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THE DEFENSE LINE

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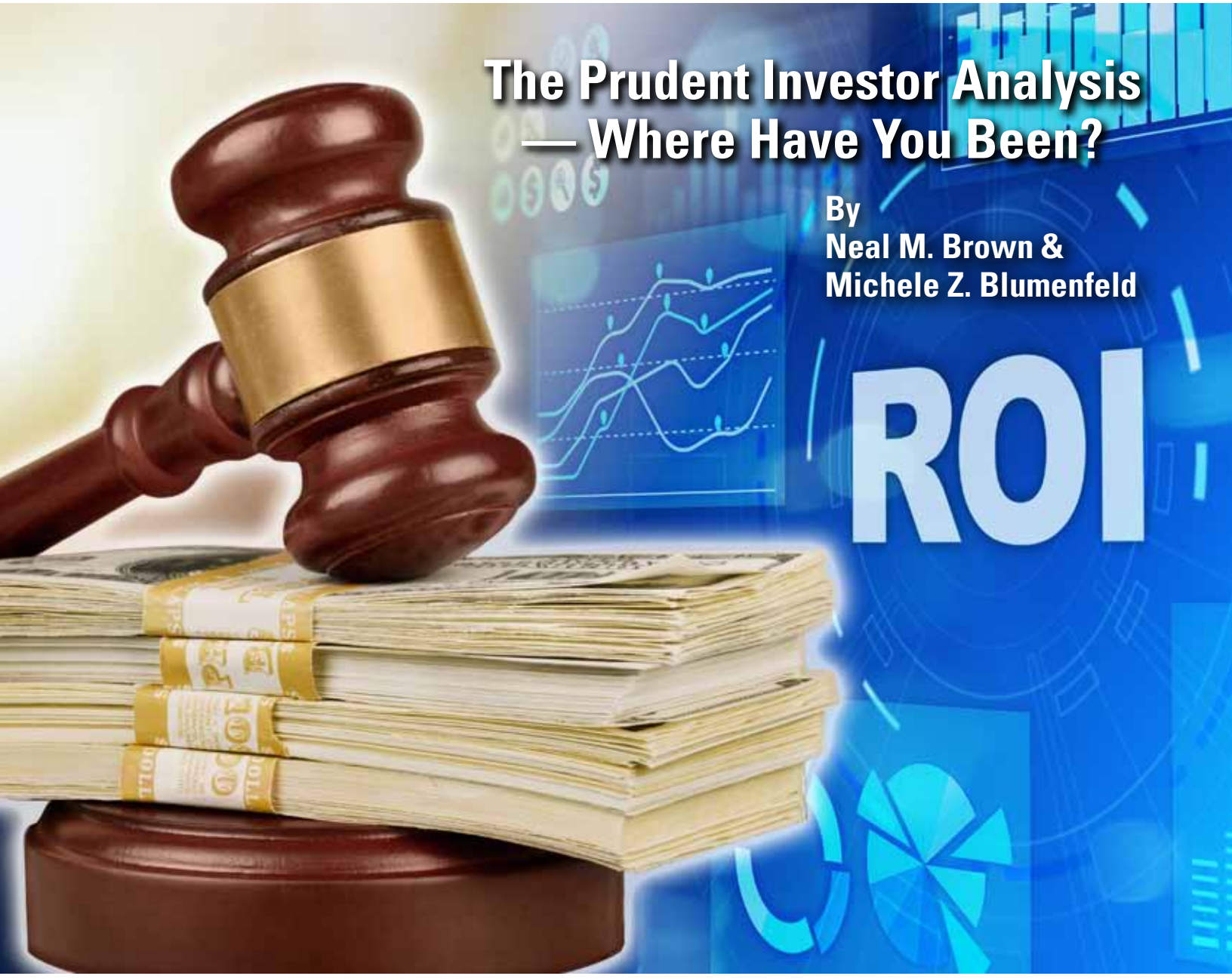

The Prudent Investor Analysis — Where Have You Been?

By
Neal M. Brown &
Michele Z. Blumenfeld

Featured Articles

President's Message

Thank you for reading our latest edition of *The Defense Line*, Fall 2021! This edition is packed with content thanks to our fantastic contributors, co-editors Rachel Gebhart and Nicholas Phillips, and graphics editor Brian Greenlee.

Katherine A. Lawler, Esquire
Nelson Mullins Riley & Scarborough LLP

This time of year marks the tail-end of "conference season." The national defense organizations have had conferences and annual meetings every few weeks it seems since the end of the summer, including an excellent DRI Annual Meeting in Boston last month. I was thrilled to see MDC members at the conference, and enjoyed catching up with Robin Silver and Dwight Stone of Miles & Stockbridge on the flight up! Michael Dailey of Schmidt Dailey & O'Neill will continue as DRI State Membership Chair for Maryland, and is a great resource for anyone looking to get more engaged at the national level. Congratulations go to MDC past-president John Sly on his appointment to Maryland State Representative to DRI, and many thanks go to Marisa Trasatti of Wilson Elser Moskowitz Edelman & Dicker for her service in this role. The meeting included several breakout sessions for State and Local Defense Organizations (SLDOs) like MDC to learn new benefits our members can experience through DRI resources. I am very excited about the content we will be able to bring you through this collaboration!

