THE DEFENSE LINE

Fall/Winter 2023 – 2024

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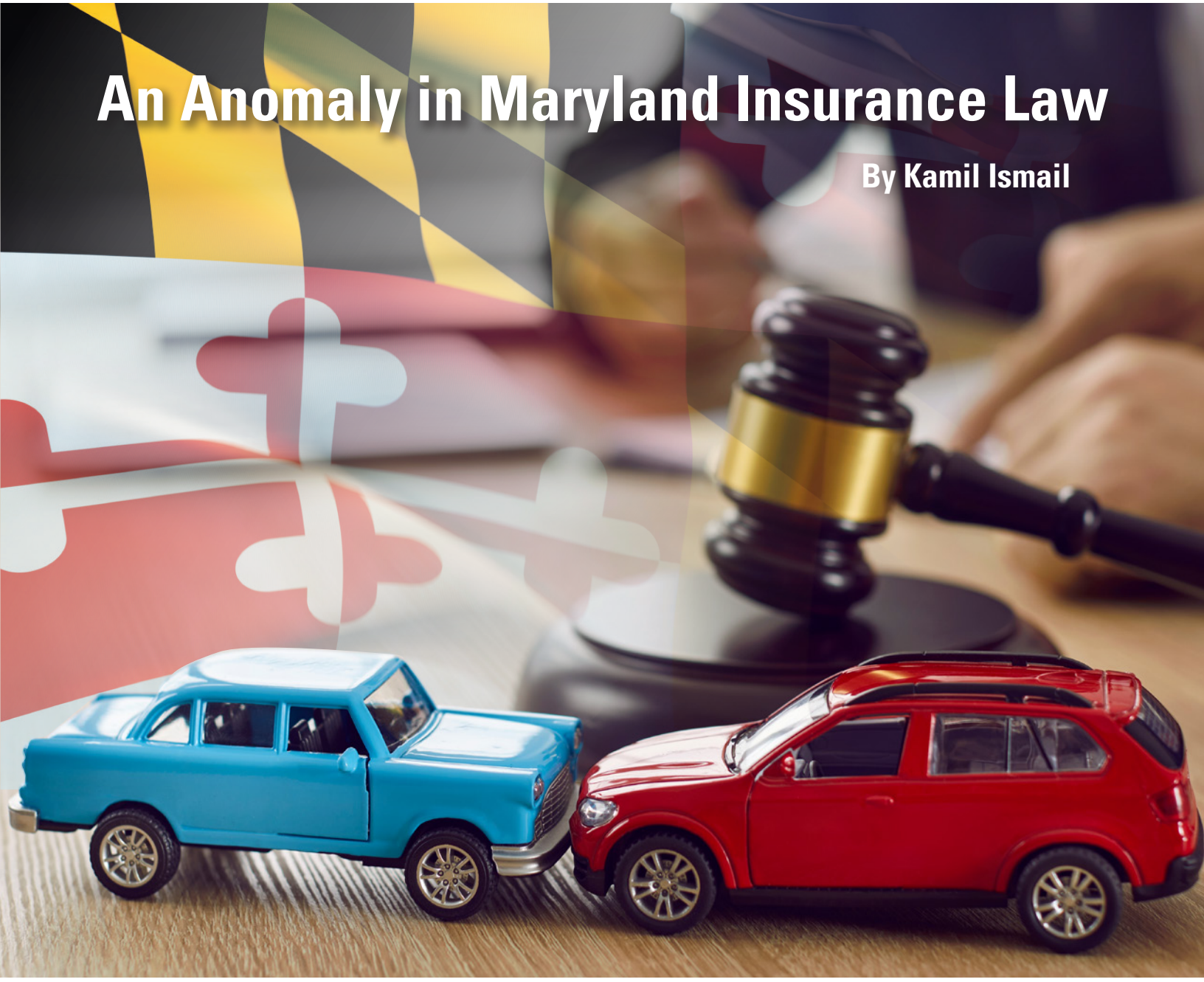

An Anomaly in Maryland Insurance Law

By Kamil Ismail

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THE DEFENSE LINE

Fall/Winter 2023 – 2024

61 Years of Service to Our Members (1962 – 2023)

The Defense Line is a publication from Maryland Defense Counsel, Inc.

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An Anomaly in Maryland Insurance Law

Kamil Ismail

Insurance law practitioners in Maryland have long recognized — and some have decried — an anomalous rule that allows a policyholder to recover its attorneys' fees in a coverage action if the court eventually rules that the insurer had a duty to defend against a liability claim.[1] This rule is applied — but only against the insurer — despite good-faith questions whether the insuring agreement extends coverage in the first place[2] or a stated exclusion then retracts it.[3] It applies whether the action was brought by the policyholder[4] or the insurer.[5] It has even been applied where the insurer clearly did *not* breach a duty to defend.[6] And yet, despite this ubiquity, it is at its core a legal oddity.

Other than with this rule, insurance law is largely a matter of contract.[7] Ordinarily, a party breaching a contract may be liable for damages but, absent a specific provision, is not liable for the counterparty's attorneys' fees.[8] Indeed, Maryland originally followed the usual American rule, and an insurer's breach of a contractual duty to defend was treated as any other breach of a contractual duty: the insured could recover damages but not attorneys' fees. As the Court of Appeals put it in 1967, "[i]n Maryland, except in special circumstances, not here present, the practice has been to require successful parties to pay their own counsel fee."[9] So why the later exception with an insurer's contractual duty to defend?

The anomaly came into being in 1969, in *Cohen v. American Home Assurance. Co.*,[10] which involved coverage for a motor vehicle accident that resulted in liability claims against the estate of the driver, who was killed in the accident, and his mother, the owner of the vehicle and the insurance policy. The policy application had listed only the mother as a permissive driver, as the son's license had been suspended. On the day of the accident, the mother gave the car keys to her son, at his request and with the express understanding that only a friend was to drive. At the time of the accident, however, the son was at the wheel. The insurer declined to defend the mother or the son's estate.

