THE DEFENSE LINE

A Publication From The Maryland Defense Counsel, Inc.

Spring 2016

Liability Insurer's Duty To Defend

Steven E. Leder

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And More…

Time Well Spent

For civil defense attorneys, our time is our trade. And as humans with lives outside of the legal profession, we often feel we have too little time to do all of the things that are important to us. That's why it is so gratifying and inspiring to see our members stepping up and giving their time to help make improvements to our chosen vocation. With great enthusiasm, I applaud just a few of the great examples I have seen as MDC President this year.

K. Nichole Nesbitt, Esquire

Goodell, DeVries, Leech & Dann, LLP

For starters, this magazine would not have ended up in your hands without the time devoted by our publications chairs, Laurie Ann Garey and Leianne McEvoy, and our Executive Director, Kathleen Shemer, who oversees all things MDC. Equal appreciation goes to the members who contributed the articles in these pages. Thank you all for keeping us current; your great work saves time for the rest of us.

The members of MDC's legislative committee — including Chris Boucher (your incoming president), Gardner Duvall, John Sly, Nicole Deford, and Mike Dailey — spent long hours drafting written arguments and presenting live testimony on bills addressing matters from lead paint to medical malpractice, workers' compensation to punitive damages and more. There's no better training for a jury trial than testifying in front of a dozen or more committee members who at any point can be disinterested, confused, hostile, or supportive. We are still awaiting the outcome of some of these bills, but I want to offer my sincere thanks to all of those who got involved. The time you spent on efforts to shape the laws so that we can better advocate for our clients is much appreciated.

MDC's judicial selections committee was just as active. Marissa Trasatti, Robert E. Scott, Jr., Tim Hurley, Katherine Lawler, and other MDC members devoted many hours to vetting new judicial candidates to ensure that we have the strongest bench possible. The candidates we deem most qualified may not always get selected, but our members take great care to ensure that MDC's endorsement only goes to those candidates who have shown their commitment to fairness, justice, and objectivity. Thank you, judicial selections team. Your work is noble.

Our appellate practice committee, led by Richard Flax, Dwight Stone, and Chris Heagy, facilitated an amicus brief (written by members Gardner Duvall, Danielle Marcus, and Peter Sheehan) that led to a pivotal Court of Appeals decision, *Beall v. Holloway-Johnson*, 446 Md. 48, 130A.3d 406 (2016). This case redefined how "malice" must be proven in connection with a request for punitive damages in civil cases. This is the kind of landscape-changing work MDC is so proud to offer, and I cannot thank the brief-writing team enough for the time they dedicated to this important project.

And speaking of pride, I have to thank and congratulate our programs and sponsorship committees — most notably Colleen O'Brien, Chris Lyon, and Jhanelle Graham — for their work with the **MDC Trial Academy**, which was held on **April 18** at the University of Baltimore School of Business. This program just keeps getting better and better, and this year we saw a fully integrated curriculum that tied the large-group demonstrations directly to the small-group skills training. The small groups were led by experienced civil defense lawyers volunteering their time to help our newer attorneys become their best. There's a reason we won the Maryland State Bar Association's "Best Service to the Bar" Project Award last year. If you are looking to practice your courtroom skills and haven't attended the Academy yet, give us just one day of your time next year when we do it again — I don't think you'll regret it!

I could go on and on about the great work our members are doing, but, well, your time is valuable, so I will wrap it up by saying this: Although my time as MDC President is almost up, I look forward to many more years as an active member devoting my time and effort to these important ventures. I hope you will get involved, too; the reward is well worth your time.

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Featured Articles

Columns

Liability Insurer's Duty To Defend

Insurance Covers Everything Except What Happens —Miller's Law

Steven E. Leder

Tony Stewart, the NASCAR Champion, was sued by the Estate of Kevin Ward, who was struck and killed when he walked onto the course during a Sprint Cup race on August 9, 2014. Stewarts' commercial general liability ("CGL"), auto and excess insurers denied a duty to defend Stewart in the lawsuit. As counsel for Tony Stewart, how do you advise your client?

The duty to defend forms the backbone of the insurance defense industry but what do we know about it? How do we measure the duty? What is the scope of the duty to defend? What are the consequences of failing to defend? When does the duty terminate? What if, after the jury verdict, there was no duty to defend?

An insurer must defend and indemnify its insured if it is sued by a third party because of an act covered by the policy. The duty to defend is a contractual, not common law, duty usually found in the insuring clause. However, the courts' decisions on this simple duty fill volumes.

A. Standard for Measuring the Duty to Defend

An insurer's duty to defend is measured by two tests: (1) the potentiality rule; and (2) the comparison test. The Maryland Court of Appeals first articulated the potentiality rule in *Brohawn v. Transamerica Insurance Company*:

> The obligation of an insurer to defend its insured under a contract provision… is determined by the allegations in the tort actions. If the plaintiffs in the tort suits allege a claim covered by the policy, the insurer has a duty to defend. Even if a tort plaintiff does not alleged facts which clearly bring the claim within or without the policy coverage, the insurer still must defend if there is a *potentiality* that the claim could be covered by the policy.[1]

The Court further explained how to determine whether there is a potentiality of coverage in *St. Paul Fire & Marine Insurance Co. v. Pryseski*, where the Court adopted the comparison test, also known as the "four corners rule" or the "exclusive pleading rule":

> In determining whether a liability insurer has a duty to provide its insured with a defense in a tort suit, two types of questions ordinarily must be answered: (1) what is the coverage and what are the defenses under the terms and requirements of the insurance policy? (2) do the allegations in the tort action potentially bring the tort claim within the policy's coverage? The first question focuses upon the language and requirements of the policy, and the second question focuses upon the allegations of the tort suit.[2]

The comparison test compares the allegations of the complaint with the policy coverage. The court must accept the allegations as true no matter how "attenuated, frivolous, or illogical that allegation may be."[3]

B. The Exclusive Pleading Rule Unchained

The comparison test normally restricts the evidence used to determine the duty to defend to the complaint and the policy language. An insured, however, may rely on extrinsic evidence outside of the complaint to establish a duty to defend where the complaint "neither conclusively establishes nor negates a potentiality of coverage."[4] The extrinsic evidence must

> relate in some manner to a cause of action actually alleged in the complaint and cannot be used by the insured to create a new, unasserted claim that would create a duty to defend. Unasserted causes of action that could potentially have been supported by the factual allegations or the extrinsic evidence cannot form the basis of a duty to defend because they do not demonstrate a reasonable potential that the issue triggering coverage will be generated at trial.[5]

Any uncertainty as to whether there is a duty to defend is resolved in favor of the insured.[6] Moreover, an ambiguous allegation may also trigger a duty to defend; for example, where the allegations in the complaint do not specifically allege that the loss occurred during the policy period, there is a duty to defend.[7]

Insurers, on the other hand, may not rely upon extrinsic evidence to deny coverage.[8] This includes whether the putative insured qualifies as an insured.[9] There is an exception to this rule permitting an insurer to contest coverage with extrinsic evidence where there is uncontroverted evidence that clearly establishes that there is no potentiality for coverage.[10] A court need not "turn a blind eye where, as here, it is firmly established by judicial decree that an insured tortfeasor is excluded from coverage under particular terms of the insurance policy." [11]

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[1] 276 Md. 396, 407-08, 347 A.2d 842, 850 (1975) (internal citations omitted) (emphasis added).
[2] 292 Md. 187, 193-94, 438 A.2d 282, 285 (1981).
[3] *Sheets v. Brethren Mut. Ins. Co.*, 342 Md. 634, 643, 679 A.2d 540, 544 (1996) (internal citations omitted).
[4] *Aetna Cas. & Sur. Co. v. Cochran*, 337 Md. 98, 108, 651 A.2d 859, 864 (1995).
[5] *Walk v. Hartford Cas. Ins. Co.*, 381 Md. 1, 21-22, 852 A.2d 198, 210 (2004) (quoting *Reames v. State Farm Fire & Cas. Ins.*, 111 Md. App. 546, 561, 683 A.2d 179, 186 (1996), *cert. denied*, 344 Md. 329, 686 A.2d 635 (1996)).
[6] *Cochran*, 337 Md. at 107, 651 A.2d at 863-64.
[7] *S. Md. Agric. Ass'n v. Bituminous Cas. Corp.*, 539 F. Supp. 1295, 1304 (D. Md. 1982); *Harford Mut. Ins. v. Jacobson*, 73 Md. App. 670, 678, 536 A.2d 120, 124, *cert. denied*, 312 Md. 601, 541 A.2d 964 (1988).
[8] *Cochran*, 337 Md. at 107-108, 651 A.2d at 864 (citing *Brohawn*, 276 Md. at 408, 347 A.2d at 850); *Balt. Gas & Electric Co. v. Commercial Union Ins. Co.*, 113 Md. App. 540, 567, 688 A.2d 496, 509 (1997).
[9] *Ohio Cas. Ins. Co. v. Lee*, 62 Md. App. 176, 488 A.2d 988, *cert. denied*, 303 Md. 471, 494 A.2d 939 (1985).
[10] *N. Ins. Co. of N.Y. v. Balt. Bus. Commc'ns, Inc.*, 68 F. App'x 414, 420 (4th Cir. 2003).
[11] *Universal Underwriters Ins. Co. v. Lowe*, 135 Md. App. 122, 151, 761 A.2d 997, 1012 (2000).

