The Defense Line

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Defense Perspectives On Year 2000 Litigation

by John F. Cooney[1]

Management consultants estimate that the Year 2000 problem will generate $1 trillion in litigation claims. So far, fewer than 20 cases have been filed. Nonetheless, many of the principal offensive and defensive strategies are visible. This article describes the most important Year 2000 defensive theories and examines how they have been applied in the cases decided to date.

Origin of The Problem

Due to a programming convention adopted 30 years ago, many computers will not recognize that the year 2000 follows 1999. Dates are used in almost all computer applications, and the failure of a computer to recognize the year 2000 may generate erroneous results or cause the entire system to crash.

The first generation of programmers made a rational decision to use only the last two digits of the year (i.e., "99") because computer processing and storage capacity were limited technically and extremely expensive. This convention enhanced the efficiency of computers and contributed to the rapid proliferation of this technology. At the time of adoption, this industry standard seemed entirely reasonable. The Year 2000 was decades away, and no one contemplated that this early software would still be in use at the turn of the century.

In the intervening decades, computing power has increased exponentially. Processing and memory capacity are now simple cost issues rather than absolute constraints. Many of the Year 2000 defenses will depend upon the development history of computers to show that the two-digit year code standard was a productive innovation, rather than a blatant mistake.

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Litigation Theories

Defective product suits may be prosecuted under breach of warranty or tort theories. Most hardware and software manufacturers have long since adopted standard contract clauses that limit their warranty exposure. Prior to the emergence of the Year 2000 problem, Federal and State courts generally have enforced these provisions, especially in suits by one commercial business against another.

Customers saddled with Year 2000 remediation costs may attempt to avoid these contract defenses by pleading their cases as tort claims. However, the Year 2000 problem differs substantially from other defective product cases, based on the justification for the initial adoption of the two-digit year standard and the effects of intervening actions by computer users. These differences will generate strong defenses against liability under tort theories.

A. Breach of Warranty.

Many breach of warranty claims are likely to fail in commercial litigation if courts continue to apply standard disclaimers as they have in the past. Accordingly, plaintiffs are likely to look to statements arising outside the contract, such as descriptions in sales materials or presentations, and attempt to argue that these statements constitute enforceable promises.

1. Express Warranties. Under Section 2-313 of the Uniform Commercial Code, a seller may be held liable if it makes explicit promises about the qualities of its product, either in contract documents or elsewhere. Under Section 2-316, however, such warranties may be disclaimed or limited. Most high-tech companies have long since

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President's Message

M. King Hill, III — Venable, Baetjer & Howard, LLP

One thing is certain, defense lawyers know how to party. On October 15, the Maryland Defense Counsel, Inc. hosted its Past-Presidents' Reception on the Terrace at Tydings & Rosenberg. The setting was a beautiful one from the outside Terrace on the 27th floor overlooking the Inner Harbor. The Mighty Mighty Barristers played two eclectic and entertaining sets of great rock and roll music. For those unfamiliar with the Mighty Mighty Barristers, these guys are great! The band includes MDC members Brad Hallwig, John Nagle, Pat Sullivan and Eric Belk. Brad Hallwig's harmonica playing is not to be missed nor is Eric Belk's James Brown impersonation.

More than a hundred members came out for the Reception, plus we had the pleasure of the company of 15 of our past presidents. For those of you who were in attendance, I am sure you will agree with me that the Reception was a huge success and a great way to start off the year for the new Board of your association.

Earlier in October, a number of our members, including Board Members Diane D'Aiutolo, Sky Woodward, and yours truly, attended the Third Annual DRI Conference in San Francisco. One of our own, Bob Scott, from Semmes, Bowen & Semmes, is the current President of DRI. The social and educational events presented by DRI in San Francisco were certainly worth the trip. For those of you who have not attended a DRI seminar recently, I encourage you to do so. Over the years, I have found the DRI seminars to be exceptionally well organized and presented, and I always enjoy getting together with those whom I have met at other conferences or with whom I represent mutual clients.

One of the most talked about subjects in San Francisco was the question of legal audits. For those of you who represent insurance companies or their insureds, you are, no doubt, familiar with outside fee auditors. Along with the fee audits come complex billing guidelines which can regulate everything from the time allowed to write a brief to how the trial of a case is to be prepared and staffed.

One of the issues discussed was the extent to which an attorney, by providing detailed billing information to an outside auditor, might jeopardize his or her client's case. Is the information provided to the outside auditor protected by the attorney-client privilege? If not, is information that would expose case strategy discoverable? Although there have been no test cases to date, the risk to lawyers and their clients is clear. There are advisory opinions from a dozen states which uniformly recommend that an attorney who takes on the representation of an insured with the knowledge that his or her bills will be reviewed by an outside auditing company first review the billing guidelines with his client (the insured) and get the client's informed consent to such procedures. The theory goes that the primary duty of an attorney hired by an insurance company is to the insured, and the lawyer may not follow the instructions of the insurance carrier where those instructions are contrary to the best interests of the insured. The defense attorney is required to inform the insured of the insurance company's guidelines and any restrictions on the attorney in the preparation of the insured's case. Under those circumstances, the defense lawyer may not follow the insurer's guidelines or the audit company's guidelines without the full knowledge and consent of the insured. Although it is generally understood that confidential information may be transmitted to an insurer without losing this privilege, in view of the insurer's duty to defend to the policyholder, the privilege does not appear to extend to an independent auditing company which has no contractual relationship with or duty to defend the insured client. Furthermore, provision of such detailed information is, arguably, unnecessary to carry out the representation.

