THE DEFENSE LINE

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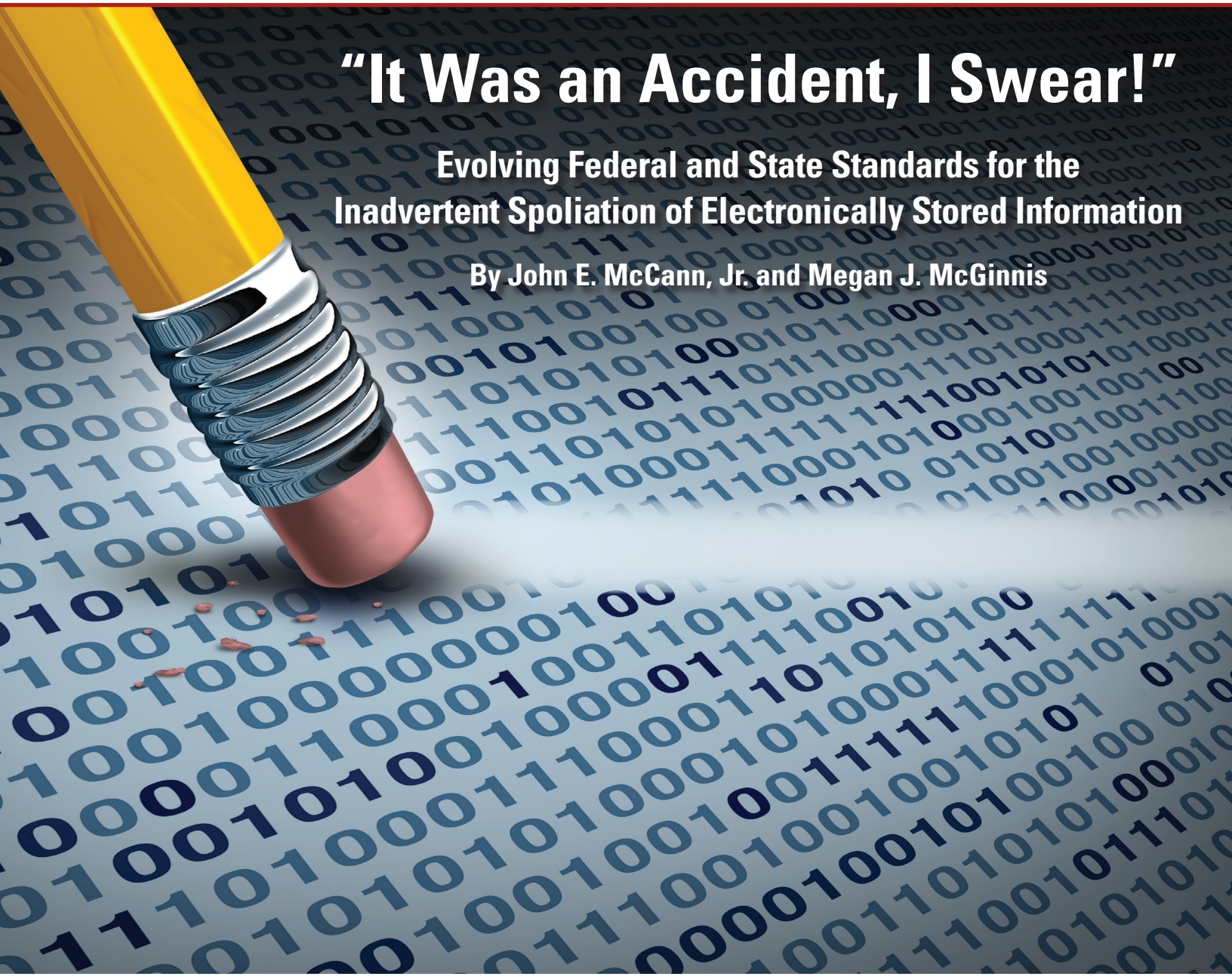

"It Was an Accident, I Swear!"

Evolving Federal and State Standards for the Inadvertent Spoliation of Electronically Stored Information

By John E. McCann, Jr. and Megan J. McGinnis

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Far from Home: Individuals and the Personal Jurisdiction Defense

Maryland's Travel Insurance Laws Align Closely with NAIC Travel Insurance Model

Five Things to Know About the Wild West of Bankruptcy and Insurance

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MDC Appellate Practice Committee — Briefs

President's Message

"A dream doesn't become reality through magic; it takes sweat, determination and hard work" — Colin Powell

Welcome to the spring 2019 edition of *The Defense Line*! As you may remember, MDC's Executive Board's term runs from June to June. So, this is my last President's Message. In light of that, let me express my sincere thanks to everyone who has helped make this a great year for MDC. This includes the entire Executive Board and all our Board members. Also, before I review our last year and some of the things you can expect in the upcoming months, I would be remiss not to specifically thank our Publications Chair, Sheryl Tirocchi, and her team who work tirelessly to make this a great publication for you. Also, big thanks to Brian Greenlee. Brian is a graphic designer who has worked with MDC for more than a decade making sure our publications and website are top quality.

John T. Sly, Esquire
Waranch & Brown, LLC

This year has been one of profound change for MDC. First, we hired Marisa Capone, Esq. as our Executive Director. She has been a fantastic addition to the MDC team. Marisa has focused on developing a robust computerized membership database to better communicate with you, our members. To that end, MDC has adopted Wild Apricot as our cloud-based database and communications tool. Like all change there has been a bit of a learning curve for everyone but throughout the process Marisa has plugged along helping to ensure MDC had a very successful year!

MDC's success comes from an extraordinary team of volunteers. Numerous members have devoted many hours to ensuring MDC has great programming and innovative activities. This year we hosted our highly regarded Deposition Bootcamp. The room was packed with those ready to learn from a great set of lawyers and judges. Lunch & Learns dealing with the opioid crises and how to choose an effective expert, among other topics, were well received. Remember also that MDC interviews every willing judicial candidate in Maryland for the circuit courts, the Court of Special Appeals and the Court of Appeals. We are also very active in the Maryland Legislature and before rule-making bodies. From filing amicus briefs to offering legal opinions on proposed changes to the judiciary, MDC is engaged to ensure the defense bar's interests are heard.

MDC proudly hosted Wendy Merrill of the consulting firm StrategyHorse for four modules addressing the development of personal branding, networking and marketing. These are needs our members have said they have and MDC is always ready to answer the call. We also volunteered at Happy Helpers for the Homeless, a charity dedicated to feeding the less fortunate. **Of course, we got to enjoy our Annual Meeting and Crab Feast!**

A new Executive Board was elected at the Crab Feast. Congratulations to: Dwight Stone of Miles & Stockbridge, P.C. as President, Colleen O'Brien of Wilson/Elser as President-Elect, Katherine Lawler of Nelson/Mullins as Treasurer and Chris Jeffries of Kramon & Graham, P.A. as Secretary.

Once again, thank you to everyone who has made this a successful year for MDC!

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Maryland Defense Counsel
6535 N. Charles Street
Suite 220
Baltimore, MD 21204

E-mail:
ed@mddefensecounsel.org
www.mddefensecounsel.org

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"It Was an Accident, I Swear!"

Evolving Federal and State Standards for the Inadvertent Spoliation of Electronically Stored Information

John E. McCann, Jr. and Megan J. McGinnis

As lawyers typically pride themselves in being careful and attentive to detail, perhaps nothing is more disconcerting than the realization that you or your client may have failed to take appropriate steps to preserve e-mails, text messages, or other forms of electronically stored information ("ESI") for use in litigation. Although there are a number of reported instances in which a litigant deliberately destroyed ESI in an effort to hide evidence or gain perceived advantage in litigation,[1] such egregious misconduct thankfully is rare. The far more common problem that practitioners face is the inadvertent deletion of ESI due to an untimely implementation of an effective "litigation hold" on the electronic files of the custodians pertinent to the case.[2] Although most practitioners routinely advise clients to implement a litigation hold once a suit has been filed, many overlook that there exists a pre-suit duty to preserve ESI that may attach as soon as litigation can be "reasonably anticipated."[3] Failure to implement a litigation hold promptly upon receipt of a pre-suit demand or cease-and-desist letter, for example, can result in the inadvertent loss of ESI before the case even starts — information that is often just as likely to be helpful, as opposed to harmful, to your client's case. Once the duty to preserve ESI attaches in a civil case, failure to take reasonable steps to implement an effective litigation hold can lead to expensive and time consuming discovery disputes and claims for sanctions.

Advising clients on these issues in Maryland is complicated by a divergence in the applicable federal and state rules addressing the spoliation of ESI. Under the current version of Rule 37(e) of the Federal Rules of Civil Procedure, sanctions for a failure to take "reasonable steps" to preserve ESI "in the anticipation or conduct of litigation" are appropriate: (i) if the information "cannot be restored or replaced through additional discovery," and (ii) upon a finding of prejudice to another party. FED. R. CIV. P. 37(e)(1). The current Federal Rule further restricts the imposition of the most severe of sanctions (*i.e.*, adverse inference instructions at trial, dismissal, or default) only upon a "finding that the party acted with the intent to deprive another party of the information's use in litigation." FED. R. CIV. P 37(e)(2). The current Federal Rule, which went into effect on December 1, 2015, was intended to fix a host of inadequacies with the prior 2006 version of the Rule 37(e) (the "Former Federal Rule") that had been interpreted by many federal courts as allowing for the imposition of even the most severe sanctions for a merely negligent or grossly negligent failure to preserve ESI. FED. R. CIV. P 37, 2015 Ad. Comm. Notes. Neither the United States District Court for the District of Maryland nor the United States Court of Appeals for the Fourth Circuit has provided guidance regarding the level of intent required under the current Federal Rule 37(e)(2), though other courts within the Fourth Circuit have taken a conservative approach to the sanctions analysis thereunder, characterizing the intent requirement as "stringent," and "not parallel" with other discovery standards.[4]

In Maryland state courts, sanctions for spoliation of ESI are governed by Maryland Rule 2-433(b). The current Maryland Rule is derived from and mirrors the Former Federal Rule, and has not been amended in wake of the 2015 revisions to Federal Rule 37(e). As a result, Maryland Rule 2-433(b), as interpreted and applied by the Maryland courts, presents the same uncertainties and risks arising out of the unintentional spoliation of ESI — difficulties that have been alleviated by its current federal counterpart. As a result, a civil litigant in Maryland state court may still confront the risk of severe sanctions for a negligent failure to properly preserve ESI — a result that the federal judiciary now views as contrary to sound public policy and the proper administration of justice. This divergence between the applicable federal and state rules is not only important to remember when advising clients litigating in Maryland, but presents an opportunity to make some interesting arguments when moving for or opposing requests for sanctions based on the inadvertent spoliation of ESI in Maryland state courts.

A. The Purpose and Effect of Current Federal Rule 37(e).

As reflected in the Advisory Committee Notes, current Federal Rule 37(e) was born out of a recognition that the Former Federal Rule, "ha[d] not adequately addressed the serious problems resulting from the continued exponential growth in the volume of [ESI]." FED. R. CIV. P. 37(e), 2015 Ad. Comm. Notes. The Former Federal Rule, like current Maryland Rule 2-433(b), simply stated:

[1] See, e.g., *Peterson v. Evapco, Inc.*, 238 Md. App. 1, 188 A.3d 210, (2018) (affirming entry of default judgment against defendants found to have intentionally destroyed ESI both before and after suit was filed); *Erickson v. Kaplan Higher Ed., LLC*, No. 14-cv-3106-RDB, 2015 WL 6408180, at *6 (D. Md. Oct. 21, 2015) (finding plaintiff acted willfully, though not in bad faith, in running a program she knew would destroy some data on a computer she acknowledged held potentially relevant evidence and recommending the exclusion of certain evidence and a jury instruction to cure the resulting prejudice); *Goodman v. Praxair Services, Inc.*, 632 F. Supp. 2d 494, 522 (D. Md. 2009) (finding a party acted willfully when it destroyed a computer and selectively deleted emails following receipt of a letter threatening litigation and imposing an adverse inference instruction).

[2] A "litigation hold" (sometimes also referred to as a "legal hold") generally refers to a directive by counsel to a client that the ESI of certain individuals be preserved by suspending the automatic or routine deletion of such information by the information technology ("IT") systems on which the designated information resides.

[3] See Michael D. Berman, *The Duty to Preserve ESI and the Spoliation Doctrine in Maryland State Courts*, 45.2 U. Balt. L. F. 129 at 133 (2015); Fed. R. Civ. P. 37(e) (recognizing a duty to preserve ESI "in the anticipation or conduct of litigation.").

[4] *Knight v. Boehringer Ingelheim Pharm., Inc.*, 323 F. Supp. 3d 837, 845 (S.D.W.Va. 2018) (observing the dearth of Fourth Circuit authority interpreting Rule 37(e)(2)'s "stringent" intent requirement, and declining to impose sanctions despite a finding of bad faith, due to the court's inability to conclude that the defendant's failure to retain information was for the intent of depriving plaintiffs of relevant information in the instant lawsuit); *Jenkins v. Woody*, No. 3:15-cv-355, 2017 WL 362475, at *17 (E.D. Va. Jan. 21, 2017) ("Rule 37(e)'s stringent 'intent' requirement does not parallel other discovery standards.").

(INFORMATION) *Continued from page 4*

> *Absent extraordinary circumstances*, a court may not impose sanctions *under these rules* on a party for failing to provide [ESI] lost as a result of the routine, good-faith operation of an electronic information system.

Id; see also MD. RULE 2-433(b) (emphasis added).

Although the Former Federal Rule attempted to establish a "safe harbor" from sanctions for the loss of ESI except in "extraordinary" circumstances, the rule was widely criticized as so imprecise as to gut its effectiveness.[5] Nowhere did the Former Federal Rule define or provide any guidance as to what constituted an "extraordinary" situation. In the absence of clear guidance in the text of the Former Federal Rule, some courts looked to the 2006 Advisory Committee Notes, which explained that "'good faith' in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent loss of information . . . [as] one aspect of what is often called a 'litigation hold.'"[6] Based on this note, some courts concluded that any failure to implement a timely and effective litigation hold was, by definition, bad faith and, therefore, an "extraordinary circumstance" justifying sanctions.[7] Under this reading of the Former Federal Rule, the safe harbor became largely illusory as even a negligent deletion of information could open the door to the full panoply of potential sanctions available to a federal court.[8]

Furthermore, the phrase "under these rules" led many federal courts to conclude that sanctions under the Former Federal Rule could only be imposed for spoliation events that occurred after the lawsuit was filed.[9] Thus, the Former Federal Rule provided no guidance as to whether and when a pre-suit duty to preserve ESI arose, and simply did not authorize sanctions for instances of pre-suit spoliation.[10] Although the courts' power to sanction this conduct was not expressly based on the Federal Rules, courts looked to both these rules and state common law principles for guidance as to a pre-suit preservation duty and the availability of sanctions or other curative measures for a breach of that duty, which they then imposed via their inherent powers.[11]

As a result of the inadequacies of the Former Federal Rule:

> Federal circuits ha[d] established significantly different standards for imposing sanctions and curative measures on parties that fail to preserve [ESI]. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions, if a court finds they did not do enough.