The administrator of the estate sued. The trial court, later affirmed by what is now the Supreme Court of Maryland, held that the insurer was bound to defend the mother but not the estate. It recognized that the grounds for denying coverage to the estate were "substantial" and the law "largely as yet unsettled."[11] However, it expressed "sympathy" for the mother's plight and indignation at the insurer's denial of her coverage.[12] In addition to the mother's defense costs, it allowed her claim — previously unrecognized — for attorneys' fees in the coverage action.[13] On appeal, the *Cohen* court recognized "a decided split of authority on the subject,"[14] and discussed potential rationales for allowing recovery of the coverage action fees.[15] Eventually, it upheld the trial court without picking a specific rationale.[16] As with the trial court, its sense of pique at the insurer's denial spilled into its opinion.[17]

The *Cohen* decision was authored by the late Judge Marvin H. Smith. According to his obituary, Judge Smith was "[k]nown for his deep, booming voice that belied his small stature[.]"[18] Judge Smith was apparently a well-respected jurist; a former law clerk who later served on what is now the Appellate Court of Maryland commented that "the overriding key to [Judge Smith's] jurisprudence was common sense."[19] Without any disrespect, however, one might also wonder whether his jurisprudence was equally driven

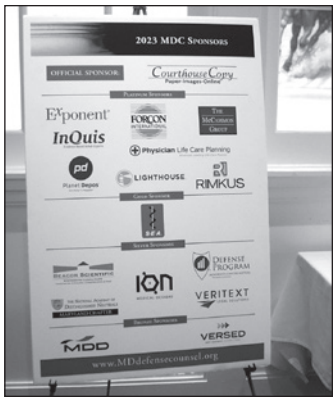
Continued bottom of page 6

1 *E.g.*, *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 415 (1975).
2 *E.g.*, *Bankers and Shippers Ins. Co. v. Electro Enters., Inc.*, 287 Md. 641 (1980).
3 *E.g.*, *Brohawn*, 276 Md. 396.
4 *E.g.*, *Gov't Empl. Ins. Co. v. Taylor*, 270 Md. 11 (1973).
5 *E.g.*, *Electro Enters.*, 287 Md. 641.
6 *See Zurich Am. Ins. Co. v. Fieldstone Mortg. Co.*, CCB-06-2055, 2007 U.S. Dist. LEXIS 81570, 2007 WL 3268460 (D. Md. Oct. 26, 2007) (applying rule despite insurer's defense under reservation of rights while seeking declaratory relief). Disclosure: the author represented Zurich.
7 *E.g.*, *Collier v. MD-Individual Practice Ass'n, Inc.*, 327 Md. 1, 5 (1992) ("In Maryland insurance policies ordinarily are construed in the same manner as contracts generally.").
8 "The general rule is that costs and expenses of litigation, other than the usual and ordinary Court costs, are not recoverable in an action for damages." *McGaw v. Acker, Merrall & Condit Co.*, 111 Md. 153, 160 (1909).
9 *Erie Ins. Exch. v. Lane*, 246 Md. 55, 64-65 (1967).
10 255 Md. 334, 363 (1969) (overruling *Lane*).
11 *Id.* at 351 (quoting trial court).
12 *Id.* (quoting trial court: "The court is in sympathy with the argument that the purpose of buying insurance would largely be defeated if the insurance company were to refuse to honor its commitment until forced to do so through suit. This is especially so when the grounds of denying liability are as tenuous as those advanced in the case of [the mother].").
13 *Id.*
14 *Id.* at 354.
15 These included: (1) a promise to reimburse the insured for expenses incurred at the insurer's request, and an implied "authorization" of litigation over the scope of the duty to defend; and (2) the goal of providing the insured with the full benefit of its bargain in purchasing insurance, which supposedly required the insurer to bear the cost of the coverage action as well. *Id.* at 363.
16 *Id.*
17 *See id.* ("American Home produced the current situation when it refused to defend its assured. . . . [T]he attorney's fees for the declaratory judgment action [might be deemed] a part of the damages sustained by the insured by American Home's wrongful breach of the contract[.]").
18 *Colleagues Remember Eastern Shore Judge*, The Daily Record, http://thedailyrecord.com/2010/09/29/colleagues-remember-eastern-shore-judge/ (Sept. 29, 2010) (last retrieved June 5, 2023).
19 *Id.* (reporting comments of Judge Timothy E. Meredith).

MDC's 2023 Past Presidents Reception

Maryland Defense Counsel ("MDC") hosted its annual **Past Presidents Reception** at The Mt. Washington Tavern in Baltimore on Wednesday, October 18, 2023. We were joined by a number of former MDC Presidents, MDC sponsors and supporters.

MDC wishes to thank our sponsors, our Executive Director, Aimee Hiers, and the participants for a beautiful evening.



(MARYLAND INSURANCE LAW) *Continued from page 5*

— at least in this case — by a booming advocacy for the perceived underdog.

It is unclear whether, or with what contours, the resulting anomaly might endure. It is at least unlikely to expand. In a 1985 opinion, the late Judge Lawrence Rodowsky of Maryland's highest court remarked that, while the exception was "now firmly established," the legal theory underpinning it "remains unrefined."[20] Seven years later, he delved deeper into this strange doctrine, recognized its oddity, and rebuffed an effort to expand its scope.

> From the standpoint of a strict application of the American rule, there is no logical reason why the successful plaintiff's action on a liability insurance policy for breach of a promise to defend, or to pay the cost of defense, should include counsel fees in prosecuting the breach of contract action, when successful plaintiffs' actions for other breaches of insurance contracts, or for breaches of other contracts, do not ordinarily include those counsel fees. The Maryland rule awarding to the successful insured counsel fees in declaratory judgment or assumpsit actions with liability insurers for breach of the promise to defend or to pay the cost of defense is an exception to the American rule. To extend that exception . . . will only compound the anomaly. It would probably mark the elimination of the American rule as to contract actions against insurers generally and leave in doubt the efficacy of the American rule as to other types of contracts.
>
> With the exception of cases involving liability insurers and cost of defense, Maryland law has never recognized fee shifting in breach of contract actions, absent contractual provision, statute or rule. **We leave that law as we find it.**[21]

Reading that last, terse, sentence, one can almost envision Judge Rodowsky throwing up his hands in vexation at *Cohen*'s analytical incoherence and flatly refusing to extend it — while recognizing that the narrow question presented did not require a full reckoning of its core validity. Anyone still decrying this lingering anomaly in Maryland law today — over fifty years after *Cohen* and thirty after Judge Rodowsky's dissection of it — may well wonder whether that reckoning will ever come.

