THE DEFENSE LINE

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Spring 2014

The Top Ten "Do's" of a Law Firm Social Media Policy

Marisa A. Trasatti & Jhanelle A. Graham

Also Featured

Thank You!

Toyja E. Kelley, Esquire

Tydings & Rosenberg LLP

It is hard to believe that my term as MDC President is nearly over. When I sat down to write my final President's Message, the only thought that kept coming to mind was "thanks." Author Dietrich Bonhoeffer is credited with saying that "In ordinary life we hardly realize that we receive a great deal more than we give, and that it is only with gratitude that life becomes rich." Bonhoeffer was no doubt on to something. So with this President's Message, I wanted to take the opportunity to thank many, but certainly not all, who have made my MDC life and President's year much more rich.

I want to begin by thanking the person that has probably been most responsible for keeping MDC on the rails over the past year and that is our executive director, Kathleen Shemer. Kathleen has served as MDC's executive director for more than 20 years. For those of you who have not served on MDC's Executive Committee, you may not fully appreciate all that Kathleen does to keep the organization operating. I have really admired Kathleen's organizational skills and patience. I am certain that it has not always been easy dealing with us defense lawyers. Thank you, Kathleen.

I have been saying for the past few years that the MDC Trial Academy has become a flagship event for the organization. For that reason, it was important to me that I have an involved role with the planning and organization of this year's event. Of course there were plenty of people that deserve all of the credit in making this year another successful one for the Trial Academy, but I would have to start by thanking Taren Stanton of Tydings & Rosenberg. Taren did most of the heavy lifting in pulling off the Academy, which took place at the BWI Marriott on April 11th. We had nearly 40 attendees and a numerous sponsors in attendance, who got to see four accomplished trial lawyers practice their craft. U.S. Magistrate Judge Timothy Sullivan gave a funny and informative keynote address during lunch. None of this would have happened but for Taren's hard work in seeing that every detail was covered. Thank you, Taren.

I also owe a great deal of gratitude to the Trial Academy's faculty, and Peggy Ward in particular. When we ran into trouble trying to fill out the Program's faculty, Peggy went above the call of duty and lined up the final faculty members. Indeed, it was also one of Peggy's cases that served as the inspiration for the fact pattern used in the Academy. Carlos Stecco and Charlie Arcodia, two members of the Maryland Association for Justice, played the roles of the lawyers for the plaintiff in the fact pattern. Two of our expert witness sponsors served as the experts in the case. The clients were played by students from the Mock Trial Teams at the University of Maryland and the University of Baltimore. Joe Jagielski was wonderful as our trial judge. I am obviously biased, but there is no doubt that the dynamic duo of Mary Dimaio and Peggy Ward secured a total defense victory in the mock trial. Thanks to all of you who participated in making the 2014 Trial Academy such a great success.

I think this year was also exceptionally successful because of MDC's legislative efforts thanks to Chris Boucher, Gardner Duval, Nikki Nesbitt, Ileen Ticer, Mike Dailey and others. I am particularly pleased that I did not have to testify in Annapolis this year! Thanks to these efforts the following bills opposed by MDC did not pass: jury excusal, dram shop, attorney's fees to prevailing plaintiffs, and all plaintiff medical malpractice and statutory cap bills. Thanks to all those involved, MDC continues a respected voice during the state's legislative session.

I am very pleased to announce to the general membership that we are reestablishing the Employment Law Committee. Bob Baror, Esq. from the Thatcher Law Firm and Jaime Luse from Tydings & Rosenberg have agreed to co-chair the reformed Committee. I am excited about the impact that this Committee can have on MDC's future.

Finally, I want to say that I am extremely grateful for having had the experience of working this past year with other Executive Committee members Mike Dailey, Nikki Nesbitt, Marisa Trasatti, and Immediate-Past Chair Mary Dimaio. You were all a real pleasure to work with and I look forward to seeing where you take MDC into the future.

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Featured Articles

Columns

The Top Ten "Do's" of a Law Firm Social Media Policy

Marisa A. Trasatti and Jhanelle A. Graham

By now, we know that social media is not a mere flash in the pan. Rather, online networking is here to stay, and lawyers must develop competency in "the benefits and risks associated with relevant technology," according to Rule 1.1 of the American Bar Association (ABA) Model Rules of Professional Conduct. Social media applications encompass a variety of online activity, all of which are traceable and leave virtual footprints. Lawyers, staff and occasional employees or contractors of a firm often participate in social media or social networking technologies, whether for purely personal or business-related reasons. These technologies include, but are not limited to, blogs; social networking sites such as Facebook and Google+; visual sharing sites like Pinterest, Instagram, and Youtube; professional networks, including LinkedIn and AVVO; and micro-blogs such as Twitter.

Although social media can serve as a useful marketing tool and investigation-gathering source, it is not used exclusively for business endeavors. Improper use may have consequences that include, among other issues, negative publicity, regulatory attention and confidentiality or copyright concerns. Additionally, misuse of social media may lead to unintended attorney/client relationships, conflicts with the professional rules of ethics, disclosure of trade secrets or other confidential information, and individual tort liability for negligence or defamation. For these reasons, every law firm should attempt to provide reasonable guidelines for online behavior to employees who participate in online networks. As new tools on the Web are introduced and new challenges emerge, the evolution of a law firm's social media policy becomes increasingly important. Below is a top ten (10) list of "do's" for creating an effective law firm social media policy:

Top Ten Inclusions in a Law Firm Social Media Policy:

1. Compliance with Law. Always ensure compliance with the law, as well as the Maryland Lawyers' Rules of Professional Conduct and the American Bar Association's Model Rules of Professional Conduct. Employees should never post any information or conduct any online activity that may violate applicable local, state, or federal rules or regulations.

2. Transparency. Where social media users are identified as employees, or where they comment on matters associated with the firm, they should be aware that they are expressing their opinions and not the opinion of the firm.[1] *Example:* "The views expressed on this site represent the author's alone and do not represent the views of the Firm." Employees should write or speak in the first person to help identify that they speak for themselves and not the firm. Further, creating or using a fictitious screen name to infiltrate an opposing party's networking site should be forbidden.[2] Employees should refrain from creating anonymous or pseudonym online profiles in order to pad statistics on page views or links.

3. Confidentiality. An effective law firm social media policy should discourage communications about the firm's sensitive and confidential information, such as the firm's fees, awards, recent cases, or case outcomes, unless specifically authorized by firm management. Also, employees should not disclose or distribute the firm's internal communications and proprietary information[3] to non-employees of the firm. Employees should never use a client's name in a social post unless they have written permission to do so.

4. Language. Discourage use of social media to post or display comments about coworkers, supervisors or the firm that are vulgar, obscene, threatening, intimidating, harassing, or a violation of the firm's workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, status, or characteristic.[4] Rather, employees who use social media sites should ensure that the tone of their comments is respectful and informative. In a similar vein, if a negative post or comment is found online about the firm or the employee, he/she should not counter with another negative post. Instead, employees should consult the firm's management about handling these types of situations. It is important that employees understand and credit the other person's point of view and avoid any communications that could result in personal, professional or credibility attacks.

5. Self-Promotion. Encourage firm employees to accurately state their positions, practices, professional qualifications, or professional accomplishments on personal websites, online networking sites, or social networking sites, beyond that described on the firm website.[5] Employees should never be false or misleading in their online credentials. Attorneys and other professional staff members must maintain complete accuracy in all of their online biographies and ensure that there is no misleading embellishment. For example, a lawyer's biography that states

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[1] *See* MODEL RULES OF PROF'L CONDUCT R.4.1 (prohibiting false statements) and R.5.7 (responsibilities regarding law-related services); MD. LAWYERS' RULES OF PROF'L CONDUCT 4.1 and R.5.7 (same).