FED. R. CIV. P. 37(e), 2015 Ad. Comm. Note.

To address these concerns, current Federal Rule 37(e)[12] specifically recognizes a duty to preserve ESI "in the anticipation or conduct" of litigation, so as to clearly apply to instances of both pre-suit and in-suit spoliation. FED. R. CIV. P. 37(e). In resolving a split among the federal circuits, the current Federal Rule expressly rejects the imposition of severe sanctions in the form of adverse inference instructions, dismissal, or default for a merely negligent or grossly negligent loss of ESI. FED. R. CIV. P. 37(e)(2). As the Advisory Committee noted:

> This subdivision authorizes courts to use specified and very severe measures to address and deter failures to preserve [ESI], but only on a finding that the party that lost the information acted with the intent to deprive the other party of the information's use in litigation. . . . It rejects cases such as *Residential Funding Corp. v. De George Financial Corp.*, 306 F.3d 99 (2d Cir. 2002) that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.

FED. R. CIV. P. 37(e)(2), 2015 Ad. Comm. Note. The Advisory Committee reasoned:

> Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. *Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have.* The better rule for the negligent or grossly negligent loss of electronically stored information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction.

Fed. R. Civ. P. 37(e), Ad. Comm. Note (emphasis added). Even under current Federal Rule 37(e)(2), however, courts have held that "intent to deprive" may be proven by circumstantial evidence.[13]

B. Maryland Rule 2-433(b)

Despite the 2015 revisions to Federal Rule 37(e), Maryland Rule 2-433(b) continues to track the Former Federal Rule. Maryland's continued adherence to the Former Federal Rule is surprising given that Maryland courts traditionally have looked to the federal courts for guidance in addressing spoliation issues.

As the Maryland Court of Special Appeals recently stated, Maryland courts evaluate the propriety of sanctions for spoliation of ESI

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5 Alexander N. Gross, *A Safe Harbor from Spoliation Sanctions: Can an Amended Federal Rule of Civil Procedure 37(e) Protect Producing Parties?* 2015 Colum. Bus. L. Rev. 705, 718 (2015).

6 FED. RULE CIV. P. 37(a) (2006 Ad. Comm. Note)

7 Gross, *supra*., at 719.

8 *See*, *e.g.*, *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002) ("The sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence."); *Rogers v. T.J. Samson Cmty. Hosp.*, 276 F.3d 228, 232 (6th Cir. 2002) ("When a plaintiff is unable to prove an essential element of her case due to the negligent loss or destruction of evidence by an opposing party, . . . it is proper for the trial court to create a rebuttable presumption that establishes the missing elements of the plaintiff's case that only could have been proved by the availability of the missing evidence.").

9 Paul W. Grimm, *Proportionality in the Post-Hoc Analysis of Pre-litigation Decisions*, 37 U. Balt. L. Rev. 381, 397, 398, n.75 (2008) ("[T]he Rules apply 'in' the courts, not to matters that predate initiation of litigation.") (citing cases).

10 *Id.*

11 *Id.* at 399-402.

12 The Advisory Committee notes, however, that, "Most court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve." FED. RULE CIV. P. 37(a) (2015 Ad. Comm. Note). *See Alabama Aircraft Indus.*, *Inc. v. Boeing Co.*, 319 F.R.D. 730, 740-41 (N.D. Ala. 2017), for an analysis of the pre-litigation duty to preserve under current Federal Rule 37(e).

13 *See Alabama Aircraft Indus. Inc.*, 319 F.R.D. at 746 (setting forth factors which constitute circumstantial evidence of bad faith).

14 *Klupt* involved a plaintiff's deliberate destruction with a hammer of audiotapes containing conversations he had with the Appellees. 126 Md. App. at 199, 728 A.2d at 737.

(INFORMATION) *Continued from page 5*

using four factors:

(1) An act of destruction;

(2) Discoverability of the evidence;

(3) An intent to destroy evidence; and

(4) Occurrence of an act at a time after suit has been filed or, if before, at a time when the filing is fairly perceived as imminent.

Peterson v. Evapco, Inc., 238 Md. App. 1, 51, 188 A.3d 210, 240 (2018) (citing Klupt v. Krongard, 126 Md. App. 179, 199, 728 A.2d 727, 737 (1999)). This four-part test, as initially adopted in *Klupt*, is derived from a decision of the Maryland federal district court's decision in *White v. Office of the Public Defender for the State of Maryland*, 170 F.R.D. 138 (D. Md. 1997). *Klupt*, 126 Md. App. at 199, 728 A.2d at 737 (citing *White*, 170 F.R.D. at 147-48).

In the recent *Peterson* decision, the Maryland Court of Special Appeals affirmed the circuit court's entry of default as a sanction for the defendants' deliberate spoliation of ESI. Both in anticipation of and during the conduct of the suit, the defendants deleted hundreds of emails from multiple accounts, as well as bank records and other discoverable documents from their personal laptops and a home desktop. *Peterson*, 238 Md. App. at 20-23, 188 A.3d at 221-23. Recognizing that, "[b]oth Maryland's discovery rules and the courts' inherent authority to manage the discovery process 'permit sanctions for the destruction of evidence,'" the Court found that the plaintiff "proved all four prongs of the test adopted in *Klupt*." *Id*, 238 Md. App. at 51, 57, 188 A.3d at 239, 243. As to the element of "intent to destroy evidence" the Court found "ample evidence to support the circuit court's finding that [defendants] intentionally destroyed relevant evidence," and held that the lower court "did not abuse its discretion by entering judgment in default against [them]." *Id.*, 238 Md. App. at 56, 188 A.3d at 242.

Although the recent decision in *Peterson*, as well as the *Klupt* decision on which it relies [14], arose in the context of the deliberate destruction of evidence, Maryland courts applying the Klupt standard have held that, "*intent* to destroy isn't a prerequisite to a finding of spoliation — courts often look to *fault*. . . . 'sometimes even an inadvertent, albeit negligent loss of evidence will justify dismissal because of the resulting unfairness.'" *Cumberland Ins. Group v. Delmarva Power*, 226 Md. App. 691, 702-03, 103 A.3d 1183, 1190 (2016) (quoting *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583 (4th Cir. 2001)) (emphasis in original). Consistent with federal authority that pre-dates the 2015 revisions to Federal Rule 37(e), therefore, *Cumberland* and other Maryland decisions can be read to support the imposition of even the most severe sanctions for a merely negligent destruction of ESI where the loss of such information is highly prejudicial. *Id*.[15]

See photos from past events at mddefensecounsel.org/gallery

Nevertheless, there are several important takeaways regarding the current state of Maryland law on the unintentional spoliation of ESI.

- The leading Maryland decisions on spoliation in the civil context are from the Maryland Court of Special Appeals. The Maryland Court of Appeals last addressed spoliation in the context of a criminal case, Cost v. State, 417 Md. 360 (2010). The high court, however, has not addressed spoliation of evidence in the context of a civil action except in passing,[16] and has never opined as to the proper interpretation and scope of current Maryland Rule 2-433(b) with respect to the destruction of ESI.
- Although the Court of Special Appeals' 2018 decision in Peterson relied heavily on its prior decision in *Cumberland*, *Peterson* did not involve (and, therefore, does not address) the negligent destruction of ESI or the propriety of imposing sanctions for the unintentional spoliation of evidence, matters at issue in *Cumberland*.
- In the absence of guidance from the Maryland Court of Appeals, the Court of Special Appeals consistently has looked to federal authority for guidance.
- Nevertheless, the Maryland Court of Appeals has not undertaken to revise Maryland Rule 2-433(b) to reflect the 2015 revisions to Federal Rule 37(e).

C. Addressing Inadvertent Spoliation in Maryland State Courts.

These considerations regarding the current state of Maryland law present an opportunity for litigants in Maryland's state courts to make and preserve some interesting arguments when moving for or opposing sanctions for the unintentional destruction of ESI. Assuming, for the sake of analysis, that a party's failure to preserve ESI was, in fact, negligent; the ESI cannot be otherwise recovered from other sources; and its loss is prejudicial to the other party — all important factors that should be carefully evaluated in the context of moving for or opposing a motion for sanctions in either state or federal court — such potential arguments may include:

- **For the Movant:** In moving for sanctions, one might argue that Maryland courts recognize that unintentional, albeit negligent spoliation of evidence can give rise to

[15] *See also*, *The Duty to Preserve ESI (Its Trigger, Scope and Limit) & The Spoliation Doctrine in Maryland State Courts*, 45.2 U. of Balt. Law Rev. 129, 158 (2015) ("The jury instruction quoted in Cost — and other Maryland decisions such as *Miller* and *Anderson* — support spoliation sanctions for negligent and unintentional destruction of information, the loss of which is prejudicial.") (citing *Cost v. State*, 417 Md. 360, 10 A.3d 184 (2010); *Anderson v. Litzenberg*, 115 Md. App. 549, 694 A.2d 150 (1997); *Miller v. Montgomery County*, 64 Md. App. 202, 494 A.2d 761 (1985); cert. denied, 304 Md. 299 (1985)).

[16] *E.g.*, *Larsen v. Romeo*, 254 Md. 220, 228, 255 A.2d 387, 391 (1969) ("As a general rule, an inference arises from the suppression or destruction of evidence by a litigant that such evidence would be unfavorable to his case. However, this inference does not amount to substantive proof and cannot take the place of proof of a fact necessary to the other party's case.") (citing *Maszczenski v. Myers*, 212 Md. 346, 129 A.2d 109 (1957)).

(INFORMATION) *Continued from page 6*

even the most severe of sanctions. Cumberland, 226 Md. App. at 705, 103 A.3d at 1191; *see also* fn. 15 *infra*.. This is consistent with the view adopted by many federal courts when interpreting and applying the Former Federal Rule, which mirrors current Maryland Rule 2-433(b). Had the Maryland Court of Appeals thought it wise to revise Maryland Rule 2-433(b) in light of the 2015 revision to current Federal Rule 37(e), it could have done so, but has not.

- **Opposing Sanctions:** In opposing the imposition of sanctions in Maryland state court, one might point out that the Maryland Court of Appeals has never addressed the inadvertent spoliation of ESI under either Maryland Rule 2-433(b) or the court's inherent power to manage the discovery process in a civil case. The Court of Special Appeals' decision in *Cumberland* did not involve the loss of ESI, but, rather, the unintentional spoliation of a fire scene that fatally prejudiced the defense. Although the *Peterson* decision relies on *Cumberland*, *Peterson* did not involve (and, therefore, does not address) the negligent destruction of ESI. Even under the Former Federal Rule, there was a split among the federal circuits on the issue of whether a merely negligent spoliation of ESI could give rise to severe sanctions in the form adverse inference instructions, dismissal, or default.[17] In resolving that circuit split, the 2015 revisions to Federal Rule 37(e) rejected the imposition of severe sanctions for an unintentional destruction of ESI as contrary to sound public policy and the proper administration of justice. To permit such sanctions would embrace a flawed interpretation of Maryland Rule 2-433(b) that has since been rejected by the federal judiciary and should not now be resurrected in the Maryland state courts.

[17] *Compare n. 7 supra with Aramburu v. The Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997); *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997); *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 334 (3d Cir. 1995); *Vick v. Texas Employment Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975); s*ee also Med. Lab. Mgmt. Consultants v. Am. Broad. Co.*, 306 F.3d 806, 824 (9th Cir. 2002); *Jackson v. Harvard University*, 900 F.2d 464, 469 (1st Cir. 1990).

Conclusion

Although making these arguments may yield creative briefs, there is a real need to clarify Maryland law regarding the inadvertent spoliation of ESI. Whether such clarification will come in the form of a revision to Maryland Rule 2-433(b) or in the context of an opinion by the Court of Appeals remains to be seen.

Disclaimer: This is for general information and is not intended to be and should not be taken as legal advice for any particular matter. It is not intended to and does not create any attorney-client relationship. The opinions expressed and any legal positions asserted in the article are those of the authors and do not necessarily reflect the opinions or positions of Miles & Stockbridge, its other lawyers or the Maryland Defense Counsel, Inc.

John E. McCann, Jr. is a principal at Miles & Stockbridge. He focuses his practice on complex commercial litigation, including antitrust litigation, software licensing disputes, patent and trademark litigation, commercial real estate disputes, dealer termination litigation and other forms of general contract and business tort disputes. Mr. McCann is ranked as an industry leader in general commercial litigation (Maryland) in the 2019 edition of Chambers and Partners USA.

Megan J. McGinnis is an associate at Miles & Stockbridge. She represents businesses and individuals in commercial litigation, including matters related to misappropriation of trade secrets, unfair competition, fraud, corporate and partnership breakups, breach of fiduciary duty, distribution and franchise disputes, commercial contract disputes, and other business torts. She also has defended physicians, other healthcare providers, and hospitals in medical malpractice actions.

Upcoming events will be announced at MDdefensecounsel.org.

Editors' Corner

The Editors are proud to publish this edition of *The Defense Line*. Once again, a huge shout out goes to you, members of the MDC, who answered the call for articles, advice, resources, and spotlights. The articles in this edition deal with a variety of legal issues and are reflective of the diversity of practice areas within our membership. A big thanks to our contributors for this edition: **John E. McCann, Jr.** and **Megan J. McGinnis** of Miles and Stockbridge, **Steven J. Willner** of Wilson Elser, **Patricia McHugh Lambert** and **Emily Devan** of Pessin Katz Law, and to the MDC Committee members, especially those featured in this publication, who work tirelessly to support the MDC and its interests. This has been a big year for the MDC under the leadership of John Sly and we are excited for what's to come following the election of the new Executive Board.

The Editors sincerely hope the members of the MDC enjoy this edition of *The Defense Line*. If you have any comments, suggestions, or would like to submit an article or spotlight for publication for a future edition, please contact one of the editors below.

Sheryl A. Tirocchi
Chair, Publications Committee
GodwinTirocchi, LLC
(410) 418-8778

Caroline E. Payton
Vice-Chair, Publications Committee
The Law Offices of Frank F. Daily, P.A.
(410) 584-9443

Legislative Summary

John Stierhoff & John T. Sly

This year's session of the Maryland Legislature was busy with numerous bills impacting our clients and our practices. It also saw the passing of Michael Busch, the longest serving Speaker of the House of Delegates in Maryland's history. Recently, a compromise candidate was chosen to be Speaker, Adrienne Jones.

