THE DEFENSE LINE

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Table of Contents

Editor's Corner… 2

Litigating Liability Insurance Coverage… 4

New Members… 5

Attorneys Fees Incurred in Defending Insurance Policy Non-covered Claims: Who Pays?… 10

Requiem for the Limitations Defense… 14

Spotlights… 18

Sponsors… 22

Important Announcements

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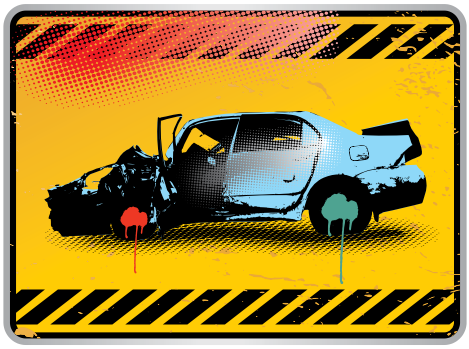
UIM Insurers Lose Right to Contest Liability by Consenting to Underinsured Tortfeasor's Carrier's Settlement

By Edward J. "Bud" Brown

In *Maurer v. Pennsylvania National Casualty Insurance Co.*, No 131 Sept. Term 2006 (filed Dec. 6, 2007) the Court of Appeals ruled that an underinsured motorist ("UIM") carrier who consents to the settlement between its insured and the tortfeasor's insurance company thereby loses its right to raise liability defenses in the trial of the UIM claim. Thus, the UIM insurer who elects to waive its subrogation rights is also now deemed to have waived its right to prove that its insured was not legally entitled to recover from the alleged tortfeasor. It appears that the UIM carrier's rights under the settlement procedures statute (Md. Code Ann., Insurance, Section 19-511) have been severely truncated, and the UIM insurer who intends to assert a liability defense must now expressly object to the settlement (and therefore must also pre-pay the settlement offer to the insured/plaintiff), or refrain from consenting until the statutory 60 day response period expires, at which time the insured is free to accept the settlement from the tortfeaser's carrier and execute releases, without prejudice to his right to pursue his UIM claim.



The decision in *Maurer* is perplexing in several aspects. As acknowledged by the Court of Appeals at Section IV of the opinion, this significant change in the law was not raised by the parties to the action, either at the Circuit Court level or on appeal (the case had been appealed to the Court of Special Appeals, but the Court of Appeals *sua sponte* issued a Writ of Certiorari before any decision was rendered by the intermediate Court). Even more puzzling is the Court's decision to deny the UIM carrier of the right to raise its liability defenses in a case involving the dual societal scourges of underage drinking and driving while intoxicated. Indeed, the ultimate outcome of the case results in the drunken driver being rendered essentially immune from any personal liability or exposure (as result of his insurer's policy limit settlement with the plaintiff coupled with Penn National's waiver of its subrogation rights against him) and the drunken passenger who, according to the facts set forth in the opinion, was illegally drinking with the driver for approximately two and half hours before the accident, receiving a free pass on bearing any responsibility for the accident and/or his own injuries. (In fact, the jury in the trial below found Maurer to have been contributorily negligent; however the instructions surrounding that finding were at the heart of the appeal, and were found to have been erroneously issued by the Court of Appeals).

Thus, as the case was being remanded due to the jury instruction issue, the Court of Appeals exercised its power pursuant to Md. Rule 8-131 (a), which notes that ordinarily an issue not raised or decided by the trial court will not fall within the scope of review, but may be addressed if necessary or desirable to provide guidance to the trial court or to avoid the expense and delay of another appeal.

Additionally, the practical result of the decision might well inspire UIM insurers to simply opt to allow their statutory response time to expire, rather than risk consenting to a settlement, thereby result-

Continued on page 2

(UIM INSURERS) *Continued from cover*

ing in further delay, albeit brief, but which seems to run contrary to the remedial nature of the UM/UIM statutory scheme.

The ruling in *Maurer* must be reviewed in the context of Section 19-511, which was enacted in 1996 to set forth with clarity the procedures that the insured/plaintiff and his UIM carrier are to follow when the tortfeasor's carrier(s) makes a policy limits offer, so that the insured can proceed without risk of waiving or extinguishing his ability to thereafter pursue his UIM insurer for additional payments. Thus, a fairly straightforward flowchart of events was delineated: 1) the insured must receive a policy limits offer in writing from the tortfeasor's insurer(s) and forward same by certified mail to his UIM carrier; 2) the UIM insurer has 60 days to provide written consent or written refusal to consent; 3) if written consent was provided by the UIM carrier, its subrogation rights against the tortfeasor are waived; 4) if written refusal to consent is forwarded, the UIM carrier must then prepay the amount of the settlement offer; 5) if the 60 days period expires without any response from the UIM carrier, the insured may accept the policy limits offer and execute a release in favor of the tortfeasor, and still pursue his UIM claims, and the UIM carrier is deemed to have lost its subrogation rights against the tortfeasor, and cannot claim the release as a defense.

In *Maurer*, although Penn National consented to the settlement, and thereby knowingly and intentionally waived its rights of subrogation against the tortfeasor, it is clear from the defenses raised at trial that it did not consider its election to forego pursuit of the drunken driver as also constituting a waiver of its right to raise the available liability defenses. The Court of Appeals, cited *Nationwide Mutual Ins Co. v. Webb*, 291 Md. 721, 739-740, 430 A.2d 465, 476 (1981), *Waters v. USF&G*, 328 Md. 700, 717-718, 616 A. 2d 884 (1992), and *West American v. Popa* , 352 Md. 455, 468, 723 A. 2d 1, 7 (1998) for the proposition that an uninsured/underinsured motorist carrier who consents to the tortfeasor's carrier's settlement is, in effect, consenting to the proposition that its insured is legally entitled to recover against the UM/UIM carrier as well. In *Maurer*, the Court likened the consent procedures under Section 19-511 to a consent to settle clause in a policy, and ultimately concluded that giving consent to settle for Section 19-511 purposes is effectively the same as the pre-19-511 consent to settle, and constitutes an election to be bound by this settlement, at least as to the liability aspect of the case.

As a result of the *Maurer* decision, the UIM carrier must now, in a relatively short time period, make the decision as to whether it will voluntarily pay the amount offered by the tortfeasors' carrier in settlement even though it believes that the plaintiff insured is not entitled to this amount, or proceed into the uncharted waters of allowing the statutory time period to expire, thereby losing its subrogation rights, but avoiding the charge of an intentional waiver via the affirmative act of consenting. Both approaches are problematic, particularly when a defense based upon drunk driving or other heinous conduct is involved, and the issues become even more convoluted when additional parties are involved. Although *Maurer* involved a single car accident, and thus the night of underage drinking and driving impacted only the tortfeasor and the insured/plaintiff, it is easy to imagine a situation wherein one intoxicated party allows another to drive his vehicle and the pair then collide with an innocent third party, so that the ensuing lawsuit involves complaints, cross-claims and counterclaims. Under the *Maurer* decision, the UIM insurer, who may not believe its subrogation rights are worth preserving based solely upon the financial insolvency of the tortfeasor, might well be compelled to pay a negligent, drunken insured, even though the innocent third-party victims prevail on their claim, i.e. obtain a jury verdict finding negligence on the part of the insured. Amidst this curious potential outcome is, perhaps, a ray of hope which may be found in the Court of Appeal's acknowledgment of the general enforceability of consent to settle clauses. Thus, the opinion at least suggests the possibility of utilizing such a clause to expressly state that a consent to settle pursuant to Section 19-511 is a limited consent, and only applies to the waiver of subrogation issue, but does not constitute a consent to be bound as to liability issues of liability.