[2] *See* MODEL RULES OF PROF'L CONDUCT R.4.1 (truthfulness in statements to others) and R.1.18 (prospective clients); MD. LAWYERS' RULES OF PROF'L CONDUCT R.4.1(truthfulness in statements to others).

[3] The National Labor Relations Board has stated that an employer prohibiting disclosure of confidential and proprietary information should be ready to narrowly define "confidential" and "proprietary". The Court of Appeals of Maryland has held that "proprietary information" includes trade secrets, which may consist of any compilation of information which is used in a business, and which gives that business an opportunity to obtain advantage over competitors. This may be a list of customers, for example. *Space Aero Products Co. v. R. E. Darling Co.*, 238 Md. 93 (1965).

[4] *See* MODEL RULES OF PROF'L CONDUCT R.8.4 (misconduct) and R.4.4 (respect for rights of third persons); MD. LAWYERS' RULES OF PROF'L CONDUCT R.8.4 and R.4.4 (same); *see also* NLRB, Memorandum OM 12-31 (January 24, 2012).

[5] *Id.; see also* MODEL RULES OF PROF'L CONDUCT R.1.18 (duties to prospective clients); MD. LAWYERS' RULES OF PROF'L CONDUCT R.1.18 (same).

(SOCIAL MEDIA POLICY) *Continued from page 5*

"Harvard-trained" after the attorney attends a weekend CLE course at Harvard is inaccurate and noncompliant with the Model Rules of Professional Conduct.[6]

6. Copyright. Enforce compliance with copyright laws. Any use of copyrighted or borrowed material by employees on social media sites should be identified with citations and links. When publishing any material online that includes another's direct or paraphrased quotes, thoughts, ideas, photos or videos, the online user should always give credit to the original material or author, where applicable.

7. Error. Acknowledge that mistakes may be made in an online forum, and encourage employees to correct them immediately. Since transparency is key, employees should simply admit the mistake, apologize if necessary, make the correction, and move on.

8. Respect. Discourage derogatory comments, blogs, Tweets, etc., about other law firms. All attorneys should practice respect for clients, competitors, lawyers and staff, vendors and other business partners in any posting on social media sites.

9. Attorney-Client Formation. Discourage the appearance of attorney-client relationships through online legal advice, whether on blogs or via other electronic channels.

10. Solicitation / Recommendations. Discourage the use of a chat room or other asynchronous form of mailing such as LinkedIn or Facebook to solicit clients.[7] Similarly, employees must be wary of the many ways in which recommendations and testimonials may violate ethics rules. Recommending colleagues is a tool of professional social networking sites, but employees should be reminded that the recommendations and comments they post about current and former attorneys of their firm can have consequences, even if the recommendations are not on behalf of the firm.

The key to drafting an effective law firm social media policy is to ensure that it is neither overbroad nor severely restricted, and continues to evolve as the legal landscape of social media changes. Law firms must

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[6] *See* MODEL RULES OF PROF'L CONDUCT R. 4.1 (truthfulness in statements to others); MD. LAWYERS' RULES OF PROF'L CONDUCT R.4.1 (same).

[7] *See* MODEL RULES OF PROF'L CONDUCT R.4.3 (dealing with unrepresented persons) and R.7.3 (solicitation of clients); MD. LAWYERS' RULES OF PROF'L CONDUCT R.4.3(dealing with unrepresented persons) and R.7.3 (direct contact with prospective clients).

Editor's Corner

The Editors are proud to publish this latest edition of *The Defense Line*, which features several interesting articles and case spotlights from our members. The lead article, submitted by Marisa A. Trasatti and Jhanelle A. Graham of Semmes, Bowen & Semmes, provides a top ten list of "do's" for creating an effective law firm social media policy. An article by Anthony W. Kraus of Miles & Stockbridge P.C. discusses the Court of Appeals of Maryland's decision in *Adler v. American Standard Corporation*, 291 Md. 31 (1981) and the three decades of issues still to be resolved with regard to claims of abusive discharge. Anthony J. Breschi and Christina N. Billiet of Waranch & Brown, LLC provide insight into the benefits of using "blind" expert reviews in medical malpractice cases. Robert Siems of the Law Offices of Robert L. Siems provides a macro look at Maryland Insurance Administration bad faith cases. Finally, Marisa A. Trasatti and Colleen K. O'Brien of Semmes, Bowen & Semmes provide a 2014 Maryland Legislative Update.

The Maryland Defense Counsel has had a number of successful events since the last edition of *The Defense Line*, including the always popular Past Presidents Reception and the 2014 Trial Academy. Mark your calendars now for the Maryland Defense Counsel's Annual Crab Feast, which will take place on June 18, 2014 at Nick's Fish House! The Editors encourage our readers to visit the Maryland Defense Counsel website **(www.mddefensecounsel.org/events)** for full information on the organization's upcoming events.

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

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Three Decades of *Adler* and Lingering Mysteries of the Abusive Discharge Tort

Anthony W. Kraus

It has been over thirty years since the Court of Appeals of Maryland first recognized the claim of abusive discharge in *Adler v. American Standard Corporation*, 291 Md. 31 (1981). Answering a certified question from Maryland's federal district court, the Court of Appeals decided that employees who are fired for reasons "in contravention of a clear mandate of public policy" are entitled to relief in tort. The newly-announced claim, in derogation of employers' traditional power to terminate at will, was based upon a delicate balancing of the interests of employees, employers, and society in general.

While thorough in its weighing of such concerns, the *Adler* decision left many thorny issues still to be resolved in the application of its new rule. Determining what constitutes "a *clear* mandate of public policy" has been the primary puzzle facing judges in adjudicating abusive discharge claims. Decisions applying the *Adler* rule have been largely devoted to discussing that issue, as has the related critical commentary. Generally, Maryland courts have found a "clear mandate of public policy" only where an employee has been discharged for (1) refusing to violate the law, (2) attempting to exercise a statutory duty, right, or privilege, or (3) performing an important public function. *Makovi v. Sherwin-Williams Co.*, 316 Md. 603, 610 (1989). Even with these guidelines, the *Adler* rule has remained obscure and the subject of controversy. *See, e.g.*, Haley, "*Porterfield v. Mascari II Inc.*: A 'Clear Mandate of Public Policy' Remains Unclear in Maryland's Wrongful Discharge Jurisprudence," 63 Md. Law Rev. 605 (2012).

Equally perplexing as how to rate the "clarity" of public policy mandates, however, are three other questions that arose but were undecided in *Adler*, and have persisted as sources of additional uncertainty in such claims. In *Adler*, the plaintiff had alleged that he had been discharged for "whistleblowing" internally to management in Maryland about illegalities that were principally defined by federal law and that had been committed out of state by company personnel in New Jersey and Mexico. This complicated scenario raised questions of (1) whether intra-company complaints, rather than reports to external public authorities, were sufficient to trigger abusive discharge relief in a whistle-blowing context, (2) whether federal law is incorporated as a source of "Maryland" public policy that can serve as a foundation for the claim, and (3) whether the relevant public policy should be confined to intra-state interests rather than more broadly encompassing interstate or international interests.

These three secondary *Adler* issues, which have been largely overlooked in the extensive commentary on the case, are the focus of this article. While these questions are yet to be decided by Maryland's Court of Appeals, they have been addressed, at least preliminarily, by judges in Maryland and elsewhere, and have been the subject of sharp difference of opinion. To track where things currently stand and where they may be heading in Maryland, the relevant decisions are discussed below.