(DUTY TO DEFEND) *Continued from page 5*

C. Ambiguous Policies + Extrinsic Evidence = A Duty to Defend

A second use of extrinsic evidence is where the policy terms are vague and ambiguous. There, extrinsic and parol evidence may be considered to ascertain the intentions of the parties.[12] If the policy terms remain ambiguous, they "will be construed liberally in favor of the insured and against the insurer as drafter of the instrument."[13]

D. Mixed Actions

The "mixed action" rule requires insurers to defend all counts of a multi-count complaint, even if only one claim is potentially covered by the policy.[14] Where there is a common core of facts or events giving rise to covered and non-covered injuries or claims under different legal theories, allocation is not permitted. Nor is there a right of allocation for defense costs incurred defending a non-covered claim where those costs were also necessary to defend a covered claim.[15] There is a limited, and rarely applied, exception to this rule that permits defense costs to be apportioned when it is easy to do so.[16]

In some states, the insurer may recoup the cost of defense if it turns out the defended counts were not covered.[17] This issue has not been addressed by the Maryland appellate courts. However, the Fourth Circuit, applying Maryland law, has predicted that there is no right to recoupment.[18]

E. Every Story Has a Beginning and an End

For occurrence policies, the duty to defend attaches when the occurrence happens.[19]

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[12] *Sullins v. Allstate Ins. Co.*, 340 Md. 503, 508-510, 667 A.2d 617, 619 (1995).

[13] *Megonnell v. U.S. Auto. Ass'n*, 368 Md. 633, 655-56, 796 A.2d 758, 772 (2002).

[14] *Utica Mut. Ins. Co. v. Miller*, 130 Md. App. 373, 383, 746 A.2d 935, 940 (2000), *cert. denied*, 359 Md. 31, 753 A.2d 3 (2000) (quoting *S. Md. Agric. Ass'n*, 539 F. Supp. at 1299).

[15] *Fed. Realty Inv. Trust v. Pac. Ins. Co.*, 760 F. Supp. 533, 536-37 (D. Md. 1991); *Cont'l Cas. Co. v. Bd. of Educ. of Charles Cnty.*, 302 Md. 516, 532, 489 A.2d 536, 544 (1985).

[16] *Loewenthal v. Sec. Ins. Co. of Hartford*, 50 Md. App. 112, 123 n.5, 436 A.2d 493, 499 n.5 (1990), *cert. denied*, 292 Md. 596 (1982).

[17] *See, e.g., Buss v. Superior Court*, 16 Cal. 4th 35, 939 P. 2d 766 (Cal. 1997).

[18] *Perdue Farms, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 448 F.3d 252, 258-59 (4th Cir. 2006).

[19] *Sherwood Brands Inc. v. Harford Accident & Indem. Co.*, 347 Md. 32, 41-42, 698 A.2d 1078, 1082-83 (1997).

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 **Steven E. Leder** of Leder & Hale P.C., discusses the scope, measure, and consequences of liability insurers' duty to defend. An article by **Thomas W. Hale** and **Michael W. Fox**, also of Leder & Hale P.C., highlights recent judicial decisions affecting lead-based paint litigation in Maryland. **Marisa A. Trasatti** and **Caroline E. Willsey** of Semmes, Bowen & Semmes provide a recap of the Supreme Court of the United States' 2014–2015 Term. **Anthony J. Breschi** and **Michelle L. Dian**, of Waranch & Brown, LLC, provide insight into how to protect a corporate client in the context of *ex parte* communications with former employees..

The Maryland Defense Counsel has had a number of successful events since the last edition of *The Defense Line*, including the **Past Presidents Reception** and the Maryland Defense Counsel's **Trial Academy** which took place on April 18, 2016. Please make plans to join us for the always popular **Annual Crab Feast** which will be held on June 8, 2016! 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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Please Welcome MDC's New Members

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The Top 2014 and 2015 Decisions Affecting Lead-Based Paint Litigation in Maryland

Thomas W. Hale and Michael W. Fox

In 2014 and 2015, the Maryland Court of Appeals and the Court of Special Appeals issued reported opinions that have refined and impacted lead-based paint litigation in Maryland. Many of the opinions address the sole use of circumstantial evidence to establish that a particular property contained lead-based paint and whether that particular property was a substantial contributing factor to a plaintiff's alleged injuries. The appellate courts have also refined the necessary qualifications of experts, medical institution liability, and governmental notice requirements. These decisions will impact all lead litigation in the future. Maryland law in this area of practice continues to evolve at a rapid pace and is expected to continue to do so in upcoming years. In fact, the Maryland Court of Appeals recently released an opinion in one of these cases (*Smith v. Rowhouses, Inc.*, *Infra*.) which likely necessitates a similar article for 2016. Below is a compilation and summary of a few of the noteworthy Maryland appellate lead-based paint litigation decisions of 2014 and 2015.

1. Using Circumstantial Evidence to Prove that a Property Contained Lead-Based Paint:

***A. Hamilton v. Kirson; Alston v. 2700 Virginia Avenue Assocs.*, 439 Md. 501 (2014).**

The Maryland Court of Appeals held that, in both *Hamilton* and *Alston*, the circumstantial evidence of lead offered by the Appellants was insufficient to permit a jury to draw the necessary inferences of the presence of lead-based paint in the subject properties. It held that the evidence presented by the Appellants was insufficient for a jury to infer that the Appellees' conduct was a substantial factor in bringing about the alleged injuries because Appellants failed to present evidence that the subject properties contained lead-based paint during plaintiffs' residence at the subject properties. In rejecting the circumstantial evidence, the Court reiterated that in order for expert testimony to be admissible there must be a sufficient factual basis to support the expert's opinions so that the opinions do not amount to conjecture, speculation or incompetent evidence.

The Court ultimately sought to answer the following question: under what scenario will circumstantial evidence of the possible presence of lead-based paint inside a residential property be sufficient to survive a motion for summary judgment challenging the sufficiency of the proof of causation?

The Court begins its analysis by recognizing that a violation of a statute is, by itself, evidence of negligence. This does not, however, eliminate plaintiffs' requirement to prove that the landlord's negligence was a proximate cause of the alleged injuries. The evidence presented by plaintiffs must rise to a level of probability rather than a possibility. Any validity in inferences used to establish causation depends on the logical deduction from established facts. In other words, the Court will require inferences to be logically sound and will refuse to allow a jury of laymen to engage in speculation, conjecture and guesswork.

The Court then turned to a two-step requirement for establishing that a particular property was a substantial contributing factor to a plaintiff's lead exposure. Those two steps are: 1) establishing that the property contains lead-based paint; and 2) establishing that the lead-based paint at the subject property was a substantial contributing factor to the exposure to lead (or, the exposure at the subject property was an effective cause of plaintiff's lead ingestion). Each step may require different evidence.

The Court held that if plaintiffs utilize the *Dow* process of elimination[1] to establish lead in a property through circumstantial evidence, plaintiffs must rule out other reasonably probable sources. Moreover, the Court went on to acknowledge that proving the presence of lead-based paint through circumstantial evidence does not exclusively require a *Dow* process of elimination. The Court gave an example of this with hypothetical facts describing a group of houses built and owned by the same series of persons or entities from the 1950s to the present with two of the three houses surrounding the subject property containing lead-based paint. This hypothetical evidence would support the inference that the subject property contained lead-based paint to a reasonable degree of probability.

Ultimately, the Court concluded that the Appellants in both cases could not show the requisite causation of any elevated blood lead levels derived from the Appellees' properties because other probable sources were not ruled out. The Court, therefore, affirmed summary judgment in both cases.