Edward J."Bud" Brown is the Secretary of the MDC and has recently opened the Law Office of Edward J. Brown, LLC in Ellicott City, Maryland. Mr. Brown's practice concentrations include insurance coverage and insurance defense litigation.

Editor's Corner

This edition of *The Defense Line* features several interesting articles and case spotlights from our members. The lead article from Edward J. "Bud" Brown, who is the Secretary of The Maryland Defense Counsel and recently opened up the Law Office of Edward J. Brown, LLC, discusses the recent holding of *Maurer v. Pennsylvania National Casualty Insurance Co.*, in which the Court of Appeals ruled that an underinsured motorist carrier who consents to settlement loses their right to contest liability. Wendy Karpel an Associate County Attorney for Montgomery County discusses a recent Court of Special Appeals opinion, *Dove v. Montgomery County Board*, which addressed the limitations on re-opening workers' compensation cases. Joseph F. Cunningham and James N. Markels of Cunningham & Associates, PLC, an insurance defense law firm in Arlington, Virginia, discuss whether or not insurers are entitled to recover attorneys' fees and costs expended by them when defending cases that involve factual allegations that fall outside the terms and conditions of their insureds' policies. Steven E. Leder, of Leder Law Group, LLC, discusses the issues and steps to consider when litigating liability insurance coverage.

The Maryland Defense counsel has had a number of successful events since the Fall 2007 edition of *The Defense Line*, including the recently held *Great Stride, Great Struggles: The Continuing Case for Diversity 70 Years after Murray* event and the always popular Maryland Defense Counsel's Annual Meeting and Crab Feast! 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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Litigating Liability Insurance Coverage

By Steven E. Leder

Unresolved coverage issues, new causes of action and changes in the standard policy forms have driven an increase in insurance coverage litigation. Whether you are representing an insurer or a policyholder in a coverage dispute, your decisions as to whether to sue, what to allege, when to sue, whom to sue, and where to sue may determine who wins and who loses.

What causes of action to allege

There are overlapping causes of actions available to the different parties. Policyholders and insurers may each seek the court's guidance in construing the policy by filing a declaratory judgment action. A court's declaratory judgment enables the insurer and the insured (or putative insured) to understand their rights and duties so that they can make responsible decisions. Congressman Gilbert remarked in debate concerning the federal declaratory judgment statute:

> *Under the present [pre-Declaratory Judgment Act] law, you take a step in the dark and then turn on the light to see if you steppe d into a hole. Under the declaratory judgment law you turn on the light and then take the step.*

Step-Saver Data Sys., Inc. v. Wyse Tech., 912 F.2d 643, 649-650 (3d Cir. 1990) (citing 69 Cong. Rec. 2108 (1928)).

The policyholder may also allege breach of contract if the insurer has denied a duty to defend or indemnify. An insurer may sue to rescind the policy for misrepresentations in the application. Further, where there is a judgment against the insured in excess of the policy limits, an insured may allege "bad faith" or "wrongful failure to settle within policy limits". However, when can they file suit?

When to sue

Should you file a declaratory judgment before the underlying tort case is tried, after it is tried, or should you move to intervene? In Maryland, a pre-tort trial declaratory judgment action is generally not permitted where the facts to be determined in the coverage action are intertwined with the facts to be determined in the underlying tort trial. *Allstate Ins. Co. v. Atwood*, 319 Md. 247, 572 A.2d 154, (1990); *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 347 A.2d 842 (1975); *Benning v. Allstate Ins. Co.*, 90 Md. App. 592, 602 A.2d 233 (1992). A pre-tort trial declaratory judgment action is permitted where the coverage issue arises out of a separate and independent question which will not be determined in the underlying tort trial. Id. Intervention by the insurer is barred in Maryland state court. *Allstate Ins. Co. v. Atwood*, 319 Md. 247, 572 A.2d 154 (1990). This creates some problems with allocating damages where there is a general verdict, which are discussed below. Most declaratory judgment actions in the Maryland state courts will be filed after the tort trial.

The Declaratory Judgment Act, 28 U.S.C. § 2201(a) provides a federal declaratory remedy. The exercise of jurisdiction under the Act is not compulsory. There is a four part test for entertaining an insurance coverage action during the pendency of the tort trial in federal court; i.e.:

> (i) the *strength of the state's interest in having the issues raised in the federal declaratory action decided in the state courts;*
>
> *(ii) whether the issues raised in the federal action can more efficiently be resolved in the state court in which the action is pending;*
>
> *(iii) whether permitting the federal action to go forward would result in unnecessary "entanglement" between the federal and state court systems, because of the presence of "overlapping issues of fact or law";*
>
> *(iv) whether the declaratory judgment action is being used merely as a device for "procedural fencing" — that is, to control the choice of forum in a race for res judicata or to obtain a federal hearing in a case otherwise not removable.*

Statute of Limitations

The three-year statute of limitations looms large in deciding when to sue. MD. CODE ANN., CTS. & JUD. PROC. § 5-101. The statute of limitations runs from the time of the breach of contract. Maryland is among the majority of courts which hold that the statute of limitations on a claim for breach of the duty to defend runs from the date of final judgment in a tort suit rather than the denial of coverage. *See Vigilant Ins. Co. v. Luppino*, 352 Md. 481, 723 A.2d 14 (1999); *Commercial Union Ins. Co. v. Porter Hayden Co.*, 116 Md. App. 605, 698 A.2d 1167 (1997). The breach of duty to indemnify also runs from the date of judgment. *Commercial Union*, *supra*; *Luppino v. Vigilant Ins. Co.*, 110 Md. App. 372, 677 A.2d 617 (1996).

Whom Should You Sue?

The insured and the insurer should make certain that all parties that must be bound by the judgment are included as parties. If the tort plaintiff is not joined as a party, he may not be bound by the judgment. *Zelinski v. Townsend*, 163 Md. App. 211, 878 A.2d 623 (2005), *rev'd on other grounds*, 393 Md. 83, 899 A.2d 835 (2006). Some plaintiffs do not wish to participate and may be dismissed if they agree to be bound by the outcome of the declaratory judgment action.

Where to Sue

The first step in deciding where to sue is to be certain that there is jurisdiction over all the parties who must be bound by the judgment. You may decide to sue in the United States District Court for the District of Maryland, another federal court, Maryland state court, or another state's court. Insurers, most of whom are not Maryland residents, may prefer to litigate in federal court. Since each forum applies its own choice of law rules, the selection of the forum may also determine which state's law applies.