Last but not least, thanks go to our Executive Board for giving MDC a modified Past Presidents' Reception despite the lingering pandemic. Last month we enjoyed a fun and successful PPR happy hour at the outdoor patio of Dutch Courage Gin Bar. The food and drinks were excellent, as was the non-stop conversation with colleagues we haven't seen in ages. We were pleased to toast past presidents Robert Erlandson, John Sly, and Colleen O'Brien, who have served and continue to support MDC. Thank you to our Executive Director, Marisa Capone, for making sure the evening went off without a hitch.

In addition to offering more opportunities to connect in person, we look forward to offering our members continued opportunities for programming, publications, and substantive law content online as well. As the weather gets colder, and holiday gatherings near, I hope you and yours stay healthy and well.

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*See our **Judicial Selections Committee** ad on page 8.*

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The Prudent Investor Analysis — Where Have You Been?

Neal M. Brown and Michele Z. Blumenfeld

As the costs of insurance (and re-insurance) rises, the defense bar continues to battle inflated economic claims in birth injury and other large dollar cases. We believe the time has come to analyze future economic claims using "real world" numbers and not "make believe" zero risk numbers.

In the real world, large settlements and judgments on behalf of minors are not kept in risk free investments; rather, these dollars, by law, are at least partially invested in prudent investments utilizing a modern portfolio theory. This prudent investor analysis should be presented to the jury when evaluating future economic loss claims. To the extent the plaintiffs' economists do not use the prudent investor analysis in their present value calculations, they should be subject to rigorous cross examination or exclusion. We set forth below the legal analysis supporting our conclusion and welcome comments and critiques.

Maryland Law — The Prudent Investor

"It is public policy of the State that any substantial sum of money paid to a minor because of a claim, action, or judgment in tort should be preserved for the benefit of the minor."[1] With these words, the Maryland legislature introduced a series of statutes which encode the requirement that minor tort victims in the state receive the benefits of trusteeship and prudent investment of their assets so as to best secure their long-term financial well-being. The statutes are clear, specifically designed for the needs of minors, and should form the basis for present value calculations in Maryland courts.

I. Background

A. Enactment of Prudent Investor Rule Legislation

In the 1990's, the rules governing how trustees invest underwent significant revision.[2] "Under these new laws, trustees are required to behave as would a 'prudent investor' in light of modern portfolio theory and are freed from depression-era statutes prohibiting all but low-yielding government securities as investment vehicles."[3]

The American Law Institute ("ALI") revised the Restatement of Trusts regarding trust investment law and released as final text, the Restatement (Third) of Trusts: Prudent Investor Rule in 1992.[4] "In 1991, the National Conference of Commissioners on Uniform State Laws ("Uniform Law Commission") began a three-year drafting project to codify the revised Restatement principles as a uniform law, which became the Uniform Prudent Investor Act" ("UPIA"), enacted in 1994.[5] The Act was approved by the American Bar Association at its February 1995 midyear meeting.[6] Since then, 45 states have adopted similar prudent investor laws.[7]

B. Maryland's Prudent Investors Rule

Maryland enacted its Prudent Investor Rule[8] in 1994, which closely mirrors the Uniform Prudent Investors Act. However, prior to adopting its Rule, Maryland enacted legislation patterned on the 1992 Restatement (Third) of Trusts: Prudent Investor Rule.[9] Even before the Restatement was enacted in 1992, Maryland Courts were already applying a prudent investor standard. In 1991, the Court of Appeals noted that "'Maryland follows a 'prudent person' standard for investment by fiduciaries.'"[10] Even as far back as 1989, the Court of Appeals recognized the prudent person standard. "In *Board of Trustees of the Employees' Retirement Sys. v. Mayor & City Council of Baltimore City*, and in *Shipley v. Crouse*, 279 Md. 613, 621, 370 A.2d 97, 102 (1977), [the Court of Appeals] quoted G. Bogert, The Law of Trusts and Trustees § 541 (2d ed. 1960) for the principle that in all management of the trust a trustee is required to manifest "'the care, skill, prudence, and diligence of an ordinarily prudent [person] engaged in similar business affairs and with objectives similar to those of the trust in question.' This duty 'is not necessarily to maximize the return on investments but rather to secure a 'just' or 'reasonable' return while avoiding undue risk.'"[11]

II. Legal Analysis

A. Statutory Authority in Maryland

An award of damages for future expenses in injury cases must be reduced to present value under Maryland law. "In considering present value, the damages must be discounted to an amount which, when invested at the prevailing interest rates, would produce an aggregate amount equal to the pecuniary loss."[12] Juries are instructed that an award must be reduced to present value. The instruction, however, only provides general guidance on the approach to discounting to present value. The jury is free