A. "Whistleblowing" Sufficient to Trigger Abusive Discharge Protection.

The ultimate resolution of the abusive discharge claim in *Adler* occurred in the United States Court of Appeals for the Fourth Circuit, following the trial of the case in federal district court. The Fourth Circuit reversed a jury verdict for the plaintiff, and held that the motivation for his discharge, which allegedly was retaliation for complaining internally to his immediate supervisors about commercial bribery, did not contravene a sufficiently clear mandate of public policy. In the view of the panel majority, an abusive discharge tort claim for whistleblowing arises only when an employee is fired for reporting employer wrongdoing to law enforcement agencies or other public authorities *outside* the company, which had not occurred. *Adler v. American Standard Corporation*, 830 F.2d 1303, 1306 (4th Cir. 1987).

The question of whether external communication to governmental authorities was necessary to trigger protection under the *Adler* doctrine was revisited in *Lee v. Denro, Inc.*, 91 Md. App. 822 (1992), in which a trial court had dismissed a complaint for lack of such alleged public reporting. The Court of Special Appeals affirmed on another ground, but the opinion by Judge Diana Motz noted in dicta that "[t]he existence of public policy would not seem to depend on whether an employee articulates her grievances to government authorities." *Id.* at 835, n. 5.

The Maryland Court of Appeals further considered the matter in *Wholey v. Sears, Roebuck & Co.*, 370 Md. 38 (2002), which involved an alleged retaliatory firing for internal investigation and reporting of criminal conduct. Contrary to the dicta in *Lee v. Denro*, the court concluded that "'[t]o qualify for the public policy exception to at-will employment, the employee must report the suspected criminal activity to an the appropriate law enforcement or judicial official, [and] not merely investigate suspected wrongdoing and discuss that investigation with co-employees or supervisors," as the plaintiff allegedly had done. *Id.* at 62 Under Section 762 of Article 27 of the Maryland Code, it is a crime to retaliate against a person who reports suspected criminal behavior to law enforcement authorities; and consistent with that statute, the Court held that an abusive discharge claim could be brought by an employee fired for reporting crimes to public officials, but not for simply reporting crimes internally. In so ruling, the court confirmed the Fourth Circuit's conclusion in *Adler* that mere investigation or internal reporting of suspected criminal activity was not enough. While two judges did not join in Wholey opinion, and just concurred in the result, their expressed reservations did not relate to the external reporting requirement. Rather, because the plaintiff had failed to meet the requirements of § 762, they concluded that the issue of whether or not an abusive discharge claim could be based on that statute's public policy was moot and need not have been addressed.

In *Lark v. Montgomery Hospice, Inc.*, 414 Md. 215 (2010), the Court of Appeals subsequently considered whether such external reporting was required as an element for a direct, statutory whistleblowing claim under Maryland's Healthcare Workers Whistleblower Protection Act, Md. Code Ann., Health Occ.§§ 1-501 - 1-506. In contrast to its more conservative decision in *Wholey* under the common law, the court interpreted the statute liberally to provide job protection for employees who merely complained internally about noncompliance

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with laws, rules or regulations; and it did not require the reporting of such wrongdoing to "an external board." The court noted that the statute specifically included protection for those who "threatened to report" as well as who reported, which clearly contemplated that no actual external report was necessary for relief. The court also cited out-of-state abusive discharge cases that had extended common law protection to internal whistleblowers.

In the most recent abusive discharge case raising the internal/external reporting distinction — *Parks v. Alpharma, Inc.*, 421 Md. 59 (2011) — the Court of Appeals side-stepped further assessment of the issue. In *Parks*, the plaintiff claimed to have been fired for making internal complaints about her employer's unlawful practices in development of pharmaceuticals. Among other things, she contended that its practices had violated the Maryland Consumer Protection Act, the Federal Trade Commission Act, and labeling regulations of the Federal Drug Administration. Consistent with *Wholey*, the trial court had dismissed her claim because she had not reported the alleged wrongdoing externally; but the Court of Appeals affirmed on the alternative ground that various public policies invoked in her complaint were insufficiently specific and focused to support a claim. While approving the result, Judge Adkins stated in a concurring opinion that the Court should specifically have disavowed the "external" reporting requirement relied upon by the trial court. She believed any such requirement had been effectively rejected in *Lark*, even though that opinion had involved a statutory rather than a common law claim. *Parks*, 421 Md. at 87-88

Consequently thirty years after *Adler*, it is still an open and much-debated question about whether the Fourth Circuit properly required "external" reporting for an abusive discharge claim based on whistleblowing, or whether, as Judge Adkins and Judge Motz both have proposed in the meantime, internal reporting should be sufficient.

B. Reliance upon Federal Public Policy.

In a later phase of the *Adler* litigation in 1982, after the theory of abusive discharge had been recognized preliminarily through the certified question procedure, the defendants had moved for dismissal of Adler's claims insofar as they were based upon alleged contravention of federal law and public policy. Federal District Judge Harvey, before whom the case was then pending, flatly rejected the argument that federal law should not be considered part of the "public policy of Maryland" for purposes of stating such a claim:

> If plaintiff recovers, there would be no binding determination of a violation of a federal statute, nor any enforcement of same. It is in no way offensive to state sovereignty to engraft federal public policy within the civil law. If defendant's arguments were to be adopted, this Court would accept the proposition that the State of Maryland, as a matter of public policy of its own, should not be concerned with serious violations of federal law resulting from acts of bribery. Federal and state officials regularly cooperate in the enforcement of the laws of the other sovereignty. This Court cannot agree that the State of Maryland should close its eyes and, as a matter of policy, not be concerned with violations of federal law.

Adler v. American Standard Corporation, 538 F. Supp. 572, 578-79 (D. Md. 1982).

Although the Fourth Circuit did not reach the issue in the appeal of *Adler*, it did address the point in a subsequent case — *Szaller v. The Am. Nat'l Red Cross*, 293 F.3d 148 (4th Cir. 2002) – where its view diverged sharply from Judge Harvey's. The Fourth Circuit concluded that predicating abusive discharge relief on federal public policy, at least as derived from the welter of federal administrative regulations, would unduly burden Maryland employers and blur the boundaries of the claim:

> Szaller argues that the Red Cross violated a clear mandate of public policy by discharging him for reporting allegedly improper blood handling procedures to a Red Cross hotline. . . He relies solely on FDA regulations and a consent decree between the FDA and the Red Cross to support his wrongful discharge claim. Maryland courts, however, have given no indication that federal regulations or consent decrees constitute Maryland public policy. . . . [F]ederal policy is enforced by the means Congress specifies, not through state-law wrongful discharge actions.
>
> In an attempt to address the overwhelming burden his position would place on Maryland employers, Szaller contended at oral argument that only federal regulations dealing with situations of "extreme importance" should be included in the state's public policy. . . But all federal regulations address areas of public concern, and a litigant could argue that all federal policies protect cogent and compelling interests. If the Maryland courts or legislature wish to define which federal regulations also qualify as clear mandates of state public policy, they are free to do so. But federal courts cannot draw the line for Maryland.

Szaller, 293 F.3d at 151.

Prior to *Szaller*, federal law had been utilized in a few Maryland abusive discharge claims as a source of applicable public policy *See*, *e.g.*, *Magee v. DanSources Technical Services*, 137 Md. App. 527 (2001) (holding a claim could be based upon discharge for refusing to violate a federal statute outlawing health care benefit fraud); *Kessler v. Equity Management*, 82 Md. App. 577 (1990) (finding that the discharge of a rental property manager for allegedly for refusing to enter apartments and "snoop" through their contents contravened not only state law policies against trespass and invasion of privacy but also the 4th Amendment's policy against unreasonable searches); and *DeBleeker v. Montgomery County Maryland*, 292 Md. 498 (1982) (upholding a potential § 1983 discharge claim by a public employee alleging retaliation for exercising 1st Amendment rights, and obliquely citing *Adler* in support of its ruling.).