Kamil Ismail is a partner at Goodell, DeVries, Leech & Dann, LLP. He is peer-review rated AV Preeminent by Martindale-Hubbell, ranked by Chambers & Partners, and recognized by Best Lawyers in America. *He has co-authored a book chapter, "Impact of Insurance Policies" in* Product Liability Litigation; Current Law, Strategy and Best Practices. *He received his bachelor's degree from Columbia College in 1982, and his J.D. from the University of Maryland School of Law in 1993, where he served as Executive Editor of the* Maryland Law Review *and received the Order of the Coif. He is a former newspaper reporter from Prince Frederick, Maryland.*

[20] *Continental Cas. Co. v. Bd. of Educ.*, 302 Md. 516, 537-38 (1985).
[21] *Collier*, 327 Md. at 16-17 (emphasis added).

The Top Five Things Civil Defense Lawyers Need to Know About Using Artificial Intelligence in Their Legal Practices

John T. Sly

Artificial Intelligence (AI) has transformed various industries, and the legal sector is no exception. Civil defense lawyers have an opportunity to leverage AI to enhance their legal practices. AI technologies can streamline processes, improve research efficiency, and even predict outcomes. But, there are serious caveats. Here are the top five things civil defense lawyers need to know about using AI in their legal practices.

1. Legal Research Enhancement

AI-powered tools have revolutionized legal research, saving valuable time for civil defense lawyers. Traditional legal research could be time-consuming, involving scouring through volumes of documents and precedents. However, AI-driven platforms can swiftly analyze vast databases, highlighting relevant case laws, statutes, and regulations. This efficiency allows lawyers to allocate more time to critical thinking and strategy development.

One can use ChatGPT, Bing and Bard for general legal concepts and iterate with them to tailor responses to the facts of a particular case. However, as will be noted throughout this article, lawyers must be very careful not to share confidential information on open AI platforms. Those platforms will incorporate whatever is inputted by a user into its own large language model (LLM) from which it learns. None of us want future users to find confidential information about our clients in the responses they receive from AI.

Lawyers also must be careful to understand AI has inherent "hallucination" proclivities. What does that mean? AI does not know what it does not know. So, AI may produce apparently reliable information that may be wrong or completely false. For example, in a high profile case in New York, a lawyer submitted a filing in connection with a case involving aviation. Apparently, he created most, if not all, of the filing through the use of ChatGPT. He happily submitted his filing which contained supportive case citations and quotes only to later learn that the citations were false and the quotes were hallucinations of ChatGPT.

As we move forward with the implementation of AI, third parties like Westlaw and Lexis-Nexis will be incorporating AI into their searches but will likely put guardrails on the responses based on their already existing reliable databases. Until then, it is strongly recommended that whatever legal research you derive from AI tools is run against Westlaw or Lexis-Nexis or some other reliable citation service.

2. Document Creation, Analysis and Review

AI's capabilities extend to document creation, analysis and review, a critical aspect of civil defense cases. Instead of manually sifting through documents to identify relevant information, AI-powered algorithms can quickly identify key details, potentially even uncovering insights that might have been overlooked. This significantly reduces the chances of missing essential evidence and streamlines the preparation process for lawyers. These points can then be incorporated into new documents such as discovery demands, discovery responses, contracts, etc. Again, it is the lawyer's responsibility to ensure that whatever is created meets legal requirements. One cannot simply hand over responsibility to AI.

Third parties have already begun incorporating AI capabilities into their products. For example, Casetext has a product called CoCounsel. CoCounsel is built on OpenAI's GPT-4, customized for the legal industry. It can read, comprehend, and write at a post-graduate level. These kinds of value-added third party products based on AI databases will become integral parts of everyday legal work.

3. Predictive Analytics for Case Outcomes

Predictive analytics, fueled by AI, offer civil defense lawyers an edge when assessing potential case outcomes. By analyzing historical case data, AI algorithms can provide insights into the likelihood of success for a particular defense strategy. This enables lawyers to make informed decisions and advise clients more accurately regarding potential settlements or trial prospects. While not foolproof, predictive analytics can guide strategies and resource allocation effectively.

What may this mean for day-to-day practice? Rather than simply searching for

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See page 9 for details.

(ARTIFICIAL INTELLIGENCE) *Continued from page 8*

prior cases seeking something that may persuade a particular judge or jury, AI will be able to analyze cases and prior decision of particular judges and the results of jury trials in particular jurisdictions to be able to predict outcomes. It will also be able to suggest modifications to arguments that may prove to be more successful.

Predictive analytics in the law is still in its infancy. However, as historical data is fed into AI engines, we will soon see a revolution in how we integrate our research into the facts and arguments of a particular case.

4. Automation of Routine Tasks

Civil defense lawyers often find themselves buried under a mountain of administrative tasks that eat into their productive time. AI-powered automation tools can handle routine tasks like scheduling, document sorting, and even initial client interactions. This automation liberates lawyers from mundane responsibilities, enabling them to focus on more complex, intellectually demanding aspects of their cases.

For those already operating in the Microsoft Office Suite, Co-Pilot is an add-on that soon will link all of the apps you are already using into a seamless whole. Further, it will use the power of ChatGPT behind the scenes to produce new more precise results for the user. For example, rather than sorting for an hour to find the email you received last October (we've all been there), Co-Pilot will be designed to have all of your emails, calendar, notes, PowerPoints, and documents available and searchable in a confidential manner. Co-Pilot is slated to be released to the public sometime in late 2023 or early 2024.

5. Ethical and Privacy Considerations

While the potential of AI is exciting, civil defense lawyers must be attuned to the ethical and privacy considerations surrounding its use. AI algorithms require data to learn and make accurate predictions. This data might include sensitive client information. Lawyers must ensure that they comply with legal and ethical standards when sharing client data with AI platforms. Moreover, understanding how AI arrives at its conclusions is crucial when presenting such insights in court; transparency is key to maintaining credibility.