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1 Code Ann., Est. & Trusts §§13-402.
2 Langbein, John H. 1995–1996. The Uniform Prudent Investor Act and the Future of Trust Investing, 81 Iowa L. Rev. 641, 641.
3 Breeden, Charles H. and Brush, Brian C. 2008. The Plaintiff as Victim and Investor: Prudent Investing and the Calculation of Economic Damages. *Journal of Litigation Economics* 14(3): pp. 9-34.
4 Langbein, *supra*, at 641.
5 Md. Code Ann., Cts. & Jud. Proc. §15-114.; Uniform Prudent Investor Act, 1994.
6 *Id.*
7 Breeden, *supra*, 9.
8 Md. Code Ann., Est. & Trusts §§15-114.
9 Langbein, *supra*, 642.
10 *Maryland Nat. Bank v. Cummins*, 322 Md. 570, 580 (1991) (citing *Attorney Grievance Comm'n v. Owrutsky*, 322 Md. 334, 350 n. 7 (1991)).
11 *Id.* (citing *Board of Trustees of the Employees' Retirement Sys. v. Mayor & City Council of Baltimore City*, 317 Md. 72, 103 (1989), *cert. denied*, 493 U.S. 1093 (1990); *Shipley v. Crouse*, 279 Md. 613, 621 (1977).
12 Maryland Tort Damages at 179 (2015) (citing, *Baltimore Transit Co. v. State*, 194 Md. 421, 71 A.2d 442 (1950); *Sun Cab Co., Inc. v. Walston*, 15 Md. App. 113, 289 A.2d 804 (1972), *aff'd*, 267 Md. 559, 298 A.2d 391 (1973)).

(PRUDENT INVESTOR ANALYSIS) *Continued from page 5*

to accept any of the amounts presented in evidence by the parties.

> **MPJI-Cv 10:5**
> **Present Value Qualification — Personal Injury**
>
> In deciding upon the damages to be awarded for any future economic loss, you shall consider the present cash value of the loss.
>
> Present cash value means that amount of money needed now which, when added to what that amount may reasonably be expected to earn in the future by prudent investment, will equal the amount of the plaintiff's future economic loss.
>
> In other words, the total anticipated future loss must be reduced to an amount which, if prudently invested at an appropriate rate of interest over the applicable number of years, will return an amount equal to the total anticipated future economic loss.[13]

There is, however, guidance in Maryland on discounting to present value provided by the Maryland Prudent Investor Rule.[14] Specifically, section 15-114 of the Estates and Trusts article adopted the recommendations of the National Conference regarding investments by a fiduciary on behalf of a disabled person (defined to include minors). Pursuant to section 15-114(b)(1), a fiduciary is required to invest the trust funds as a "prudent investor." Prudent investing does not contemplate the absence of risk.

> A fiduciary shall: Invest and manage fiduciary assets **as a prudent investor** would, considering the purposes, terms, distribution requirements, and other circumstances of the governing instrument and nature of the fiduciary appointment.[15]

Thus, in exercising the duty to invest as a prudent investor, the fiduciary is **obligated** to consider a diversified portfolio of investments. Absent a specific reason to the contrary, the statute **requires diversified investments**.

> A fiduciary **shall: "Diversify investments** unless, under the circumstances, the fiduciary reasonably believes it is in the best interests of the beneficiaries or furthers the purposes for which the fiduciary was appointed not to diversify."[16]

Furthermore, section 15-114(b)(6), lends clarity to the often cited "best and safest" investment strategy by requiring the fiduciary to "[p]ursue an investment strategy that considers both the **reasonable production of income and safety of capital**. . ."[17], while section 15-114(c)(5)(v) identifies the standards for judging investment decisions to include "[t]he expected total return of the investment including both income yield and appreciation of capital."[18]

These duties on the part of the fiduciary are mandatory (a fiduciary shall diversify).[19] Although no Maryland case has addressed this issue, pursuant to the statute, when calculating present value, economic experts should apply this standard.

The Prudent Investor Rule applies specifically to damage awards to a minor, since by statute a minor plaintiff's award will be managed by a trustee. Under Maryland law, all tort damage awards to a minor must be placed into a trust.[20]

> [I]f a minor or any other person in whose name a claim in tort is made or judgment in tort obtained on behalf of a minor recovers a net sum of $5,000 or more, the person responsible for the payment of the money shall make payment by check made to the order of (name of trustee), trustee under Title 13 of the Estates and Trusts Article, Annotated Code of Maryland for (name of minor), minor.[21]

How should a trustee prudently manage a minor's different investment options? The Maryland legislature answered this question. The Recovery by Minor in Tort Act establishes certain investment parameters with respect to the responsibilities of a trustee managing money recovered by a minor in a tort action. With regard to the most vulnerable citizens of the state, injured children, the Md. Code Ann., Est. & Trusts §§13-404 permits the trustee to invest up to 30% of the award in stock mutual funds (with the remainder invested in conventional government-backed bonds).