Bills impacting workers' compensation, medical malpractice, insurance disclosure and damages caps were all considered by the Legislature. MDC was involved throughout. In fact, MDC successfully worked to craft a compromise bill recently signed by Governor Hogan to preserve protections against professional witnesses testifying on the standard of care in medical malpractice cases. MDC was proud to be part of the process.

With respect to the Administration of the Courts, two bills passed. Senate Bill 205 increases the number of resident judges of the circuit court by adding one additional judgeship in Washington County. The bill also creates one additional District Court judgeship in District 4 (which must be appointed from St. Mary's County),one additional District Court judgeship in District 7 (Anne Arundel County), and two additional District Court judgeships in District 5 (Prince George's County) and District 8 (Baltimore County). The fiscal 2020 budget includes funding of $2.2 million for this purpose. Additionally, Senate Bill 236 increases, from more than six months to more than one year, the length of time of a criminal sentence or potential sentence that disqualifies an individual from jury service.

Qualified experts in health care malpractice actions was the subject of intense negotiations after legislation failed in 2018. The General Assembly passed Senate Bill 773, which makes multiple changes related to the qualification of an expert in a health care malpractice action. The bill (1) defines "professional activities" to mean all activities arising from or related to the health care profession; (2) increases, from 20% to 25%, the limit on the amount of an expert's professional activities that may directly involve testimony in personal injury claims during the 12 months immediately before the date when the claim was first filed; and (3) specifies that once a health care provider meets the requirements to qualify as an expert, the health care provider must be deemed to be a qualified expert during the pendency of the claim. The bill also establishes that, unless there is a showing of bad faith, if a court dismisses a claim or action because a qualified expert failed to comply with the bill's requirements, a party may refile the same claim or action before the later of (1) the expiration of the applicable period of limitation; or (2) 120 days after the date of the dismissal. However, a claim may be refiled only once. The bill's provisions apply to any proceeding filed on or after the bill's October 1, 2019 effective date.

Under the provisions of Senate Bill 101, prelitigation discovery applies to the applicable limits of coverage in any automobile, homeowner's, or renter's insurance policy. The bill expands the documentation a claimant must submit in order to receive this information by requiring a claimant to also submit a letter from an attorney admitted to practice law in the State certifying that (1) the attorney has made reasonable efforts to investigate the underlying facts of the claim and (2) based on the attorney's investigation, the attorney reasonably believes that the claim is not frivolous. The bill makes corresponding changes to other statutory provisions. The bill applies prospectively to claims filed with an insurer on or after the bill's October 1, 2019 effective date.

The Maryland No-Fault Birth Injury Fund was again introduced in 2019 (Senate Bill 896 and House Bill 1320), but failed to receive a vote in either chamber.

Initially as an amendment to the state budget, and subsequently in a late filed bill, the backlog of civil asbestos cases was discussed at length during the final weeks of the session. Senate Bill 1049, which ultimately failed, would have altered procedures for the management and disposition of asbestos cases in the Circuit Court for Baltimore City. As passed by the Senate, the bill would have established the Office of Asbestos Case Mediation and Resolution in the Executive Department, to be headed by a director appointed by the Governor with the advice and consent of the Senate. The bill would have required the director to perform specific functions and would have required the court to refer asbestos cases to the office for mediation.

Priority for mediation of an asbestos case would have been given to cases involving serious illness, including mesothelioma, lung cancer, and any other type of cancer. All parties referred to the office for mediation would have been required to participate in the mediation process, subject to a mesothelioma plaintiff's right to elect to forego mediation. For those parties unable to reach an agreement through the mediation process, the director would have been required to notify the court of the conclusion of mediation, and the court would have been required to proceed with the asbestos case in accordance with specified procedures. The court would have been prohibited from proceeding with an asbestos case referred to the office for mediation before receiving notice of the election to forego mediation by a mesothelioma plaintiff or the conclusion of mediation.

Senate Bill 1049, as amended and subsequently passed by the House of Delegates, would have established the Joint Committee on Asbestos Litigation Oversight. The committee would have been comprised of legislators, representatives of relevant legal organizations, and retired judges. The committee would have been required to (1) make recommendations regarding increasing the use of mediation in asbestos cases; (2) examine and evaluate the effect of all laws, including court rules, on asbestos litigation in the State; (3) consider information provided by the Court of Appeals and representatives of litigants concerning asbestos litigation; (4) examine and consider consolidating cases by job site location or disease type; and (5) study the establishment of a separate asbestos court as used in other states.

Under the bill as amended by the House, the Court of Appeals would have been required to submit to the committee annual reports containing specified information regarding, among other things, docket statistics, evaluation of judicial resources, and an assessment of ongoing efforts to manage the asbestos docket. The bill also would have expressed the intent of the General Assembly that (1) the Judiciary include in its fiscal 2021 budget submission the resources necessary to fund special masters for the asbestos docket and (2) the General Assembly ensure that sufficient funding is available to fund

any special master positions provided by the Judiciary for the asbestos docket.

It is anticipated that the House Judiciary Committee will have briefings on this issue during the legislative interim.

A number of proposals amending the Workers' compensation law were introduced, but the majority were defeated in the Senate and House committees.

House Bill 595 was passed and establishes additional occupational disease presumptions for specified public safety employees who contract bladder cancer or kidney or renal cell cancer that is caused by contact with a toxic substance encountered in the line of duty. These additional occupational disease presumptions apply only to (1) volunteer and paid firefighters; (2) volunteer and paid firefighting instructors; (3) volunteer and paid rescue squad members; (4) volunteer and paid advanced life support unit members; and (5) fire marshals employed by an airport authority, a county, a fire control district, a municipality, or the State. Further, the presumptions only apply when the covered employee or volunteer meets the same eligibility criteria established for the existing cancer or leukemia occupational disease presumption.

Senate Bill 646 and House Bill 604 both passed, and alter the eligibility criteria for a firefighter, firefighting instructor, rescue squad member, advanced life support unit member, or sworn member of the Office of the State Fire Marshal to qualify for a cancer or leukemia occupational disease presumption under workers' compensation law.

House Bill 795 (passed) alters the definition of "public safety employee" to include Baltimore City deputy sheriffs, thereby making these deputy sheriffs eligible for enhanced workers' compensation benefits for permanent partial disabilities. The bill applies only prospectively and does not apply to claims arising before October 1, 2019.

Finally, Senate Bill 62 passed, and requires the Director of the Uninsured Employers' Fund to report, on or before October 1, 2019, to the Senate Finance Committee, the House Economic Matters Committee, and the Joint Committee on Workers' Compensation Benefit and Insurance Oversight on the solvency of the fund and whether the General Assembly should adjust or provide authority to adjust the assessment that supports the fund. The report must include specified information about (1) the solvency of the fund, including a review of solvency from October 1, 2012, through August 31, 2019; (2) payments for compensation made from the fund from September 1, 2017, through August 31, 2019; and (3) the fund's prospective liabilities, including a discussion of Bethlehem Steel Corporation hearing loss claims for compensation.

The following reflects the status of relevant bills. MDC thanks John Stierhoff and Angel Lavin for their kind assistance in developing this chart.

Maryland Defense Counsel — 2019 Regular Session Maryland General Assembly

(As of May 14, 2019)

Bill Number (Cross File)	Title	Primary Sponsor	Status	History Committee(s) and Heard Dates
HB 257	Civil Actions - Immunities - Donated Food	Del. R. Lewis	Withdrawn	Judiciary Withdrawn
HB 317 (SB 271)	Maryland Commission on Civil Rights - Civil Penalties	Del. Cullison	First Reading Judicial Proceedings	Health and Government Operations Heard: 2/12/2019 - 1:00 p.m. Favorable w/Amendments Report – HGO Floor Amendment (Del. Adams) Adopted Passed House Amended (97 – 39) Judicial Proceedings
HB 364 (SB 909)	Health Care Practitioners - Medical Examinations on Anesthetized or Unconscious Patients	Del. Bagnall	Passed Enrolled	Health and Government Operations Heard: 2/12/2019 - 1:00 p.m. Favorable with Amendments Report – HGO Passed House Amended (135 – 0) Education, Health, and Environmental Affairs Favorable w/Amendments Report – EHE Passed Senate Amended (45 – 0) House Concurs w/Senate Amendments Passed Enrolled
HB 412 (SB 768)	Civil Actions - Strategic Lawsuits Against Public Participation	Del. Rosenberg	Withdrawn	Judiciary Withdrawn
HB 425	Civil Actions - Unfair, Abusive, or Deceptive Trade Practices by Mortgage Servicer - Statute of Limitations	Del. Sydnor	Returned Passed	Judiciary Heard: 2/13/2019 - 1:00 p.m. Favorable w/Amendments Report – JUD Motion to Reconsider Committee Amendment Committee Amendment Withdrawn Substitute Committee Amendment Adopted Passed House Amended (122 – 9) Judicial Proceedings Heard: 3/28/2019 – 12:00 p.m. Favorable Report – JPR Passed Senate (33 – 13) Returned Passed
HB 452 (SB 429)	Procurement Contracts - Architectural and Engineering Services - Indemnity Clauses	Del. Krebs	Withdrawn	Health and Government Operations Withdrawn
HB 499 (SB 100)	Civil Actions - Interstate Pipeline Liability Act	Del. Fraser-Hidalgo	Withdrawn	Judiciary Economic Matters Withdrawn
HB 503	Employers of Ex-Offenders - Liability for Negligent Hiring or	Del. Cassilly	Unfavorable Report – ECM	Judiciary

Bill Number (Cross File)	Title	Primary Sponsor	Status	History Committee(s) and Heard Dates
(SB 219)	Inadequate Supervision - Immunity			Canceled: 2/20/2019 - 1:00 p.m. Reassigned to Economic Matters Heard: 2/19/2019 – 1:00 p.m. Unfavorable Report – ECM
HB 508	Alcoholic Beverages - Prohibited Acts - Defense to Prosecution for Sale to Underage Individuals	Del. Brooks	Heard March 26	Economic Matters Heard: 2/22/2019 – 1:00 p.m. Favorable Report – ECM Passed House (136 – 0) Judicial Proceedings 3/26/2019 – 12:00 p.m.
HB 556	Maryland Transit Administration - Limits of Liability	Del. Hornberger	Unfavorable Report – JUD	Judiciary Heard: 2/20/2019 - 1:00 p.m. Unfavorable Report – JUD
HB 676	Campaign Finance – Judges of the Circuit Court	Del. Washington	Heard February 26	Ways and Means 2/26/2019 - 1:00 p.m.
HB 687	Civil Actions - Child Sexual Abuse – Definition and Statute of Limitations (Hidden Predator Act of 2019)	Del. Wilson	Unfavorable Report – JPR	Judiciary Heard: 2/28/2019 - 1:00 p.m. Favorable w/Amendments Report – JUD Special Order Until 3/16 (Del. Wilson) Adopted Passed House Amended (135 – 3) Judicial Proceedings Heard: 3/28/2019 – 12:00 p.m. Unfavorable Report – JPR
HB 713	Jury Duty - Individuals Qualified for Jury Service Living Outside the United States	Del. Rosenberg	Heard March 27	Judiciary Heard: 2/20/2019 - 1:00 p.m. Favorable w/Amendments Report – JUD Passed House Amended (125 – 10) Judicial Proceedings 3/27/2019 – 12:00 p.m.
HB 818 (SB 629)	Access to Maryland Courts Act	Del. Dumais	Heard March 1	Judiciary Canceled: 3/6/2019 - 1:00 p.m. 3/1/2019 – 11:30 a.m.
HB 848 (SB 320)	Courts - Documentary Evidence - Protective Order	Del. McComas	First Reading Judicial Proceedings	Judiciary Heard: 3/1/2019 – 1:00 p.m. Favorable w/Amendments Report – JUD Passed House Amended (135 – 0) Judicial Proceedings
HB 865	Public Schools - Student Misconduct - Parent or Guardian Liability	Del. Long	Heard February 28	Ways and Means 2/28/2019 – 1:00 p.m.
HB 868 (SB 459)	Medical Records - Compulsory Process Requests - Advisory Protocol and Voluntary Training	Del. Barron	Rereferred to Finance	Health and Government Operations Heard: 2/21/2019 – 1:00 p.m. Favorable w/Amendments Report – HGO Passed House Amended (140 – 0) Senate Rules Rereferred to Finance
HB 991	Courts - Prohibited Indemnity and Defense Liability Agreements	Del. Parrott	Withdrawn	Judiciary Withdrawn
HB 1030	Civil Law – Jury Proceedings – Fundamental Rights	Del. Cox	Unfavorable Report – JUD	Judiciary Heard: 2/28/2019 - 1:00 p.m. Unfavorable Report – JUD
HB 1053	Civil Actions - Duty to Render Assistance	Del. Lisanti	Withdrawn	Judiciary Withdrawn
HB 1191 (SB 488)	Baltimore City - Civil Actions - Liability of Toxic Substance Manufacturers	Del. Mosby	Heard March 6 (E&T)	Environment and Transportation 3/6/2019 - 1:00 p.m. Judiciary
HB 1310 (SB 720)	Real Property – Fiber Deployment – Broadband Services	Del. Mautz	First Reading House Rules and Executive Nominations	Rules and Executive Nominations
HB 1320 (SB 869)	Maryland No-Fault Birth Injury Fund	Del. Cullison	First Reading House Rules and Executive Nominations	Rules and Executive Nominations
HB 1323 (SB 784)	Civil Actions - Health Care Malpractice Claims (Life Care Act 2019)	Del. Rosenberg	Heard March 14	Rules and Executive Nominations Judiciary 3/14/2019 – 1:00 p.m.
HB 1334 (SB 525)	Vehicle Manufacturers and Dealers - Violations - Award of Damages	Del. Lisanti	First Reading House Rules and Executive Nominations	Rules and Executive Nominations
SB 100 (HB 499)	Civil Actions - Interstate Pipeline Liability Act	Sen. Zirkin	Withdrawn	Judicial Proceedings Withdrawn
SB 101	Civil Actions - Prelitigation Discovery of Insurance Coverage	Sen. Zirkin	Returned Passed	Judicial Proceedings Heard: 1/30/2019 - 2:00 p.m. Favorable Report – JPR Passed Senate (42 – 2) Judiciary Heard: 3/21/2019 – 1:00 p.m. Favorable Report – JUD Passed House (94 – 43) Returned Passed
SB 102	Courts - Direct Action Against Automobile Insurer	Sen. Zirkin	Heard March 27 (Judiciary)	Judicial Proceedings Heard: 1/30/2019 - 2:00 p.m.