Choice of Law

Maryland applies the substantive law of the place where the contract was made (*"lex locus contractus"*) to issues of contract interpretation. *See Cooper v. Berkshire Life Ins. Co.*, 148 Md. App. 41, 55, 810 A.2d 1045, 1052-1053 (2002); *Commercial Union*, *supra*. *Cf. Am. Motorists Ins. Co. v. ARTRA Group, Inc.*, 338 Md. 560, 659 A.2d 1295 (1995) *(renvoi)*. Contracts are made in the place where the last act occurs necessary to give the contract

a binding effect. *Commercial Union*, *supra*, 116 Md. App. at 672, 698 A.2d at 1200. Typically, the place where the policy is delivered and the premiums are paid or where the policy is countersigned is the place of the contract. *Md. Cas. Co. v. Armco, Inc.*, 643 F. Supp. 430 (D. Md. 1986), *aff'd*, 822 F.2d 1348 (4th Cir. 1987); *E. Stainless Corp. v. Am. Prot. Ins. Co.*, 829 F. Supp. 797 (D. Md. 1993). Issues concerning the performance of the insurance contract are governed by the law of the place of performance. *First Nat. Bank & Trust Co. of W. Md. v. Security Mut. Cas. Co.*, 285 F. Supp. 337 (D. Md. 1968).

The doctrine of r*envoi* is an exception to this rule. Under this doctrine, if Maryland's choice of law rule results in the application of another state's law and that other state's choice of law rule (applying the law of the state with the "most significant contacts" for example) dictates the application of Maryland substantive law, *renvoi* permits the Maryland court to apply Maryland law to the dispute. *Am. Motorists Ins. Co. v. ARTRA Group, Inc.*, 338 Md. 560, 659 A.2d 1295 (1995).

A federal court sitting in diversity will normally apply the substantive choice of law principles of the state in which it is located. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S. Ct. 1020, 1021 (1941).

Discovery in General

Discovery in coverage litigation is much different from discovery in tort litigation. The scope of discovery depends upon the issue. In duty to defend cases, generally, no significant discovery is needed by the insurer, since the duty to defend is based upon the allegations of the Complaint. *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 347 A.2d 842 (1975). However, since insureds may rely upon extrinsic evidence to bring an action within coverage, discovery may prove helpful to the insured. In duty to indemnify cases, the evidence is generally limited to that produced at the underlying tort trial. In "bad faith" duty to settle within policy limits cases, more extensive discovery is permitted.

Whether information as to other claims and lawsuits is discoverable is an issue for the trial court. Most courts find it marginally relevant at best and either not discoverable or subject to limited discovery. *North River Ins. Co. v. Mayor and City Council of Baltimore*, 343 Md. 34, 67, 680 A.2d 480, 497 (1996) ("[t]he numerical majority of the cases deny any discovery of the records of other insureds, either on the ground that it will not lead to the discovery of relevant evidence, or on the ground that the relevance is so clearly outweighed by the burden of production that production is denied").

Depositions

As with discovery in general, the purpose and goals of the deposition vary depending upon whether the suit concerns the duty to defend, the duty to indemnify or "bad faith." In a duty to defend case, policy language and the allegations of the complaint drive the court's determination of coverage. Hence, it is rarely useful to depose the adjuster in a duty to defend case. The handling of the file and the insurer's reasons for denying coverage or reserving rights are not relevant to the determination of coverage by the court. The same goes for a duty to indemnify case, where the jury verdict sheet or the evidence adduced at trial—not the reasons the insurer accepted or denied coverage—determines coverage. Insureds, however, tend to notice the deposition of the claims adjuster as a knee jerk reaction. Of course, in a bad faith case, the issues concerning handling of the file and settlement negotiations make the deposition of the adjuster central.

The deposition of the insured is useful in a duty to defend case to flesh out any extrinsic evidence the insured relies upon and the related factual basis of the underlying plaintiffs' allegations, such as whether the insured intended or expected the plaintiff's injury or whether the putative insured had permission to drive the insured motor vehicle. Further, it is an opportunity to pin down the insured's claim that extrinsic evidence brings the case within coverage.

Experts generally should not be permitted to testify since the policy is interpreted based upon its plain language as understood by laypersons. *Truck Ins. Exch. v. Marks Rentals, Inc.*, 288 Md. 428, 433-434, 418 A.2d 1187, 1190 (1980) (citing *Della Ratta, Inc. v. Am. Better Community Developers*, 38 Md. App. 119, 131, 380 A.2d 627, 635 (1977)). Expert testimony may be introduced to assist in interpreting particularly specialized and/or arcane policies. *Johnson & Higgins of Pa., Inc. v. Hale Shipping Corp.*, 121 Md. App. 426, 710 A.2d 318 (1998). Nonetheless, experts are frequently named in coverage litigation.

Burden of Proof

Once you have assembled your evidence, you have to prove your case. The insured has the burden of proving every fact essential to his or her right to recover. *See N. Am. Acc. Ins. Co. v. Plummer*, 167 Md. 670, 176 A. 466 (1935); *Towne Mgt. Corp. v. Hartford Acc. & Ind. Co.*, 627 F. Supp. 170 (D. Md. 1985); *Royal Ind. Co. v. Wingate*, 353 F. Supp. 1002 (D. Md. 1973). The insurer has the burden of proving any exclusion under the policy. *Finci v. Am. Cas. Co.*, 323 Md. 358, 394, 593 A.2d 1069, 1087 (1991). *See also Warfield-Dorsey Co. v. Travelers Cas. & Sur. Co. of Illinois*, 66 F. Supp. 2d 681, 689 (D. Md. 1999). The insurer has the burden of proving prejudice from the insured's violation of a notice provision. *Prince George's County v. Local Gov't Ins. Trust*, 388 Md. 162, 187-88, 879 A.2d 81, 97 (2005). The insurer has the burden of proving that the insured made a misrepresentation in the application for the policy. *Cohen v. Am. Home Assur. Co.*, 255 Md. 334, 342, 258 A.2d 225, 229 (1969). Lost policies require the proponent to establish the fact of loss and terms and conditions of the policy by clear and positive evidence. *See Barranco v. Kostens*, 189 Md. 94, 54 A.2d 326 (1947). The insured has the burden of making the allocation where part of the loss is within the policy and part is not.

Allocation

a. Allocating a verdict between insurer and insured

Who has the burden of apportioning the loss

New Members

Matthew R. Alsip
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Christopher J. Jeffries
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between covered and uncovered damages when there is a general verdict? Allocation is simple where the verdict is distinguished between covered and uncovered claims. If there is no specific allocation, the court must determine what portion is allocated to covered claims. *St. Paul Fire & Marine Ins. Co. v. Englemann*, 639 N.W.2d 192 (S.D. 2002); *Comsys Info. Tech. Services, Inc. v. Twin City Fire Ins. Co.*, 130 S.W.3d 181 (Tex. App. 2003); *Bohrer v. Church Mut. Ins. Co.*, 965 P. 2d 1258 (Colo. 1998); *Agency of Nat. Res. v. U.S. Fire Ins. Co.*, 796 A.2d 476 (Vt. 2001). Generally, the insured has the burden of proving a loss is within coverage. Where the verdict is mixed, it remains the insured's obligation. *Universal Underwriters Ins. Corp. v. Reynolds*, 129 So.2d 689, 692 (Fla. App. 1961). A few courts have shifted the burden to the insurer in some situations, such as where the insurer controlled the defense and failed to request special jury interrogatories to allocate the verdict. *Duke v. Hoch*, 468 F.2d 973 (5th Cir. 1972). *See also Magnum Foods, Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491, 1498-1499 (10th Cir. 1994); *Gay & Taylor, Inc. v. St. Paul Fire & Marine Ins. Co.*, 550 F. Supp 710, 716-717 (W.D. Okla. 1981); *Palermo v. Fireman's Fund Ins. Co.*, 676 N.E.2d 1158 (Mass. App. 1997); *Buckley v. Orem*, 730 P.2d 1037, 1043 (Idaho App. 1986); *Liquor Liability Joint Underwriting Ass'n v. Hermitage Ins. Co.*, 644 N.E.2d 964 (Mass. 1995). *Cf. Int'l Commc'n Material, Inc. v. Employer's Ins. of Wausau*, 1996 WL 1044552 at *9-10 (W.D. Pa. 1996) (distinguishing that case from *Duke*, *supra*, on the basis of who controlled the defense).