> Investments in money market funds under paragraph (1)(ii)3A of this subsection, **investments in stock mutual funds under paragraph (1)(ii)3B of this subsection**, and investments in any combination of both money market funds and stock mutual funds **may not exceed 30% of the trust assets at the time of investment**.[22]

Maryland has long held that more risk than simply guaranteed returns is both prudent and required. The duty of trustees to meet the prudent person standard for investment is not necessarily to maximize return on investments, but, rather, to secure a just or reasonable return while avoiding undue risks.[23]

When read in conjunction with the Prudent Investor Rule, section §§13-404 establishes that prudent investment by a trustee on behalf of an injured child may include up to 30% of the initial investment

Continued on page 7

13 MPJI-CV 10:5.
14 Md. Code Ann., Est. & Trusts §§15-114.
15 Md. Code Ann., Est. & Trusts §15-114(b)(1) (emphasis added).
16 Md. Code Ann., Est. & Trusts §15-114(b)(4)(emphasis added); *see also*, Langbein, *supra* at 646 ("The official Comment to the Act identifies two situations in which resisting diversification might be appropriate: first, when the tax cost of selling low-basis securities would outweigh the gain from diversification; and second, when the settlor mandates that the trust retain a family business. **When, however, the trust investor starts with cash in hand, failing to diversify is inexcusable.**").
17 Md. Code Ann., Est. & Trusts §15-114(b)(6)(emphasis added).
18 Md. Code Ann., Est. & Trusts §15-114(c)(5)(v).
19 *Id.*
20 Md. Code Ann., Est. & Trusts §13-402, §13-403, §13-404.
21 *Id.*
22 *Id.* [Emphasis added]
23 *Maryland Nat. Bank*, *supra*, at 570, 580 (Holding that "trustee bank **breached its duty under the 'prudent person' standard for investment** by initially depositing cash receipts for all personal trusts in demand deposit account which paid no interest, and investing only in increments of $1,000 the principal cash of those trusts which had assets exceeding $150,000; appropriate award to income beneficiaries was lost return on uninvested trust cash, rather than "profit" realized during class period by trustee bank.").
24 Md. Code Ann., Est. & Trusts §13-404(b)(1)(ii).
25 The cost of compensating a trustee is addressed separately in Md. Code Estates and Trusts Title 14.5. Maryland Trust Act. Subtitle 7 — Office of Trustee. § 14.5-708. Commissions or compensation. The statute provides for separate scales of commission percentages applied to the income earned and principal held each year, which should be included in the analysis of economic damage.

(PRUDENT INVESTOR ANALYSIS) *Continued from page 6*

placed in stock based mutual funds.[24, 25]

B. Other Cases

Justification for an undiversified discount rate based exclusively on government bond yields has traditionally relied chiefly on two antiquated Supreme Court opinions which were issued prior to the enactment of the Maryland Prudent Investor Rule: *Chesapeake & Ohio Railway, Co. v. Kelly ("Kelly")* and *Jones and Laughlin Steel Co. v. Pfeifer ("Jones")*.[26] Neither of these opinions provide guidance beyond an undefined assertion of the 'best and safest' investments.

The holdings in these two cases do not provide guidance, let alone precedent for cases litigated in Maryland. The cause of action asserted in *Jones* is "'rooted in federal maritime law.'" *Jones* has no precedential value as the Supreme Court acknowledged that its ruling is only applicable to suits arising under the Longshoremen's and Harbor Workers' Compensation Act.[27] Furthermore, its discussion concerning a discount rate based on the rate of interest that would be earned on "the best and safest investments", as well as the suggestion that a plaintiff should not be required to accept the risk of default, are presented in the context of imagining a hypothetical, inflation-free economy.[28] Moreover, the Supreme Court's calculation of the injured workers' future lost wages was based on an after-tax rate of return.[29] The Supreme Court clearly did not contemplate this standard being imposed on states such as Maryland, where damages awards are made tax-free.[30]

The *Kelly* Court, for its part, did not mandate use of a risk-free discount rate. In fact, the Court declined to "lay down a precise rule or formula" of any kind.[31] The *Kelly* case instead underscores the importance of applying a Prudent Investor standard when it recognized that a tort victim has an obligation to mitigate damages by investing the lump sum as a "reasonable" person would.[32, 33]

III. Other Views

A. Selection of a Proper Discount Rate in Maryland

In a recently published "how-to" guide,[34] Maryland forensic economists Thomas C. Borzilleri and Joseph Irving Rosenberg acknowledge that Maryland case law has not indicated any specific preferences regarding discounting to present value, other than it being required, noting, "Maryland case law has provided no explicit preferences of one discount method over another." Further, Dr. Borzilleri and Mr. Rosenberg agree that the Maryland pattern jury instructions do provide guidance on the discounting of future amounts to present value, although the guidance provided by the pattern instruction is mandatory — supported by statute — not general as the economists suggest. The pattern jury instruction provides, in part:

> Present cash value means that amount of money needed now which, when added to what that amount may reasonably be expected to earn in the future **by prudent investment**, will equal the amount of the plaintiff's future economic loss.[35]

While the discount rate is not quantified, the award is required to be **"prudently invested,"** which is defined by statute to include diversification.[36]

B. Diversification Generally

Although the specific discount rate or method has not been vetted by the Maryland Courts, the statutory language of the Uniform Prudent Investor Act contemplates diversification.

> It is quite clear from the language of these model laws and the actual state laws patterned after them that prudence does not mean avoiding risk at all costs. Rather, it means investing in a manner that reflects the body of knowledge, largely developed in the past three decades that has come to be known as 'modern portfolio theory.' Prudent investing recognizes the risk/return trade-off, the role of diversification in reducing risk, and the importance of aligning investment decisions with the specific circumstances of the individual.[37]

Hiding the award in a mattress may give the victim greater certainty

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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.