Bill Number (Cross File)	Title	Primary Sponsor	Status	History Committee(s) and Heard Dates
SB 102				Favorable w/Amendments Report – JPR Special Order Until 3/13 (Zirkin) Adopted Passed Senate Amended (30 – 16) Judiciary 3/27/2019 – 1:00 p.m. Economic Matters
SB 219 (HB 503)	Employers of Ex-Offenders - Liability for Negligent Hiring or Inadequate Supervision – Immunity	Sen. Cassilly	Unfavorable Report – JPR	Judicial Proceedings Heard: 2/6/2019 - 12:00 p.m. Unfavorable Report – JPR
SB 246	Circuit Court Judges – Election	Sen. Kramer	Unfavorable Report – JPR	Judicial Proceedings Heard: 2/14/2019 - 12:00 p.m. Unfavorable Report – JPR
SB 271 (HB 317)	Maryland Commission on Civil Rights - Civil Penalties	Sen. Lee	Heard February 14	Judicial Proceedings 2/14/2019 - 12:00 p.m.
SB 320 (HB 848)	Courts - Documentary Evidence - Protective Order	Sen. Cassilly	Heard February 14	Judicial Proceedings 2/14/2019 - 12:00 p.m.
SB 321	Civil Actions - Offers of Judgment	Sen. Cassilly	Heard February 14	Judicial Proceedings 2/14/2019 - 12:00 p.m.
SB 322	Medical Malpractice - Notice of Intent to File Claim	Sen. Cassilly	Heard February 14	Judicial Proceedings 2/14/2019 - 12:00 p.m.
SB 323	Medical Malpractice – Discovery	Sen. Cassilly	Heard February 14	Judicial Proceedings 2/14/2019 - 12:00 p.m.
SB 367	Courts - Prohibited Indemnity and Defense Liability Agreements	Sen. West	Withdrawn	Judicial Proceedings Withdrawn
SB 388	Civil Actions - Liability Insurance - Prohibition on Disclaiming Coverage	Sen. Zirkin	Withdrawn	Finance Judicial Proceedings Withdrawn
SB 429 (HB 452)	Procurement Contracts - Architectural and Engineering Services - Indemnity Clauses	Sen. Gallion	Unfavorable Report – EHE	Education, Health, and Environmental Affairs Heard: 3/5/2019 – 1:00 p.m. Unfavorable Report – EHE
SB 459 (HB 868)	Medical Records - Compulsory Process Requests - Advisory Protocol and Voluntary Training	Sen. Waldstreicher	First Reading House Rules and Executive Nominations	Finance Heard: 2/20/2019 - 1:00 p.m. Favorable w/Amendments Report – FIN Passed Senate Amended (46 – 0) House Rules and Executive Nominations
SB 473	Hate Crimes - Civil Remedy	Sen. Kramer	Unfavorable Report – JPR	Judicial Proceedings Heard: 2/20/2019 - 12:00 p.m.
SB 488 (HB 1191)	Baltimore City - Civil Actions - Liability of Toxic Substance Manufacturers	Sen. Carter	Heard February 28	Judicial Proceedings Canceled: 2/20/2019 - 12:00 p.m. 2/28/2019 - 12:00 p.m.
SB 525 (HB 1334)	Vehicle Manufacturers and Dealers - Violations - Award of Damages	Sen. Hough	Heard March 5	Judicial Proceedings 3/5/2019 - 12:00 p.m.
SB 629 (HB 818)	Access to Maryland Courts Act	Sen. Carter	Heard February 19	Judicial Proceedings 2/19/2019 - 12:00 p.m.
SB 692	Criminal Law - Neighborhood Nuisance - Civil Penalties	Sen. Kramer	Withdrawn	Judicial Proceedings Withdrawn
SB 720 (HB 1310)	Real Property - Eminent Domain - Broadband Services	Sen. Eckardt	Unfavorable Report – JPR	Judicial Proceedings Heard: 2/28/2019 - 12:00 p.m. Unfavorable Report – JPR
SB 768 (HB 412)	Civil Actions - Strategic Lawsuits Against Public Participation	Sen. Smith	Unfavorable Report – JPR	Judicial Proceedings Heard: 2/13/2019 - 12:00 p.m. Unfavorable Report – JPR
SB 773	Health Care Malpractice Qualified Expert - Qualification	Sen. Smith	Approved by the Governor – Chapter 525	Judicial Proceedings Heard: 3/6/2019 - 12:00 p.m. Favorable w/Amendments Report – JPR Passed Senate Amended (44 – 0) House Rules and Executive Nominations Rereferred to Judiciary Heard: 4/5/2019 – 1:00 p.m. Favorable Report – JUD Passed House (135 – 3) Returned Passed Approved by the Governor – Chapter 525
SB 775	Courts - Civil Jury Trials - Amount in Controversy	Sen. Waldstreicher	Heard February 28	Judicial Proceedings 2/28/2019 - 12:00 p.m.
SB 776	Constitutional Amendment - Civil Jury Trials - Amount in Controversy	Sen. Waldstreicher	Heard February 28	Judicial Proceedings 2/28/2019 - 12:00 p.m.
SB 784 (HB 1323)	Civil Actions - Health Care Malpractice Claims (Life Care Act 2019)	Sen. West	Heard March 6	Judicial Proceedings 3/6/2019 - 12:00 p.m.
SB 813	Personal Injury or Wrongful Death - Noneconomic Damages	Sen. Smith	Heard March 6	Judicial Proceedings 3/6/2019 - 12:00 p.m.
SB 869 (HB 1320)	Maryland No-Fault Birth Injury Fund	Sen. Kelley	Heard March 13 (JPR)	Rules Judicial Proceedings

Amendment to Rule 2-231

Gardner M. Duvall and Patrick McKevitt

On May 15, 2019 the Maryland Court of Appeals amended Rule 2-231 to eliminate provisions for defendant class actions. This amendment was proposed by the Rules Committee, and supported by MDC members **Gardner Duvall** and **Patrick McKevitt** at Whiteford Taylor & Preston LLP, and by MDC.

This rule change results directly from a suit in the Circuit Court for Montgomery County concerning the towing of trespassing vehicles. More than 25,000 plaintiffs were joined in a class action against a towing company. After that suit was settled by effectively putting the towing company out of business, the plaintiff class then obtained certification of a defendant class of property owners and managers. One of those defendants was selected for service of process and nominated as class representative.

Over his objection that defendant was appointed class representative, and the defendant class action was certified. That class representative chose James Ulwick at Kramon & Graham as his counsel, and vigorous litigation commenced, followed by a class settlement. Many class members learned for the first time of the suit when notified that they could opt out of a settlement where some of the hundreds of the defendants were faced with a six-figure settlement.

The defendant class action settlement was approved, but some of the members opted to litigate rather than settle. There was another round of settlement negotiations (all mediated by Judge James Eyler, Ret'd) for tows to which a limitations defense was asserted. Jim Ulwick approached the Rules Committee to propose an amendment to Rule 2-231 to permit a discretionary interlocutory appeal of class certification rulings.

The Rules Committee did not recommend the proposed interlocutory appeal, for reasons concerning the relation between the Maryland Rules and appellate jurisdiction. The Rules Committee did, however, recommend revising Rule 2-231 to eliminate the possibility of defendant class actions. Whiteford Taylor supported the rule change, because of the inherent unfairness of denying defendants notice, and of compelling an unwilling defendant to undertake the representation of others. Furthermore, existing rules for consolidation and modern case management techniques obviate the need for defendant class actions. MDC joined the position submitted by Whiteford Taylor. With little discussion a large majority of the Court of Appeals accepted the recommendation of the Rules Committee, with prospective application.

Gardner Duvall is a partner at Whiteford Taylor & Preston, LLP, the head of the Products Liability & Environmental Exposures practice group there, and a Past President of MDC.

Patrick McKevitt is an associate at Whiteford Taylor & Preston, LLP. His practice focuses on construction litigation, business litigation, insurance defense and coverage disputes, products liability defense, and class action defense.

Bill Number (Cross File)	Title	Primary Sponsor	Status	History Committee(s) and Heard Dates
SB 869 (HB 1320)				3/13/2019 - 12:00 p.m. Finance
SB 909 (HB 364)	Health Care Practitioners - Medical Examinations on Anesthetized or Unconscious Patients	Sen. Feldman	Approved by the Governor – Chapter 425	Education, Health, and Environmental Affairs Heard: 3/13/2019 - 1:00 p.m. Favorable w/Amendments Report – EHE Passed Senate Amended (46 – 0) Health and Government Operations Heard: 3/26/2019 – 1:00 p.m. Favorable w/Amendments Report – HGO Passed House Amended (136 – 0) Senate Concurs w/House Amendments Passed Enrolled Approved by the Governor – Chapter 425
SB 968	Circuit Court Judges - Selection and Tenure	Sen. West	First Reading Senate Rules	Rules
SB 1034	Civil Actions - Family Caregiver Reimbursement	Sen. Klausmeier	Heard March 21	Judicial Proceedings 3/21/2019 – 12:00 p.m.
SB 1049	Civil Actions - Office of Asbestos Case Mediation and Resolution	Sen. Waldstreicher	Passed House Amended (96 – 36)	Judicial Proceedings Heard: 3/27/2019 - 12:00 p.m. Favorable w/Amendments Report – JPR Passed Senate Amended (44 – 0) House Rules and Executive Nominations Rereferred to Judiciary Heard: 4/5/2019 – 1:00 p.m. Favorable w/Amendments Report – JUD Passed House Amended (96 – 36)

Governor's Executive Order

Excerpt from the May 24, 2019 Issue of *Maryland Register*

The Governor

EXECUTIVE ORDER 01.01.2019.05

(Rescinds Executive Order 01.01.2015.09)
Judicial Nominating Commissions

WHEREAS, The appointment of highly qualified persons to the appellate and trial courts of the State of Maryland is of paramount importance to the people of the State;

WHEREAS, The process from which a judicial appointment is made by the Governor must be respected, be free from political influence, and be beyond reproach;

WHEREAS, The appointment of persons to the judiciary from a diversity of backgrounds enhances the quality of justice dispensed by the State's courts and encourages respect for the law and the courts;

WHEREAS, By Executive Order 01.01.1974.23, the Governor of the State of Maryland established Judicial Nominating Commissions for the purpose of recommending to the Governor the names of persons for appointment to the appellate and trial courts of Maryland, and provided for the composition and general functions and procedures of the Judicial Nominating Commissions; and

WHEREAS, The interests of the people and the State of Maryland will be best served by the continued existence of Judicial Nominating Commissions;

NOW, THEREFORE, I, LAWRENCE J. HOGAN, JR., GOVERNOR OF THE STATE OF MARYLAND, BY VIRTUE OF THE AUTHORITY VESTED IN ME BY THE CONSTITUTION AND LAWS OF MARYLAND, HEREBY RESCIND EXECUTIVE ORDER 01.01.2015.09 AND PROCLAIM THE FOLLOWING EXECUTIVE ORDER, EFFECTIVE IMMEDIATELY:

A. In this Executive Order, the following words have the meanings indicated:

(1) "Appellate Court" means the Court of Appeals of Maryland or the Court of Special Appeals of Maryland.

(2) "County" means a county of the State or Baltimore City.

(3) "Immediate family" includes a spouse, child, sibling, parent, grandparent, grandchild, stepparent, stepchild, step-sibling, or any adopted relative.

(4) "Trial Court" means the District Court of Maryland or the Circuit Court for a county.

B. Appellate Courts Judicial Nominating Commission.

(1) Creation and Composition.

a. The Appellate Courts Judicial Nominating Commission is hereby established as part of the Executive Department. It consists of seventeen persons chosen as follows:

i. Twelve persons appointed by the Governor; and

ii. Five members of the Maryland State Bar Association appointed by the Governor from 10 such persons submitted by the Association president within 30 days of the date of this Executive Order.

b. No more than one lawyer from the same firm or legal office may serve on the Appellate Courts Judicial Nominating Commission at the same time.

c. No person may serve on the Appellate Courts Judicial Nominating Commission while simultaneously serving on a Trial Courts Judicial Nominating Commission.

d. No person may serve on the Appellate Courts Judicial Nominating Commission who:

i. Holds an elected office in local, State, or federal government;

ii. Is an employee of the Office of the Governor;

iii. Hears cases as an active or senior member of the State or federal judiciary; or

iv. Holds an office in a political party.

e. In submitting persons for appointment, the president of the Maryland State Bar Association shall give appropriate consideration to the racial, ethnic, gender, and geographic diversity of Maryland.

f. If the president of the Maryland State Bar Association submits fewer than 10 persons for appointment the Association's appointments shall be decreased by the number not submitted and the Governor shall make the appointments.

g. If a vacancy occurs on the Appellate Courts Judicial Nominating Commission by reason of the death, resignation, removal, or disqualification, a successor will be appointed by the Governor.

(2) The Chair of the Appellate Courts Judicial Nominating Commission will be designated by the Governor.

(3) Terms.

a. The terms of the members of the Appellate Courts Judicial Nominating Commission shall extend to the date of the qualification of the Governor at the next quadrennial election.

b. At the end of a term, a member continues to serve until a successor is appointed and qualifies.

c. If the Appellate Courts Judicial Nominating Commission meets on two or more occasions during any calendar year, and if, during that year, a member fails to attend at least half of the meetings in which that member is not otherwise disqualified from participating, the member may be removed by the Governor.

(4) An Appellate Courts Judicial Nominating Commission member shall not be appointed to an Appellate Court during the term for which the member was appointed.