Lastly, the Court reiterated that in order for expert testimony to be admissible there must be a sufficient factual basis to support an expert's opinion so that the opinion does not amount to conjecture, speculation or incompetent evidence. In these cases, the Court found that the experts did not have a factual basis to conclude that the subject properties contained lead-based paint and that the properties were substantial contributing factors to the Appellants' alleged injuries.

***B. Myishia Smith v. Rowhouses, Inc.*, 223 Md. App. 658, 117 A.3d 622 (2015), *cert. granted* October 16, 2015.**[2]

In this case, the Maryland Court of Special Appeals held that there was adequate circumstantial evidence of lead at the subject property because the other potential sources where the Appellant spent time during the relevant time frame did not contain peeling, chipping, or flaking interior paint. The Maryland Court of Appeals, however, recently granted *certiorari*. It is likely that the Maryland Court of Appeals will re-evaluate the evidence presented in this case and fur-

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[1] The Court was referencing *Dow v. L & R Props., Inc.*, 144 Md. App. 67, 796 A.2d 139 (2002) (Plaintiff was able to rule out all other possible sources to conclude that the subject property was the only probable source of her lead ingestion).

[2] The Maryland Court of Appeals recently released an opinion affirming the Maryland Court of Special Appeals' judgment. *Smith v. Rowhouses, Inc.*, No. 60, Sept. Term 2015, 2016 WL 1170215 (March 25, 2016).

Ex Parte Communications with Former Employees: How to Protect Your Corporate Client

Anthony J. Breschi and Michelle L. Dian

Imagine you represent a corporation in a negligence action. Unbeknownst to you, the Plaintiff's attorney has located a former employee of your client who has factual information important to your case. Without contacting you, Plaintiff's attorney meets with this witness, learns some crucial information and gains a decided advantage in the litigation as a result. Astonished that Plaintiff's attorney communicated with your client's former employee *ex parte*, you search the Maryland Rules of Professional Conduct and case law to see what recourse you have. Does a plaintiff's attorney really have unfettered access to your client's former employees?

According to the Maryland Rule of Professional Conduct (MRPC), an organization may assert privilege over *current* employees in two situations:

1. employees who supervise, direct, or regularly communicate with the organization's lawyers concerning the matter and possess privileged information; or

2. employees whose acts or omissions in the matter may bind the organization for civil or criminal liability.

See MRPC 4.2(b).

The above rule, however, does not address communications with *former* employees. Comment Six of MRPC 4.2 specifically refers the reader seeking information about communications with former employees to MRPC 4.4(b), which simply addresses communications with "third persons." However MRPC 4.4(b) merely prohibits a lawyer from seeking information "relating to the matter that the lawyer knows or should know is protected from disclosure by statute or established evidentiary privilege." *Id.*

In practice, applying MRPC 4.2 and 4.4 (the "Rules") to communications with former employees has proven difficult as the Rules do not explain what types of communications with former employees are "privileged." To further complicate the matter, Maryland's appellate courts have not addressed the issue[i] and Maryland's federal district court has provided only limited direction in this area,[ii] leaving litigants unsure as to whether *ex parte* communication with former employees is ethically permissible.

In Spring 2003, an article was published in *The Defense Line* discussing the same Rules and noting conflicting decisions issued by several of the judges of the United States District Court for the District of Maryland.[iii] The authors pointed out that the earlier decisions turned on how "extensively exposed" the former employee was to the organization's confidential information, where later decisions applied a "strict interpretation of the language" to permit blanket *ex parte* communications with former employees.[iv] One federal judge, asked by the Plaintiff's attorney for permission to communicate *ex parte* with the corporate defendant's former employee, refused to issue an advisory opinion.[v] The article ended with a discussion of the changes to Rules 4.2 and 4.4, and posed an open question regarding the implications these amendments may have on State and Federal court decisions regarding *ex parte* communications with former employees.[vi]

In the years since thee article was written, Maryland's federal district court judges have attempted to "clear up" the recognized conflict in the past decisions. In 2012, Judge Schultz stated, "[C]ourts in this District have consistently prohibited *ex parte* communications with former employees who have protected information, but have held that contact with former employees who do not have protected information does not violate the Rule.[vii]

Last year, Judge Gallagher of Maryland's federal district court revisited the issue in *Hanlin-Cooney v. Frederick Cnty., Md.*[viii] In that case, the plaintiff's attorney communicated *ex parte* with the defendant's former employee (a former corrections officer).[ix] The witness divulged his personal experiences while employed by the defendant, including his knowledge of duties that corrections officers perform, his employment status, and the condition of the medical units.[x]

The court held the *ex parte* contact with the defendant's former employee did not violate Rule 4.4(b).[xi] In so holding, Judge Gallagher conducted an analysis under both the earlier "extensively exposed" test and the later "plain language" test.[xii] Ultimately, the court found the *ex parte* communication did not run afoul of the Rules of Professional Conduct, as the former corrections officer was not privy to information protected by attorney-client privilege and was thus not extensively exposed to confidential information.[xiii]

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[i] *See Chang-Williams v. United States*, No. CIV. DKC 10-783, 2012 WL 253440, at *3 (D. Md. Jan. 25, 2012) (explaining that Maryland Courts have not addressed the application of Rule 4.2 to *ex parte* communications with former employees).

[ii] *See Larry R. Seegull & Jill S. Distler*, *Ex Parte Communications with Former Employees Under the Maryland Rules of Professional Conduct*, *THE DEFENSE LINE*, Spring 2003, at 1, 3-5 (discussing conflicting opinions in United States District Court for the District of Maryland).

[iii] *Seegull*, *supra* note ii.

[iv] *Seegull*, *supra* note ii at 1, 3.

[v] *Seegull*, *supra* note ii at 5. *See also Rogosin v. Mayor & City Council of Baltimore*, 164 F. Supp. 2d 684, 685 (D. Md. 2001).

[vi] *Seegull*, *supra* note ii at 5.

[vii] *Chang-Williams*, No. CIV. DKC 10-783, 2012 WL 253440, at *4.

[viii] No. CIV. WDQ-13-1731, 2014 WL 3421921 (D. Md. July 9, 2014).

[ix] *Id.* at 1.

[x] *Id.* at 10.

[xi] *Id.* at 8-10.

[xii] *Id.* (discussing the 4.4(b) test and the 4.2 test).

[xiii] *Id.*

A Recap of the SCOTUS 2014–15 Term

Marisa A. Trasatti and Caroline E. Willsey

As the Supreme Court of the United States ("SCOTUS"), works on this year's docket, let us reflect on the most groundbreaking decisions from its 2014–2015 term. Last term, SCOTUS addressed many controversial topics such as housing discrimination, free speech and social media, same-sex marriage, the Patient Protection and Affordable Care Act ("ACA"), and religious freedom in the workplace. Surprisingly, the Court declined to hear a controversial Second Amendment case, brought by San Francisco gun owners, challenging a city ordinance that required all guns kept in the home to be stored in locked containers or disabled by trigger locks. The Court also declined to hear a challenge to state voter registration laws requiring documentary proof of citizenship and a dispute over code copyrighting between Google and Oracle. Despite a record number of unanimous decisions in its 2013–2014 term, the Court's 2014–2015 term was more divided–the Court only issued unanimous decisions in thirty (30) out of seventy-six (76) cases. Sixteen cases were decided by 5-4 plurality opinions. Of those 5-4 decisions, the vast majority divided the Court along party lines (i.e., Justices Ginsburg, Breyer, Sotomayor, and Kagan ("liberals") versus Chief Justice Roberts and Justices Thomas, Alito, and the late Justice Scalia ("conservatives"). The Court was most frequently divided in cases involving politically controversial topics. Let us review seven (7) of the most noteworthy cases that have emerged from SCOTUS' 2014 – 2015 term.

1) Housing Discrimination — *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. ____ (2015).

In *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, the issue before the Supreme Court was whether claims of a racially disparate impact in the distribution of low-income housing credits was legally cognizable under the Fair Housing Act ("FHA"). The Federal Government provides low-income housing tax credits to developers, which are distributed through state housing agencies. The Inclusive Communities Project ("ICP") is a nonprofit organization that helps low-income families secure affordable housing. The ICP brought a disparate impact claim against the Texas Department of Housing and Community Affairs (the "Department"), alleging that the Department caused segregated housing patterns by disproportionately allocating tax credits for low-income housing in predominantly black inner-city neighborhoods.