The question arose again in *Parks v. Alpharma*, *ante*, which involved alleged violation of Federal Drug Administration regulations, among other things; but the Court of Appeals skirted the issue of reliance on federal law, and affirmed for other reasons. Again, however, in dicta in a concurring opinion, Judge Adkins expressly endorsed permitting state abusive discharge claims based on contravention of federal public policies, and stated her concern that the majority's references to the *Szaller* opinion might be construed as tacit approval of the Fourth Circuit's conclusion to the contrary. With a vehemence reminiscent of Judge Harvey's in *Adler*, she rejected what she characterized as the "Fourth Circuit's tirade against reliance on federal regulation in abusive discharge cases" and remarked that "it was by no means beyond the ken of this Court to assess the

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relative importance of one Federal regulation over another in terms of wrongful discharge law." *Parks*, 421 Md. at 89–91. Although not mentioned in her concurrence, she had personal experience in applying federal law in an abusive discharge setting, having authored the Court of Special Appeals' decision in *McGee*, which had relied upon an anti-fraud provision in federal health care benefit law.

Whether the failure of other judges to join Judge Adkins' concurrence in *Parks* reflects their support for the Fourth Circuit's position, or simple reluctance to consider an issue they may have viewed as unnecessary to address, remains to be seen when the question again arises before the court in a future case.

C. Extra-Territorial Contravention of Relevant Public Policy.

An additional unresolved question raised in *Adler* was whether a retaliatory firing in Maryland for whistleblowing about wrongdoing occurring outside of the state contravened *Maryland's* public policy sufficiently to support an abusive discharge claim. Judge Harvey's opinion in *Adler* had given short shrift to any potential constitutional and practical problems related to the out-of-state location of the reported misconduct, which primarily had been commercial bribery in New Jersey and Mexico. *Adler*, 538 F. Supp. at 578 ("The civil law remedy in Maryland for an abusive discharge does not . . . have extraterritorial effect"). One Fourth Circuit panel member had raised concerns about it in oral argument in the *Adler* appeal, but the court's eventual decision did not address it.

In the wake of Judge Harvey's original ruling, the courts of Maryland appear not yet to have had occasion to reconsider the issue, but there is a split of authority that has emerged in the out-of-state decisions, illustrated by decisions from Illinois and New Jersey.

In *Pratt v. Caterpillar Tractor Co.*, 500 N.E.2d 1001, 1002 (Ill. App. Ct. 1986), an Illinois appeals court rejected an abusive discharge claim brought by an employee who alleged that his employer's Swiss subsidiary had paid bribes in violation of the Foreign Corrupt Practices Act ("FCPA") and who reportedly was terminated for refusing to certify to the contrary on company documents. The court concluded that Congress's efforts to regulate American international corporations in their dealings with foreign states did not implicate the public policy of Illinois. In *Osikowiz v. Northwest Airlines, Inc.*, 1994 WL 23153 (N.D. Ill. Jan 27, 1994), another Illinois court concluded that there is no local public policy basis under Illinois law "favoring the reporting of extraterritorial crimes."

In contrast, two decisions from New Jersey's Supreme Court have taken the opposite view. In *D'Agostino v. Johnson & Johnson*, 133 N.J. 516 (1993), the court addressed an abusive discharge claim by a Swiss resident working for the Swiss subsidiary of a New Jersey-based corporation, who claimed to have been fired in Switzerland for objecting to payments there in alleged violation of the FCPA. The court concluded that foreign bribery in Switzerland had a potential effect on New Jersey and upon the health and welfare of its citizens, and that because the FCPA was intended to have an extraterritorial effect, incorporation of the FCPA's policies into New Jersey employment law was a permissible extraterritorial effect. It also sought to characterize the result as "not exporting New Jersey employment law so much as applying New Jersey domestic policy, drawn from federal sources, to a domestic company." *Id.* at 539.

Subsequently, that court sustained a similar internationally oriented claim brought under the New Jersey Conscientious Employees Protection Act, which codifies the state's abusive discharge law. In *Mehlman v. Mobil Oil Company*, 153 N.J. 163 (1998), the state supreme court concluded that the defendant company's director of toxicology, who alleged that he was fired for advising a company manager that gasoline sold by the company in Japan contained unsafe benzene levels in excess of 5%, had a viable claim. Such benzene levels exceeded those prescribed by the Japanese Petroleum Association, which represented the oil industry in its relations with the Japanese government, and whose guidelines were found by the court to authoritatively state the public policy of Japan. The court concluded that retaliation for whistleblowing about violation of such foreign public policy, even if the employee had been unaware of the policy's specific legal underpinning in the law of Japan, was properly actionable under the statute.

It is unclear whether Maryland will go so far in extending the reach of its law of abusive discharge, although doing so would appear to be at odds with the Court of Appeals' cautionary comments about the intended "limited nature" of the claim. *See, e.g., Makovi v. Sherwin-Williams, Co.* 316 Md. 603, 609 (1989). But whatever the eventual outcome, the persistence of these basic questions, among others, is a reminder of the complexity of what the Court of Appeals began in *Adler*. In initiating relief for discharged employees that seeks to vindicate the vague, general concept of "public policy," and also is to evolve through the halting, case-by-case procedure of the common law, the court created what, to borrow Churchill's phrase, seems to be an abiding riddle, wrapped in a mystery inside an enigma, at least in comparison to the more familiar forms of employment regulation found in focused, comprehensive statutes.

Anthony Kraus is a Principal in Miles & Stockbridge P.C.'s Baltimore office. His practice focuses on traditional labor-management matters in the Firm's Labor and Employment Practice Group.

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Sometimes "Blind" is Better!

Anthony J. Breschi and Christina N. Billiet

More information is always good, right? The traditional thinking among the medical malpractice defense bar (and usually for good reason), is the better informed your expert witness, the less vulnerable he will be to cross examination and the more he will shine in front of a jury. Toss that thinking aside for now.

A 2010 study concerning medical/legal expert reviews exposes a huge problem with the "more is better approach." The study, published by the American Journal of Roentgenology, examined a radiology medical malpractice case where the defendant radiologist was alleged to have "missed" a 1 mm symmetric widening of the facet joints at T10 on CT scan.[1] The plaintiff retained four radiology experts, each of whom testified that the standard of care required identification of this finding by the defendant radiologist.

Following settlement of that case, researchers had thirty-one independent radiologists review the CT scan in question in the normal course of business, with no knowledge of the patient's outcome or the litigation. The result was that *none* of the thirty-one radiologists made the finding identified by the plaintiff's expert witnesses. In other words, all thirty-one radiologists "missed" the 1 mm widening of the facet joints at T10. This suggests that the plaintiff's expert radiologists — either intentionally or unintentionally — applied an unrealistic standard of care in reviewing the CT scan in question.

So what is the problem and, more importantly, how can you solve it to the benefit of your client? The answer is twofold:

(1) Obtain "blind reviews" of your case by potential defense expert witnesses to ensure a fair review; and

(2) Expose the failure of plaintiff's experts to perform blind reviews and, as a result, the application of an inappropriate standard of care.

What is a blind review and when can the blind review process be utilized? There are many versions of the "blind review," which can be tailored to fit nearly any type of medical malpractice case.

The "blind review" is most often used in radiology cases, and for good reason. CT scans, MRIs and other imaging studies often lend themselves to a "Where's Waldo?" approach to litigation. *No matter how obscure or difficult the finding may be, once the expert is told where that finding is, it becomes obvious!* We have all experienced this phenomenon in everyday life, and medical/legal experts are no different. So, how can the blind review combat this?