Some Federal Courts have permitted insurers to intervene pursuant to FRCP Rule 24 to request special jury interrogatories or a verdict form. *See e.g.*, *Thomas v. Henderson*, 297 F. Supp 2d 1311 (S.D. Ala. 2003).

b. Allocating a verdict among insurers with concurrent coverage

In cases with concurrent (overlapping) insurance policies, Maryland courts look to the policies' "other insurance" clauses to determine allocation. There are three common types: escape clauses are designed to prevent a policy from responding at all if there is other available insurance, excess clauses purport to make a policy excess to other available insurance, and pro rata clauses attempt to allocate the indemnity obligation among primary insurers based on the ratio of their policy limits to the total available coverage. *See Consol. Mut. Ins. Co. v. Bankers Ins. Co. of Pa.*, 244 Md. 392, 395-96, 223 A.2d 594, 596 (1966).

After determining which types of clauses are at issue, the court will then attempt to reconcile the clauses, if possible. "This approach recognizes that the rights and liabilities of the different insurers involved should depend, as far as possible, upon the specific language of the policies." *Id.* at 396, 223 A.2d at 597. An excess clause prevails over a pro rata clause in Maryland. As a result, the policy with a pro rata clause will be primary, and must cover the loss up to its policy limits before the policy with the excess clause will respond. *Id.* at 399, 223 A.2d at 598. When the Court of Appeals is reconciling an escape and excess clause, the result depends upon the specific wording of the "other insurance" provisions. An escape clause will prevail over an excess clause if the escape clause specifically states that it will be activated by the existence of excess coverage. *State Farm Mut. Auto Ins. Co. v. Universal Underwriters Ins. Co.*, 270 Md. 591, 312 A.2d 265 (1973). On the other hand, an excess clause will prevail over a broadly worded escape clause; in that case the policy with the excess clause will serve as excess insurance and the policy with the escape clause will be primary. *Zurich Ins. Co. v. Cont'l Cas. Co.*, 239 Md. 421, 212 A.2d 96 (1965). When a Maryland court cannot reconcile competing clauses, it will equitably distribute the insurers' liability for the verdict. *Ryder Truck Rental, Inc. v. Schapiro & Whitehouse, Inc.*, 259 Md. 354, 366, 269 A.2d 826, 832 (1970) (excess clauses); *Celina Mut. Cas. Co. of Ohio v. Citizens Cas. Co. of N.Y.*, 194 Md. 236, 245, 71 A.2d 20, 24 (1950) (pro rata clauses); *Centennial Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 71 Md. App. 152, 524 A.2d 110 (1987) (escape clauses).

c. Allocating a verdict among insurers with consecutive coverage

In cases with consecutive insurance policies covering the same risk, there are three methods of allocating the duty to indemnify the insured: (1) "joint and several" or "all sums", (2) "actual injury," and (3) "pro rata" by time on the risk or by policy limits. The Maryland Court of Special Appeals has adopted the third method, pro rata by time on the risk. *Mayor and City Council of Baltimore v. Utica Mut. Ins. Co.*, 145 Md. App. 256, 309, 802 A.2d 1070, 1101 (2002). Under this method, each insurer's indemnity burden is proportionate to the length of time its policy covered the risk. *Id.* Uninsured periods are allocated to the insured, unless they are caused by the unavailability of insurance during that time. *Id.* at 313, 802 A.2d at 1104. *See also Scottsdale Ins. Co. v. Am. Empire Surplus Lines Ins. Co.*, 811 F. Supp. 210 (D. Md. 1993) (predicting that Maryland would use the pro-rata method of allocation).

Attorney's Fees

Attorney's fees are recoverable by the insured in a duty to defend action, but not in a duty to indemnify action. Maryland follows the American Rule, which provides that each party bears his own attorney's fees in breach of contract actions. *Bausch & Lomb Inc. v. Utica Mut. Ins. Co.*, 355 Md. 566, 590, 735 A.2d 1081, 1094 (1999). There is, however, an exception to this rule in actions involving third-party insurance policies. Where a policyholder prevails in a declaratory judgment action after its insurer has denied a duty to defend, attorney's fees may be recovered. *Id.*; *Mesmer v. MAIF*, 353 Md. 241, 264, 725 A.2d 1053, 1064 (1999); *Collier v. MD-Individual Practice*, 327 Md. 1, 11-17, 607 A.2d 537, 542-545 (1992). The underpinnings of this rule are explained in *Bankers and Shippers Ins. Co. of N.Y. v. Electro Enterprises, Inc.*, 287 Md. 641, 648-649, 415 A.2d 278, 282-283 (1980) (citing *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 409-10, 347 A.2d 842, 851 (1975)).

Steven E. Leder founded the five attorney Leder Law Group, LLC in 1993. He focuses his practice on insurance coverage litigation, toxic torts and recreational boating.

Rebecca H. Bossle also contributed to this article.

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 (mary.dimaio@aig.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.

Attorneys Fees Incurred in Defending Insurance Policy Non-covered Claims: Who Pays?

By Joseph F. Cunningham with James N. Markels

I. Introduction

In 2005, the U.S. property/casualty insurance industry generated $437,709,106.00 in net premiums written. Of the top ten U.S. carriers, nearly all had created in-house law firms in metropolitan areas to lessen the claims-handling/litigation costs so paramount an element of their business costs. Indeed, it is difficult to name another commercial enterprise that devotes so much money to payment of attorney fees. At the same time, commentators on the legal profession have indicated that moneymaking has become the profession's "driving issue… the driving goal" and that the emphasis has become the "priority" of moneymaking.

Given this growing tension between the interests of insurers and many non-captive law firms, it is surprising that relatively little scholarly or academic attention has addressed the significant issue of whether or not insurers are entitled to recover attorneys' fees and costs expended by them when defending cases that involve factual allegations that fall outside the terms and conditions of their insureds' policies. The lack of critical regard for this topic cannot be rationalized by concluding only insignificant sums of money are involved, because many disputes between insurer and insured over the obligation to pay defense counsel involve millions of dollars.

With this somewhat odd indifference by scholars to this far-reaching legal and business issue, it is appropriate to look at the major cases on this topic over the past few years. Case law is not abundant on this topic. But those jurisdictions—both state and federal—that have addressed it have done so in depth—with a polar disparity of opinion by a number of well-regarded courts.