C. Trial Courts Judicial Nominating Commissions.

(1) Creation and Composition.

a. A Trial Courts Judicial Nominating Commission is hereby established as part of the Executive Department for each of the Commission Districts set forth below:

i. Commission District 1 — Somerset, Wicomico, and Worcester Counties;

ii. Commission District 2 — Cecil, Kent, and Queen Anne's Counties;

iii. Commission District 3 — Baltimore County;

iv. Commission District 4 — Harford County;

v. Commission District 5 — Allegany and Garrett Counties;

vi. Commission District 6 — Washington County;

vii. Commission District 7 — Anne Arundel County;

viii. Commission District 8 — Carroll County;

ix. Commission District 9 — Howard County;

x. Commission District 10 — Frederick County;

xi. Commission District 11 — Montgomery County;

xii. Commission District 12 — Calvert and St. Mary's Counties;

xiii. Commission District 13 — Prince George's County;

xiv. Commission District 14 — Baltimore City;

xv. Commission District 15 — Charles County; and

xvi. Commission District 16 — Caroline, Dorchester, and Talbot Counties.

b. Each Trial Courts Judicial Nominating Commission shall consist of thirteen persons chosen as follows:

i. Nine persons appointed by the Governor; and

ii. Four members of the Bar Associations for the counties for which the Trial Courts Nominating Commission is responsible, appointed by the Governor from seven such persons submitted collectively by the presidents of those Associations within 30 days of the date of this Executive Order.

c. No more than one lawyer from the same firm or legal office may serve on the same Trial Court Judicial Nominating Commission at the same time.

d. No person may serve on a Trial Courts Judicial Nominating Commission while simultaneously serving on the Appellate Courts Judicial Nominating Commission or another Trial Courts Judicial Nominating Commission.

e. No person may serve on a Trial Courts Judicial Nominating Commission who:

i. Holds an elected office in local, State, or federal government;

ii. Is an employee of the Office of the Governor;

iii. Hears cases as an active or senior member of the State or federal judiciary; or

iv. Holds an office in a political party.

f. In selecting persons to submit for appointment, the presidents of the Bar Associations shall consult with the presidents of other bar organizations that may operate in the Commission District.

g. In submitting persons for appointment, the presidents of the Bar Associations shall give appropriate consideration to the racial, ethnic, and gender diversity of Maryland.

h. If the presidents of the Bar Associations submit fewer than seven persons for appointment to a Trial Courts Judicial Nominating Commission, the Associations' appointments shall be decreased by the number not submitted and the Governor shall make the appointments.

(2) The Chair of each Trial Courts Judicial Nominating Commission will be designated by the Governor.

(3) Terms.

a. The terms of the members of each Trial Courts Judicial Nominating Commission shall extend to the date of the qualification of the Governor at the next quadrennial election.

b. At the end of a term, a member continues to serve until a successor is appointed and qualifies.

c. If a Trial Courts Judicial Nominating Commission meets on two or more occasions during any calendar year, and if, during that year, a member fails to attend at least half of the meetings in which that member is not otherwise disqualified from participating, the member may be removed by the Governor.

(4) If a vacancy occurs on a Trial Courts Judicial Nominating Commission by reason of the death, resignation, removal, or disqualification, a successor will be appointed by the Governor.

(5) A Trial Courts Judicial Nominating Commission member shall not be appointed to a Trial Court during the term for which the member was appointed.

D. The chair of each Commission may request the assistance of the Administrative Office of the Courts in providing:

(1) Training to Commission members;

(2) Notification of when a vacancy occurs or is about to occur;

(3) Recommendations as to application requirements and forms; and

(4) Any other assistance the chair deems appropriate.

E. For each vacancy, the Governor shall:

(1) Reappoint the incumbent judge;

(2) Appoint an applicant who was recommended for a prior vacancy in the same position, if the appointment for the prior vacancy was made within two years of the occurrence of the current vacancy; or

(3) Accept applications from new candidates for the vacancy.

F. Commission Responsibilities and Procedures.

(1) If applications are accepted from new candidates for the vacancy, a Commission shall:

a. Advertise the vacancy;

b. Encourage qualified candidates from a diversity of backgrounds to apply for judicial appointment;

c. Notify the Maryland State Bar Association and other appropriate bar associations of the vacancy and request recommendations from them;

d. Seek recommendations from interested citizens and from its own members; and

e. Set a closing date for submission of applications.

(2) If there are fewer than three applicants for a vacancy, the vacancy shall be automatically re-advertised to new candidates. If, after re-advertisement, there remain fewer than three applicants, then a Commission may proceed with evaluating the applicants.

(3) A Commission shall place notices in at least one newspaper read by members of the general public identifying the applicants and inviting written and signed comments to the Commission regarding the applicants.

(4) A Commission shall review all applications submitted and evaluate each applicant. In the course of its evaluation, the Commission may:

a. Seek information beyond that contained in the materials submitted by an applicant;

b. Obtain pertinent information from the Attorney Grievance Commission, judges, courts, personal references given by the applicant, criminal justice agencies, knowledgeable persons known to Commission members, or other sources; and

c. Request criminal history record information from a criminal justice agency, including the Central Repository, for the purpose of evaluating an applicant.

(5) A Commission shall interview each applicant:

a. In person, or

b. Via video teleconference, if:

i. Extraordinary circumstances prevent the applicant from appearing in person; and

ii. The Governor gives prior approval.

(6) A Commission shall consider the applicant's integrity, maturity, temperament, diligence, legal knowledge, intellectual ability, professional experience, community service, and any other qualifications that the Commission deems important for judicial service, as well as the importance of having a diverse judiciary.

(7) In evaluating applications to fill a vacancy on a Trial Court, the Trial Courts Judicial Nominating Commission shall give the same consideration to eligible applicants regardless of whether an applicant's legal practice is located outside of the county in which the applicant resides.

(8) A Commission member is disqualified from participating in the consideration, evaluation, or recommending of applicants for a vacancy in which an applicant is:

a. In the member's immediate family; or

b. A lawyer in the same firm or legal office as the member.

(9) A voting session of a Commission shall be attended by at least three-fifths of the members who are qualified to participate.

(10) No applicant may be recommended to the Governor for appointment unless by vote of a majority of members present and qualified to participate at a voting session of the appropriate Commission, as taken by secret ballot. A Commission may conduct more than one round of balloting during its deliberations.

(11) If a Commission determines that fewer than three applicants are legally and professionally qualified, the Commission shall notify the Governor, who shall direct the Commission:

a. To re-advertise the vacancy to new candidates, or

b. To submit the names of the qualified applicants.

(12) If a Commission determines that at least three applicants are legally and professionally qualified, it shall report in writing to the Governor the names of at least three applicants recommended by the Commission as the most fully professionally qualified to fill the vacancy. The names of these recommended applicants shall be listed in alphabetical order. The Commission shall release this list to the public concurrently with submission of its report to the Governor.

(13) Upon request of the Governor, a Commission shall reconvene for further deliberations, or re-advertise a vacancy to new applicants.

G. Confidentiality.

(1) A Commission shall not disclose to the public the names of candidates who have submitted applications to fill a vacancy until after the closing date for submission of applications.

(2) Materials submitted by an applicant, or obtained from other sources in connection with the evaluation of an applicant, are confidential and may not be released to the public.

(3) Each Commission member shall maintain the confidentiality of the Commission's evaluation of candidates, including its interviews, deliberations, and voting, and, except as provided in Section F(12), shall not disclose the Commission's evaluation of candidates to the public.

GIVEN Under My Hand and the Great Seal of the State of Maryland, in the City of Annapolis, this 6th day of May, 2019.

LAWRENCE J. HOGAN, JR.
Governor

ATTEST:

JOHN C. WOBENSMITH
Secretary of State

[19-11-16]

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Far from Home: Individuals and the Personal Jurisdiction Defense

Steven J. Willner

Our world is shrinking. Technological advancements in communication, travel and the internet can make us feel we are everywhere while sitting on our living room couch. So in a shrinking world, what happens to the personal jurisdiction defense — entirely predicated on a person's "presence" or "meaningful connection" with a particular place?

Surely this is not a new question facing lawyers and judges. Technology's challenges to personal jurisdiction are as old as *International Shoe Co. v. Washington*, the U.S. Supreme Court's watershed 1945 opinion that established the foundation for all modern jurisdictional jurisprudence — not to mention generating pre–final exam nightmares for first-year law students.[1] Courts have been dealing with the internet's impact on personal jurisdiction since the influential 1997 decision *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* that ultimately spawned our Fourth Circuit's internet-activity test.[2]

Yet, the overwhelming majority of leading personal jurisdiction decisions involve corporate defendants. Individual defendants have received far less attention,[3] likely because few individuals have a strong multistate presence. But with enhanced communications and social media participation comes enhanced exposure to lawsuits filed outside of an individual's home forum.

Communications-based tort claims, like defamation, appear to be a prime candidate for interstate forum selection where personal jurisdiction issues arise. Such was the backdrop in the recent decision *Pandit v. Pandit, et al.*, Civ. No. PX-18-1136, 2018 WL 5026373 (D. Md. 2018), where a Maryland plaintiff sued several Arkansas defendants in Maryland federal court, asserting defamation and related claims arising out of alleged emails and letters the defendants sent from Arkansas. The court ultimately found it did not have personal jurisdiction over the Arkansas defendants and dismissed the lawsuit.

The *Pandit* case is exemplary of the type of interstate communications–based claims that could become more common as social media continues to evolve. The case provides a setting to highlight some key issues that arise in litigating the personal jurisdiction defense on behalf of individual defendants.

General jurisdiction rarely applies to individuals, if at all. Personal jurisdiction has two theories: *general jurisdiction*, which allows a court to hear any claim against a defendant considered to be "at home" in the forum state, and *specific jurisdiction*, which permits the court to hear controversies arising out of specific case-linked activities occurring in the forum.[4]

In 1990, a U.S. Supreme Court footnote expressed skepticism that general jurisdiction could ever apply to an individual outside of the state where the individual lives.[5] The Supreme Court took it a step further in the 2011 case *Goodyear Dunlop Tires Operations, S.A. v. Brown*, stating that "for an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile."[6] Many federal courts have taken the *Goodyear* dictum to mean that an individual can never be sued outside her domicile except in exceptional circumstances.[7] One could theorize that exceptional circumstances exist where an out-of-state defendant spent significant time living in the forum state or if the defendant visits the forum state so frequently she can be considered practically living there. In *Pandit*, the court held that the Arkansas defendants' familial ties and handful of visits in Maryland were not enough to establish anything equivalent to a domicile in Maryland.[8]

General jurisdiction has long been considered a difficult standard to satisfy.[9] Defendants are much more commonly compelled to defend lawsuits in foreign forums under the theory of specific jurisdiction, which looks to the defendant's suit-related activities in the forum state.[10] Even in these circumstances, there are adequate contentions to protect a nonresident defendant from being unfairly hauled into a Maryland court.

In Maryland, it matters more where a communication originated than where it was received. Maryland's long-arm statute provides that a nonresident can be sued in Maryland for a tortious act and injury that occurred in Maryland.[11] The *Pandit* plaintiff argued that this long-arm statute provision was satisfied because the alleged defamatory communications were received by Maryland residents — therefore, the tortious conduct occurred in Maryland. The plaintiff cited the recent opinion in *Seidel v. Kirby*, which held that for purposes of the federal venue statute defamation occurs where the publication occurs.[12] However, a long line of cases shows that Maryland law differs with respect to the long-arm statute.[13] For example, in *Dring v. Sullivan*, the court held that a person who "sat at a computer in New Jersey"

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1 *International Shoe Co. v. Washington*, 326 U.S. 210, 317 (1945); *See* Wright & Miller, 4 Fed. Prac. & Proc. Civ. § 1067 (stating that *International Shoe* was the watershed Supreme Court case that accounted for "the nation's increasingly industrialized economy, the advent of high speed transportation and communication, and the mobility of the population.").

2 *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997); *See Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452 (3rd Cir. 2003) (recognizing that *Zippo* has become the "seminal" authority for internet jurisdiction cases); *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2012).

3 *See* Wright & Miller, 4 Fed. Prac. & Proc. Civ. § 1069.5 (reaching the same conclusion).

4 *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. at 915, 919 (2011).

5 *Burnham v. Superior Ct. of Cal.*, 495 U.S. 604, 610 n. 1 (1990).

6 *Goodyear*, 564 U.S. at 915, 924 (2011).

7 *See McCullough v. Royal Caribbean Cruises, Ltd.*, 268 F. Supp. 3d 1336, 1349–50 (S.D. Fla. 2017) (collecting cases); *See also Fid. Nat. Title Ins. Co. v. M & R Title, Inc.*, 21 F. Supp. 3d 507, 515 (D. Md. 2014) (holding that "regular vacations and travel and occasional work in Maryland" did not support a general jurisdiction finding).

8 *Pandit*, 2018 WL 5026373 at 3.

9 *See ESAB Group, Inc. v. Centricut, Inc.*, 126 F. 3d 617, 623 (4th Cir. 1997).

10 *Goodyear*, 564 U.S. at 919.

11 *See* Maryland's Long-Arm Statute, Md. Code Ann., Cts. & Jud. Proc. § 6-103(b)(3).

12 *Seidel v. Kirby*, 296 F. Supp. 3d 745 (D. Md. 2017).

13 *See, e.g., Zinz v. Evans and Mitchell Indus.*, 22 Md. App. 126 (1974); *McLaughlin v. Copeland*, 435 F. Supp. 513 (D. Md. 1977); *Dring v. Sullivan*, 423 F. Supp. 2d 540 (D. Md. 2006).

(FAR FROM HOME) *Continued from page 21*

and sent a defamatory email to numerous Maryland recipients was considered to have committed the tortious act in New Jersey.[14] Thus, Maryland law is favorable to out-of-state defendants who would prefer to litigate their communications-based lawsuits in their home forum.

A handful of communications to a forum doesn't mean you can be sued there. The *Pandit* plaintiff argued that a "handful" of letters and emails sent by the Arkansas defendants to Maryland residents constituted a "persistent course of conduct" under the Maryland long-arm statute.[15] The court disagreed, remarking that "such isolated and sporadic association with this forum does not amount to a persistent course of conduct.[16] The court cited another opinion holding that "six email exchanges, multiple telephone calls, and a 'friend' request on Facebook simply does not rise to the level of persistent course of conduct."[17] Furthermore, from a constitutional perspective, a long line of cases suggest that correspondence exchanges between a Marylander and a nonresident is insufficient to establish jurisdiction in Maryland.[18] Fortunately, people can rest assured that sending a string of innocuous emails is not likely to expose them to a lawsuit in a foreign forum.

Frequent visits to the forum may expose one to specific jurisdiction. One court has suggested that "very frequent" suit-related visits to the forum state could expose individuals to jurisdiction in the forum.[19] Other reported decisions seem skeptical that visits to a forum for personal or recreational purposes could ever serve as a basis for jurisdiction.[20] The *Pandit* court held that the Arkansas defendants' two to six Maryland visits in 14 years was insufficient for specific jurisdiction purposes.[21]

The location where plaintiff feels the injury matters increasingly less. Plaintiffs frequently argue that jurisdiction is proper in the plaintiff's home forum because that is where they feel the harm most. They rely primarily on *Calder v. Jones*, a 1984 U.S. Supreme Court case the impact of which has waned substantially. In *Calder*, the Supreme Court permitted actress Shirley Jones to bring a defamation suit in California against the Florida-based *National Enquirer* because California was the focal point of the tortious activity and harm. However, case law published in *Calder*'s wake showed that *Calder* was more an outlier than the new baseline. The Fourth Circuit commented that determining jurisdiction based solely on the location of the plaintiff's injury "would *always* make jurisdiction appropriate in a plaintiff's home state, for the plaintiff always feels the impact of the harm there."[22] In addition, the Supreme Court later said that "the proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." Thus, proponents of the *Calder* theory need to show some intimate connection between the tortious activity and the forum state.