Case Example: A fifty-year-old male Patient presents to his primary care physician with a cough. The physician suspects pneumonia and orders a chest x-ray. The Radiologist interprets the chest x-ray as indicative of pneumonia and reports that finding. Fast forward a year and a half — the Patient is diagnosed with Stage 3 lung cancer. The allegation is that the Radiologist missed early indicators of lung cancer on the chest x-ray, thereby depriving the Patient of earlier treatment options and the opportunity for a better outcome.

The ULTIMATE Blind Review: The defense team anonymously contacts a radiology Expert and does not inform her whether they represent the plaintiff or defendant, or provide any information about the case at issue. The Expert is provided a CD with *15 de-identified, HIPAA-protected* imaging studies for 15 different patients — x-rays, CT scans, MRIs — and is asked to review each and state whether the accompanying report is accurate.

The Key: This type of blind review most closely imitates the "normal course of business" for a radiologist. While not perfect, it eliminates potential bias and allows the Expert to review and interpret the study just as she would at any other time.

The "level" of blind review performed can be simplified in several ways — the expert can be provided several *HIPAA-protected and de-identified* cases to be reviewed at the same time, and not told which is the subject of a medical malpractice action.

Case Example: A pregnant woman presents for genetic testing due to her advanced maternal age and accompanying increased risk for genetic defect. Chromosomal analysis performed on the fetus is reported as normal. When the child is born, however, he is diagnosed with a rare genetic disorder that, according to plaintiffs' experts, was evidenced by a micro-deletion in chromosome 17. The allegation is that the maternal-fetal medicine Specialist who performed the chromosomal analysis should have identified the micro-deletion and its significance, thereby providing plaintiffs the opportunity to terminate the pregnancy.

The Blind Review: The defense team retains multiple maternal-fetal medicine Experts and provides them with four HIPAA-protected and de-identified chromosomal fetal analyses, one of which is the chromosomal analysis at issue. The Experts are provided only with the background information that they would be given in the normal course of business. The Experts are asked to review each chromosomal analysis and draft a report confirming his/her findings.

Continued on page 17

Expert Information Inquiries

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

To check out the **MDC Expert List**, visit **www.mddefensecounsel.org** and click the red "Expert List" button in the left hand corner of the home page or access it from the directory menu.

[1] Semelka, et al., *Objective Determination of Standard of Care: Use of Blind Readings by External Radiologists*, AJR 2010; 195: 429–431.

(BLIND IS BETTER) *Continued from page 15*

The Key: When performing their reviews, the Experts do not know which of the four cases is in litigation, or what the plaintiffs' criticisms are. As a result, they do not unfairly "focus" their review on chromosome 17, thereby applying a standard of care influenced by knowledge of the outcome.

The easiest way to implement a blind review is by simply withholding from your potential expert the "end of the story."

Case Example: A 70-year old male Patient presents to the Emergency Department with back and chest pain after running 100 yards. The Patient is worked-up by the Hospitalist, who suspects a musculoskeletal issue, but admits the Patient for cardiac monitoring overnight, to be safe. Just prior to Patient A's scheduled stress test the following morning, he suffers a fatal heart attack. The allegation is that the Hospitalist failed to appreciate and treat Patient A's evolving cardiac condition with medication and an emergent cardiac catheterization.

The Blind Review: The defense team retains a hospitalist Expert and provides her with all records relating to Patient A's history, presentation, work-up, diagnosis and plan for treatment. The Expert is not provided any information regarding Patient A's heart attack or death. The Expert is asked to opine whether the Hospitalist's work-up, diagnosis and treatment plan complied with the standard of care.

The Key: When performing her review, the Expert knows only what the Hospitalist treating Patient A knew at the time of treatment. The Hospitalist did not have the "benefit" of knowing Patient A's ultimate outcome, and in order to provide a fair, prospective review, the Expert should not, either.

In our experience, presenting a jury with an expert who performed a true blind review — and found that the Defendant Doctor complied with the standard of care — gains the defense credibility. You are able to argue that your expert applied the true "standard of care." The plaintiffs' expert, by contrast, "knew the end of the story" and, as a result, was biased in his or her review.

A 2010 New York University Law Review article studied the impact of blind expert reviews in many types of cases, including medical malpractice. The author reported that experts who perform blind reviews are more likely to "reveal a truthful opinion" at trial and exhibit accompanying "truth signals" to the jury.[2] By contrast, an expert who does not perform a blind review may appear to be a "hired gun" and earn less credibility with the jury.

You may be thinking — what is the downside to obtaining a blind review? There are some, although we believe all are outweighed by the benefits gained:

(1) **It's extra wo**rk! Obtaining a blind review requires defense counsel, often in conjunction with the client, to create a blind review "package." This means — on the easy end — excluding certain records and ensuring you do not reveal critical information to the Expert, and — on the complicated end — compiling numerous HIPAA-protected, de-identified case files for the Expert's review.

(2) **You don't always get the opinion you want.** When you remove bias, you remove bias. If you have a tough case, a "defense-oriented" Expert may offer the greatest opportunity for obtaining a positive review and Certificate of Qualified Expert. We suggest attempting a blind review and, if that does not result in a positive review, moving on to a traditional review with a different Expert.

The blind review is, overall, a relatively simple tool that defense counsel has in just about every medical malpractice case. The potential benefit in terms of jury appeal is huge, and we think it is clear that sometimes, Blind is Better!

Anthony J. Breschi is a partner and Christina N. Billiet is an associate at Waranch & Brown, LLC.

[2] Robertson, Christopher, *Blind Expertise*, NYU Law Review, Vol. 85: 174–257, 220 (2010).

(SOCIAL MEDIA POLICY) *Continued from page 7*

respect the privacy and autonomy of their employees while also maintaining a sense of professionalism in online networking. In summary, law firm social media policies should encourage employees to abide by the following three (3) principles: **Disclose** — an employee's presence in social media must be transparent; **Protect** — take extra care to protect the firm, its clients, and the employee; and **Use Common Sense** — remember that professional, straightforward, and appropriate communication is always best. *When in doubt, leave it out!*

Marisa A. Trasatti is a partner at Semmes, Bowen & Semmes in Baltimore, Maryland. Her practice focuses primarily on civil litigation, with an emphasis on products liability litigation.

Jhanelle Graham is an associate at Semmes, Bowen & Semmes.

ADDITIONAL SOURCES

See also NATIONAL LABOR RELATIONS BOARD, MEMORANDUM 12-31, REPORT OF THE GENERAL COUNSEL (Jan. 24, 2012); *Echostar Technologies, LLC*, Case No. 27-CA-066726 (N.L.R.B. Div. of Judges, Sept. 20 2012) (finding that the social media policy provision at issue could be reasonably interpreted to interfere with the right of union and non-union employees to engage in protected concerted activity under Section 7); *COSTCO Wholesale Corporation and United Food and Commercial Workers Union, Local 371*, 358 NLRB 1, 2012 WL 3903806 (Sept. 7, 2012) (same); *Knauz BMW and Robert Becker*, 358 NLRB No. 164, 2012 WL 4482841 (Sept. 28, 2012) (upholding the discharge of an employee for "his unprotected Facebook postings about an auto accident" at an adjacent dealership, which did not relate to his own terms and conditions of employment); USER NAME AND PASSWORD PRIVACY PROTECTION AND EXCLUSIONS ACT, SB 433 (eff. Oct. 1, 2012) (forbidding Maryland employers from: (1) requesting or requiring that an employee or an applicant for employment, provide access to personal social media accounts; and (2) discharging, disciplining, penalizing or threatening an employee for refusing to disclose such information); Jennifer S. Lubinski, *A Real Danger of Speech in the Social Media Era: Employment Termination*, Md. Bar. J. (November 2013).