Assuming that the Department's proffered interest in its method of administering tax credits was legitimate, the District Court held that the Department still had to prove that "no less discriminatory alternatives" existed. 860 F. Supp. 2d 312, 331 (N.D. Tex. 2012). Because the Department failed to meet this burden, the District Court ruled for the ICP. The U.S. Court of Appeals for the Fifth Circuit affirmed the District Court, ruling that the disparate impact standard articulated by the District Court mirrored that of the U.S. Department of Housing and Urban Development. The Supreme Court affirmed the Fifth Circuit ruling. The Supreme Court compared the language of the FHA to the language of Title VII of the Civil Rights Act of 1964, which focuses on the discriminatory consequences of the challenged state action, rather than the actor's discriminatory intent. Several circuits had already read the 1988 Amendments to the FHA as creating disparate-impact liability and the Supreme Court interpreted Congress' inaction acquiescenced in this interpretation. Finally, the Court reasoned reading the FHA to include disparate-impact liability was consistent with the FHA's purpose of preventing discriminatory housing practices.

In his dissent, Justice Thomas disagreed that Title VII, on which the majority based much of its analysis, provided disparate-impact liability. In a separate dissent, Justice Alito argued that the plain language of the FHA does not impose disparate-impact liability because it focuses on intentional discrimination, rather than racial disparity itself.

2) Free Speech and Social Media — *Elonis v. United States*, 576 U.S. ____ (2015).

In *Elonis v. United States*, the Supreme Court decided whether a conviction for transmitting threats to injure another person under 18 U.S.C. § 875(c) required proof of the defendant's subjective intent that the thing transmitted be an intent to injure. After his wife left him, Anthony Elonis used the social media website, Facebook, to post rap lyrics containing graphically violent imagery regarding his wife and state and federal law enforcement, among others. Elonis injected these lyrics with multiple disclaimers that the lyrics were "fictitious" and that he was exercising his First Amendment rights in posting them. Elonis' employer reported the Facebook posts to the FBI, which began monitoring Elonis' Facebook page, and

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(DUTY TO DEFEND) *Continued from page 7*

Under claims-made policies, the duty to defend attaches when the claim is made during the policy period.[20]

The duty to notify is not a condition precedent but a mere covenant due to Maryland's notice-prejudice statute.[21] The duty to defend is not breached until after the insurer receives notice of the event and the insurer unjustifiably declines to fulfill its obligations.[22] Tender need not be by the insured, but may be made by another on the insured's behalf to trigger a duty to defend.[23]

The duty to defend is a continuing one that extends to an appeal as long as reasonable grounds to appeal exist.[24] The duty to defend terminates when the claimant's "claim may be confined to non-covered allegations."[25] The duty to defend also terminates when the policy limits are exhausted.[26] If there is no duty to defend, there is no duty to indemnify.[27]

F. Better Late Than Never—Insurer's Liability For Pre-Tender Defense Costs

Maryland, unlike virtually every other state, requires insurers to reimburse insureds for pre-notice defense costs unless it can show prejudice as a result of the delay.[28] The Court of Appeals set forth several factors for determining whether the insurer was prejudiced by the delay; *i.e.*: (1) was it reasonable for the insured to have incurred the expense; (2) was the expense reasonable; and (3) did the expense materially exceed what the insurer would likely have incurred had the notice been given earlier?[29] For example, a rate may be reasonable yet materially in excess of a rate a specific insurer has negotiated with competent counsel.[30] Each of these factors goes to the amount of defense costs, not liability for defense costs.

G. Court Actions, Administrative Actions, Judicially Created Trusts -What Type of Proceedings Must be Defended?

The Maryland Court of Appeals has not addressed directly the type of proceeding a liability insurer must defend. It appears that the duty may encompass administrative and some non-traditional proceedings, such as claims filed in judicially created trusts.[31]

H. Allocation of the Duty to Defend Among Multiple Insurers

Trouble shared is trouble halved.

— *Sayers, Dorothy L.*

Where two or more insurers cover the same policy period, defense costs are shared the same way as indemnity; *i.e.* pursuant to the "other insurance" provisions.[32] How consecutive insurers share the cost of defense is unresolved; however, it is likely to follow indemnity, which is shared on a time-on-the-risk basis.[33]

I. Reservations of Rights and the Right to Independent Counsel

A reservation of rights letter is the insurer's first impression of the coverage issues that may arise between it and its insured. The letter informs an insured that a defense is provided subject to certain specified issues. The scope of coverage is not expanded by failure to include them in a reservation of rights letter.[34] However, conditions subsequent, such as late notice or failure to cooperate, may be waived.[35] Nonetheless, a reservation of rights letter should include all policy language and facts that may serve as the basis for a denial of coverage.

There is a right to independent counsel when there is a conflict of interest in the defense of the action. Maryland follows the dual client approach, where counsel represents both the insured and the insurer.[36] This dual representation presents problems where there is a conflict of interest. Where there is a conflict of interest in the defense of the case, such as where the facts to be adjudicated in the lawsuit will also determine coverage, the insured has the right to independent counsel.[37]

Where the claimant alleges both covered and non-covered counts, the insured and the insurer have diametrically opposed interests. The insurer's interest is to establish non-coverage and the insured's interest is to establish coverage. This is a type of conflict of interest where the insurer must allow the insured to choose independent counsel. The seminal case on this point in Maryland is *Brohawn v. Transamerica Insurance Company*,[38] where the complaint alleged negligence and assault (an intentional tort) in the alternative. The insured had previously pled guilty to assault charges. The Court reasoned that the insurer's selected counsel could defend on the basis that the guilty plea was an admission that the injuries were caused by an intentional act. This could result in a verdict against the insured on the non-covered intentional injury count and a dismissal of the negligence count. The *Brohawn* Court

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[20] *Id.*

[21] *Id. See also* Md. Code Ann., Ins. § 19-110.

[22] *Sherwood Brands*, 347 Md. at 47, 698 A.2d at 1085-86.

[23] *Scottsdale Ins. Co. v. Am. Empire Surplus Lines Ins. Co.*, 791 F. Supp. 1079, 1084 (D. Md. 1992).

[24] *Commercial Union Ins. Co. v. Porter Hayden Co.*, 116 Md. App. 605, 654-55, 698 A.2d 1167, 1191 (1997), *vacated*, 339 Md. 150, 661 A.2d 691 (1995) (*citing Luppino v. Vigilant Ins. Co.*, 110 Md. App. 372, 382, 677 A.2d 617, 622 (1996), aff'd, 352 Md. 481, 723 A.2d 14 (1999)).

[25] *Balt. Gas & Electric*, 113 Md. App. at 572, 688 A.2d at 511-12.

[26] *Griffith Energy Servs., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 224 Md. App. 252, 284-85, 120 A.3d 808, 827 (2015) (dicta).

[27] *Nautilus Ins. Co. v. REMAC Am., Inc.*, 956 F. Supp. 2d 674, 681-82 (D. Md. 2013).

[28] *Sherwood Brands*, 347 Md. at 45, 698 A.2d at 1084.

[29] *Id.* at 48-49, 698 A.2d at 1086.

[30] *Id.* at 49 n.7, 698 A.2d at 1086 n.7.

[31] S*ee, e.g., Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.*, 330 Md. 758, 625 A.2d 1021 (1993) (duty to indemnify cost of complying with administrative directive prior to legal proceeding; *a fortiori*, there is a duty to defend); *Liberty Mut. Ins. Co. v. Black & Decker Corp.*, 2005 WL 102964 (D. Mass. Jan. 13, 2005) (applying Maryland law) (pre-suit letter may trigger duty to defend); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Porter Hayden Co.*, 408 B.R. 66 (D. Md. 2009) ("suit" encompassed claims filed in Asbestos Bodily Injury Trust). *See also ACE Am. Ins. Co. v. Ascend One Corp.*, 570 F. Supp. 2d 789 (D. Md. 2008) (where policy terms include the defense of administrative or regulatory investigations there is a duty to defend).

[32] *See Ryder Truck Rental, Inc. v. Schapiro & Whitehouse, Inc.*, 259 Md. 354, 364-65, 269 A.2d 826, 831-32 (1970); *Centennial Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 71 Md. App. 152, 164, 524 A.2d 110, 116 (1987), *cert. denied*, 310 Md. 491, 530 A.2d 273 (1987).