As the authorities cited here demonstrate, many of the territorial litigation boundaries that have withered for corporations still exist for individuals. At the rate of technological evolution, this could change soon; but for now, attorneys with out-of-state individual clients should keep the personal jurisdiction defense as a useful arrow in their quiver.

Steven J. Willner is an associate in Wilson Elser's Baltimore office. He represents individuals and businesses in complex civil litigation.

Young Lawyers Event

On Friday, April 26th MDC's Young Lawyers Division hosted a happy hour at Crossbar in Federal Hill. The event was well attended and provided an excellent opportunity for young lawyers to both catch up with old friends as well as build new relationships with colleagues of the state bar. The happy hour was generously sponsored by Exponent, a gold sponsor of MDC.

Contact the MDC Young Lawyers Committee chair for further information about upcoming young lawyer events.

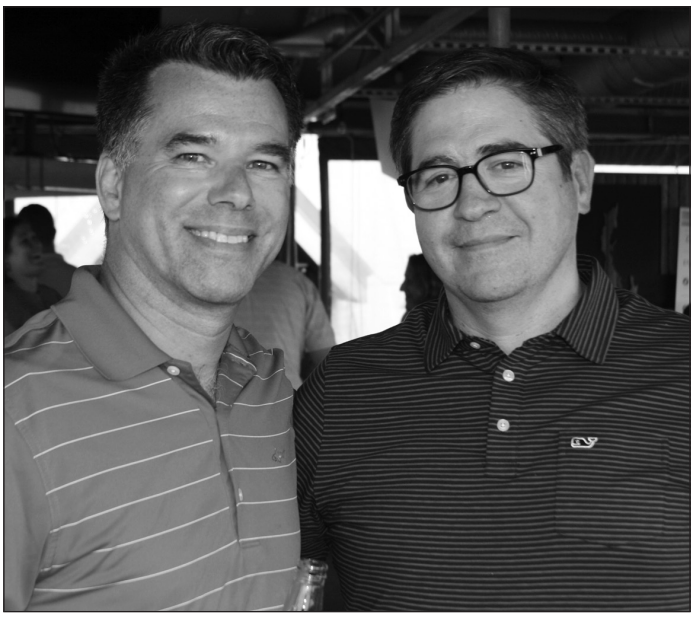
[14] *Dring*, 423 F. Supp. 2d at 546.
[15] *See* Md. Code Ann., Cts. & Jud. Proc. § 6-103(b)(4).
[16] *Pandit*, 2018 WL 5026373 at 3.
[17] *Id.* (quoting *Estate of Morris v. Goodwin*, No. DKC-13-3383, 2015 WL 132617 at 5 (D. Md. Jan. 8, 2015).
[18] *See Pharmabiodevice Consulting, LLC v. Evans*, Civil Action No. GJH-14-00732, 2014 WL 3741692, at 4 (D. Md. July 28, 2014) (collecting cases).
[19] *See Sibert v. Flint*, 564 F. Supp. 1524, 1529 (D. Md. 1983).
[20] *See Shong Ching Lau v. Change*, 415 F. Supp. 627, 631 (E.D. Pa. 1976); *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 779 (5th Cir. 1986).
[21] *Pandit*, 2018 WL 5026373 at 3.
[22] *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 625-26 (4th Cir. 1997).

MDC's 2019 Annual Meeting and Crab Feast

Maryland Defense Counsel ("MDC") held its **Annual Meeting and Crab Feast** at Nick's Fish House in Baltimore on **Wednesday, June 5, 2019**. MDC would like thank our members and sponsors for their support of MDC and the new board.

New board members include:

Dwight Stone of Miles & Stockbridge, P.C. — President
Colleen O'Brien of Wilson/Elser — President-Elect
Katherine Lawler of Nelson/Mullins — Treasurer
Chris Jeffries of Kramon & Graham, P.A. — Secretary



Maryland's Travel Insurance Laws Align Closely With NAIC Travel Insurance Model

Patricia McHugh Lambert

On December 19, 2018, the National Association of Insurance Commissioners ("NAIC") adopted a Travel Insurance Model Law ("Travel Ins. Model Law") after three years of development in the Travel Insurance Working Group. Largely based off the National Council of Insurance Legislators' ("NCOIL") March 2017 version, the NAIC Travel Insurance Model Law intends to create a foundation for states to enact regulations to help travel insurance align with to the needs of consumers.

The Model Law classifies travel insurance as an inland marine line of insurance for the purposes of form and rate filings. Travel Ins. Model Law § 9(A). If the travel insurance policy covers sickness, accident, disability or death occurring during travel, either exclusively or in conjunction with related coverages of emergency evacuation or repatriation of remains, however, the policy may be filed as either an accident and health product or as an inland marine product. *Id.* Additionally, the NAIC Travel Insurance Model Law sets forth standards for a Limited Lines Travel Insurance Producer License with which insurance producers can sell, solicit, and negotiate travel insurance. *Id.* § 4.

The NAIC's approval of the Model Law has already impacted the regulation of travel insurance in Maryland as the legislature in 2018 made changes to the insurance article bringing Maryland largely into line with the NAIC's Model Law. Md. 90 Day Report, 2018 Sess., Part H, *Travel Insurance* ("In an effort to modernize the regulation of travel insurance as recommended by the National Association of Insurance Commissioners, Senate Bill 652/ House Bill 979 (both passed) establish an updated regulatory framework for the sale of travel insurance in the State."); *see also* Md. Code, Ins. §§ 10-101(j), 10-122, 19-1001—1005; Part VII, *infra*. Several other states have similarly updated their insurance laws to conform with NAIC's Model Travel Insurance Law. *See* Part VIII, *infra.*

Model Law Background

Limited Line Insurance

There are 5 types of "core" limited lines insurance producer licenses, including: car rental, credit, crop insurance, surety, and travel.[1] In addition to the "core" limited lines, some states authorize limited lines licenses for such things as pet, self-storage, communications equipment, pre-paid legal, and motor club, among others. Within the core limited lines licenses, the regulatory requirements for issuance of a limited line license also vary widely among the states. *Id.*

Passage of GLBA and Early Model Legislation

With the passage of the federal Gramm-Leach-Bliley Act ("GLBA") in 1999, the NAIC has been working to avoid certain preemption of state producer licensing laws by compliance with the provisions of Section 321.[2] To avoid federal preemption, the NAIC elected the reciprocity route rather than the uniformity route and crafted a model law to assist with meeting the reciprocity requirement. *Id.* The Producer Licensing Model Act (Model # 218 or PLMA) was adopted by the NAIC in 2000 and was intended to serve as the primary vehicle for states to achieve reciprocity, as well as assist in the next step to reach uniformity. See footnote 1.

Although the PLMA established uniform definitions for the six major lines of insurance: (1) Life, (2) Accident and Health, (3) Property, (4) Casualty, (5) Variable Life and Variable Annuity, and (6) Personal Lines, the PLMA only specifically addressed one limited line—credit insurance. *Id.* The PLMA did provide certain definitions relating to limited lines, including the definition for:

"Limited lines insurance" means those lines of insurance defined in [insert reference to state specific limited line statute] or any other line of insurance that the insurance commissioner deems necessary to recognize for the purposes of complying with Section 8E; and

"Limited lines producer" means a person authorized by the insurance commissioner to sell, solicit or negotiate limited lines insurance.

Id. The original Model Law was limited to licensing, as well as commentary on the current regulatory environment and the critical need for regulatory/legislative modernization and guidance. *Id.*

Subsequent to the adoption of the PLMA, in 2002, the NAIC adopted the Uniform Resident Licensing Standards which focused on the certain broad areas not addressed in the PLMA: (1) licensing qualifications, (2) pre-licensing education, (3) licensing testing, (4) integrity/background check standards, (5) license application process, (6) appointment process, (7) continuing education requirements, and (8) limited lines. *Id.*

iii. 2009 Amendments

The NAIC's Producer Licensing (D) Working Group (PLWG) was charged with ongoing monitoring of state implementation of the Uniform Resident Licensing Standards ("URLS"). *Id.* In June 2002, the Uniform Producer Licensing Initiatives Working Group, acting under the direction of the NARAB Working Group, adopted limited lines definitions which are commonly referred to as "core" limited lines car rental, credit, crop insurance, surety and travel. *Id.*

In 2009, the PLWG was charged with: "Review limited line licensing issues with particular focus on the following: (1) the establishment of a limited line that encompasses several insurance products where the business of insurance is ancillary to the business of the person offering the product, (2) the licensing requirements of individuals selling limited line insurance products, and (3) the fingerprinting of individuals selling limited line insurance products."

Id.

Throughout 2009, thoughtful informa-

[1] Greg E. Mitchell, Esq., *NAIC Review of Limited Lines Producer License Update*, Federation of Regulatory Counsel, Mar. 5, 2019, http://www.forc.org/Public/Journals/2013/Articles/Fall/Vol24Ed3Article3.aspx.

[2] Section 321 required a majority of states, not later than three years after the effective date, to enact: (1) uniform laws and regulations governing the licensure of individuals and entities authorized to sell and solicit the purchase of insurance within the state; or (2) reciprocity laws and regulations governing the licensure of non-resident individuals and entities authorized to sell and solicit insurance within those states. Gramm-Leach-Bliley Act § 321; *Mitchell*, *supra.*

tion was presented to the PLWG in an effort to outline necessary changes to the PLMA, as well as provisions of the URLS, which were necessary to address the limited lines issues. *Id.* Issues were noted as to reflect how the URLS and the PLMA were unintentionally undermining the goal of reciprocity and increasing the compliance burdens without improving consumer protection. *Id.*

Industry, particularly the travel industry, proposed modifications to the PLMA and revisions to the URLS to substantively change the system. *Id.* The deliberations confirmed that consumer complaints attributable to limited lines products are nominal. *Id.*

As part of the PLWG effort in 2009, an ancillary definition of insurance was developed and then tabled due to resistance of some PLWG members to establish change in the current process. *Id.* Issues were presented which included whether to include "core" limited lines in the definition of "ancillary" limited lines. *Id.* Some regulators expressed concern with a new ancillary line definition because of the belief that implementation would require legislative action. *Id.* Some regulators also objected to any changes that would not require those who sold these products to be specifically licensed. As a result, the "ancillary" definition was tabled. *Id.*

Following the tabling of the "ancillary" definition, the PLWG proceeded to review changes to the core limited lines. *Id.* The 2010 review by the PLWG included a revision of the Uniform Licensing Standards. Revisions were made to standards 16 (Lines of Authority), 33 (Definition of Core Limited Lines), 34 (Travel), and 37 (Standards for Non-Core Limited Lines). *Id.* Importantly, standard 34 adopted the Limited Lines Travel Insurance Standard. *Id.* This standard introduced a definition of travel insurance that was not limited to a specific trip or travel in connection with a common carrier. *Id.* It also introduced the concept of the "travel retailer," a business entity that offers and disseminates travel insurance on behalf and under the direction of the "limited lines travel insurance producer." *Id.* These revisions were retained for the recent 2018 approved version of the Travel Ins. Model Law. See Travel Ins. Model § 4.

Under these revisions, a travel retailer may offer and disseminate travel insurance under the license held by the limited lines travel insurance producer if certain conditions are met. *See id.* The producer must hold a business entity license, pay all applicable fees, and must be clearly identified as the licensed producer on marketing materials and fulfillment packages distributed by travel retailers. *Id.* The producer must also keep a register of all travel retailers offering travel insurance on its behalf containing various information and compliance certifications. *Id.* At least one employee of the licensed producer must be a licensed individual producer and be designated as a Designated Responsible Producer ("DRP") responsible for the business entity's compliance with state insurance laws, rules, and regulations. *Id.* The DRP, president, secretary, treasurer, and any other person who directs and controls the licensed producer's insurance operations must comply with the fingerprinting requirements applicable to insurance producers in the resident state of the business entity. *Id.* Each employee of the travel retailer must receive training before offering and disseminating travel insurance. If these requirements are met, individual employees are not required to obtain a license. *Id.*

2018 Approved NAIC Model Law

The recently-approved Model Law's purpose is to move toward the creation of a comprehensive legal framework to permit and regulate the sale of travel protection products in adopting states, while protecting consumers by encouraging fair and effective competition in the market. The Model Law expands on the NCOIL draft, which was intended to address licensing and establish a clear regulatory framework for the development and distribution of travel protection products, but ultimately did not adopt many of the provisions regarding competitive markets. Compare Travel Ins. Model Law with NCOIL Travel Ins. Model Act (2012).

The NAIC hopes their approved Model Law will encourages innovation in the marketing and development of travel protection products, providing value to consumers and helping support the tourism industry—a major economic driver—despite many of the proposed provisions regarding a regulatory framework for competitive travel insurance markets not ultimately being adopted. (The November 18, 2012 NCOIL version of the Model Law had a section for Competitive Markets in travel insurance. *Id.* § 6.)

Maryland Response

Maryland provides limited lines insurance producer licenses for various types of limited lines insurance,[3] including (i) sellers of transportation tickets (travel insurance);[4] (ii) limited line credit insurance;[5] (iii) employees of health maintenance organizations;[6] (iv) attorneys who solicit, procure, or negotiate title insurance contracts,[7] (v) portable electronics vendors[8] and (vi) motor vehicle rental businesses selling insurance incidental to rental.[9]

In 2018, Maryland passed legislation to brings its travel insurance law into close conformance with the NAIC's Model Law. Md. 90 Day Report, 2018 Sess., Part H, *Travel Insurance* ("In an effort to modernize the regulation of travel insurance as recommended by the National Association of Insurance Commissioners, Senate Bill 652/ House Bill 979 (both passed) establish an updated regulatory framework for the sale of travel insurance in the State."). These changes dealing with travel insurance in Maryland can be found in Subtitle 10 of the Insurance article of the Maryland Code and came into effect on October 1, 2018. Md. Code, Ins. §§ 19-1001—1005.[10] As a result of these changes, Maryland regulates limited line travel insurance in virtually the same fashion as

[3] "'Limited lines insurance' means: (1) limited line credit insurance; (2) the lines of insurance described in §§ 10-122 through 10-125 of this subtitle; (3) insurance sold in connection with, and incidental to, the rental of a motor vehicle under Subtitle 6 of this title; or (4) any other line of insurance that the Commissioner considers necessary to recognize for the purpose of complying with § 10-119(d) of this subtitle." Md. Code, Ins. § 10-101(h). "Notwithstanding any other provision of this subtitle, a person licensed as a limited line credit insurance producer or other type of limited lines insurance producer in the person's home state is entitled to receive a nonresident limited lines insurance producer license, pursuant to subsection (b) of this section, granting the same scope of authority as granted under the license issued by the person's home state." Md. Code, Ins. § 10-119(d).