Part II of this article will analyze major cases that do not recognize the insurer's right to recovery. Part III will analyze major cases that do recognize the insurer's right to recovery. Finally, Part IV will compare the two different ways courts treat this issue and conclude that the rule recognizing the insurer's right to recovery is the better rule.

II. Major Case Law Not Recognizing a Right to Recovery

A. Fourth Circuit Interpreting Maryland Law

In *Perdue Farms, Inc. v. Travelers Casualty & Surety Co. of America*, the U.S. Court of Appeals for the Fourth Circuit, interpreting Maryland law under *Erie R.R. Co. v. Tompkins*, recently tackled the issue of carrier entitlement to defense fees/costs. The insurer had paid out defense costs for both covered and uncovered claims but then sought to recover the costs of the uncovered claims. The court decided that to allow such partial recovery would "significantly tip the scales in favor of the insurer," and cause liability insurance to "all but cease to function," turning it instead into an "up-front defense whose line-item costs would then be the subject of subsequent litigation."

This chamber-of-horrors argument is a bit extreme, given the broad obligation of an insurer in Maryland, and elsewhere, to fully defend both the covered and non-covered claims once a duty to indemnify potentially exists. This principle of great benefit to the insured, coupled with the basic premise that an insurance policy is a contract whose particular language alone governs the duties and benefits conferred on both parties, plus the court's silence on the insurer's right to ultimate restitution for non-covered claim defense suggests an insured's potential windfall.

The *Perdue Farms* panel gave little deference to any of these concepts. The opinion's author, Judge J. Harvie Wilkinson III, is known as a particularly conservative judge on a very business-friendly, conservative court. Therefore, the adoption of an industry-hostile, rigid exclusionary rule in this case, buttressed by relatively banal generalities appears odd. This is especially true, given an absence of controlling Maryland law on point and the case facts.

The insured, Perdue, held a policy issued by Travelers to cover claims based upon violations of the federal Employee Retirement Income Security Act (ERISA). The plaintiff in the underlying class action alleged ERISA as well as wage- and hour-law violations. Wage and hour claims were not covered under the Travelers policy. Nevertheless, the bulk of the allegations of wrongdoing related to such issues, and the bulk of the $10 million settlement of the case and $4.4 million in defense costs was attributable to those non-covered items. The court reversed the district court's decision to have Travelers pay all settlement costs involving all claims made, reasoning correctly that the policy clearly did not respond to non-covered events. But it followed what has been termed the minority rule by rejecting application of this analysis to the attorneys fees and costs expended to defend such extra-policy claims. To bolster its reasoning that settlement indemnification costs should not be borne entirely by Travelers, the court stated that to do otherwise, "… would turn the insurance policy on its head [and] … impose liability upon Travelers for claims that its insurance policy never covered."

It is puzzling that the court thought it was appropriate to split the settlement costs, with the insurer paying the costs for the covered claims and the insured paying the costs for the uncovered claims, but found this same reasoning did not apply to splitting the attorneys' fees/costs. This seems especially odd, given the need for lower-court involvement in any necessary apportioning of covered and non-covered dollar amounts comprising the settlement. Furthermore, Travelers had earlier put Perdue on notice: upon receipt of the underlying law suit from its insured, Travelers warned Perdue that it was reserving its rights under the policy as to both fees/costs and indemnification obligations. Travelers further stated that it intended to seek recovery of defense costs expended on non-covered claims defense.

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B. Illinois Law

In 2005, the Supreme Court of Illinois embraced the same minority view as Maryland. In *General Agents Insurance Co. of America v. Midwest Sporting Goods Co.*, it reversed the Circuit and lower appellate courts, which had held an insurer entitled to reimbursement of attorneys' fees for defending a no-coverage case. The underlying case was brought by the City of Chicago and Cook County against the insured for selling guns to inappropriate purchasers and alleged intentional wrongdoing and other uncovered acts. The City sought injunctive relief and punitive damages. Nonetheless, a defense was provided under a reservation of rights which included the right to seek repayment of defense costs for non-covered claims. But the Illinois Supreme Court, while recognizing the majority of jurisdictions permit such recovery, cited current Wyoming and Texas Supreme Court decisions that did not. Both of these courts held that the absence of policy language permitting the insurer to recoup defense costs was fatal to the carrier's subsequent effort to recover them, despite its articulated reservation of rights to do so if appropriate. The Illinois court adopted this reasoning on the premise that to do otherwise would allow the insurer to "unilaterally modify its contract." It went on to cite with approval *Terra Nova Insurance Co. v. 900 Bar, Inc.* and *Liberty Mutual Insurance Co. v. FAG Bearings Corp*. While the latter case, in rejecting the insurer's claim for reimbursement, provided no thoughtful analysis, the Third Circuit's opinion provides interesting reasoning:

> *A rule permitting such recovery would be inconsistent with the legal principles that induce an insurer's offer to defend under [a] reservation of rights. Faced with uncertainty as to its duty to indemnify, an insurer offers a defense under reservation of rights to avoid the risks that an inept or lackadaisical defense of the underlying action may expose it to if it turns out there is a duty to indemnify.*

The Illinois Supreme Court found this reasoning persuasive. Practitioners know that it is speculative at best and removed from reality otherwise. In many cases the insurer who reserves its rights still undertakes to defend with counsel of its own choosing. The insurance defense bar has been accused of many things over the decades, but "inept or lackadaisical" is not a known label. Surely, chosen defense counsel would not be used more than once if it exhibited such traits. For that matter, any counsel who fail to vigorously represent their clients put their clients at risk and expose themselves to malpractice claims. Nevertheless, the Fourth Circuit in *Perdue Farms* also quoted this dubious reasoning.

The Illinois court also reasoned that implying an agreement to permit the insurer to recover attorneys' fees for non-covered claims defense "places the insured in the position of making a Hobson's choice between accepting the insurer's additional conditions on its defense or losing its right to a defense from the insurer."

This straw man of a Hobson's choice is not in accord with practice. Insurers generally do not pull coverage if an insured or its attorney disputes the content of a reservation–of-rights letter. To do so puts the carrier at risk of paying all personal counsel's fees/costs for defending the underlying suit and the insured's prosecuting the subsequent coverage action, as well as a potential bad-faith claim. Such a course comports with no reasonable risk/reward analysis. Its erroneous premise hardly provides a reasoned basis for precluding the insurer from attempting to recover attorneys fees unrelated to covered claims.

III. Major Case Law Recognizing a Right to Recovery

A. California Law

Less than a year before the *Perdue Farms* decision, the Supreme Court of California reached the opposite decision of the *Perdue Farms* court in *Scottsdale Insurance Co. v. M.V. Transportation*. The facts in *Scottsdale* were similar to those in *Perdue*. The insured, M.V. Transportation, was sued by a competitor alleging contractual breaches, unlawful business actions, misappropriation of trade secrets and unfair competition in the underlying case. None of these acts were covered by the *Scottsdale* policy. Although the carrier did not believe the claims were covered by the policy's "advertising injury" provisions, the carrier nevertheless provided a defense because of the possibility of coverage, and advised in its reservation-of-rights letter that it would seek reimbursement of defense fees for causes of action raising no potential for coverage.