[33] *Mayor & City Council of Balt. v. Utica Mut. Ins. Co.*, 145 Md. App. 256, 302-03, 802 A.2d 1070, 1097-98 (2002), *cert. granted*, 371 Md. 613, 810 A.2d 961 (2002), *appeal dismissed*, 374 Md. 81, 821 A.2d 369 (2003).

[34] *Creveling v. GEICO*, 376 Md. 72, 97-98, 828 A.2d 229, 243-44 (2003).

[35] *Id.*

[36] *See Fid. & Cas. Co. of N.Y. v. McConnaughy*, 228 Md. 1, 10, 179 A.2d 117, 121 (1962).

[37] *Roussos v. Allstate Ins. Co.*, 104 Md. App. 80, 90, 655 A.2d 40, 44 (1995), *cert. denied*, 339 Md. 355, 663 A.2d 73 (1995), *cert. denied*, 517 U.S. 1107 (1996).

[38] 276 Md. 396, 347 A.2d 842 (1975).

(DUTY TO DEFEND) *Continued from page 15*

recognized that the rights of an insured could be adequately protected by the duties imposed upon the attorney by the Cannons of Professional Responsibility. However, the Court held

> that an insured is not deprived of his contractual right to have a defense provided by the insurer when a conflict of interest between the two arises under circumstances like those in this case. When such a conflict of interest arises, the insured must be informed of the nature of the conflict and given the right either to accept an independent attorney selected by the insurer or to select an attorney himself to conduct his defense. If the insured elects to choose his own attorney, the insurer must assume the reasonable costs of the defense provided.[39]

Two federal district court judges applying Maryland law have found the requirement of independent counsel was fulfilled where the insurer-appointed panel counsel: (1) was instructed by the insurer to represent *only* the interests of the insured; (2) was at no time also representing the insurer in the case; and (3) had an ethical responsibility to work only on behalf of his client, and no conflict of interest was created.[40]

A conflict as to how the case should be defended strategically does not give rise to a right to independent counsel,[41] nor does a claim in excess of the policy limits.[42] Further, an insurer's rejection of an offer to settle within the policy limits does not automatically create a conflict.[43]

The insurer must assume the *reasonable* costs of defense by an independent counsel where required due to a conflict between the insurer and the insured.[44] The courts applying Maryland law have not examined what constitutes reasonable attorneys' fees.

J. Insurer's Risk in Failing to Defend.

Where an insurer breaches its obligation to defend, it is liable for the damages, including attorneys' fees, incurred by the insured as a result of the breach.[45] These attorneys' fees may be incurred in defending against the underlying tort claim or in a declaratory judgment action to determine coverage.[46]

An insurer that mistakenly refuses to defend is not estopped from denying its duty to indemnify.[47] If it is found to cover the loss it is bound by the judgment.[48] Moreover, it does not give rise to a tort action for bad faith.[49]

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[39] *Id.* at 414-15, 347 A.2d. at 854.
[40] *Driggs Corp. v. Pa. Mfrs. Ass'n Ins. Co.*, 3 F. Supp. 2d 657, 658-59 (D. Md. 1998), aff'd, 181 F.3d 87 (4th Cir. 1999); *Cardin v. Pac. Emps. Ins. Co.*, 745 F. Supp. 330, 336-38 (D. Md. 1990).
[41] *Nationwide Mut. Ins. Co. v. Webb*, 291 Md. 721, 741, 436 A.2d 465 (1981); *Roussos*, 104 Md. App. at 89-90, 655 A.2d at 44.
[42] *Id.*
[43] *Allstate Ins. Co. v Campbell*, 334 Md. 381, 396, 639 A.2d 652, 659 (1994).
[44] *Id.* at 392, 639 A.2d at 657.
[45] *Mesmer v. Md. Auto. Ins. Fund*, 353 Md. 241, 252, 725 A.2d 1053, 1058 (1999); *Litz v. State Farm Fire & Cas. Co.*, 346 Md. 217, 232-33, 695 A.2d 566, 573 (1997).
[46] *Id.*
[47] *Glens Falls Ins. Co. v. Am. Oil Co.*, 254 Md. 120, 136-37, 254 A.2d 658, 667 (1969).
[48] *Id.*
[49] *Mesmer*, 353 Md. at 252, 725 A.2d at 1058.

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ther elaborate on whether there was sufficient facts to establish lead at the Appellee's property in order for a jury to hear the case.

There was no direct testing for the presence of lead at the subject property. However, the property was built prior to 1950 and the evidence indicated that there was peeling, chipping and flaking paint on the interior during the Appellant's residence there. The only other potential source identified was described as not containing such paint conditions. The court held that the evidence supported a reasonable inference that the subject property was the only reasonably probable source of the Appellant's first documented lead level while she lived at the subject property. The Court held that this evidence was sufficient to establish the necessary presence of lead at the subject property. This decision affirmed and elaborated upon *Dow v. L & R Props., Inc.*, 144 Md. App. 67, 796 A.2d 139 (2002).

There are two interesting side notes to this opinion. First, the Court recognized prior decisions stating that the presence of lead-based paint in a subject property cannot be established by the age of the property alone. The Court concluded that an expert opinion that lead was present in the property based simply upon the property's age lacked an adequate foundation and was inadmissible for that purpose. Second, the Court set forth a relatively limited version of the Maryland Court of Appeals' example of circumstantial evidence described above in *Hamilton v. Kirson*. You will recall that the *Hamilton* example had an illustration that consisted of three houses in addition to the subject property, two of which had direct evidence of lead and one of which was unknown as to the possibility of containing lead. Here, the Court narrowed this illustrated example by asserting that the two adjacent properties sharing common walls with the subject property must be the two known to contain lead in order to show that the subject property contained lead-based paint.

C. *Barr v. Rochkind*, 225 Md. App. 336, 124 A.3d 1128 (2015), *cert. denied*, 446 Md. 291, 132 A.3d 194 (2016)[3]

In this case the Maryland Court of Special Appeals held that the Appellant had the burden of production to present evidence that ruled out all other reasonably probable sources that could have caused the plainitff's elevated blood lead levels when she was relying solely on circumstantial evidence to establish lead in the subject property. The Court pointed to *Hamilton v. Kirson* as support. Summary judgment was affirmed.

Appellant did not rule out other potential sources of lead. Instead, Appellant claimed that it was not her burden to rule out other potential sources of lead; rather, the Appellant argued that the burden shifted to the Appellees to establish that there were other probable sources of lead. The Court rejected Appellant's argument.

The Court concluded that defendants have no obligation to identify other likely sources of lead to trigger plaintiffs' burden to rule out other sources. The Court further concluded, as discussed in the *Hamilton* opinion, that plaintiffs cannot use an expert to fill a factual gap.

2. Pediatrician Who Has Not Treated Lead Ingestion Was Qualified to Testify as to Medical Causation: *Roy v. Dackman*, 2015 WL 6108017 (Md. Ct. App. October 16, 2015).

The Maryland Court of Appeals held that a jury may be assisted on the issue of medical causation in a lead-based paint case by a pediatrician who has not treated children for lead ingestion, but who has generally treated environmental exposures with the assistance of more specialized practitioners, and who has also reviewed relevant medical literature. Thus, the expert's exclusion was an abuse of discretion.

The Court cited prior decisions stating that a medical expert can be qualified to offer expert medical causation testimony even though he or she does not specialize in the specific field upon which he or she is offering testimony. Instead, the expert may utilize acquired knowledge, skill, experience, training or experience in rendering such opinions. The distinction here was that the expert did not have "specialized knowledge," or first-hand experience with a medical procedure. In this instance, it was sufficient for the sake of admissibility that the medical doctor had experience in determining the effect of general environmental exposures on patients with the assistance of similar specialists as utilized in the subject litigation, was familiar with the relevant literature, and was able to speak on the topic of specific causation.

In so holding,the Court emphasized three points. First, while the qualifications hurdle for admissibility of medical causation testimony is relatively low, any aspect of those qualifications that may be lacking beyond that hurdle are subject to cross-examination and may bear on the weight given to the expert's opinions by the jury. Second, the Court limited the scope of its opinion to the medical expert's medical causation opinions by concluding that the trial court did not abuse its discretion in excluding the same expert's source of ingestion opinions. Finally, the Court, through *dicta*, reiterated the finding in *Hamilton*, that circumstantial evidence of lead using the *Dow* process of elimination is insufficient if it does not eliminate other potential sources.

3. Lead-Based Paint Liability and Medical Institutions: *White v. Kennedy Krieger Institute, Inc.*, 221 Md. App. 601, 110 A.3d 724 (2015), *cert. denied*, 443 Md. 237, 116 A.3d 476 (2015).