[4] Md. Code, Ins. § 10-122 ("Without regard to the education, experience, or examination requirements of this subtitle, the Commissioner may issue a limited lines license to an individual who or a business entity that sells travel insurance.").

[5] Md. Code, Ins. § 10-101(f).

[6] Md. Code, Ins. § 10-124 ("[T]he Commissioner may issue a limited lines license to an individual who is employed by a health maintenance organization solely to solicit membership in the health maintenance organization under a contract: (1) between the health maintenance organization and the Maryland Department of Health; and (2) in accordance with which the Maryland Department of Health obtains prepaid comprehensive health care services for recipients of medical assistance under § 15-105 of the Health-General Article.").

[7] Md. Code, Ins. § 10-125 ("[T]he Commissioner may issue a limited lines license to an attorney who solicits, procures, or negotiates title insurance contracts to act as a title insurance producer.").

[8] Md. Code, Ins. § 10-704

[9] Md. Code, Ins. § 10-602.

[10] "The purpose of this subtitle is to promote the public welfare by creating a comprehensive legal framework within which travel insurance may be sold in the State. . . . All other applicable provisions of this article apply to travel insurance, except that specific provisions of this subtitle supersede any general provisions of this article." Md. Code, Ins. § 19-1002(a), (c).

NAIC's Model Travel Insurance Law.

What is "Travel Insurance"

The Model Law defines "Travel Insurance" as coverage for personal risks incident to planned travel, including:

1. Interruption or cancellation of trip or event;
2. Loss of baggage or personal effects;
3. Damages to accommodations or rental vehicles;
4. Sickness, accident, disability or death occurring during limited duration travel;
5. Emergency evacuation;
6. Repatriation of remains; or

Travel Insurance does not include major medical plans that provide comprehensive medical protection for travelers with trips lasting longer than six (6) months, including for example, those working or residing overseas as an expatriate, or any other product that requires a specific insurance producer license." Travel Ins. Model Law § 3 (Definitions).

Maryland defines "travel insurance" in the same manner as the model law.[11] Like the Model Law, the Maryland Insurance Commissioner may issue a limited lines license to a business or entity that sells travel insurance upon application with special forms the Commissioner considers proper in connection with the application for or renewal of a limited lines license. Md. Code, Ins. § 10-122(a). Like the NAIC's Model Law, Maryland's travel insurance law does not apply to cancellation fee waivers or travel assistance services. Md. Code, Ins. § 19-1002(b)(2).

Licensing

The NAIC Travel Insurance Model Law sets forth standards for a Limited Lines Travel Insurance Producer License with which insurance producers can sell, solicit, and negotiate travel insurance. Travel Ins. Model Law § 2.

The Commissioner may issue a Limited Lines Travel Insurance Producer License to an individual or business entity that has filed with the Commissioner an application for a Limited Lines Travel Insurance Producer License in a form and manner prescribed by the Commissioner. Travel Ins. Model Law § 4(A). Such Limited Lines Travel Insurance Producer shall be licensed to sell, solicit or negotiate Travel Insurance through a licensed insurer. *Id.* No person may act as a Limited Lines Travel Insurance Producer unless properly licensed. *Id.*

The Model Law provides that Travel Retailers may offer and disseminate Travel Insurance under a Limited Lines Travel Insurance Producer business entity license under certain conditions. Travel Ins. Model Law § 4(B). The most onerous conditions for a Limited Lines Travel Insurance Producer to offer Travel Insurance through a Travel Retailer relate to (i) a register which must be maintained by the Limited Lines Travel Producer containing information regarding each Travel Retailer that offers Travel Insurance on the Limited Lines Travel Insurance Producer's behalf, and (ii) a program of instruction or training which must be given to each employee and authorized representative of the Limited Lines Travel Insurance Producer. *Id.*

Under the Model Law, Limited Lines Travel Insurance Providers must require each employee and authorized representative of the Travel Retailer whose duties include offering and disseminating travel insurance to receive a program of instruction or training, which is subject at the discretion of the Commissioner to review and prior approval. *Id.* The training material shall, at a minimum, contain adequate instructions on the types of insurance offered, ethical sales practices, and required disclosures to prospective customers. *Id.*

This training must also include direction that the retailer, employees, administrator is prohibited from making any statement or engaging in any conduct express or implied that would lead a customer to believe travel insurance is required, or that anyone other than a licensed travel insurance producer is qualified to evaluate the adequacy of any of the customer's existing insurance coverage. *Id.*

Similarly, Maryland permits travel retailers to offer and disseminate travel insurance on behalf of and under the license of a limited lines travel insurance producer under exactly the same circumstances as the Model Law.[12] The general conditions for a limited lines travel insurance producer to offer travel insurance through a travel retailer under the Model Law are the same for the requirements in Maryland relating to (i) maintenance of a register containing information regarding each travel retailer, and (ii) a program of instruction or training which must be given to each employee and authorized representative of the limited lines travel insurance producer.[13]

Like the Model Law, Maryland requires that this training contain "at a minimum, instruction on the types of insurance offered, ethical sales practices, and required disclosures to prospective customers."[14] A Limited Lines Travel Insurance Producer, in both Maryland and under the Model Law, is responsible for the acts of the Travel Retailer and is tasked with using reasonable means to ensure compliance by the Travel Retailer with the law.[15]

One difference is that under the Model Law, the training must include "direction that the retailer, employees, administrator is prohibited from making any statement or engaging in any conduct express or implied that would lead a customer to believe travel insurance is required, or that anyone other than a licensed travel insurance producer is qualified to evaluate the adequacy of any of the customer's existing insurance coverage." Travel Ins. Model Law § 4(B). In Maryland, however, this information need only be given in the brochures or written materials provided by travel retailers offering or disseminating travel insurance on behalf of a limited lines travel insurance producer.[16]

Travel Protection Plans

In Section 6, the Model Law provides that Travel Protection Plans may be offered for one price for combined features that the Travel Protection Plan offers in each state if:

1. The Travel Protection Plan clearly discloses to the consumer at or prior to the time of purchase that it includes Travel Insurance, Travel Assistance Services and Cancellation Fee Waivers as applicable, and provides information and an opportunity at or prior to the time of purchase for the consumer to obtain additional information regarding the features and pricing of each; and

[11] *Compare* Travel Ins. Model Law § 3 *with* Md. Code, Ins. § 10-101(o)(1), (2).
[12] *Compare* Travel Ins. Model Law § 4(B) *with* Md. Code, Ins. § 10-122(d)(1).
[13] *Compare* Travel Ins. Model Law § 4(B) *with* Md. Code, Ins. § 10-122(d)(1)(iii), (vi).
[14] *Compare* Travel Ins. Model Law § 4(B) *with* Md. Code, Ins. § 10-122(d)(1)(vi).
[15] *Compare* Travel Ins. Model Law § 4(F) *with* Md. Code, Ins. § 10-122(d)(5).
[16] Md. Code, Ins. § 10-122(d)(2)(ii) (A travel retailer offering or disseminating travel insurance on behalf of a limited lines travel insurance producer shall make available to a prospective purchaser brochures or other written materials that . . . explain that the purchase of travel insurance is not required in order to purchase any other product or service from the travel retailer. . . . ").

2. The fulfillment materials: (1) Describe and delineate the Travel Insurance, Travel Assistance Services and Cancellation Fee Waivers in the Travel Protection Plan, and (2) include the Travel Insurance disclosures and the contact information for persons providing Travel Assistance Services and Cancellation Fee Waiver, as applicable.
Travel Ins. Model Law, § 6.

The Maryland travel insurance law mimics these provisions of NAIC's Model Travel Insurance Law regarding travel protection plans. Md. Code, Ins. § 19-1003 (Conditions to offer travel protection plans).

Sales Practices

In Section 7, the Model Law makes all licensed persons and those who are not licensed but should be licensed who offer Travel Insurance to residents of the state as subject to the Unfair Trade Practices Act. Maryland also adopted this provision of the Model Act. Md. Code, Ins. § 19-1004(a).

The Model Law also establishes offering or selling a Travel Insurance Policy that could never result in payment of claims for any insured under the policy (illusory travel insurance) as an unfair trade practice. *Id.* § 7(B). Maryland has similarly adopted this provision. Md. Code, Ins. § 19-1004(b). The Model Law further prohibits licensed persons from offering insurance via a negative option or opt out, which would require a consumer to take an affirmative action to deselect coverage such as unchecking a box on an electronic form while purchasing a trip. *Id.* § 7(E). Maryland has likewise adopted this provision. Md. Code, Ins. § 19-1004(d).

Section 7 also contains provisions regarding marketing Travel Insurance including information about exclusions and other policy information which must be provided to prospective purchasers of Travel Insurance. *Id.* § 7(C). Maryland has similarly adopted documentary requirements to be provided to a consumer before the purchase of travel insurance (including sales materials, advertising materials, and marketing materials, which must be consistent with the travel insurance policy itself). Md. Code, Ins. § 19-1004(c)(1)-(5). Section 7 also requires that each insurance file with the Commissioner, before using, all Travel Insurance rates and forms it proposes. *Id.* § 7(C)(1).

Finally, in rate filings, rates for Travel Insurance shall be based on characteristics of the insured trip or trips and of the individual person who elects and purchases Travel Insurance. Travel Insurance Model Law § 8(C). Insurers are not permitted to use different rates for different marketing or distribution channels. *Id.* Maryland has not adopted these provisions.

Recent Responses From Other States

Recently, Ohio (SB 169) also enacted travel insurance legislation adopted variations of the Limited Lines Travel Insurance Model Act. Similarly, Pennsylvania (SB 630) has enacted legislated adopting a variation of the Limited Lines Travel Insurance Model Act. Legislation has likewise been introduced in Rhode Island,[17] dubbed the "Travel Insurance Act," which would adopt the NAIC's model act with modification.

The Model Act notes that "[s]tates that have already implemented a licensing and registration law or regulation consistent with the NCOIL Limited Lines Travel Insurance Model Act and NAIC Uniform Licensing Standard 34 (Limited Lines Travel Insurance Standard) may choose to cross-reference that law or regulation instead of using the language set forth in this section." Model Act § 4 Drafting Note (2018).

Prior to the recent approval of the Model Law, as of 2014, according to the American Society of Travel Advisors, thirty-one (31) states had taken initiative to include travel insurance as a limited line insurance to come into line with the limited line travel licensing guidelines previously adopted by NAIC.[18] For example, in 2012 Alabama added travel insurance as a limited line of insurance.[19] Arkansas as early as 2009 passed Ak. H.B. 175 (AS 21.27.150(a)).

In 2013, Washington's insurance commissioner amended WAC § 284-17-001 to bring the "agency in line with the uniform limited line travel licensing guidelines adopted by the National Association of Insurance Commissioners." California, which had previously passed the NAIC standard in 2012, subsequently eliminated the option of maintaining a limited lines travel insurance license.

Sources:

1. Travel Insurance Model Law — (https://www.naic.org/documents/cmte_c_travel_ins_wg_180613_wa_comments.pdf)
2. NAIC — Travel Insurance background (https://www.naic.org/cipr_topics/topic_travel_insurance.htm)
3. NAIC Review of Limited Producer License Update, 24 Federation of Regulatory Counsel 3 (2013) (http://www.forc.org/Public/Journals/2013/Articles/Fall/Vol24Ed3Article3.aspx)
4. State Updates — American Society of Travel Advisors (https://www.asta.org/Government/content.cfm?ItemNumber=2816)
5. Md. Ins. Admin. Report on Limited Lines Insurance — 1/15/14 (https://insurance.maryland.gov/Consumer/Appeals%20and%20Grievances%20Reports/limitedlinesstudy.pdf)

Note: This article appeared previously at pklaw.com on April 22, 2019.

Ms. Lambert has over 25 years of experience in handling complex commercial litigation and insurance matters. Ms. Lambert has worked on national class actions, significant litigation and regulatory matters for Fortune 500 companies. She has also assisted small and mid-sized companies and business executives with contract, real estate and commercial disputes that needed to be resolved quickly and efficiently. Ms. Lambert is best known as an attorney who knows the field of insurance. She has represented insurers, policyholders, and insurance producers in disputes both in court and before the Maryland Insurance Administration. She can be contacted by phone at 410-339-6759 or email at mailto:plambert@pklaw.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.

[17] R.I. Gen. Laws, Ins. §§ 27-77-1—7 (2013).
[18] *State Updates*, Am. Soc. Travel. Advisors (2014), https://www.asta.org/Government/content.cfm?ItemNumber=2816.
[19] Ala. Code §§ 27-7-1, 27-7-5.2(a)(2) (2018); *see also* Al. H.B. 113 (2012).

Five Things to Know About the Wild West of Bankruptcy and Insurance

Emily Devan

Bankruptcy courts are sometimes referred to as the wild west. Rather than using the advantages of the open range, remote countryside and badlands for hideouts, filers use complex bankruptcy statutes and inconsistent case law to protect themselves from paying their debts and turn contracts on their head. Unfortunately for insurers in this landscape, insurance proceeds become even more attractive when the claimant, either the insured or a third party claimant, is bankrupt. Insurers can become enmeshed in disputes among creditors and pay significant defense costs and claims.

Below are five tips for insurers to help navigate the wild, wild west of bankruptcy.

1) **Litigation will be stayed.** Unless the debtor has filed several bankruptcy cases close together, all litigation against the debtor will be stayed by the automatic stay, codified at 11 U.S.C. § 362. Any actions taken in violation of the automatic stay will be void and could subject the party who takes them to penalties. Even actions brought by the debtor are frequently stayed as the opposing party cannot effectively litigate within the strictures of the automatic stay.

However, the automatic stay is not absolute. Frequently, parties litigating against a debtor will petition the bankruptcy court to lift the automatic stay. As the bankruptcy court does not have jurisdiction over personal injury cases, it will almost always allow a personal injury plaintiff relief from the automatic stay to pursue his or her case to judgment and collect against insurance proceeds. In addition, the court will frequently allow complex cases centered on state law issues to proceed to judgment (and sometimes collection against insurance proceeds). An insurer may wish to monitor a bankruptcy case to see if a party is trying to lift the stay on a matter where the insurer is a party or paying defense costs.

In large cases, especially cases where there is a pending or expected class action lawsuit and a wasting policy, an insurer may want to consider opposing the lifting of the stay. The bankruptcy court is frequently a better forum to apportion limited insurance proceeds with lower defense costs. In such cases, the debtor will generally be seeking a similar, efficient result and will also oppose the lifting of the stay.