The American Bar Associations' House of Delegates adopted a Resolution dated August 12-13, 2019, which notes:

> That the American Bar Association urges courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence ("AI") in the practice of law including: (1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI.

112 2019A (americanbar.org)

Conclusion

Artificial Intelligence has ushered in a new era of efficiency and effectiveness in the legal field, and civil defense lawyers stand to benefit significantly. From streamlining research to predicting case outcomes, AI offers a plethora of tools that can transform legal practices. However, it is essential to strike a balance between the advantages AI provides and the ethical considerations it raises. Civil defense lawyers must stay informed about the latest AI developments in the legal sector, continually adapting their strategies to harness AI's power effectively.

As AI technology continues to evolve, civil defense lawyers should invest time in understanding how these tools can be integrated seamlessly into their practices. While AI can handle many tasks, the human touch remains indispensable, particularly in interpreting complex legal nuances and crafting persuasive arguments. By embracing AI as a valuable assistant rather than a replacement, civil defense lawyers can position themselves at the forefront of a tech-savvy legal landscape, offering clients the best of both worlds — cutting-edge technology and expert legal acumen.

John T. Sly is a partner with Waranch & Brown, LLC and is a past President of MDC. John has also been named to Super Lawyers every year since 2009.

Editors' Corner

The editorial staff wish to express our thanks for the outstanding contributions made by MDC members to this publication of *The Defense Line*. The articles in this edition provide an analysis and historical review of fee-shifting in insurance coverage litigation, guidance for using online investigative tools that can change the outcome of your case, and the use of AI. We continue to look for articles and case updates for publication and will accept those submissions at any time. We continue to look forward to opportunities to support the MDC and be a resource to its members.

We hope that you enjoy this edition of *The Defense Line*. If you have any comments suggestions, or submissions for future editions, please contact the Publications Committee.

Nicholas J. Phillips
Chair, Publications Committee
Thomas, Thomas & Hafer, LLP
(571) 464-0436

Co-chair, Publications Committee

We have a vacancy on the Publications Committee. If you or one of your colleagues are looking to get involved with the MDC and are interested in joining the Publications Committee, please reach out to Nick Phillips or Chris Jeffries.

Take-Home COVID Claims Should Not Prevail in Maryland and D.C.

Sean Gugerty

The COVID-19 pandemic has taken an unthinkable toll on the United States, taking over 1.1 million American lives in the past three years.[1] In the pandemic's aftermath, some families of those taken by the disease and others seriously injured by it have brought personal injury claims in state court. But some of these COVID claims — particularly those involving employees who acquired COVID while working — should not be permitted to proceed in state court.

In many states, the workers' compensation process is the exclusive remedy for employees who are injured or sustain an occupational disease while working. Under these exclusivity provisions, employees are generally barred from suing their employers for damages from personal injury or occupational illnesses acquired on the job — including harm or injuries from certain viral illnesses — absent rare circumstances, such as the employer deliberately trying to kill or injure the employee.[2] But given the rapid transmissibility of the novel coronavirus, workers who acquired the disease often infected close family members. This has spawned "take-home" COVID litigation— where the plaintiffs assert that an employer is liable for inadequate workplace infection-control measures, causing an employee to acquire COVID and to infect his or her spouse, children, or other family members. Because such claims are brought on behalf of a non-employee family member, plaintiffs have argued that they are not subject to workers› compensation exclusivity provisions.

Several courts have held that take-home COVID claims are impermissible as a matter of law, including California courts and — in a case handled by Goodell DeVries — a Maryland state court addressing claims brought under Maryland and D.C. law.

California recently rejected take-home COVID claims on the basis of public policy

In July 2023, the California Supreme Court addressed a take-home COVID claim in *Kuciemba v. Victory Woodworks, Inc.*[3] In March 2020, Plaintiff Robert Kuciemba was working at a construction site in San Francisco for Victory Woodworks.[4] Two months later, the company transferred a group of other employees to his work site from another location where they may have been exposed to the virus, allegedly without taking the precautions required by the county's health order.[5] After working with these employees, Robert became infected, returned home, and infected his wife, Corby Kuciemba.[6] Corby was later hospitalized for several weeks.[7]

The Kuciembas sued Victory Woodworks in California state court. The case was transferred to federal court, which dismissed the claims, prompting an appeal to the Ninth Circuit Court of Appeals, which then submitted certified questions to the California Supreme Court. It asked whether (1) the claims were barred by California's workers' compensation exclusivity statute and (2) "an employer owe[s] a duty of care under California law to prevent the spread of COVID-19 to employees' household members[.]"[8] The California Supreme Court held that the California workers' compensation exclusivity provisions did not bar claims brought by a spouse or other non-employee relative.[9]

The next question, whether the employer owed a duty to non-employees to prevent take-home Covid, produced the more significant analysis and holding. The court noted that the general duty in tort under California law is very broad, with "the default rule that each person has a duty to exercise, in his or her activities, reasonable care for the safety of others."[10] The Court held that the default rule of duty "applies in the COVID-19 context," but that this "does not end the matter" because courts can recognize exceptions to the general rule of duty "when supported by compelling policy considerations."[11]

California courts employ a multi-factor test to determine if policy considerations justify a departure from the default presumption of duty.[12] The California Supreme Court held that most of those factors *favored* imposing a duty because (1) "it is plainly foreseeable that an employee who is exposed to the virus through his employer's neg-

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1 CDC Covid Data Tracker, available at https://covid.cdc.gov/covid-data-tracker/#datatracker-home (last accessed August 25, 2023).
2 Maryland Code, Ann., Labor and Employment § 9-509; *see also* D.C. Code § 32–1504.
3 14 Cal. 5th 993 (2023).
4 *Id.* at 1005.
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.* at 1004.
9 *Id.* at 1005-1016.
10 *Id.* at 1016 (internal citations omitted).
11 *Id.* at 1021
12 *Id.* (citing *Rowland v. Christian*, 69 Cal.2d 108 (1968)).