Macro Look at MIA Bad Faith Cases

Robert L. Siems and Yosef Kuperman

Under Maryland's Insurance Code, §27-1001 *et seq.*, insureds bring first party bad faith claims with the Maryland Insurance Administration ("MIA"). From there, the parties can choose to appeal to the Office of Administrative Hearings or the local Circuit Court.

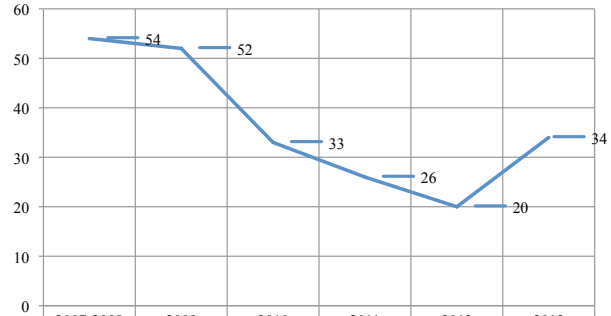
About half of bad faith cases in any given year settle. Of those cases that reach a merits decision, the insurer usually wins. In 2013, the worst year for insurers so far, the insurers won 75% of merits decisions.

We pulled all the data in this article from the MIA's annual reports. The annual reports cover 2007–2008 until 2013. The 2007–2008 report covers two years for administrative reasons. We treat the data from the report as a single unit for reasons of convenience.

MIA Cases Filed

The MIA's workload has steadily declined since it started the reports. 2012 saw approximately less than half of the total cases in 2007-2008. But numbers climbed for the first time in 2013.

Total Cases By Year

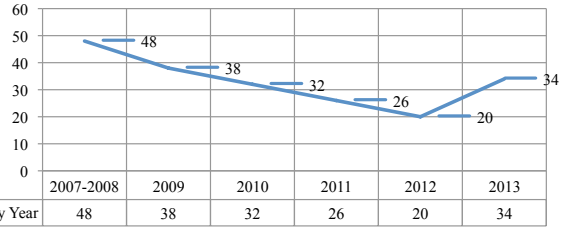


	2007-2008	2009	2010	2011	2012	2013
Total Number of Cases	54	52	33	26	20	34

MIA Cases Excluding Those Without Jurisdiction

If you exclude cases dismissed for lack of jurisdiction (see data summarized below), the graph looks slightly different. The decline in cases prior to 2013 becomes far more pronounced.

Properly Filed Cases By Year

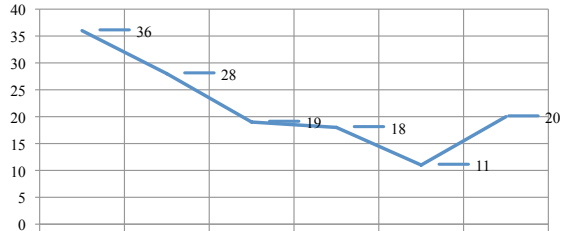


	2007-2008	2009	2010	2011	2012	2013
Adjusted Total Cases By Year	48	38	32	26	20	34

MIA Cases Decided On Merits

When you narrow it down to how many cases were decided on the merits in any year, excluding both improperly filed cases and settled cases, the numbers still show the same basic trend.

Merits Decisions By Year



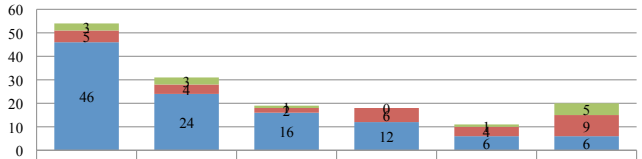
	2007-2008	2009	2010	2011	2012	2013
Merits Decisions By Year	36	28	19	18	11	20

MIA Cases by Line of Business

The MIA Reports classify their cases by line of business. In the first year, they listed what percent of all cases filed came from what line of business. In later years, they listed what percent of all cases *decided on the merits* came from what line of business.

Misc. includes "miscellaneous", "commercial", and "trademark". In 2007–2008, the report used "Auto" instead of UM, but later reports switched to UM. "Home" includes "Renters."

MIA Cases by Line of Business



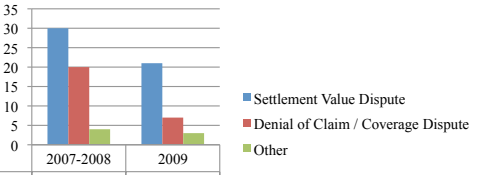
	2007-2008	2009	2010	2011	2012	2013
Misc.	3	3	1	0	1	5
Home	5	4	2	6	4	9
Auto/UM	46	24	16	12	6	6

MIA's caseload originally overwhelmingly consisted of UM/Auto cases, but the proportion has decreased as the number of cases has declined. 2013 was the first year that Auto/UM did not constitute a majority of the cases involved.

Reasons for Grievance

The MIA also reported the reason for cases in the first two reports.

MIA Cases by Grievance (2007-2008, 2009 only)



	2007-2008	2009
Settlement Value Dispute	30	21
Denial of Claim / Coverage Dispute	20	7
Other	4	3

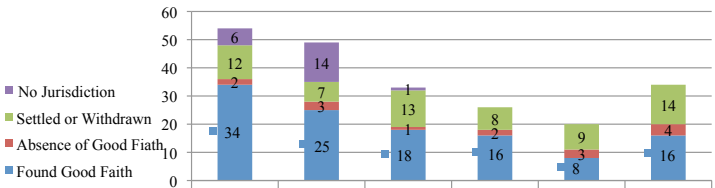
Continued on page 21

(MIA BAD FAITH CASES) *Continued from page 19*

MIA Case Dispositions

The MIA Report tracks what happened to cases. Both the number and the percentage appear on the chart.

Case Dispositions by Year



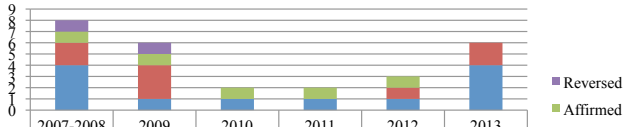
	2007-2008	2009	2010	2011	2012	2013
No Jurisdiction	6	14	1			
Settled or Withdrawn	12	7	13	8	9	14
Absence of Good Fiath	2	3	1	2	3	4
Found Good Faith	34	25	18	16	8	16

Two things stand out:

- First, Insurers usually win merits based decisions. The MIA has not found an absence of good faith more than four times in a year.
- Second, between a third to a half of all cases are Settled, Withdrawn, or Dismissed. We do not know what happened to those cases.

Office of Administrative Hearings Appeals

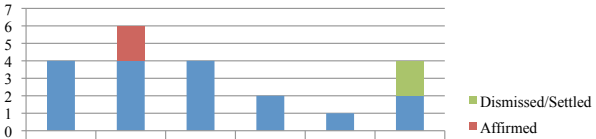
Administrative Appeals of MIA Decisions



	2007-2008	2009	2010	2011	2012	2013
Reversed	1	1	0	0	0	0
Affirmed	1	1	1	1	1	0
Pending	2	3	0	0	1	2
Withdrawn	4	1	1	1	1	4

Circuit Court Appeals

Circuit Court Appeals of MIA Decisions



	2007-2008	2009	2010	2011	2012	2013
Dismissed/Settled	0	0	0	0	0	2
Affirmed	0	2	0	0	0	0
Pending	4	4	4	2	1	2

Lessons Learned

Claim Handling Mistakes

- Taking enormous amounts of time to make simple determinations.
- Making low-ball offers, including offers for less than the insured's quantifiable damages.
- Making offers to settle a case without any basis in the facts, especially if made before gathering the facts.
- Making offers to settle a case based on highly selective readings of the facts, especially if you base the offer on ignoring your own staff's repeated recommendations and your own doctor's report.
- Sending the insured a barrage of offers (especially low-ball offers), one after another, in a short period of time.
- Sending a low-ball offer to "fish" for counter-offers or sound out an insured's position.
- Changing claim handlers midway through handling the case (especially if done several times) and losing continuity between the different claim handlers during the process (especially if you make the claim handlers reevaluate each other's work or recant on their predecessor's positions without a good reason.)
- Not communicating with other claim handlers handling related claims at the same company.