The Maryland Court of Special Appeals held that Appellant's proposed jury instruction setting forth Appellee's "special duties" owed to Appellant arising from a "special relationship" was properly excluded. In reaching this decision, the Court interpreted *Grimes v. Kennedy Krieger Institute*, 366 Md. 29, 782 A.2d 807 (2001). In *Grimes*, the Court of Appeals held that parents cannot provide informed consent for their children in research studies that do not provide any treatment benefit to the child. It also held that a special relationship between an institution and a subject in such a non-therapeutic study may arise from the subject's informed consent, creating special duties on the part of the institution. As the Court of Special Appeals later pointed out in *White*, however, *Grimes* did not set forth standards as to the formation of these "special relationships" or the resulting "special duties." In fact, the *Grimes* court responded to a motion for reconsideration as to its opinion stating that the holding only stood for the proposition that summary judgment for the Kennedy Krieger Institute was improper based on the specific facts presented in *Grimes*.

Here, the Court of Special Appeals concluded that Appellant's *Grimes*-based proposed jury instruction outlining the alleged special relationship and the resulting special duties of the Appellant was not erroneously excluded at trial for three reasons. First, the Court found that the proposed instruction did not accurately set forth the law because *Grimes* did not actually provide standards for how these special relationships arise and define the resulting duties. Second, it found that the study at issue was distinct from the

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[3] The Maryland Court of Appeals' decision in *Smith v. Rowhouses, Inc.*, No. 60, Sept. Term 2015, 2016 WL 1170215 (March 25, 2016) negatively impacts this decision.

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non-therapeutic study in *Grimes*, as there was a treatment component. This made a jury instruction as to special duties owed in non-therapeutic studies irrelevant in *White*. Third, the Court found that the instruction was inapplicable because the Appellee did not receive the patients' documented lead levels as part of the relevant study. This eliminated any potential duty to warn that was set forth in the proposed instruction.

The *White* court also dealt with proposed jury instructions that were not related to *Grimes*. These involved federal regulations regarding the informed consent process. The Court found that the instructions were unnecessary and properly excluded, as they pertained to non-therapeutic studies. Also, it found that jury instructions on informed consent were not relevant to Appellant's sole remaining claim that Appellee negligently oversaw the study at issue.

Finally, the *White* court examined whether judgment in favor of Appellee was proper in relation to Appellant's misrepresentation claims and his claims asserted under the Consumer Protection Act. It decided that, for the reliance requirement in a misrepresentation claim, the reliance of a parent can be imputed to his or her child when the misrepresentation is designed to elicit action by or on behalf of the child. The Court determined, however, that there was no misrepresentation by Appellee because it had never asserted to Appellant's mother that it would be providing "lead free" housing as was alleged. As to Appellant's Consumer Protection Act claim, the Court stated that a non-party to the underlying transaction can still be liable under the Act if its actions so related to the underlying transaction that it would not have occurred absent such actions. Nevertheless, the Court ruled that the Act did not apply to Appellee's actions, as it only asserted that the property was "lead safe," and not that it was "lead free."

4. Providing Notice of a Tort Claim Pursuant to the Local Government Tort Claims Act, Md. Code Jud. Proc. § 5-301, *et seq.*: *Housing Auth. of Baltimore City v. Woodland*, 438 Md. 415, 92 A.3d 379 (2014).

The Maryland Court of Appeals held that it was not an abuse of discretion for the trial court to deny summary judgment in favor of the Appellant for Appellee's failure to strictly comply with the 180 day notice requirement to governmental agencies as set forth in Local Government Tort Claims Act (Md. Code, Cts. & Jud. Proc., § 5-304 (2013)) (the "Act.")

There are two exceptions to a plaintiff's notice requirement under the Act: 1) substantial compliance effectuating the purpose of the Act; and 2) good cause for the failure to comply with the Act. In this case, the Court held that there was insufficient evidence of substantial compliance because the notice to the Appellant did not include the threat of legal action or the intention to sue. The Court determined, however, that the trial court did not abuse its discretion in finding that there was good cause for the failure to comply, as the Appellee's family exhibited due diligence in notifying the Appellant of Appellee's lead level. This allowed the Appellant to investigate the potential claim, as is intended by the notice requirement. It also found that the Appellant's subsequent actions of inspecting the subject property and moving the Appellee and her family demonstrated that the Appellant received adequate notice of the potential claim. Thus, the Court found that the Appellee's family reasonably relied on these actions to determine that additional formal notice was unnecessary.

Unrelated to the notice requirement, the Court also held that evidence of the Appellant's efforts taken to comply with the Reduction of Lead Risk in Housing Act, Md. Code, Envir., § 6-801 (2011), *et seq.*, after receiving Appellee's notice, was inadmissible. The Court found that evidence of post-injury conduct was not relevant to Appellee's negligence claims, as Appellant's reasonableness was limited to what happened prior to the injury, not after.

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So what can a corporate defendant do to protect itself? Where former employees are involved, here are a few thoughts which may help you protect your client:

• Talk to former employees

Reach out to any former employees who may have important knowledge regarding the case. Explain to them your role in the case and remind them that any privileged communications they had with the corporation's lawyers should not be revealed to anyone. You may also explain the potential repercussions they face if they discuss the case with the plaintiff's lawyer. If the facts warrant it, you may want to advise the former employees to secure legal counsel of their own.[xiv] This advice may alert the former employees not to speak to opposing counsel *ex parte*. If the threat of litigation looms prior to an employee's departure, you may want to advise your client to explain to the employee the need to maintain established confidences during an exit interview.

Be aware that you will likely not be able to assert attorney-client privilege or work product with a former employee in a subsequent deposition or trial. Do not discuss with the former employee what you have learned about the case from your client, witnesses, etc., as this information may be discoverable.

If the employee has already met with the plaintiff's attorney, be sure to find out what was discussed. Just as your discussions with the witness may not be privileged, neither are your opponent's conversations.

• Identify any statutory privilege you may assert over former employees

Information possessed by former employees who do not communicate with the corporation's lawyers may be protected from disclosure by statute. Be sure to check for any statutory or regulatory provisions that may apply.

For example, HIPAA prohibits disclosure of private health information without consent of the patient.[xv] Even if your opposing counsel represents the patient, HIPAA regulations require the patient's authorization specify which healthcare providers are authorized to disclose information in their possession.[xvi] A health care provider is not authorized to access a patient's chart in the possession of the hospital or practice that no longer employs them.

Other statutory privileges include the medical review committee privilege,[xvii] patient-therapist privilege,[xviii] accountant-client privilege,[xix] patient-professional counselor privilege,[xx] patient-psychiatric nursing specialist privilege, news media privilege,[xxi] and social worker-client privilege.[xxii] If any of these are implicated in your case, be sure to invoke them with the plaintiff's attorney and affirm that they may apply to the former employee.

• Caution plaintiff's counsel against discussing privileged information with former employees

If you suspect that plaintiff's counsel might contact former employees who have privileged information, contact the plaintiff's attorney early on and caution that he/she should not attempt to discuss confidential matters with the witnesses. The implication of running afoul of attorney-client confidentiality may dissuade your opponent from seeking *ex parte* interviews. While there may be no legal means to prevent discovery from a former employee, being proactive may limit the exposure to your client. Spot the critical people early on in the litigation process, and determine if you can ethically assert that they may possess privileged information.

• Can a former employee's statements be used against your client?

If plaintiff's counsel has already contacted your client's former employee *ex parte* can their statement be used against your client?

Apart from information protected by attorney-client or statutory privilege, there is no prohibition on disclosure from the former employee to opposing counsel. However, there may be ways to mitigate damaging testimony that you may confront at trial. Is the information hearsay? Are there other facts contradicting the former employee's statements? Did he/she leave the employ of your client under circumstances that might give a motive to fabricate or exaggerate the facts? A thorough investigation of the former employee may provide a means to defend against otherwise damaging disclosures.

• Last words: when dealing with former employees, it is always better to be cautious!

In light of the language of the Rules and the federal court's interpretation, safe practice should assume the Maryland Rules of Professional Conduct do *not* prohibit a plaintiff's attorney from speaking to a former employee *ex parte*. While you may not have the ability to preclude such communications, observing the advice above may limit your client's exposure.

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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 (mmd@cls-law.com). 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.

[xiv] Because former employees are typically unrepresented third parties, you should be wary of giving any legal advice other than to secure counsel. *See* MRPC 4.3.