(COVID) *Continued from page 11*

ligence will pass the virus to a household member"[13] and (2) the defendant's conduct deserves "moral blame."[14] But the court also held that the factor of the "burden to the defendant and consequences to the community" weighed strongly *against* imposition of a duty.[15] It found that, with imposition of a duty, "the prospect of liability for infections outside the workplace could encourage employers to adopt precautions that unduly slow the delivery of essential services to the public" or even to "shut down if a new pandemic hits."[16] And "a duty to prevent secondary COVID-19 infections would extend to *all* workplaces, making every employer in California a potential defendant," such that "even limiting a duty of care to employees› household members, the pool of potential plaintiffs would be enormous, numbering not thousands but millions of Californians."[17]

Ultimately, weighing the factors, the California Supreme Court unanimously refused to find a duty for take-home COVID claims given the "daunting" and "intolerable" financial burden on defendants, the judicial system, and the community of litigating such claims.[18] Thereafter, the Ninth Circuit affirmed dismissal of the Kuciembas' claims.[19]

Goodell DeVries won dismissal of a take-home COVID claim in Maryland state court

The California Supreme Court in *Kuciemba* noted that courts applying Maryland law had similarly dismissed take-home COVID claims, including a case brought against Southwest Airlines.[20] The California court recognized that "Maryland law is especially focused on limiting duty in the third party[21] context." Indeed, Maryland courts have declined to permit take-home claims, holding that an employer owed no duty to a spouse who allegedly developed mesothelioma from asbestos fibers brought home in her husband's clothes,[22] and that a laboratory owed no duty to a third-party spouse who was infected with HIV by her spouse, who had apparently contracted the virus in a workplace accident.[23]

Goodell DeVries attorneys **Kelly Hughes Iverson**, **Marianne DePaulo Plant**, **Derek Stikeleather**, and **Sean Gugerty** represented Sibley Memorial Hospital in a three-count wrongful death claim brought by a former hospital nurse who claimed she contracted COVID-19 from a patient or co-worker in the District of Columbia hospital in March 2020, and in turn infected her husband at their Maryland home, ultimately causing his death. In March 2021, following a motion to dismiss and argument from Ms. Iverson and Mr. Gugerty, the Circuit Court for Montgomery County, Maryland dismissed all claims against the hospital, with prejudice. The court explicitly found that the hospital owed no duty to the third-party spouse under either Maryland or D.C. law.

Takeaways for Maryland and D.C. employers

The reasoning of the *Kuciemba* decision, Maryland and D.C. precedent limiting duty to third parties, and the Sibley Memorial Hospital case all indicate that Maryland and D.C. courts should dismiss future take-home COVID claims. Employers who face lawsuits or pre-suit claims raising take-home COVID allegations, or other types of COVID claims, should consult with counsel as to potential defenses and the prospect of dismissal for such claims.

Goodell DeVries is a regional law firm with a national presence. Our team of attorneys handles the most complex legal challenges for clients across the country in business law, medical malpractice law, appellate matters, complex commercial litigation, insurance, and more. If you have a COVID claim and would like to consult with an attorney at Goodell DeVries, please contact us at info@gdldlaw.com.

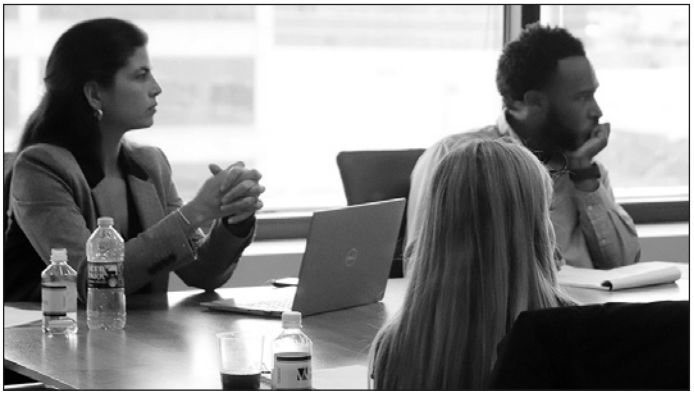
Sean Gugerty is a partner with Goodell DeVries, where he defends healthcare providers and healthcare institutions in medical malpractice and other claims throughout Maryland and D.C. He also represents pharmaceutical manufacturers in product liability litigation in state and federal court, and he provides advice and analysis on regulatory compliance and risk mitigation. Sean can be reached at sgugerty@gdldlaw.com.

[13] *Id.* at 1025.
[14] *Id.* at 1026.
[15] *Id.* at 1026-1030.
[16] *Id.* at 1028.
[17] *Id.* at 1029.
[18] *Id.* at 1030-1031
[19] *Kuciemba v. Victory Woodworks, Inc.*, 74 F.4th 1039 (9th Cir. 2023).
[20] *See Estate of Madden v. Sw. Airlines, Co.*, Civil Action No. 1:21-cv-00672-SAG, 2021 U.S. Dist. LEXIS 117266 (D. Md. June 23, 2021).
[21] *Kuciemba*, 14 Cal. 5th at 1032.
[22] *Adams v. Owens-Illinois, Inc.*, 119 Md. App. 395 (1998).
[23] *Doe v. Pharmacia & Upjohn Co.*, 388 Md. 407, 879 A.2d 1088 (2005).

MDC's 2023 Deposition Bootcamp

On Wednesday, **June 14**, MDC held another successful **Deposition Bootcamp** at the Baltimore offices of Miles & Stockbridge, PC. This is the fourth Deposition Bootcamp that MDC has conducted in recent years, and is the first since the pandemic. Participants were able to practice their skills taking/defending depositions on witnesses in a small group setting while receiving helpful hints from deans of the bar. Just like earlier versions of the program, this event was very well-attended and well received.

MDC would like to thank Zachary Miller, Chris Jeffries, and MDC Executive Director Aimee Hiers, among others, who worked very hard to organize the event. We are already looking forward to the next one which will be held on January 23, 2024. Check www.mddefensecounsel.org for details.