[26] *Chesapeake & Ohio Railway Co. v. Kelly*, 241 U.S. 485 (1916); *Jones & Laughlin Steel Co. v. Pfeifer*, 462 U.S. 523 (1983).

[27] *Jones*, 462 U.S. at 537, 547 ("**We limit our attention to suits under § 5(b) of the Act, noting that Congress has provided generally for an award of damages but has not given** specific guidance regarding how they are to be calculated. **Within that narrow context**, we shall define the general boundaries within which a particular award will be considered legally acceptable").

[28] *Id.* at 537.

[29] *Id.*

[30] MPJI-CV 10:12.

[31] *Kelly*, 241 U.S. at 491.

[32] Breeden, *supra* at 19; *Kelly*, 241 U.S. at 632 ("Ordinarily a person seeking to recover damages for the wrongful act of another must do that which a reasonable man would do under the circumstances to limit the amount of damages").

[33] Though making reference to "best and safest" investments, the *Kelly* Court, as early as 1916, also goes beyond state and municipal bonds in stating, "the sale of annuities is not unknown."

[34] Rosenberg, Joseph Irving & Borzilleri, Thomas C. 2021. Assessing Economic Damages in Personal Injury and Wrongful Death Litigation: The State of Maryland. *Journal of Forensic Economics*, 29(2) at 5.

[35] MPJI-Cv 10:5.

[36] Md. Code Ann., Est. & Trusts §15-114(b)(4).

[37] Breeden, *supra* at 10.

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The Judicial Selections Committee is in the midst of an active season, having recently conducted interviews for vacancies in Washington County, Caroline County, Charles County, and the Maryland Court of Special Appeals. Additional interviews for vacancies on the Maryland Court of Appeals are tentatively scheduled for December 13 and December 14, 2021 beginning at 3:00 p.m., with additional dates to be added as needed. We encourage MDC members to participate by attending these or future judicial nominations interviews or by joining the Judicial Selections Committee!

If interested, please contact **Jennifer Alexander**, jalexander@mhlawyers.com, or her paralegal, **Natalie Kalmus**, nkalmus@mhlawyers.com.

(PRUDENT INVESTOR ANALYSIS) *Continued from page 7*

about preserving the principal but the failure to earn interest would be understood as a failure to mitigate damages. Similarly, in light of modern portfolio theory developed since both *Kelly* and [*Jones*], investment of the entire lump sum in risk-free, low yielding securities would be unreasonable for a long-term loss and presumably would also fail to meet the mitigation test set out by *Kelly*.[38]

The 'prudent investor' of the model statutes might thus be reconciled with the Supreme Court's concern with safety, so long as the level of risk assumed by a prudent investor is reasonable. Presumably, the word 'reasonable' in this context should now be understood in light of modern financial theory."[39] The modern portfolio theory has been developed since the *Kelly* and *Jones* opinions were issued.[40]

Largely on the basis of lay interpretations of legal pronouncements, many forensic economists continue to perform their calculations of economic damages with the implicit assumption that victims will invest all their damages in 'risk-free' securities such as U.S. Treasury bills, notes and bonds. Yet the newly emerging legal frameworks require, in cases where a fiduciary relationship exists, that funds be invested in a diversified manner that increases average investment returns at an acceptable exposure to risk.[41]

IV. Conclusion

In their deliberations, Maryland juries are asked to consider the present value of future losses, giving effect to the expectation that any damage amount awarded will be prudently invested throughout the period of future loss. Those juries should be given the opportunity to hear and consider the scope and limitations of prudent investing as defined by the Maryland legislature in various statutes specific to the needs of minor tort victims. The goal of fair and appropriate compensation is only advanced when full disclosure of the actual investment options available to trustees are presented.

Neal Brown is a Fellow of the American College of Trial Lawyers and a Martindale-Hubbell AV-rated trial attorney. He is the founding partner of Waranch & Brown, where he has devoted his career to defending hospitals and health care providers in medical malpractice and licensure issues.

Michele Blumenfeld is a trial attorney and partner at Waranch & Brown. Her practice concentrates in civil litigation with a focus on defending medical research institutions and healthcare providers against tort and medical malpractice claims.

The MDC Expert List

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[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] Breeden, *supra* at 10.

"Subject Matter Expertise" in Mediation

The Hon. J. Mark Coulson & Jeff Trueman

How much of an expert should a mediator be on the substantive law or practice specialty at issue in litigation? Certainly a mediator should have some awareness of legal issues particularly germane to the outcome, such as the availability of certain types of damages or the viability of certain defenses. But beyond what a mediator might be aware of in the ordinary course, or be made aware of in the pre-mediation submissions of the parties, does greater subject matter expertise on the part of the mediator necessarily make for a more successful mediation?

Many lawyers would answer "yes". Few accept the facilitative, "hands off" model of mediation. Instead they opt for an evaluative mediation focused on the "merits" conducted by one with actual or perceived expertise on those merits. In short, many want a mediator to accept the dispute as lawyers have decided to frame it, and then hope for the mediator to render an "expert opinion" telling them they are right and their opponent wrong.