Lawyering Mistakes

- Not filing all required documents. Not filing a complete claims file, for example, is apparently a procedural default. (That said, the MIA will proceed to find the facts on the record showing bad faith anyway.)
- Making spurious legal arguments that ignore precedent. The MIA notices.
- Refusing to pay despite known and obvious legal obligations to do so.
- For plaintiffs, not submitting an detailed bill for legal fees showing how you earned them. In 2013, the MIA denied two plaintiffs their attorney's fees for failure to show how those fees will earned.

Robert L. Siems is principal in the Law Offices of Robert L. Siems, P.A. His practice is primarily first and third party coverage litigation, extra contractual insurance claims, insurance bad faith, insurance defense, complex litigation, and ADR. He is certified as a chartered property casualty underwriter. Mr. Siems previously has spoken for various professional groups on his areas of practice. He is a member of the Maryland State Bar Association, Inc., American Bar Association, Maryland Defense Counsel, Inc. and the Defense Research Institute. Mr. Siems earned his B.A. degree from the University of Miami, his J.D. degree from the University of Baltimore and his M.B.A. degree from Loyola College.

Yosef Kuperman is a recent graduate of the University of Baltimore School of Law, Class of 2014. He has worked as a law clerk for the Law Offices of Robert L. Siems, and he plans to take the July 2014 Bar Exam. He hopes to practice civil litigation in Baltimore.

2014 Legislative Update

Marisa A. Trasatti and Colleen K. O'Brien

MDC's lobbyists have been busy monitoring the bills affecting its members during the 2014 General Assembly Session. John Stierhoff, Ileen Ticer, Gardner Duvall, Mike Dailey, Chris Boucher and Nikki Nesbitt are among those who have testified or are expected to testify and propose amendments to certain bills. We highlight below some of the bills on which MDC is acting:

HB 73 / SB 247: A hot topic this year is the reversal of the Maryland Court of Appeals' decision in *Tracey v. Solesky*, 427 Md. 627 (2012) (concerning dog bite liability and holding that an owner or landlord could be held strictly liable for dog bites from pit bulls or pit bull mixed breeds, so long as the owner or landlord knew or should have known that the dog was part pit bull.). HB 73 / SB 247 would establish that in a claim for damages against a dog owner for death or personal injury, evidence that the dog caused the personal injury or death creates the rebuttable presumption that the owner knew or should have known of the dog's vicious propensities. Given *Tracey*, MDC supported the rebuttable presumption at the heart of HB 73 / SB 247, but sought for the law to be redrafted to eliminate the interpretation that it reverses the burden of proof on any element of a dog liability claim other than the propensity of the dog to cause harm. Additionally, MDC proposed to strike out the section requiring every liability claim to be submitted to a jury even if the court would grant judgment as a matter of law to the defendant. If the rebuttable presumption were established as a matter of law, then MDC submitted that the Rules of Civil Procedure should be applied as in any other case. The Judicial Conference and many others, agree with MDC's view. This legislation is a compromise to protect innocent landowners while avoiding the strict liability for dog owners that many legislators advocate for.

SB 209: This dram shop liability bill would for the first time impose liability on liquor licensees and their employees for accidents caused by drunk drivers leaving the licensed premises in Maryland. Under the proposed act, a person may bring an action against a liquor licensee or its employee who sold or furnished alcoholic beverages to an individual if: (1) the licensee/employee knew or reasonably should have known that the individual to whom the alcoholic beverages were sold or furnished was "visibly under the influence of alcoholic beverages"; (2) the licensee/employee could have reasonably foreseen that the individual might drive or attempt to drive a motor vehicle after consuming the alcoholic beverages; (3) after consuming the alcoholic beverages, the individual negligently drove or attempted to drive a motor vehicle; and (4) the individual's negligence in driving or attempting to drive the motor vehicle was a proximate cause of the damages claimed in the action. The standard of proof to be applied is clear and convincing evidence and a one year statute of limitations applies to such claims. MDC urged an unfavorable report with respect to SB 209 on grounds that it imposes far too lenient a standard of liability for such liability to be imposed fairly. Patrons are too unpredictable to impose liability fairly to strangers to the licensee, and there is no objective and equitable way to impose a meaningful standard of liability.

SB 215 / HB 280: This purpose of this Act is to prohibit employers or their insurers, except under certain circumstances, from being required to pay for a prescription that is dispensed by a physician to certain covered employees, and generally relating to payment for prescriptions dispensed by physicians to covered employees. According to Ileen M. Ticer, Esquire, Co-Chair of the MDC Workers' Compensation Committee, physician dispensing continues to be an unnecessary cost driver in compensation claims: "It is a practice that is not seen on the health side, only in workers' compensation. Repackagers, who supply the drugs, hype this practice to physicians as a way to increase their income and it falls on the backs of businesses and insurers to absorb the cost." Generally, the Act would only require employers/insurers to pay for prescriptions dispensed by a physician to a covered employee if that prescription is dispensed within 30 days after the covered employee's initial consultation, and would limit the prescription to no more than a 30-day supply of the medication. MDC supports this Act, but submitted a proposed Amendment to clarify that it applies to prescriptions dispensed by a physician to a covered employee whose accidental personal injury, compensable hernia, or occupational disease has been "accepted by the employer or its insurer" or "has been determined to be compensable by the Commission."

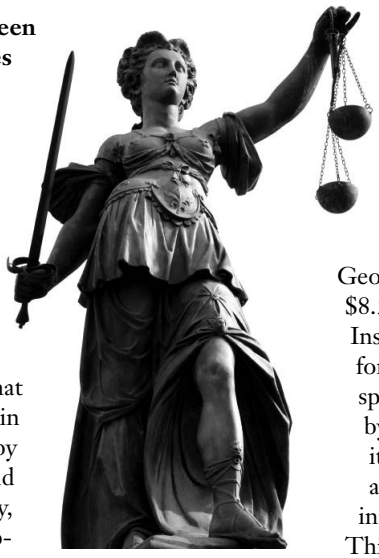
HB 219 / SB 216: MDC supported this workers' compensation bill which would allow either party to request subpoenas once an issue has been filed by either party. In its current form, the applicable statute has been interpreted to prohibit the issuance of subpoenas until a disputed issue in a compensation claim has been set for hearing. Issues can be filed at any time and it usually takes 3–4 weeks after an issue has been filed in order for a hearing to be set. Due to the restrictions of HIPAA, MD. CODE ANN., HEALTH GEN. § 4-306, and the speedy resolution of disputes by the Workers' Compensation Commission, the parties are prevented from being able to subpoena and receive relevant medical and employment history prior to the hearing. This bill would allow either party to request subpoenas once an issue has been filed by either party. As of the date of this article submission, the bill passed the Senate Finance Committee. According to Ticer, "In an effort to alleviate the time constraints imposed by the prior statute, all parties-claimants, employers, carriers, and the Commission, under the direction of Delegate Jameson and Senator Klausmeier, worked together in order to pass a bill that was acceptable to all."

HB 439: This bill provides that an individual may be excused from jury service if the individual is a primary caregiver for a minor under the age of 6 years and unable to find child care for that minor, is a breast-feeding mother, or is a parent currently on paternity or maternity leave. MDC urged an unfavorable report with respect to House Bill 439. Although MDC agreed that it may well be difficult for the primary caregivers, mothers and parents on maternity leave to appear for jury service, the Court already has broad discretion when it comes to considering a request to be excused from jury service. Specific exclusion of certain groups of persons from jury service could unintentionally skew the makeup of juries and the constitutional right to a jury of one's peers. MDC proferred that the bill created a slippery

Continued bottom of page 25

Spotlights

In re: Baltimore City Asbestos Litigation, Baltimore City Circuit Court, Case No. 24X87048500.