Don't Just Google: Online Investigation Tools for the Modern Maryland Litigator

Glenn A. Gordon

A lawsuit can be won or lost based on a litigator's efforts (or lack thereof) to investigate the facts concerning the subject matter of the case and the parties involved. One of the first steps many litigators take in investigating an incident, an opposing party, or some other aspect of a new case, is something that just about everybody, lawyers and nonlawyers alike, does these days to obtain information about any subject matter — searching on Google. While helpful information can often be gleaned from a Google search, or from checking court dockets for a party's litigation history, there are several other free online resources a litigator can use from the comfort of their office (or their couch in this age of working from home) to obtain information that may be useful in their investigation. Included in this article are some of the free online resources I use most often in investigating a case, and examples of how they have been useful in cases I have litigated.

Business Entity Searches

For any matter involving business entities, a plethora of information can often be gleaned by reviewing the an entity's corporate filings. In this day and age, many such filings are available online (often free of charge). In Maryland, filings with the State Department of Assessments and Taxation ("SDAT") can be obtained by looking the entity up here: https://egov.maryland.gov/BusinessExpress/EntitySearch (filings circa 2001 or later are available in PDF free of charge, while older filings are available on microfiche at SDAT's offices). Similar lookups in other states can easily be located by Googling the name of the state and "business entity search." Aside from the obvious information that can be gleaned from such filings (e.g., the name and address of a resident agent for service of process) reviewing a company's filings can reveal a lot of helpful information about the company's history and the individuals or other entities associated with the company. In cases where a litigator is trying to establish an alter ego relationship between two entities, for example, reviewing corporate filings can help determine whether the two entities have common officers, do business at the same address, etc. Notably, where an entity does business in more than one state, it can be helpful to pull that entity's filings in multiple jurisdictions, as opposed to merely checking in Maryland or the state in which the entity was originally formed. For example, in the process of investigating the membership of an LLC to determine whether diversity jurisdiction would exist in federal court (as the Fourth Circuit holds that an LLC has the citizenship of each of its members), I learned that California, unlike Maryland, has a form on which an LLC is supposed to list the names and addresses of its members. By locating that form for an LLC that did business in California, I was able to adequately plead diversity jurisdiction in a case in which I otherwise would not have been able to do so after failing to locate the identity of the LLCs members in documents the entity had filed in Maryland and other states.

MDLandRec.net

MdLandRec.net is a fantastic online resource created by the Maryland Judiciary and Maryland State Archives in partnership with the Clerks of every Circuit Court in the State. The website provides free access to digitized versions of verified land records from across the State and provides various ways to search the records (e.g., by a county's book/page number, by street address, or by individual or corporate entity names). Obviously, reviewing land records can be useful in litigation involving questions of ownership of property, property boundaries, easements, and the like. But there are a number of other contexts in which I have found land records obtained from MDLandRec.net to be useful. As one example, the website was useful in a case in which I represented a family that sold a large tract of farmland to a large homebuilder entity and the homebuilder refused to pay its fair share of an agricultural transfer tax imposed under State law. The parties' contract did not specifically reference this tax, and the homebuilder denied that language in the contract referring more generally to transfer taxes was intended to include the agricultural transfer tax, in part because the homebuilder denied knowledge that this type of tax existed at the time it entered into the contract. We were able to obtain evidence that the homebuilder did have prior knowledge of the tax by searching the homebuilder's name on MDLandRec.Net and locating records from numerous prior land purchases by the homebuilder for which the agricultural transfer tax was imposed. In another case, in which a party

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(DON'T JUST GOOGLE) *Continued from page 14*

claimed that an appliance manufactured by my client was defective, I learned from land records obtained from MDLandRec.Net, well before having any discovery, that the prior owner of the plaintiff's home conveyed the subject appliance to her in the transfer of the property. This meant, among other things, that the plaintiff would have difficulty proving that the condition of the appliance at the time of her injury was the same condition the appliance had been in when it left my client's possession.

The Internet Archive's Wayback Machine (https://archive.org/web/)

The Wayback Machine is a fascinating project of a non-profit organization called The Internet Archive, which also happens to come in handy as an investigation tool from time to time. Essentially, The Internet Archive has created archived versions of websites to capture and document the history of the internet. A user can go to the Wayback Machine, type in a website address, and find snapshots of that website at different points in time. This can be a useful investigation tool for a litigator any time the use or content of a particular website is in question, given that a lot of information would otherwise be lost when a website changes over time. The Wayback Machine can sometimes be helpful even where the content or use of a website is not a primary issue in the litigation. For example, in a case in which I was trying to prove that a successor entity was merely an alter ego of a predecessor entity that had failed to pay my client royalty fees due under a licensing agreement, I was able to show from screenshots obtained on the Wayback Machine that the website operated under the name of the successor entity at the time of the lawsuit had been operated under the name of the predecessor entity three years earlier. This was compelling evidence of my alter ego theory because everything about the website, from its layout and design, to the products being sold on the website, to the business address listed, were the same, the only thing that had changed was the name of the entity listed above the business address.

WHOIS Lookups

WHOIS (pronounced "who is") lookups are another helpful investigation tool in cases in which ownership of a website may be at issue. WHOIS is an internet directory containing information about ownership of web domains, such as the name and address of the person or entity to whom the website is registered, and the date on which the website was created. There are various WHOIS lookup tools available on the internet, with one well-known option being the Domain Tools version (https://whois.domaintools.com/). Currently, unlike earlier days of the internet, many website domains are sold through third-party web hosting companies like GoDaddy, which can mask the true owner of a website, and website owners can take other efforts to keep their identities private, so WHOIS lookups often result in little useful information. Sometimes, however, a multi-level search can reveal helpful information. In the same case mentioned above in which the Wayback Machine helped me obtain evidence to establish an alter ego relationship between two entities, I performed a WHOIS search and found that the website being operated by the successor entity was registered to a webhosting company similar to GoDaddy. I then went to the web hosting company's website and found that it had its own WHOIS lookup tool. When I searched for the subject website on that WHOIS lookup, I found that the site was registered to a person who had been an officer of the predecessor entity (which I knew from business entity filings I had obtained online) and also that the site was being maintained by a digital marketing company whose name, physical address and administrator's email address were included in the WHOIS lookup results. Had the matter not settled soon thereafter, I would have subpoenaed the digital marketing company for payment records and communications regarding its management of the website, which might have resulted in additional evidence linking the two companies.