A subject matter expert can be a perfect fit in binding arbitration or other forms of ADR "on the merits." But if such expertise is the key to a successful mediation, why is the case in litigation at all? Typically, it is not because of a significant knowledge gap. Usually, at least the lawyers and sometimes their clients are "experts" of a sort. Yet each side has applied expertise and come to opposite conclusions. In such situations, empiricism has its limits in negotiating a solution acceptable to both sides.

That's because what's really at the heart of a dispute may escape expert analysis. Often, clients have concerns that do not rise and fall with "objective" opinions. A former business partner feels betrayed. A non-breaching party is angry. An ex-employee seeks respect. A former employer bristles at being accused of discrimination. An injured party feels ignored.

Likewise, other drivers of settlement value can be divorced from the legal merits. Parties to a commercial dispute might have more interest in preserving a business relationship than in "winning" the mediation. An insurer might be more driven by timing of payment than amount. An individual might highly value avoiding the stress of testifying in court.

Such situations are common and are not usually solved simply by educating a given side on the law or subject area. This is not to say evaluative opinions have no place in mediation. If a trial is contemplated, the parties, at some point, need to come to grips with the strengths and weaknesses of their case. For mature torts and other traditional case types that have a track record for valuation, each mediation lives within the shadow of prior settlements and verdicts. Counsel on each side will know those ranges, no doubt. And, when properly timed by the mediator, such evaluations can close the gap. But relying primarily on anecdotes about "what these cases settle for" or "what juries do with these cases" overlooks that the settlement value of a case is largely a function of the micromarket the parties create, and how they have subjectively assigned value to it. Finding and driving overlap in those respective valuations will determine the mediation's success. Tools such as active listening for common ground, building trust and rapport, and creative problem solving are often more helpful than subject matter expertise in resolving such disputes.

Finally, every mediation should include a comparison of the offer on the table with the consequences of not settling. In the absence of a negotiated solution, the ultimate decision-makers in your case are unlikely to be experts themselves. The presiding judge is most often a generalist by necessity, and jurors lack subject matter expertise by design. What they rely upon to make decisions in the absence of subject matter expertise should be at least as important in assessing value. Moreover, variables like witness performance, how jurors will reconcile competing expert opinions, "likeability", etc, also affect outcome. Depending on a subject matter expert to posit reliable predictions about such factors may be expecting too much.

To be sure, there certainly are subject matter experts who are skilled mediators, and their success in resolving disputes speaks for itself. But subject matter expertise alone may not be any more likely to result in a successful mediation. Ultimately, a mediator who seeks to learn from the parties is more successful than a mediator who depends on the parties learning from him or her.

The Hon. J. Mark Coulson is a United States Magistrate Judge for the District of Maryland

Jeff Trueman, Esq., an independent mediator and the former director of Civil ADR for the Circuit Court for Baltimore City.

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Maryland's Court of Appeals Rules in Favor of Beretta U.S.A. Corp.

T. Sky Woodward, Marc A. Nardone, and John Parker Sweeney



In August 2021, a Bradley Arant Boult Cummings LLP ("Bradley") team led by MDC Past-President T. Sky Woodward and including John Parker Sweeney, Marc A. Nardone, Gregory C. Marshall, James W. (Jay) Porter, III, Erin K. Sullivan, Connor M. Blair, and Anna M. Lashley received a denial of certiorari from the Court of Appeals in favor of client Beretta U.S.A. Corp. ("Beretta"), leaving intact a published decision by the Maryland Court of Special Appeals affirming the Baltimore County Circuit Court's reduction of a $20 million jury award for breach of a Non-Disclosure Agreement to $1 on a motion for JNOV.

In 2012, Beretta and a Baltimore-based firearm manufacturer, Adcor Industries, Inc. ("Adcor"), began exploring the possibility of working together to manufacture and market a semi-automatic rifle. Both parties signed Non-Disclosure Agreements ("NDAs") and exchanged design information for evaluation and testing. No agreement was ever made to produce a firearm together or for Beretta to purchase Adcor's intellectual property. Ultimately, Adcor's prices to supply component parts were too high, and Beretta ended the relationship.

Bitterly disappointed (and hurting financially), Adcor threatened litigation and demanded that its information be returned pursuant to the terms of the NDA. Beretta returned Adcor's information but advised that a copy of all documents would be kept in order to defend against the threatened litigation.

Making good on its threat, in 2015 Adcor filed a 17-count complaint against Beretta in the Circuit Court for Baltimore County, alleging breach of contract, misappropriation of trade secrets, fraud, unjust enrichment, and breach of the NDA, among other causes of action. Adcor's complaint sought hundreds of millions of dollars in damages, including punitive damages and a constructive trust. The case was specially assigned to Judge Vicki Ballou-Watts.

Beretta's motion for summary judgment was granted in part, which disposed of half of the case in October 2018. The case went to trial in December 2018. At the close of Adcor's case-in-chief at trial, the court granted Beretta's motion for judgment on every remaining count, except breach of the NDA. The jury found that Beretta breached the NDA and returned a verdict of $20 million in favor of Adcor.

Beretta filed a post-trial motion for judgment notwithstanding the verdict ("JNOV"). In February 2019, the trial court held that Adcor had failed to produce any evidence of actual damages caused by breach of the NDA, and vacated the $20 million verdict, ordering entry of a new judgment for nominal damages in the amount of $1.