2) **You cannot terminate or modify an insurance contract merely due to a bankruptcy filing.** While an insurance policy and/or local law may allow for termination due to insolvency or a bankruptcy filing, 11 U.S.C. § 365(e)(1) prohibits any termination or modification of an existing contract due to the bankruptcy filing or the debtor's financial condition. However, if a policy is up for renewal, the insurer has more options and is likely able to decline to renew of the policy.

3) **Your insured and/or the person entitled to payment of proceeds may change.** Upon the filing of a bankruptcy, the policy and/or a claim to insurance proceeds become property of the bankruptcy estate. The practical implications of this vary based on the type of bankruptcy filing.

In a chapter 7 bankruptcy, a trustee is appointed by the court to liquidate the estate and steps into the debtor's shoes. If the debtor was your insured, the chapter 7 trustee now holds the rights of the insured. The chapter 7 trustee also has a claim to receive any payments that the debtor would have received (whether the debtor was your insured or a third party claimant), although the debtor may be able to exempt certain portions of the proceeds. If your insured or a third party claimant has filed chapter 7 bankruptcy, be sure to work with the chapter 7 trustee, the debtor and other potential claimants, in adjusting and paying the claim. If you issue payments to the debtor that should have gone to the chapter 7 trustee, you can be liable to the chapter 7 trustee for those amounts. If a claimant has filed chapter 7 bankruptcy, you are well-advised to consult with bankruptcy counsel before making any payments.

If the debtor has filed a chapter 13 bankruptcy, the debtor retains his or her pre-petition rights either as the insured or a third party payee. However, the debtor may be required to pay insurance proceeds to creditors under the bankruptcy plan, and secured creditors (such as mortgagees) retain rights they may have under the policy to receive payment. The chapter 13 trustee and any alternate payees should be notified before a payment is made to a debtor in a chapter 13 bankruptcy.

In a chapter 11 bankruptcy, it is most common for the debtor to retain control of the bankruptcy estate. However, occasionally a trustee is appointed or there is a significant change in management. You should inquire as to who maintains control of the company, especially if there is litigation involved.

Finally, courts are divided on how this change in the identity of the insured impacts insured vs. insured exceptions. If you want to exercise an insured vs. insured exception after an insured has filed bankruptcy, you should have bankruptcy counsel review the matter.

4) **Debt that arises from events prior to the petition date will be paid through the bankruptcy case, even if unliquidated at filing.** Any debt that arises from pre-petition events is considered a pre-petition claim. This includes unliquidated claims. For example, if an insured's premium is subject

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MDC at DRI

Marisa A. Trasatti,
Wilson Elser
DRI State Representative

DRI is the leading national organization of defense attorneys and in-house counsel, supporting over 22,000 members through advocacy, education, member services and legal resources. **Marisa A. Trasatti**, Partner at Wilson Elser, serves as the DRI State Representative for Maryland.

DRI recently held its regional meeting in Virginia. A great deal of focus was placed on identifying changes in the practice of the civil bar and how state organizations like MDC can help their members successfully manage those changes.

DRI is host to 29 substantive committees whose focus is to develop ongoing and critical dialogue about areas of practice. DRI has served the defense bar for more than 50 years and focuses on five main goals:

- **Education:** To teach and educate and to improve the skills of the defense law practitioner
- **Justice:** To strive for improvement in the civil justice system
- **Balance:** To be a counterpoint to the plaintiff's bar and seek balance in the justice system in the minds of potential jurors and on all fields where disputes are resolved
- **Economics:** To assist members in dealing with the economic realities of the defense law practice, including the competitive legal marketplace
- **Professionalism and Service:** To urge members to practice ethically and responsibly, keeping in mind the lawyer's responsibilities that go beyond the interest of the client to the good of American society as a whole

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Expert Witness Resources		×		×	×			×
DRI Career Center	X	×		×			×	×
DRI Law Firm Information Security Audit				×				×
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DRI Circles	X	X	X	X	X	X	X	X
In House Defense Quarterly		X				×		×
Substantive E-Newsletters	X	X	X	X	X	×	X	×
Personal DRI Membership Directory Profile		X	×			X	×	×
Attend DRI's Annual Meeting	X	X	×	X	X	X	×	×
Publishing and Speaking Opportunities	×	×	×		X		×	×
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DRI Dividends	X	X	×				×	×
LegalPoint		×	×	X	X	X	×	×
Laurel Road Student Loan Refinancing Discount Program		×		X				×

DRI's membership benefits include networking/leadership opportunities, client connections, publication in *For The Defense*, CLE credits, member only communities, and a DRI career center! The ROI on this investment is unquestionable. Returning members who decide to rejoin DRI are also eligible for a $500.00 CLE credit. See the chart above for the full list of benefits.

(BANKRUPTCY AND INSURANCE) *Continued from page 31*

to a true-up based on claims made through the policy period, any additional premium attributable to pre-bankruptcy insurance claims would be a pre-petition claim to be paid through the bankruptcy case. If there was a claim made pre-petition that includes a deductible or a self-insured retention portion, that amount would also be a prepetition claim. In order to preserve your right to receive payment for these amounts, you will likely be required to file a proof of claim.

5) **Non-payment of deductibles or premiums may not excuse your responsibility to cover a claim.** As noted above, amounts that are due based on pre-petition events, whether premiums, deductibles or self-insured retentions, are considered pre-petition debt. As a result, they are paid through the bankruptcy plan or by the chapter 7 trustee following liquidation of assets. Non-payment of these pre-petition debts is generally not a basis to deny a debtor its rights under the policy such as defense costs or claim payments. In addition, even when a claim is made post-petition, an insured debtor's inability to pay a deductible and/or self-insured retention may not excuse an insurer's performance. As court decisions on this issue are inconsistent, you should consult with bankruptcy counsel if you find yourself in this situation.

These are just a small number of the complexities that can arise for insurers in a bankruptcy case, especially where large claims or expensive commercial policies are at issue. In house legal departments are well-advised to be aware of some of the potential pitfalls and contact counsel with bankruptcy experience with questions. If your company is interested in further educational opportunities or advice on this issue, please reach out to PK Law.

Note: This article appeared previously at pklaw.com on April 22, 2019.

Emily Devan is an Associate in the firm's General Litigation and Insurance Group. Her practice includes commercial litigation in state and federal courts throughout the country. She has significant experience with litigation arising from or related to insolvency proceedings including bankruptcy cases, receiverships, and assignments for the benefit of creditors. Emily can be reached at 410-339-6772 or edevan@pklaw.com.

MDC Appellate Practice Committee

MDC extends its gratitude and thanks to **Bryant S. Green** and **Niles, Barton & Wilmer, LLP** for the excellent "Brief of *Amicus Curiae* of Maryland Defense Counsel, Inc." recently submitted to the Court of Appeals of Maryland in the case of *Timothy Heidenberg v. Claudia Grier* [No. 78, September Term, 2018].

The MDC *Amicus* Brief addressed two important issues raised in this Appeal:

1. Does *Dawkins v. Balt. City Police Dept.* preclude a Maryland parent immediate appellate review from the rejection of the Doctrine of Parent-Child Immunity?
2. Does the Doctrine of Parent-Child Immunity survive the death of a child?

The following MDC arguments in this case were presented with clarity and pinpoint analysis:

- The Circuit Court's Refusal to Articulate its Decisions Compromises the Law's Legitimacy;
- Parent Child Immunity Applies to Bar the Survivorship Claim; and
- The Doctrine of Parent-Child Immunity Applies to Bar Wrongful Death Claim.

Regarding the procedural conundrum presented, the MDC Amicus Brief noted, "… the trial court has unilaterally abrogated parent-child immunity by relying solely on its status as arbiter and without making any attempt to provide a reason for its decision….Now the parties are stuck in a procedural quagmire trying to deal with a case where no judge will provide a rationale for the court's decision with respect to the doctrine of parent-child immunity."

As to maintaining parent-child immunity involving the alleged passive negligence of a father with respect to his son, the MDC Amicus Brief highlights:

"Anyone who has been a parent knows that there will inevitably be instances where a parent's negligence results in (hopefully only minor) injuries to a child. Indeed:

> During the long and intimate family relation of a parent and his minor child, living in the household of the parent, it is extremely likely that circumstances may arise resulting in some injury to the child, which injury may be imputed to the negligence of the father because of the condition of the family dwelling, or the act of the parent himself or that of his servant or agent. To permit each of such act of real or alleged negligence to be the basis of an action for damages against the father during the child's minority or upon his majority or against the father's estate upon the latter's death would destroy the harmony of the family and militate against the peace of society."
>
> *(citation omitted).*

Again thanks to Bryant S. Green and Niles, Barton & Wilmer, LLP, and a reminder to all MDC members — should you have an Appeal that merits an MDC *Amicus* Brief please contact the MDC Appellate Practice chairs at:

http://www.mddefensecounsel.org/leadership.html .

POSTSCRIPT

The Court of Appeals has issued the following Per Curiam Order in this matter: "The petition for writ of certiorari in the above-entitled case ha ving been granted and argued, it is this 11th day of June, 2019, ORDERED, by the Court of Appeals of Maryland, that the writ of certiorari be, and it is hereby, dismissed with costs, the petition having been improvidently granted, and it is further, ORDERED, that this case be, and it is hereby, remanded to the Circuit Court for Howard County for further proceedings, if any."

The full brief is available here:

www.mddefensecounsel.org/images/Amicus_Brief-Heidenberg_Grier.pdf

See photos from past events at mddefensecounsel.org/gallery

Spotlights

Experienced Trial Attorney Paul Finamore Joins PK Law

PK Law is pleased to announce that **Paul M. Finamore** has joined the firm. Paul joins the firm as a Member in PK Law's Labor and Employment Group. He is an experienced trial lawyer who has practiced in state and federal courts throughout Maryland and the District of Columbia for over 30 years. His experience includes litigation of general and professional liability matters, including first and third party insurance claims; insurance fraud; liability claims involving accountants, insurance agents, dentists, title companies and underground facility locating services; and the defense of employment litigation claims such as Title VII, age, race, and gender discrimination; wage and hour; whistle blowing; wrongful termination; ADA, FLMA and FLSA. As a trial lawyer, Mr. Finamore understands the importance of providing his clients with practical advice to assist them with balancing business risk while avoiding unnecessary litigation. However, in the event of litigation, Mr. Finamore has the depth of experience, skill and efficacy required.

In addition to his litigation practice, Mr. Finamore regularly counsels employers on employment issues, workplace policies, and compliance with federal, state, and local employment laws. He began practicing in employment law while serving on active duty in the US Army Judge Advocate Generals Corps at Aberdeen Proving Ground.

Mr. Finamore is rated AV-Preeminent® by Martindale-Hubbell, awarded by peer review, for the highest standards of professional skill and ethics. He has been recognized as a top attorney in general litigation and employment and labor by Maryland *Super Lawyers* from 2008–2019. He has also been selected by his peers for inclusion in The Best Lawyers in America® 2019 in the area of Litigation — Insurance. He is a member of the Federation of Defense & Corporate Counsel (FDCC) and a Fellow of the Litigation Counsel of America. Mr. Finamore serves on the DRI Employment Law Steering Committee as Liaison to the FDCC and as Litigation Tactics Chair. He has published articles with DRI, the FDCC, and PLUS. Mr. Finamore has lectured extensively regarding numerous litigation topics and on employment law.

Mr. Finamore is active in the community. He served on the Board of Directors of Boys Hope Girls Hope of Baltimore, a privately funded, non-profit organization that provides at-risk children with a stable home, high-quality education, and support to reach their full potential. He currently serves on the Board of Trustees of Mount de Sales Academy in Catonsville, Maryland.

Paul joins PK Law along with two Associates, John Doran and Bethany Neeb, a Senior Paralegal, Doreen Jett, and Legal Administrative Assistant, Melodie Brown.

Rollins, Smalkin, Richards & Mackie, LLC's attorneys **Tara Taylor** and **Rima Kikani** recently won an appeal in the Maryland Court of Special Appeals in *James Trautwein v. Erie Insurance Exchange*.

This matter stemmed from an October 2013 low-impact motor vehicle collision in which the Appellant was rear-ended by the at-fault driver. After seeking treatment for nearly four years and accumulating more than $100,000.00 in special damages, Appellant sued his insurer, Erie Insurance Exchange, seeking underinsured motorist benefits. Erie conceded that Mr. Trautwein sustained minor sprains and strains as a result of the collision, but the parties disputed the extent and permanency of the injuries.

At trial, the Appellant moved *in limine* to exclude evidence of seven other prior and subsequent injuries he had suffered, arguing that the lack of expert testimony connecting the other collisions to his present injuries rendered the evidence irrelevant and prejudicial. Erie opposed the exclusion, contending that its expert opined that Appellant's present injuries were not related to the 2013 motor vehicle accident, but a result of pre-existing degenerative conditions, which may have stemmed from the other seven injuries. Siding with Erie, the trial court admitted evidence of Appellant's seven prior and subsequent injuries. At the end of trial, Appellant requested damages in excess of $100,000.00. The jury awarded him $28,598.86.

Appellant appealed the judgment to the Maryland Court of Special Appeals, arguing that the trial court improperly admitted evidence of his prior and subsequent injuries because the evidence was irrelevant, or alternatively, substantially and unfairly prejudiced him — as seen by the jury's low award. Erie argued that the trial court properly admitted the evidence because it provided a basis for Appellant's pre-existing degenerative condition, but even if the court erred, it committed harmless error because Appellant, in his own testimony, conceded to suffering from pre-existing degenerative diseases — which also would have allowed the jury to reach the same verdict.

Affirming the decision of the trial court, the Court of Special Appeals decided that the seven prior and subsequent injuries were relevant to the matter because evidence of other trauma had relevance in explaining the source of the degeneration and supplied the basis for the expert opinion that the Appellant's damages were not attributable to the 2013 collision. The Court also held that the trial court acted within its discretion in deciding that the probative value of the other injuries was not substantially outweighed by *unfair* prejudice to the Appellant.

Ben Beasley and Rollins, Smalkin, Richards & Mackie, LLC Secures Defense Verdict in the Circuit Court for Baltimore City

RSRM Associate Attorney Ben Beasley represented the driver of a sedan-style vehicle that collided with the front driver-side of a bus. The plaintiff was a passenger on the rear passenger side of the bus. As a result of the collision, the plaintiff alleged to have sustained bodily injuries, and sued Mr. Beasley's client in the Circuit Court for Baltimore City. At trial, Mr. Beasley argued that the plaintiff was not injured as he alleged given the point of impact on the bus, the lack of property damage sustained by the bus, and because the plaintiff's own medical providers had expressed doubt about the plaintiff's alleged injuries. After deliberating for approximately 15 minutes, the Baltimore City jury returned a verdict finding that Mr. Beasley's client did not cause the injuries claimed by the plaintiff.

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