Social Media

I know what you're thinking: this one is obvious. Litigators conduct social media searches often to see if a party in their case has commented about the subject matter or posted photos, videos or other content that might belie a position are taking in the case (e.g., a personal injury plaintiff posting photos of themself engaging in activities that undermine their claims of painful or permanent injury). But there is a lot of other information that can be found on social media that lawyers do not always know to look for. An example that has proved useful for me on more than one occasion is searching for social media pages associated with first responder agencies. In personal injury or property damage cases where emergency services are provided by police, fire departments, or emergency medical providers, checking social media accounts for known first responder agencies can uncover a lot of useful information. Examples of information I have found in first responder agencies' social media postings include accident scene photos, comments by witnesses, information about the timing of the response and other agencies involved, and even an occasion in which a personal injury plaintiff "Liked" photos of the accident he was involved in, which undermined his later claims of emotional trauma. In one particularly helpful instance, a fire department posted a YouTube video that one of the firefighters recorded on his phone from the fire engine window as it approached the scene of a burning building just minutes after the fire started. That video, which showed flames raging on one side of the building, was helpful in proving that the fire did not originate near an appliance my client manufactured, which was located on the other side of the building.

I hope that readers will find this article useful, and I would love to hear from readers about their own creative uses of these or other online investigation tools.

Glenn A. Gordon is a Principal in the Litigation Group at Miles & Stockbridge P.C. Glenn represents individuals and businesses in a variety of litigation matters including products liability, premises liability, class actions, and private and commercial contract disputes. He can be reached at ggordon@milesstockbridge.com.

The MDC Expert List

The MDC expert list is designed to be used as a contact list for informational purposes only. It provides names of experts sorted by area of expertise with corresponding contact names and email addresses of MDC members who have information about each expert as a result of experience with the expert either as a proponent or as an opponent of the expert in litigation. A member seeking information about an expert will be required to contact the listed MDC member(s) for details. The fact that an expert's name appears on the list is not an endorsement or an indictment of that expert by MDC; it simply means that the listed MDC members may have useful information about that expert. MDC takes no position with regard to the licensure, qualifications, or suitability of any expert on the list.

For Immediate Release

Goodell DeVries Lawyer Carrie Williams Appointed to Appellate Courts Judicial Nominating Commission

Goodell DeVries lawyer ***Carrie J. Williams*** has been appointed by Maryland Governor Wes Moore to the Appellate Courts Judicial Nominating Commission.

The commission evaluates applicants for vacancies on Maryland's appellate courts based on a variety of factors, including their integrity, temperament, legal knowledge, and professional experience.

In a press release, Governor Moore's office noted there is "historic diversity among all of Maryland's judicial nominating commissions to date, as 57% of all commission members are women; 53% are people of color; 63% of commission chairs are women; and 75% of commission chairs are people of color."

Carrie is a member of Goodell DeVries's Appellate Practice Group. She represents clients across the firm's many practice groups in pre-trial and appellate matters. Carrie brings 16 years of appellate experience at the Maryland Office of the Attorney General, where she served as Principal Counsel for Criminal Policy and, before that, Division Chief of the Criminal Appeals Division. During her government service, Carrie argued more than 50 cases before the Supreme Court of Maryland and hundreds of cases in the Appellate Court of Maryland. She also handled cases in the United States Supreme Court.

Carrie was an Adjunct Faculty member at the University of Baltimore School of Law, where she taught Introduction to Advocacy from 2014–2022.

She is Co-chair (with colleague Derek Stikeleather) of the Maryland State Bar Association's (MSBA) Appellate Practice Committee. She is an editor and frequent contributor to the Maryland Appellate Blog, published by the MSBA. She was recently appointed Chair of the Programming Committee of the Cole-Davidson Appellate Inn of Court.

About Goodell DeVries

Goodell DeVries is a regional law firm with a national presence. Our team of attorneys handles the most complex legal challenges for clients across the country in business law, intellectual property, product liability, mass torts, medical malpractice law, appellate matters, complex commercial litigation, insurance, toxic torts, and more. Our lawyers are ranked among the best in the nation by leading directories, including *Chambers* and *Best Lawyer*s, and we've been named among the top law firms for women by *Law360*. To learn more, visit www.gdldlaw.com or follow us on LinkedIn.

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Austin, TX
- Product Liability Conference
- Litigation Skills Seminar

March 8-10

Chicago, IL
- Insurance Coverage and Claims Institute
- Medical Liability and Health Care Law Seminar
- Fidelity and Surety Roundtable *(March 10)*

March 13-14

Indianapolis, IN
- Sexual Torts Seminar

April 26-28

New Orleans, LA
- Life, Health, Disability and ERISA Seminar
- Business and Intellectual Property Litigation Seminar
- Toxic Torts and Environmental Law Seminar

May 3-5

New Orleans, LA
- Cannabis Law Seminar *(May 2-3)*
- Drug and Medical Device Seminar
- Employment and Labor Law Seminar

**Dates and locations are subject to change. Check dri.org for updates.*

June 14-16

Charlotte, NC
- Diversity for Success Seminar
- Insurance Bad Faith and Extra-Contractual Liability Seminar
- Young Lawyers Seminar
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June 19-20

Zurich, Switzerland
- DRI International

August 16-18

Washington, D.C.
- Senior Living and Long-Term Care Litigation Seminar
- Strictly Automotive Seminar
- Fire Science and Litigation Seminar
- Talc Litigation Seminar

October 24-27

San Antonio, TX
- Annual Meeting

November 15-17

Austin, TX
- Asbestos Medicine Seminar
- Retail and Hospitality Seminar
- Law Firm Leaders and Managing Partners Conference

Nov. 29 – Dec. 1

New York, NY
- Insurance Coverage and Practice Symposium
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Generic Ranitidine Manufacturers Win Dismissal of Consolidated Illinois Litigatione


BALTIMORE, MD August 21, 2023 — On August 17, 2023, in the consolidated Illinois Zantac/ranitidine proceedings, Cook County judge Daniel Trevino granted motions to dismiss all claims against generic ranitidine manufacturers, with prejudice. Representing Perrigo and arguing for all generic-manufacturer defendants, Sean Gugerty of Goodell DeVries persuaded the court that the state-law claims against the generics were all preempted by federal law. Mr. Gugerty was also co-drafting counsel for the generic ranitidine manufacturers, along with Amy McVeigh of Holland & Knight LLP and Gregory E. Ostfeld of Greenberg Traurig, LLP.