The trial court in *Scottsdale's* declaratory judgment action found a duty to defend and no right to reimbursement. An intermediate appellate court affirmed, but the Supreme Court reversed. As in *Perdue* Farms, California law obligated the carrier to defend all claims if any involved are covered. The court referenced the very broad existing case language that a potential for coverage is all that is required, and,

> *[m]oreover, that the precise causes of action pled by the . . . complaint may fall outside policy coverage does not excuse the duty to defend where, under the facts alleged, reasonably inferable or otherwise known, the complaint could fairly be amended to state a covered liability.*

Under California law, a duty to defend exists until extinguished by case resolution or declaratory judgment, and the right to reimbursement was believed to be restricted to prospective costs only. On a prior remand the intermediate appellate court determined the carrier was entitled to attorneys' fees only prospectively, because prior decisions by the court had found an obligation to defend, if not pay. The Supreme Court rejected this analysis and concluded that as no coverage existed for any claim, the carrier was entitled to reimbursement ab initio.

The court's rationale is worth considering:

> *The insured pays for, and can reasonably expect, a defense against third party claims that are potentially covered by its policy, but no more. Conversely, the insurer does not bargain to assume the cost of defense of claims that are not even potentially covered. To shift these costs to the insured does not upset the contractual arrangement between the parties. Thus, where the insurer, acting under a reservation of rights, has prophylactically financed the defense of claims as to which it owed no duty of defense, it is entitled to restitution. Otherwise, the insured, who did not bargain for a defense of non-covered claims, would receive a windfall and would be unjustly enriched.*

The Fourth Circuit decision in *Perdue Farms* failed to either cite this case or reference the reasoning expressed. Common sense supports the *Scottsdale* court's point that:

> *Without a right of reimbursement, an insurer might be tempted to refuse to defend an action in any part—especially an action with many claims that*

are not even potentially covered and only a few that are—lest the insurer give, and the insured get, more than they agreed.

B. Sixth Circuit Interpreting Ohio Law

In *United National Insurance Co. v. SST Fitness Corp.*, the Sixth Circuit, interpreting Ohio law, concluded that attorneys' fees were recoverable by the insurer after defense of uncovered claims related to patent and trademark infringement. It distinguished both the Wyoming and Third Circuit opinions as predicated on imprecise or untimely reservations of rights and followed the majority rule. The court thus limited its holding to cases, "where the insurer: 1) timely and explicitly reserves its rights to recoup … costs, and 2) provides specific and adequate notice of the possibility of reimbursement." As the insured did not contest the carrier's specific notice of intent to recover fees/costs for uncovered claims, the court concluded an implied-in-fact contract between the parties existed permitting recovery. If the insured rejects this conditional defense, the court indicated the insured could proceed by itself with personal counsel defense of the underlying dispute or file a declaratory judgment.

This appears too harsh and the conclusion is unrelated to reality. Experience indicates insureds will do neither and need not! The issue can be resolved when the third party claim is settled or adjudicated. The alternative courses put all expense that appears to be extra-contractual and unnecessary on the insured. Yet the Sixth Circuit's underlying conclusion that a carrier should not be required to pay for the defense of uncovered claims is basically correct if adequate notice is given the insured.

C. Florida Law

A Florida Court of Appeals decision in *Colony Insurance Co. v. G&E Tires & Service, Inc.* approved reimbursement to a carrier for defending non-covered sexual discrimination claims under the insured's garage owners' policy which specifically excluded such a risk. It pointed out that a "duty to defend does not create coverage where coverage does not exist." The carrier filed a declaratory judgment action on the coverage issue and prevailed. The Florida appellate court then correctly concluded that the insurer was not entitled to fee reimbursement for its defense of partially covered claims. But for those claims clearly and entirely not covered, reimbursement was appropriate. The court relied on the policy language and said:

With regard to defense costs for these claims, the insurer has not been paid premiums by the insured. To attempt to shift them would not upset the arrangement. . . . The insurer therefore has a right of reimbursement that is implied in law as quasi-contractual whether or not it has one that is implied in fact in the policy as contractual.

Perhaps more pertinently, it reasoned:

The courts should be consistent in encouraging insurance companies to properly meet their duty to defend [their] insured[s] against third party claims and minimize unnecessary claims to enforce policy coverage. However, where an insurer has properly met its duty and subsequently successfully challenges policy coverage, it should be entitled to the full benefit of such a challenge and be reimbursed for the benefits it bestowed, in good faith, to its insured.

Years of experience on both sides of coverage litigation confirms this position is sound.

D. California Law: "Mixed Claims"

The above landmark cases, except for *Perdue Farms*, involved instances when a complete absence of coverage existed as to all claims. Consequently, our survey closes with a review of another "mixed claims" circumstance addressed by a prominent court. In *Buss v. The Superior Court*, the California Supreme Court decided an insurer was entitled to reimbursement of defense costs as to those claims not covered under its policy, as opposed to those potentially covered, on a theory of implied-in-law or quasi-contract recovery. It found that an "enrichment" of the insured by the insurer through the bearing of unbargained-for defense costs is inconsistent with the insurer's duty under the policy and therefore "unjust." It correctly placed the burden of proof on the insurer by a preponderance of the evidence to show the proper allocation. The opinion is thorough and detailed; written by the generally liberal Justice Mosk.

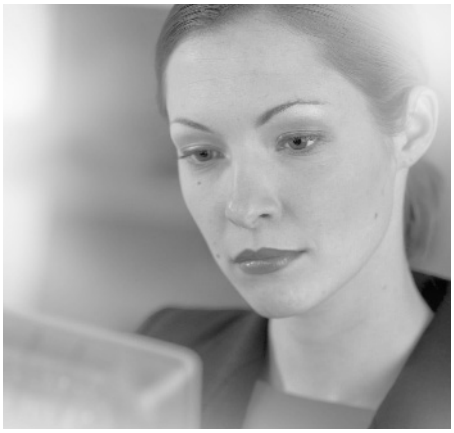
The *Buss* case involved some twenty-seven (27) claims, with the not-unusual mix of some covered and some not-covered allegations. It presents the most realistic scenario or real-world circumstances facing claims professionals and attorneys for both sides. Unlike most such cases, however, given California law on potential conflicts of interest when coverage issues arise, the carrier initially agreed to and paid for personal counsel for the insured's defense. The case settled ultimately for $8.5 million with attorneys' fees in excess of $1 million.

The trial and intermediate appellate courts found for the insurer. In affirming, Justice Mosk, in an exhaustive citation of California case law, made the wise point that the insurer' has a duty to *defend* all claims if some are covered in a typically "mixed" scenario but with a potential for repayment as to some:

[W]e can, and do, justify the insurer's duty to defend the entire 'mixed' action prophylactically, as an obligation imposed by law in support of the policy. To defend meaningfully, the insurer must defend immediately. To defend immediately, it must defend entirely. It cannot parse the claims, dividing those that are at least potentially covered from those that are not . . . The 'plasticity of modern pleading' allows the transformation of claims that are at least potentially covered into claims that are not, and vice-versa. The fact remains: As to the claims that are at least potentially covered, the insurer gives, and the insured gets, just what they bargained for, namely the mounting and funding of a defense. But as to the claims that are not, the insurer may give, and the insured may get, more than they agreed, depending on whether defense of these claims necessitates any additional costs.