In a unanimous, reported opinion issued in April 2021, Maryland's Court of Special Appeals (J. Gould) credited every fact in favor of Adcor, and then squarely rejected each of the arguments, affirming the judgment of the trial court in every respect. Adcor petitioned the Maryland Court of Appeals for review, and the Court rejected the petition on August 2, 2021.

The Bradley team persisted against Adcor's relentless efforts — fueled by a litigation funding company — to convert its business disappointment into a litigation windfall. Adcor's principal, Jimmy Stavrakis, is currently serving 13 years in federal prison for conspiring to set fire to his business premises. The principals of Adcor's litigation funding company are also serving time in federal prison for operating a Ponzi scheme, the proceeds of which supported Adcor's litigation.

T. Sky Woodward, Marc A. Nardone, and John Parker Sweeney are partners at the DC office of Bradley Arant Boult Cummings LLP.

Editors' Corner

As we head into the holidays, the editorial staff wish to express our sincerest gratitude for the continued support and contributions of MDC members to *The Defense Line*. Special thanks goes to the following individuals for their submissions to the Fall Edition: **Neal M. Brown** and **Michele Z. Blumenfeld** of Waranch & Brown, LLC; **The Hon. J. Mark Coulson** of District Court of Maryland and **Jeff Trueman**, Mediator & Arbitrator; and **T. Sky Woodward**, **Marc A. Nardone**, and **John Parker Sweeney** of Bradley Arant Boult Cummings LLP.

We are thankful for the opportunity to present useful content to and from our members and to highlight our members' many successes. If you have any comments, suggestions, or submissions for future editions of *The Defense Line*, please contact the Publications Committee.

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MDC's 2021 Past Presidents Reception

Maryland Defense Counsel ("MDC") hosted its annual **Past President's Reception** at Dutch Courage Gin Bar in Baltimore on Wednesday, October 27. Attendees enjoyed drinks, hors d'oeuvres and camaraderie on the covered outdoor patio in support of our past presidents.

MDC wishes to thank all attendees, including our sponsors and members for their participation and contributions to a fun evening. It was fun to see everyone in person!

For Immediate Release

Best Lawyers in America Names Three Kramon & Graham Attorneys "Lawyer of the Year"

Twenty Firm Lawyers Are Recognized in the Best Lawyers 2022 Guide

Baltimore, MD (August 31, 2021) — Kramon & Graham, a leading law firm providing litigation, real estate, and transactional services, announced today that three firm attorneys were named Baltimore "Lawyer of the Year" in the 2022 edition of *The Best Lawyers in America*.©

As the oldest and most respected peer-review publication in the legal profession, Best Lawyers listings signal not only legal proficiency, but also ethics and professionalism of the highest caliber. *Corporate Counsel* magazine has called Best Lawyers "the most respected referral list of attorneys in practice."

The "Lawyer of the Year" distinction is presented to individuals who have received especially high peer ratings from Best Lawyers surveys. Earning the Baltimore "Lawyer of the Year" designation are:

Amy E. Askew — Litigation – Health Care

David B. Irwin — Criminal Defense – White-Collar

M. Natalie McSherry — Bet-the-Company Litigation

In addition, twenty firm attorneys were selected for inclusion in the Best Lawyers 28th edition:

Philip M. Andrews *(recognized in Best Lawyers since 2008)*
Bet-the-Company Litigation
Commercial Litigation
Government Relations Practice

Amy E. Askew *(recognized in Best Lawyers since 2018)*
Commercial Litigation
Litigation – Health Care
Mass Tort Litigation / Class Actions – Defendants
Professional Malpractice Law – Defendants
Railroad Law

Cynthia A. Berman *(recognized in Best Lawyers since 2015)*
Real Estate Law

John A. Bourgeois *(recognized in Best Lawyers since 2019)*
Commercial Litigation
Criminal Defense: White-Collar

George E. Brown *(recognized in Best Lawyers since 2018)*
Commercial Litigation
Litigation – Construction
Litigation – Labor and Employment

Continued on page 17

John F. Dougherty *(recognized in Best Lawyers since 2021)*
Commercial Litigation

Geoffrey H. Genth *(recognized in Best Lawyers since 2012)*
Bet-the-Company Litigation
Commercial Litigation

Ezra S. Gollogly *(recognized in Best Lawyers since 2018)*
Commercial Litigation
Criminal Defense: General Practice
Criminal Defense: White-Collar
Insurance Law

Andrew Jay Graham *(recognized in Best Lawyers since 1993)*
Arbitration
Bet-the-Company Litigation
Commercial Litigation
Criminal Defense: White-Collar
Litigation – Intellectual Property
Litigation – Labor and Employment
Litigation – Real Estate
Litigation – Securities
Mediation

Erin R. Guiffre *(recognized in Best Lawyers since 2019)*
Real Estate Law

David B. Irwin *(recognized in Best Lawyers since 2006)*
Criminal Defense: General Practice
Criminal Defense: White-Collar
DUI / DWI Defense

Christopher C. Jeffries *(recognized in Best Lawyers since 2021)*
Commercial Litigation

Steven Klepper *(recognized in Best Lawyers since 2019)*
Appellate Practice
Insurance Law