Judge Trevino issued a lengthy ruling from the bench, agreeing that the U.S. Supreme Court's *Mensing and Bartlett* decisions on generic preemption and the "duty of sameness" in labeling controlled and required dismissal. The court distinguished the Illinois Court of Appeal's *Guvenoz* decision. It explained that the limited exception to preemption outlined in *Guvenoz* did not apply because Plaintiffs pleaded failure to warn and other claims that were squarely preempted under *Mensing* and *Bartlett*.

With this victory, Perrigo has obtained dismissal (voluntary or on motions) of ranitidine cases against it in Illinois, Baltimore, New York, New Jersey, and Ohio. Perrigo is represented by **Richard M. Barnes** and **Sean Gugerty** of Goodell DeVries of Baltimore.

About Goodell DeVries

Goodell DeVries is a regional law firm with a national presence. Our team of attorneys handles the most complex legal challenges for clients across the country in business law, intellectual property, product liability, mass torts, medical malpractice law, appellate matters, complex commercial litigation, insurance, toxic torts, and more. Our lawyers are ranked among the best in the nation by leading directories, including *Chambers*; and *Best Lawyers*, and we've been named among the top law firms for women by *Law360*. To learn more, visit www.gdldlaw.com or follow us on LinkedIn.

Upcoming events will be announced at MDdefensecounsel.org.

See photos from MDC past events: mddefensecounsel.org/gallery



Spotlights


Waranch and Brown partners **Christina N. Billiet** and **Michelle L. Dian** secured a May 2023 victory in a twins wrongful birth case. Plaintiffs, the parents of twin boys diagnosed with a rare genetic disorder, claimed they were not offered certain prenatal genetic testing which would have revealed an abnormality and resulted in a pregnancy termination. The Baltimore County jury returned a defense verdict on standard of care after deliberating for approximately 30 minutes. Plaintiffs were represented by Zev Gershon and Randy Getz of Gershon, Willoughby & Getz, LLC.

Mary Malloy Dimaio of Crosswhite, Limbrick & Sinclair, LLP recently obtained summary judgment in the Circuit Court for Baltimore City on behalf of a driver who was T-boned in a Baltimore intersection and then sued by the tortfeasor. Due to his complete discovery failures, Mary first obtained an order precluding plaintiff from introducing any evidence at trial as to liability or damages via an unopposed motion for sanctions. Plaintiff was incarcerated after his attorney filed suit, and the attorney claimed he could not locate or communicate with his client and thus was unable to provide discovery responses or produce him for deposition, despite suggestions on how to do that and to file a stay in the proceedings, all of which were ignored. On plaintiff's motion to vacate the sanctions, the judge found that plaintiff's counsel had several additional ways in which to locate and connect with his client, but failed to use any of them, and denied his motion to vacate the sanctions, finding them warranted. Summary judgment followed. An appeal is expected.



After nearly 10 years of hard-fought litigation, Waranch & Brown, LLC's **John Sly, Saamia Dasti**, and **Barry Goldstein** reached a very positive result for our Orthopedic Physician client. This case arose from a medical malpractice dispute alleging negligence and use of improper orthopedic implants. The matter was originally venued in Baltimore City Circuit Court but was later transferred to Anne Arundel County Circuit Court.

A decade later, Waranch & Brown, LLC's client dismissed with prejudice and without any admission of wrongdoing.


After an 8-day jury trial, Waranch & Brown, LLC is delighted to congratulate **Neal M. Brown**, **Rachel Giroux, Esquire** and the rest of the W&B Team on a hard-fought defense verdict. On June 9, a Harford County jury found no negligence on behalf of our general surgeon client. This case arose out of a dispute regarding a ureter injury following an emergency surgery for a bowel rupture. The issue was whether the ureter was negligently transected during surgery or blocked by post-operative inflammation. W&B is proud to have been part of the effort explaining the complex medicine simply so the jury understood there was no negligence in this case.

Get Involved with MDC Committees

To volunteer, contact the chairs at

www.mddefensecounsel.org/leadership.html

MDC's 2023 Crab Feast

Maryland Defense Counsel ("MDC") held its **Annual Meeting and Crab Feast** at Nick's Fish House Upper Deck in Baltimore on Thursday, June 15, 2023. MDC would like thank our members and sponsors for their support of MDC and the new board. It was great to see everyone!

New board members include:

President: Sheryl A. Tirocchi, GodwinTirocchi, LLC

President-Elect: Amy E. Askew, Kramon & Graham PA

Treasurer: Zachary A. Miller, Esquire, Wilson Elser Moskowitz Edelman & Dicker LLP

Secretary: Rachel L. Gebhart, GodwinTirocchi, LLC

Immediate Past President: Christopher C. Jeffries, Kramon & Graham PA

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How do MDC members benefit from MLM's Defense Program?

Managing your practice can be stressful. The last thing you want to think about is your lawyers' professional liability insurance, but it also can be one of the most important decisions you make. MLM and its Defense Program - offering preferred pricing and coverage enhancements to firms with substantial MDC membership. These coverage enhancements are offered at no additional cost to you.

Perhaps the most valuable of these coverage enhancements is additional claim expense: **'ADDITIONAL CLAIM EXPENSE OF 50% OF THE POLICY LIMIT, UP TO $250,000, PER POLICY PERIOD'.**

Most professional liability insurance limits include claim expenses such as defense costs. In protracted cases, these claim expenses can erode a significant portion of your policy limits, potentially affecting your ability to settle a case or satisfy an entire judgment against you.

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Consider a case with $200,000 of claim expenses. If your policy limits are $500,000, after claim expenses, there would only be $300,000 remaining to make any necessary indemnity payment. If you have $250,000 in additional claim expense through MLM's Defense Program, claim expenses would first be deducted from this enhancement before eroding the policy limits. You would have your full $500,000 policy limits still available to ensure that your practice is protected.

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