The court went on to point out that without the right to ultimately seek some reimbursement of extended costs in defending non-covered claims, an insurer might risk not defending any claims. Given a fair chance at some recovery, however, the economic risk of defending decreases; consequentially the instinct to deny all coverage also decreases. Justice Mosk recognized the economic motive prevalent in such disputes:

It is as to defense costs that can be allocated solely to the claims that are not even potentially covered that the insurer has not been paid premiums by the insured. By contrast, the insurer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has in fact been paid as to costs that can be allocated solely to the claims that are at least potentially covered.

The court's decision brims with very sound, elemental reasoning and fairly balances what is fair to both the insurer and the insured.

IV. Comparison And Conclusion

It is apparent the law governing the obligation of insurer and/or insured to pay attorneys' fees in insurance policy coverage defenses will continue to develop without much consistency. These significant choices and issues presented remain to be resolved in most jurisdictions. A cautious application of the majority rule, as articulated by the California and Florida courts, is the better-balanced approach. However, the more absolutist denial of fees to insurers under any circumstances, as seen in *Perdue Farms* and the other court decisions adhering to the minority position, provides the virtue of simplicity. But this simplicity comes at a steep price. Practically, denial of attorneys' fees to a carrier for defending uncovered claims encourages an insurer to refuse to defend the insured on borderline cases in order to minimize costs, often with the insured either financially unable or otherwise unwilling to contest such a decision.

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Requiem for the Limitations Defense:

Dove v. Montgomery County Board of Education, 943 A.2d 662 (2008)

By Wendy B. Karpel

The Court of Special Appeals in the case of *Dove v. Montgomery County Board*, 943 A.2d 662(2008) arguably extended the limitations on re-opening workers' compensation cases indefinitely. Under §9-736(b) of the Labor and Employment Article of the Maryland Annotated Code (the "Workers' Compensation Act"), an employee has five years to re-open his/her claim from the latter of the last payment of compensation for a permanent or temporary disability or the date of the accidental injury (or the date of disablement in an occupational disease case). Before the decision in *Dove*, the Court of Special Appeals in *Buskirk v. C.J. Langenfelder*, 136 *Md. App. 261, 762 A.2d 857 (2001)*, held that any petition for re-opening must be supported by a "basis in fact." Practically, this "basis in fact" requirement was interpreted as requiring the Claimant to provide medical documentation of the worsening of condition at the time the petition for modification was filed. However, the Court in *Dove* found that the law includes no such requirement. Rather, the attorney filing a re-opening for a worsening of condition need only have had a reasonable basis that a worsening of condition had occurred at the time of the filing for a modification.

Facts:

Inek L. Dove worked for the Montgomery County Board of Education (the "Board") as a school bus driver. On October 5, 1995, she slipped and fell on the job sustaining injury to her low back. The Board accepted the claim as compensable. Ms. Dove then began treatment for her low back injury. On June 6, 1998, Ms. Dove underwent a laminectomy and interbody fusion for a diagnosis of spondylisthesis. The last payment of indemnity benefits (non-medical benefits) was on June 6, 2000. Therefore, the five year limitations period would run on June 6, 2005 unless issues for modification were filed before that date to toll the statute.

On June 3, 2005, three days before the limitations period would have run, Ms. Dove filed issues for modification claiming additional temporary total disability benefits from November 29, 2001, to present and continuing. In other words, Ms. Dove claimed over four years of temporary total disability. At the Commission hearing on February 2, 2006, over seven months after the statute of limitations had run, Ms. Dove changed her issues. Instead of pursuing the original issues of temporary total disability from November 29, 2001 to present and continuing, Ms. Dove changed her issues to only two days of temporary total disability: August 29, 2002 and September 17, 2002, which were the dates that she received epidural steroid injections. No disability slips were ever produced for those dates.

By order dated February 10, 2006, the Commission awarded Ms. Dove two additional days of temporary total disability for the days that the epidural injections were given: August 29, 2002 and September 17, 2002. The Commission further held that this additional temporary total disability was not barred by the five year statute of limitations applicable to re-opening claims under the Workers' Compensation Act (the "Act"). The Board appealed that finding.

The Circuit Court for Montgomery County, Maryland granted the Board's motion for summary judgment finding that Ms. Dove's claim for additional temporary total disability benefits were barred by the statute of limitations under §9-736(b) of the Act and that she failed to support her claim before the Commission by expert medical testimony and medical records. The Claimant appealed and the Court of Special Appeals reversed both of the circuit court's findings.

The Arguments

The Claimant appealed the decision of the circuit court on two points. First, she argued that there is no requirement to produce medical documentation at the time of filing a modification for a worsening of condition. Second, Dove argued that she had presented sufficient evidence to support the Commission's award so that summary judgment was inappropriate based on the idea that a prevailing party at the Commission by relying on the fact that the Commission's decision is presumed correct on appeal cannot suffer an adverse decision on summary judgment.

With regard to the limitations portion of the appeal, Dove claimed that she filed a timely petition to reopen alleging a change in disability status; specifically, she claimed that

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she was entitled to over four years of temporary total disability benefits in her petition for modification. Furthermore, the documentation to support the change in disability does not need to be produced until the hearing. Accepting this argument, the Court of Special Appeals held that a Claimant need not produce the medical support for a petition for modification until the date of the hearing. However, this documentation needs to show that the worsening occurred before the date that limitations had expired. In support of its decision, the Court of Special Appeals cited to the COMAR regulations indicating that the applicable rules (14.09.01.10, .14, and .16) do not have a requirement that a Claimant must file all documentation at the time of filing a request for modification of an award.

In the end, the Court held that the Claimant must only have a "reasonable basis" for the claim at the time of filing. As long as the petition to reopen is not "frivolous," filing a petition to reopen without any medical documentation to support the worsening of condition is acceptable as long as documentation that a change in disability status occurred prior to the expiration of the statute of limitations is presented at the hearing. It also did not matter that Dove had narrowed her issue from a claim for over four years of temporary total disability to a claim for two days of temporary total disability benefits. Since Dove was able to prove two of the days within the time period claimed, the filing of the petition to reopen without the medical documentation did toll the statute of limitations.

The second basis for the appeal was whether summary judgment could even be granted to the Board in light of the *Baltimore County v. Kelly*, 391 Md. 64 (2006) case which states that the prevailing party at the Commission can rely on the presumption of correctness on factual issues to survive summary judgment. The Board countered that the medical evidence produced at the Commission hearing was insufficient to establish that Ms. Dove was temporarily and totally disabled on the August 29, 2002 and September 17, 2002 when she received two epidural injections. The Court held that the medical reports documenting the injections were sufficient to support the Commission's award so that Dove was immune from summary judgment being assessed against her.

What Comes Next

The practical affect of the Court of Special Appeal's decision in this case is the death of the limitations defense on petitions to reopen. Maryland's five year re-opening provision has always been one of the most liberal limitations provisions in the country. *Stevens v. Rite-Aid Corp.*, 340 Md. 555, 569, 667 A.2d 642, 647 n.11 (1995). Now, it is even more liberal.