[xv] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104–191, 110 Stat. 1936 (codified as amended in scattered sections 18, 29, 42 of the U.S.C.)

[xvi] *Id.*

[xvii] Md. Code, Health Occ. § 1-401 (2014); *see also St. Joseph Med. Ctr., Inc. v. Cardiac Surgery Assoc., P.A.*, 896 A.2d 304 (2006) (held e-mails, letters, correspondences and testimony of hospital staff to hospital's medical review committee were privileged from discovery pursuant to the medical review committee privilege).

[xviii] Md. Code, Cts. & Jud. Proc. § 9-109 (2014).

[xix] Md. Code, Cts. & Jud. Proc. § 9-110 (2014).

[xx] Md. Code, Cts. & Jud. Proc. § 9-109 (2014); *see also Butler-Tulio v. Scroggins*, 774 A.2d 1209, 1216 (2001) (recognized a narrow exception to the general rule that there is no physician-patient privilege in Maryland in the mental health area).

[xxi] Md. Code Ann., Cts. & Jud. Proc. § 9-112 (2014).

[xxii] Md. Code Ann., Cts. & Jud. Proc. § 9-121 (2014).

(SCOTUS) *Continued from page 13*

eventually arrested him. Elonis was charged with five (5) counts of violating 18 U.S.C. § 875(c), which criminalizes the transmission, in interstate commerce, of threats to injure another person.

At Elonis' criminal trial, the District Court instructed the jury that it could convict Elonis if a reasonable person would foresee that his statements would be interpreted as a threat. Elonis challenged this jury instruction, arguing that the jury should have been required to find that Elonis intended to communicate a "true threat." Elonis appealed and the U.S. Court of Appeals for the Third Circuit upheld Elonis' conviction. The Supreme Court disagreed, in an 8-1 decision, holding that the prosecution needed to prove a subjective intent to threaten. The Supreme Court explained that an objective reasonable person standard did not go far enough to distinguish innocent, accidental conduct, from purposeful, unlawful acts. In this case, especially, the Court viewed the subjective intent element as crucial, because the criminal act was the making of a threat, not the posting on social media.

In a concurring opinion, Justice Alito criticized the majority for not clarifying whether the proper standard for assessing Elonis' subjective intent on remand was recklessness or knowledge. Justice Alito argued that recklessness was the standard. In his dissenting opinion, Justice Thomas argued that nine circuits had already addressed this issue and determined that the objective reasonable person standard was appropriate.

3) Same-Sex Marriage — *Obergefell v. Hodges*, 576 U.S. ____ (2015).

In *Obergefell v. Hodges*, the Supreme Court decided whether state officials who denied same-sex couples the right to marry had violated the Fourteenth Amendment. The petitioners were fourteen (14) same-sex couples and two (2) men whose same-sex partners were deceased. The petitioners came from Michigan, Ohio, Kentucky, and Tennessee—all states which refused to grant marriage licenses to same-sex couples and refused to legally recognize same-sex marriages lawfully performed in other states.

Each District Court ruled in favor of the petitioners. The U.S. Court of Appeals for the Sixth Circuit consolidated the petitioners' cases and reversed. The Supreme Court reversed the Sixth Circuit and held that the Fourteenth Amendment requires state officials to license the marriages of same-sex couples and to recognize lawfully performed marriages of same-sex couples performed in other states. The Supreme Court held that the fundamental liberties protected by Fourteenth Amendment extend to "personal choices central to dignity and autonomy" including the right to marriage. The Supreme Court further held that this applies with equal force to same-sex couples.

In his dissent, Justice Roberts recognized that same-sex marriage may be a good and fair policy; yet, he argued that the Constitution does not address the issue, and that it was, therefore, beyond the purview of the Supreme Court to decide the issue. In a separate dissent, Justice Scalia made a similar argument, stating that the legality of same-sex marriage was an issue for state legislatures to decide. In another dissenting opinion, Justice Thomas wrote that the majority stretched the bounds of the Fourteenth Amendment so far that it had distorted the democratic process by taking power from the legislative branch. Finally, Justice Alito wrote that the Constitution does not address the issue of same-sex marriage and that, therefore, it is for states to decide what definition of marriage they wish to recognize.

4) ACA Tax Credits — *King v. Burwell*, 576 U.S. ____ (2015).

In *King v. Burwell*, the issue before the Supreme Court was whether the Internal Revenue Service ("IRS") acted within its authority under the Patient Protection and Affordable Care Act ("ACA") when it promulgated a regulation that extended tax credits to a federal "Exchange" through which individuals could purchase healthcare coverage. The ACA implemented a series of healthcare reforms, one of which required the creation of an "Exchange" in each state that would serve as a marketplace for the purchase of insurance plans. The ACA provides that if a state does not or will not establish an "Exchange," then the federal government will establish one. The ACA provides tax credits for individuals who enroll through an "Exhange." The IRS interpreted this provision to include individuals who enrolled through the federal "Exchange," in addition to individuals who enrolled through state "Exchanges." The petitioners in this case were four individuals who lived in Virginia, which has a federal "Exchange." Without the tax credit for individuals enrolled under the federal "Exchange," the petitioners would fall under the ACA's "unaffordability exception," and be exempt from having to purchase healthcare insurance. The petitioners challenged the IRS Rule in federal court, alleging violations of the Administrative Procedures Act ("APA").

The District Court granted the IRS's motion to dismiss, and the U.S. Court of Appeals for the Fourth Circuit affirmed. The Supreme Court affirmed the Fourth Circuit decision by a 6-3 vote. The Court determined that the language providing tax credits for individuals enrolled in an "Exchange" was ambiguous. Therefore, the Court held that a reading of the provision within the context of the entire ACA supported the interpretation that the tax credits were to be provided to individuals who enrolled under both state and federal "Exchanges." The Court justified its reading by concluding that it was necessary for federal "Exchanges" to function like their state counterparts.

In dissenting, Justice Scalia countered with his own plain-meaning interpretation of the ACA, which he argued limited the

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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.

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.

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tax credit to individuals enrolled in state "Exchanges." Justices Alito and Thomas joined Justice Scalia in his dissent.

5) Voting Rights — *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. ___ (2015).

In *Alabama Legislative Black Caucus v. Alabama*, the Supreme Court reviewed the U.S. District Court for the Middle District of Alabama's decision to reject a racial gerrymandering claim, brought in response to the redrawing of state legislative voting districts. Appellants, Alabama Legislative Black Caucus, among others, claimed that Alabama's new district boundaries created a "racial gerrymander" in violation of the Fourteenth Amendment's Equal Protection Clause. The District Court ruled against Appellants, holding that redistricting violates the Fourteenth Amendment only when race is the "predominant" consideration. In the alternative, the District Court ruled that if race was the "predominant" consideration, the State's use of race was "narrowly tailored" to serve a "compelling state interest" in avoiding retrogression.

The Supreme Court, in a 5-4 decision, held that the District Court improperly looked at the statewide impact of the legislative redistricting, when in fact, Appellants had only claimed that racial gerrymandering took place in a few, select districts. The Court further ruled that the District Court erred in considering the State's goal of achieving less than a one (1%) percent population deviation among districts as a relevant factor to a determination of whether race was a "predominant" factor in redrawing district lines. Instead, the Supreme Court held, the District Court should have considered the traditional goals of the Voting Rights Act, which is to prevent retrogression in minority voters' ability to elect candidates of their choice.

In his dissent, Justice Scalia argued that Appellants' complaint was fatally flawed in that it failed to establish Alabama Legislative Black Caucus' standing to sue and failed to establish whether it was alleging a statewide claim of racial gerrymandering, or a select district claim. Therefore, Justice Scalia argued, Appellants did not deserve a second bite at the apple because of the Court's sympathy for the Appellants. In a separate dissent, Justice Thomas argued that it was nearly impossible for the State of Alabama to comply with the numerous, and often conflicting, requirements of the Voting Rights Act.

6) Government Speech — *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. ____ (2015).

In *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, the Supreme Court decided whether the Texas Department of Motor Vehicles Board (the "Board") engaged in a constitutionally prohibited decision when it refused to approve a specialty license plate design submitted by the Texas Division of the Sons of Confederate Veterans ("SCV"). Texas allows drivers to submit proposed specialty license plate designs to the Board, which, if approved, will be made available for display on vehicles registered in Texas. The Board rejected a proposed design by SCV that featured a Confederate battle flag. SCV challenged the Board's decision and the U.S. District Court upheld the Board's rejection of the design. The U.S. Court of Appeals for the Fifth Circuit reversed, holding that specialty license plate designs are private speech and that the Board violated the Constitution by refusing to approve SCV's design.