Robert E. Scott, **Jr.**, **Marisa A. Trasatti**, **Colleen K. O'Brien**, and **Semmes, Bowen & Semmes** were granted a Motion to Dismiss for Lack of Personal Jurisdiction on behalf of a New York-based gasket fabricator in ten (10) asbestos personal injury cases advanced in Baltimore City by the Plaintiffs' firm of Napoli, Bern, Ripka, Shkolnik, LLP ("Napoli Bern"). An additional six (6) lawsuits filed against this fabricator by either the Law Offices of Peter G. Angelos, P.C., Napoli Bern, or Matthew E. Kiely, LLC, had previously been voluntarily dismissed. In these cases, the Plaintiffs alleged that they were exposed to asbestos-containing gaskets in and outside of Maryland which were fabricated by the New York-based company, and sought to hold the company liable under claims of strict liability, negligence and breach of warranty. Following submission of motions papers, supplemental motions papers, two (2) jurisdictional depositions and written discovery limited to jurisdiction, on February 20, 2014, in a bench ruling during a telephonic hearing, the Honorable John M. Glynn granted the out-of-state fabricator's Motion to Dismiss for Lack of Personal Jurisdiction. Factually significant was that the fabricator never sold any asbestos-containing products in Maryland, and further, since the early 1990's, it had only sold non-asbestos containing products to a manufacturer that had a storage facility in Maryland. Over a ten (10) year period, the fabricator's sales in Maryland were less than six percent of its overall annual sales. The Court specifically noted during the hearing that the Defendant may have shipped product to a customer that had a warehouse in Maryland, but he did not find that nexus significant to justify exercising jurisdiction over the Defendant.

St. Paul Fire & Marine Ins. Co. t/u/o Interstate Brands Corp. and Richard Pellettiere v. Chrysler Group LLC, et al., Prince George's County Circuit Court, Case No. CAL11-08775.

Michael A. Brown, **Donald E. English**, **Matthew R. Schroll**, **Sydney Fairchild** and **Miles & Stockbridge, P.C.** with **Brian W. Bell**, **Anthony J. Monaco** and **Swanson, Martin & Bell, LLP** obtained a defense verdict on behalf of Chrysler Group LLC in Prince George's County Circuit Court. The case arose from an $8.5 million settlement paid by St. Paul Fire & Marine Ins. Co. to JoAnn Reid-Fitzgerald and her husband for injuries Mrs. Reid-Fitzgerald sustained in a high-speed rear impact collision. The accident was caused by St. Paul's insureds: Interstate Brands Corp. and its employee, Richard Pellettiere. Mr. Pellettiere fell asleep at the wheel and slammed his delivery truck into Mrs. Reid-Fitzgerald's Dodge Dakota at 45 mph. This was Mr. Pellettiere's fifth on-the-job sleep related accident. In light of these facts, St. Paul settled Mrs. Reid-Fitzgerald's claims and pursued an action for contribution against Chrysler under the crashworthiness doctrine. Specifically, St. Paul alleged that the seatback in Mrs. Reid-Fitzgerald's Dodge Dakota collapsed during the collision causing her enhanced injuries, and that Chrysler was strictly liable and/or negligent in its design of the seat. Chrysler filed a third-party complaint against Lear Corporation, the seat manufacturer, for contribution and indemnification. Prior to trial, St. Paul stipulated to Interstate Brand Corp.'s and Mr. Pellettiere's negligence and moved to exclude all evidence relating to their conduct, which the Court denied. After a 10-day trial, the jury found that Chrysler did not owe contribution to St. Paul for its settlement of Mrs. Reid-Fitzgerald's claims.

Continued bottom of page 27

(2014 LEGISLATIVE UPDATE) *Continued from page 23*

slope which is better addressed by the judge and lawyers during jury selection.

HB 568: This bill would allow a "prevailing plaintiff" in a civil action suing to enforce a right secured by the Maryland Constitution or whose litigation brings "about a voluntary change in the conduct of the Defendant" to collect attorney's fees and expenses from the Defendant. The Defendant would not be entitled to fees unless the Plaintiff's claim was frivolous. The fees would not be limited by existing caps on awards under the Local Government Tort Claims Act. The Maryland Defense Counsel urged an unfavorable report with respect to HB 568. MDC submitted that not only was the bill patently unfair to Defendants, but it would encourage litigation against our public entities and other private parties.

Members should also note that although **HB 1009 / SB 789** is not scheduled to be heard until after the submission of this article, it is expected that MDC will submit written testimony against this bill and in favor of preserving the cap on noneconomic damages, especially at this time when healthcare providers are facing unprecedented and unsustainable jury verdicts relating to birth injuries and ever-increasing insurance rates. This bill would alter the maximum amount of noneconomic damages that may be recovered in health care malpractice and other civil actions for catastrophic injury under specified circumstances.

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(SPOTLIGHTS) *Continued from page 25*

Peggy Fonshell Ward, of **Ward & Herzog**, recently achieved a defense verdict for an insurer and insurance agent in an E&O and breach of contract case. The insured had purchased property coverage for two farms and insured one barn with a limit of $300,000, with replacement cost coverage endorsement. When the barn burned, he wanted to spend $780,000 to replace it. He asserted that he had been promised "full replacement cost coverage" which did not limit his recovery to the limit of liability purchased for the barn. After two days of trial, the trial court granted the defense motion for judgment, ruling that the law could not support the insured's claims of breach of contract and negligent misrepresentation. Other counts for constructive fraud, intentional misrepresentation, and negligence had previously been dismissed on summary judgment.

In re: Baltimore City Lead Paint Litigation, Baltimore City Circuit Court, Case Nos. 24-C-12001069LP, 24-C-12000802LP, 24-C-12001069LP.

Michael A. Brown, **Michael E. Blumenfeld**, **Laura A. Cellucci**, **Amanda Kesler**, **Katherine A. Lawler**, **Lee C. Douthitt**, and **Miles & Stockbridge P.C.** joined **Barry C. Goldstein**, **Saamia H. Dasti**, and **John T. Sly** of **Waranch & Brown** as trial counsel in defending Kennedy Krieger Institute, Inc. against allegations concerning its administration of a drug trial in the 1990s. The drug trial was held to determine the effectiveness of a drug in reducing the effects of lead exposure in children. All plaintiffs were represented by Tom Yost of Yost Legal Group and alleged several counts against Kennedy Krieger for allegedly contributing to their lead poisoning and related injuries. The first trial in April of 2013 involved allegations on behalf of a brother and sister. The defense successfully obtained summary judgment on all of the sister's claims against Kennedy Krieger. After a four week trial before The Honorable Charles Peters in Baltimore City Circuit Court, the defense obtained directed verdicts on five of the brother's six counts against Kennedy Krieger, including a count with punitive damages. On the sole remaining count of negligence, the jury returned a defense verdict within two hours of deliberation, finding that Kennedy Krieger did not breach its duty. In the second trial, in October of 2013, the defense successfully argued for summary judgment on three of the seven counts against Kennedy Krieger, and struck Plaintiff's claim for punitive damages. After a three-week trial before The Honorable Melissa Phinn in Baltimore City Circuit Court, the jury returned a defense verdict on all remaining counts within 48 minutes of deliberation. In the third case, in December of 2013, again before Judge Peters, the defense was able to exclude a key expert for the Plaintiff and obtained a defense verdict on all counts after a three week jury trial.