The *Dove* decision encourages Claimants to flood the Commission with unsupported issues in the hopes of keeping time-barred claims alive. In fact, the careful Claimant's attorney will file preemptory issues for temporary total disability from the date of the last award of compensation and the ensuing five years in hopes of finding one day of temporary total disability to keep limitations from running. Furthermore, under the *Dove* decision, the employee need not notify the employer/insurer until the date of the hearing of the actual basis in fact of the employee's request to reopen. The only requirement that exists to toll the limitations period is that the Claimant provides medical documentation at the time of the hearing that supports that there was a worsening of condition before the limitations period had run.

Based on the changes engendered by the *Dove* decision, a defense attorney confronted by a case where the §9-736(b) reopening defense may exist has few avenues of defense. Despite these constraints, there are a few strategies that should be utilized.

First, the defense attorney should oppose any continuance requested by the Claimant because the Claimant does not have the documentation to support his/her claim for re-opening. If the defense attorney agrees to a continuance, the Claimant has more time to search for the medical report that may toll the statute. If forced to go forward without medical documentation that shows that there was a worsening of condition before the limitations existed, the Claimant will lose on limitations.

Second, if confronted with new medical evidence at the time of the hearing, the defense attorney must **formally object** on the record to the medical document being entered into evidence based on COMAR Rule 14.09.01.10 (that each party promptly provide to all other parties copies of relevant medical information) and Rule 14.09.01 .14 (that the Claimant send to all other parties a list of all medical reports to be submitted at hearing ten days in advance). Technically, these rules were imposed to protect the employer/insurer from being surprised with new information at the time of a hearing. If these documents are not admitted into evidence and there are no other documents in evidence showing a worsening of condition existed before limitations had run, the Claimant will lose on limitations.

Finally, the defense attorney needs to examine the medical report provided for when it was written. The *Dove* case is unclear as to when the medical report needs to have been written. The *Dove* court held that the Claimant must produce evidence at the time of the hearing that the change in disability status occurred prior to the expiration of the statute of limitations. However, a question remains as to whether a medical document created five years after the fact alleging that there was a change in disability status five years earlier will constitute sufficient medical evidence. If the medical report is insufficient to establish that a worsening of condition existed before limitations had run, the Claimant will lose on limitations.

What can the defense community do as a whole to combat the pitfalls engendered by the *Dove* decision? The best solution would be for the Commission to change COMAR 14.09.01.14 so as to require that a Claimant must file supporting documentation with all issues that are filed with the Commission. Before the rule was modified to remove the requirement that a Claimant must file supporting documentation with all issues filed with the Commission, the decision in *Dove* would have been different. Perhaps, when the floodgates of filings in worsening of condition cases reach an unmanageable level, the Commission will be open to changing the regulation.

Wendy B. Karpel is an Associate County Attorney for Montgomery County. In that capacity, she heads the workers' compensation unit for the Montgomery County's Self-Insurance Fund, which is comprised of 17 self-insured municipal employers.

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SPOTLIGHTS

Fourth Circuit Affirms Important Dismissal for Local Government in Long-Running Environmental Litigation

On April 23, 2008, the United States Court of Appeals for the Fourth Circuit, in a published opinion, affirmed the dismissal of Carroll County, Maryland from a federal law suit alleging violations of the Clean Water Act. *Piney Run Preservation Ass'n v. Carroll County, Maryland*, United States Court of Appeals for the Fourth Circuit, Case No. 07-1348. Attorneys Linda S. Woolf, K. Nichole Nesbitt, and Joseph B. Wolf of Goodell, DeVries, Leech & Dann, LLP secured the victory, which established important authority on the issue of "diligent prosecution" in environmental cases.

This suit was the latest action in a long history of attempts by certain Baltimore County landowners to impose liability on the Carroll County government for alleged thermal pollution of the Piney Run stream. Carroll County operates a wastewater treatment plant that discharges treated wastewater into the Piney Run, which runs through the landowners' properties. In this suit, the landowners alleged that the County is in violation of the federal Clean Water Act because, on isolated occasions during the hottest days of the year, the temperature of the treated wastewater exceeds the temperature limit contained in the plant's discharge permit by one or two degrees. The plaintiffs argued that the County should be required to construct million-dollar mechanical cooling towers to chill the wastewater before discharging it into the Piney Run.

Carroll County moved to dismiss the suit for lack of subject matter jurisdiction, arguing that any permit violations were being "diligently prosecuted" by the Maryland Department of the Environment (MDE), the governing agency. MDE had brought an enforcement action against Carroll County and subsequently executed a comprehensive Consent Judgment, pursuant to which the County is required to pay penalties for any violations of the permit and engage in extensive efforts to improve the environmental wellbeing of the Piney Run and its aquatic and plant life. The County argued that, under the terms of the Clean Water Act, such diligent prosecution is a bar to any Citizen's Suit, such as the one brought by the plaintiffs. The United States District Court for the District of Maryland agreed and dismissed the action with prejudice.

The Fourth Circuit has now affirmed the dismissal. The court held that MDE's decision to enter into the Consent Judgment is "precisely the type of discretionary matter to which we should defer."

K. Nichole Nesbitt is a partner at Goodell, DeVries, Leech & Dann, LLP who concentrates her practice on employment law, commercial litigation, civil rights defense, professional liability defense, and general insurance defense. Ms. Nesbitt is a member of the executive board of the Maryland Defense Counsel and serves as co-chair of its Legislative Committee. She is also actively involved in the Defense Research Institute, a national organization of defense trial lawyers and corporate counsel, as a member of its Lawyers Professionalism and Ethics Committee.

Goodell, DeVries, Leech and Dann, LLP Successfully Defends a Leading Manufacturer of Material Handling Equipment Against Design Defect Claims in a Federal District Court in Missouri

On May 1, 2008, Thomas J. Cullen, Jr. and Renée N. Sewchand of Goodell, DeVries, Leech and Dann, LLP obtained a defense verdict on behalf of Crown Equipment Corporation in Springfield, Missouri, before the Honorable Gary A. Fenner of the United States District Court for the Western District of Missouri.

Through their counsel, Steve Garner and Chandler Gregg at Strong-Garner-Bauer, P.C., Darin and Denise Martin sought compensatory and punitive damages on one count each of strict liability product defect and negligence for a severe crush injury Martin sustained to his right leg and knee in a workplace accident. Plaintiffs claimed that the design of the stand-up rider forklift was defective and that it enhanced the injury Martin sustained during the accident. Plaintiffs proffered the alternate design theory that stand-up rider forklifts should be fully enclosed with latched operator compartment doors to protect lower appendages in hit fixed object impacts. Crown presented biodynamic testing, medical evidence, and testimony from mechanical and biomechanical engineers to establish the reasonableness of Crown's open operator compartment design.

After nearly two weeks of evidence, the jury deliberated for less than one and a half hours before unanimously reaching a full defense verdict. The jury entered a verdict in favor of Crown on the product defect claim, and found Crown 0% at fault on the negligence claim.

Tom Cullen is a senior partner and Renée Sewchand is an associate at Goodell, DeVries, Leech and Dann, LLP. Both practice primarily in the areas of pharmaceutical, toxic tort, and general product liability defense.

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