property was required and that the vote in a closed executive session after many open meetings and budget enactments concerning the project, its construction and the financing of the project complied with the Open Meetings Act and Section 8 of Article 23A of the Maryland Code.

Raymen, et al. v. United Seniors Association, Inc., et al., United States Court of Appeals for the District of Columbia Circuit, No. 06-7013, September term, 2006. James A. Johnson, a principal at Semmes, Bowen & Semmes and Christopher J. Lyon and Jigita A. Patel, associates at Semmes, Bowen & Semmes, represented United Seniors Association, Inc. in a lawsuit filed by Richard Raymen and Steven Hansen. On March 3, 2004, Plaintiffs, a same sex couple, waited in line to be married in Multnomah County, Oregon along with 300 other same sex couples. Plaintiffs sued United Seniors Association, Inc. and Mark Montini for $25 million alleging that United Seniors Association, Inc., through its agent, Mark Montini, published an advertisement containing a photograph of Plaintiffs. The photograph depicted Plaintiffs kissing while waiting in line to be married and had been taken and published by the Oregon Tribune. Plaintiffs alleged that Defendants' use of the photograph was unauthorized. Its use, they contended, invaded their rights to privacy. They also claimed Defendants defamed them and intended to inflict emotional distress through use of the photograph. United Seniors Association, Inc. filed a motion to dismiss the complaint arguing that the alleged use of the photograph was protected by the First Amendment and that Plaintiffs had otherwise failed to state claims under Oregon law. The United States District Court for the District of Columbia granted the motion and on appeal the decision was affirmed.

Jury Finds Insured's Settlement Collusive

Bud Brown recently obtained a verdict in favor of CNA in the jury phase of a coverage trial in the Circuit Court for Baltimore County. Martin Resnick had been sued by his neighbors, a 15 year-old girl and her parents, for pulling a gun on them while they were working on their property. In Mr. Resnick's criminal trial, he entered into an Alford plea. As part of that plea, he acknowledged, via counsel, to having secreted a .38 caliber Smith and Wesson revolver on his person and, without provocation by the neighbors, pulling the handgun on them and threatening to blow off the parents' kneecaps. After Mr. Resnick received only a $1,000 fine in the criminal proceeding, the neighbors sued him, alleging assault and battery, intentional infliction of emotional distress and false imprisonment. Mr. Resnick settled the case and then attempted to obtain reimbursement of the settlement amount from CNA. The jury phase of the trial concerned Mr. Resnick's efforts to obtain reimbursement for his settlement payment to the neighbors (i.e. whether he was entitled to indemnity coverage under the policy).

The jury also was presented with the issue of whether the settlement was collusive. The collusion issue arose because there was evidence that Mr. Resnick's counsel and the neighbor/victims' counsel had agreed to dismiss the assault, battery and intentional infliction counts but maintain the false imprisonment counts in an effort to maximize the potential for Mr. Resnick to pursue coverage under the CNA policy. Interestingly, the victims indicated that they had pursued the tort suit in order to make Mr. Resnick take some responsibility for his actions; thus, the last thing they desired was for Mr. Resnick to be able to recoup his payment from his insurance company.

The case was tried as a declaratory judgment action, which, under Maryland law, allows factual issues to be determined by the jury. Following a four-day trial, the jury returned a verdict finding that the majority of Mr. Resnick's acts constituted not only intentional acts, but also criminal acts. The jury also found that the settlement that was reached was collusive. Interestingly, the Court had instructed the jury that they could only find collusion if fraudulent and/or illegal conduct was at play. Although additional findings will be made by the Court, the case stands as a shining example of the ability of jurors to decide critical issues within the context of coverage litigation.

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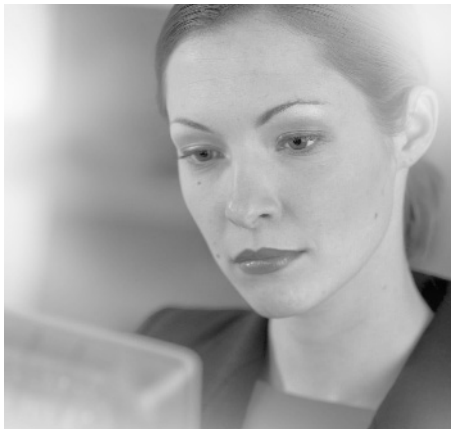


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