The Supreme Court overturned the Fifth Circuit, 5-4, holding that specialty license plate designs constitute government speech, and thus Texas was entitled to refuse to issue license plates bearing SCV's proposed design. The Court based its decision on the facts that states have long used license plates to convey messages, that the public associates license plates with the State, and that Texas maintains control over the production of specialty license plates. Writing in dissent, Justice Alito argued that with hundreds of different specialty license plate designs, an observer would understand that the license plate was an expression of the driver, not the state. Justice Alito expressed his view that specialty license plates were a form of private expression, carried out in a limited public forum, and that any efforts to suppress this type of expression were unconstitutional.

7) *Religious Freedom — EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. ___ (2015).

In *EEOC v. Abercrombie & Fitch Stores, Inc.*, the Supreme Court was presented with the question of whether an employer could be held liable under Title VII of the Civil Rights Act of 1964 ("Title VII") for refusing to hire an applicant based on a religious practice, if the employer did not have direct knowledge of the applicant's need for religious accommodation. Abercrombie & Fitch Stores, Inc. ("Abercrombie") refused to hire Samantha Elauf, a practicing Muslim, because the headscarf she wore, in religious observation, contradicted Abercrombie's employee dress code. The EEOC filed suit on Elauf's behalf, alleging violations of Title VII, which make it unlawful for an employer to refuse to hire an applicant because of the applicant's religious practices when those practices can be accommodated without undue hardship on the employer.

The District Court ruled in favor of the EEOC, but the U.S. Court of Appeals for the Tenth Circuit reversed, holding that failure-to-accommodate liability attaches only when the applicant informs the employer of his or her need for religious accommodation. The Supreme Court reversed the Tenth Circuit in an 8-1 decision. The Supreme Court held that to prevail under Title VII, the applicant need only show that his or her need for an accommodation was a motivating factor in the employer's decision. The employer's actual knowledge was not a necessary factor for the applicant to prove, because the employer may make an applicant's religious practice a factor in its decision of whether to hire the applicant without having express confirmation of the applicant's need for religious accommodation.

In dissent, Justice Thomas argued that the application of a neutral policy by an employer (i.e. a uniform dress code) cannot constitute intentional discrimination that violates Title VII. Although the dress code may have disproportionately impacted applicants who wear headscarves for religious reasons, Justice Thomas believed that because all applicants were presented with the same dress code, no applicants could claim to have suffered from disparate treatment. Justice Thomas urged a narrow construction of Title VII, such that an employer could only be punished for acting with a discriminatory motive.

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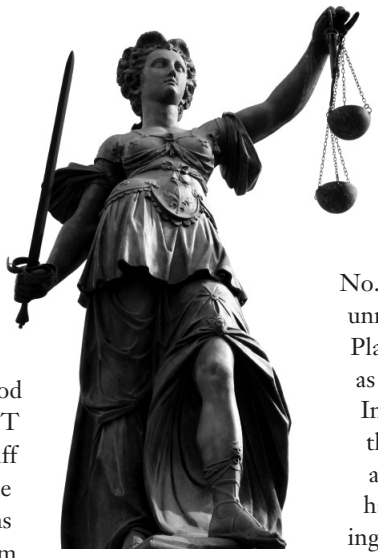
Spotlights

Stanley Souranis v. Baltimore Ravens, L.P., et al., Baltimore City Circuit Court, Case No.: 24-C-13-008256 — Rollins, Smalkin, Richards & Mackie, L.L.C. Wins Motion for Summary Judgment in favor of the Baltimore Ravens in a premises liability action



James R. Andersen and **Catherine A. Dickinson** recently obtained summary judgment on behalf of the Baltimore Ravens in a premises liability action filed in the Circuit Court for Baltimore City. In his Complaint, Plaintiff alleged that he slipped and fell on food located on a set of steps in the concourse of M&T Bank Stadium prior to a Ravens game. Plaintiff sought to hold the Baltimore Ravens and the Maryland Stadium Authority liable under claims of negligence. Co-Defendant Maryland Stadium Authority adopted the Baltimore Ravens' motion for summary judgment. On August 26, 2015, the Hon. Lynn Stewart Mays granted the Ravens' Motion for Summary Judgment, holding that there was no "time on the floor" evidence as to how long the food had been on the steps to support Plaintiff's claims that the Ravens had actual and/or constructive notice of the hazard. Counsel for the Ravens relied on applicable Maryland case law to support its argument that the Ravens were not on notice of the hazard, including *Burwell v. Easton Mem'l Hosp.*, 83 Md. App. 684, 577 A.2d 394 (1990) and *Moulden v. Greenbelt Servs., Inc.*, 239 Md. 229, 210 A.2d 724 (1965), both cases in which the Court of Special Appeals of Maryland and the Court of Appeals of Maryland, respectively, held that reliable "time on the floor" evidence is essential in a slip and fall case when there is no other evidence of how long the food had been on the floor.

John Murphy and **Gretchen Slater** of **Walker, Murphy & Nelson, LLP** secured a defense verdict on behalf of a nurse anesthetist in a week long medical malpractice trial in the Circuit Court for Kent County. The Plaintiffs alleged that the anesthesia team failed to conduct a proper Rapid Sequence Induction (RSI) and, as a result thereof, the patient aspirated during urgent surgery for a colonic obstruction. In addition to disputing liability, medical causation was also in dispute. While all parties agreed the patient developed Acute Respiratory Distress Syndrome (ARDS), the defense claimed that the patient's ARDS was the result of his pre-existing peritonitis. Damages included in excess of $100,000.00 in medical expenses and permanent lung damage including years of chronic pleural effusions. The jury returned a verdict in favor of the defense after 45 minutes of deliberations.

On August 31, 2015, the Circuit Court for Montgomery County issued a ruling upholding the District Court on appeal, with an Opinion that should be of note to all personal injury attorneys in Maryland. Simply put, the Court ruled that following a failure to comply with the 60 day requirement under Maryland Courts and Judicial Proceedings, §§ 10-104 and 10-105, a Court may find insufficient evidence to proceed to trial, and dismiss the case with prejudice.

In the case, *Irabeta v. Cuollo, et. al.*, Case No. 9051-D, the facts giving rise to the lawsuit were unremarkable. However, during the discovery phase, Plaintiff failed to disclose the required medical records as required by §10-104, until 38 days prior to trial. In arguing for the admissibility, the Plaintiff claimed that despite missing the deadline, the defendant had ample time to review the records, and that Plaintiff had made a "good faith" effort at service by attempting to fax the bills and records. Plaintiff argued that their efforts amounted to substantial compliance. The District Court Administrative Judge, Eugene Wolf, rejected this argument and dismissed the case.

The Honorable Anne Albright had the case on appeal. In her opinion, she found that §§ 10-104 and 10-105 make no mention of substantial compliance, and therefore could not be a basis for finding abuse of discretion. Instead, the Court upheld the District Court's plain language interpretation of the statute, and required compliance with the 60 day deadline.

The District Court also denied plaintiff's request for a continuance pursuant to Maryland Rule 3-508, which grants broad discretion to the trial judge in determining when and where to grant continuances. In his ruling, the Judge Wolfe concluded that the request for a continuance was another attempt to soften the time requirements of §§10-104 and 10-105, and for the same reason would not grant a dismissal without prejudice. Following the striking of the medical bills and records, Judge Wolfe granted Plaintiffs request for dismissal, doing so with prejudice. Judge Albright subsequently ruled that Plaintiff's request for dismissal without prejudice foreclosed any argument by Plaintiff that Plaintiff should have been allowed to proceed to trial on non-economic damages.

These ruling demonstrate a number of complexities and issues that can arise during litigation. Primarily, all timing requirements when utilizing §10-104 and 10-105 are very important. The 60 day requirement is a hard deadline, and the courts are required to strike the notice for non-compliance. Because these rules are used as a cost-saving shortcut, the courts may not allow any sidesteps. Complete compliance was required here, and was not difficult. Further, Rules governing service are also important. Service cannot be completed by using a fax machine, for the very reason that occurred in this case — transmissions are unreliable, and therefore insufficient. In sum, this procedural shortcut carries with it significant risks.

Maryland Defense Counsel, Inc. Presents

Annual Meeting and Crab Feast

June 8, 2016
5:30 p.m. – 7:30 p.m.

Nick's Fish House
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