Jean E. Lewis *(recognized in Best Lawyers since 2019)*
Appellate Practice
Commercial Litigation
Legal Malpractice Law – Defendants
Litigation – Bankruptcy

M. Natalie McSherry *(recognized in Best Lawyers since 2006)*
Bet-the-Company Litigation
Commercial Litigation
Health Care Law
Mediation
Medical Malpractice Law - Defendants

Ryan A. Mitchell *(recognized in Best Lawyers since 2021)*
Commercial Litigation

Jeffrey H. Scherr *(recognized in Best Lawyers since 2003)*
Litigation – Real Estate
Real Estate Law

David J. Shuster *(recognized in Best Lawyers in 2018)*
Bet-the-Company Litigation
Commercial Litigation
Litigation – Construction
Personal Injury Litigation – Defendants
Personal Injury Litigation – Plaintiffs

Brian S. Southard *(recognized in Best Lawyers in 2018)*
Real Estate Law

James P. Ulwick *(recognized in Best Lawyers since 1993)*
Bet-the-Company Litigation
Commercial Litigation
Criminal Defense: White-Collar

Eight firm attorneys have been selected for inclusion in the second annual edition of Best Lawyers: Ones to Watch. Those attorneys are Henry A. Andrews, Sheila R. Gibbs, Emily R. Greene, Louis P. Malick, B. Summer Hughes Niazy, Justin A. Redd, Bradley M. Strickland, and Callie J. Tucker.

With their exceptional track record, Kramon & Graham attorneys are regularly recognized by legal ranking sources, including *Chambers USA*, *Benchmark Litigation*, *Martindale Hubbell*, and *Super Lawyers*.

Best Lawyers lists are compiled based on an exhaustive peer review evaluation. To view the complete methodology used by Best Lawyers to compile the 2022 guide rankings, click here.

About Kramon & Graham

Consistently recognized as one of Maryland's leading law firms, Kramon & Graham provides litigation, real estate, and transactional services to clients both locally and across the country. The firm's practices include commercial litigation, white-collar and criminal defense, class actions, government contracts, professional liability defense, personal injury and wrongful death claims, state and federal appeals, asset recovery, real estate, transactions, and insurance coverage. For more information about Kramon & Graham, visit www.kramonandgraham.com.

# # #

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Get Involved With MDC Committees

To volunteer, contact the chairs at

www.mddefensecounsel.org/leadership.html

Spotlights


Neal M. Brown and **Michelle L. Dian** secured a trial victory in *Watson, et al. v. Lakew, et al.*, Case No. CAL19-18128, before a jury in the Circuit Court for Prince George's County. This case was tried before the Honorable Herman C. Dawson.

This wrongful death medical malpractice case related to the death of a 62-year-old woman after she suffered a stroke in the emergency department at PGHC. The Plaintiffs, represented by Shulman Rogers, Meyers, Rodbell & Rosenbaum, and the Boston Law Group, claimed the Defendant hospital and ED physician failed to timely diagnose a stroke and transfer the patient to a comprehensive stroke center for appropriate treatment. Defendants presented testimony from experts in emergency medicine, vascular neurology, and interventional neuroradiology. There was a superseding/intervening cause question on the verdict sheet regarding a previously-dismissed physician's care but the jury did not get past question #1.

Michelle L. Dian and Neal M. Brown are trial attorneys at Waranch & Brown, LLC.


The **Waranch & Brown** defense team secured a trial victory in the Circuit Court for Baltimore County in this emergency room medical malpractice case relating to the death of a 40 year-old woman in 2017. The Plaintiff, represented by Mark Herman, Esquire, claimed the Defendant ER physician failed to treat the Decedent empirically for suspected pulmonary emboli and to facilitate the treatment after the diagnosis was confirmed and appropriate treatment ordered.

The ER physician and group were represented by **Neal M. Brown** and **Saamia H. Dasti** of Waranch & Brown, LLC.

Okobi, et al. v. Osler Drive Emergency Physician Associates, P.A., et al.; The Honorable Vicki Ballou-Watts; Circuit Court for Baltimore County; date of verdict October 8, 2021.

Neal M. Brown and Saamia H. Dasti are trial attorneys at Waranch & Brown.

Upcoming events will be announced at MDdefensecounsel.org.

Peggy Fonshell Ward had her first post-pandemic trial in Circuit Court for Frederick County in July. The trial was mostly normal in process, which was a relief. The case was a medical malpractice claim against a nursing home for a fall that resulted in a hip fracture. Plaintiffs also claimed that the fracture led to the patient's death several months later. The defendant conceded liability for the hip fracture but could not reach a settlement despite three mediations. The jury concluded that the death was not caused by the fracture and awarded damages for the hip fracture that were less than the last settlement offer.

Peggy Fonshell Ward is a partner at Downs, Ward, Bender, Hauptmann & Herzog, P.A.

See photos from past events at mddefensecounsel.org/gallery



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

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

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

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

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- **Increased Supplementary Payment Limit -** From $10k to $25k - this includes loss of earnings if you attend a trial at our request and coverage for costs and fees incurred defending disciplinary claims
- **Aggregate Deductible -** Caps the total amount the insured will have to pay in total deductibles regardless of the number of claims in a single policy period

*Visit **www.mlmins.com** for qualification details

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

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