There are obviously other controversial and unsettling issues involved with this accelerating trend. What kind of defense is obligated under the policy's "duty to defend?" How does the use of outside audits affect the trust relationship that is essential between insurance company and counsel? Is the practice of fraudulent billing prevalent enough to justify the use of outside fee auditors? How are the auditors compensated?

When contacted by the MDC, the Maryland State Bar Association indicated that, although an ethics opinion had been requested on the issue of outside fee audits, the opinion had not yet been finalized. The MDC has requested a copy of the opinion in draft form and, upon receipt, I will make it available to anyone who requests it. In the meantime, I will ask Al Frederick, Chair of our Professional Malpractice Committee, to get together with our Program Chairs Peggy Ward and Dan Moylan to put together a program on this issue. Al Frederick and Bill Jackson presented a luncheon program on this topic last Spring, and it might be beneficial to hear more on this topic at a subsequent program. Any thoughts, comments, or questions from the membership can be directed to Al, Peggy, Dan, or me.

I look forward to seeing each of you at upcoming luncheon and dinner programs. ■

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minimized their exposure by adopting standard warranty provisions that make only limited performance guarantees (i.e., this product will perform as described in our manual) and that extend for only a limited time period (i.e., 90 days). Prior to 1996, few contracts contained an explicit warranty addressing Year 2000 compatibility.

Liability under a warranty theory also might arise from sources other than contract documents, such as sales letters or advertisements that could be interpreted as making an express representation. Whether a promotional statement (i.e., "software for the 21st century") constitutes an express representation may be a question of fact, which would entitle the purchaser to a jury trial on the issue. Indeed, if a buyer can avoid summary judgment on the ground that a triable question of fact exists about whether non-contractual statements constitute a binding representation, this finding would give the plaintiff substantial leverage in negotiating a settlement for its Year 2000 conversion costs.

For this reason, many companies have been reluctant to make anything but bland, uninformative comments when customers inquire about the Year 2000 readiness of their products. This closed-mouth attitude has persisted, notwithstanding the passage of Federal legislation in October 1998 (Pub. L. No. 105-271) designed to give a measure of legal immunity to such readiness disclosures. Companies fear that a substantive response to a Year 2000 question will be deemed to constitute a representation or warranty that may be enforceable in litigation, thereby trumping careful contractual efforts to limit their liability. Accordingly, many companies have responded to customer inquiries with "non-representation representations." For example, Bell Atlantic has advertised that its network is 99.9% reliable, and "we don't plan for that to change when the Year 2000 arrives."

2. <u>Implied Warranties</u>. The Uniform Commercial Code establishes two implied warranties which arise by operation of law and are not tied to any statements actually made by the seller. The implied warranty of merchantability (§ 2-314) promises the buyer that the product is suited for the ordinary purposes for which it normally is used. The buyer may sue for breach of this warranty when the product contains a latent design defect that causes it not to work up to reasonable expectations. The implied warranty of fitness for a particular purpose (§ 2-315) comes into existence if the seller knows that the buyer is purchasing the product in order to fulfill a particular need and is relying on the superior skill or knowledge of the seller to obtain a product that meets that need.

In most states, implied warranties may be disclaimed pursuant to Section 2-316. The courts almost always uphold the validity of contract clauses excluding implied warranties. Most computer companies have for many years included blanket disclaimers of implied warranties in their standard contract provisions.

3. <u>Limits on Damages</u>. Section 2-318 of the U.C.C. allows sellers to disclaim or limit damages for breach of warranties. Most high-tech companies have long since adopted standard warranty language that disclaims lost profits and consequential damages. In particular, many software warranties limit the seller's liability to repair or replacement of the defective product, so that it works as anticipated. The courts have routinely upheld these damage limitation clauses.

4. <u>Statutes of Limitation</u>. Many claims, especially for the older legacy systems that are disproportionately affected by the Year 2000 problem, may be time barred.

B. Tort Theories.

The courts have long been unsympathetic to efforts by commercial purchasers to sue under a negligence or strict liability theory in order to avoid contractual limitations. Under the so-called economic loss rule, a person is limited to remedies specified in its contract if the parties were in a buyer-seller relationship, the injury alleged consists only of damage to goods, and there was no physical injury to a person. The courts are most likely to implement this rule where the plaintiff is a large institution that was capable of negotiating a contract that defined the risks it would assume. The costs of the Year 2000 problems are concentrated in large institutions (notably financial services companies and government agencies) that were early purchasers of mainframe computers. Accordingly, the economic loss rule is likely to have a substantial effect on Year 2000 litigation.

Even if the buyer survives a motion to dismiss based on the economic loss rule, high-tech companies will have substantial defenses to tort claims on several grounds that are unique to the Year 2000 problem.

1. <u>Segmenting the Problem</u>. Under a tort theory, the issue of liability will have to be examined in three different time periods:

- an initial period — from the 1960s until some undefined point in the 1980s — in which processing and storage capacity were at a premium, and manufacturers did not yet understand the Year 2000 problem;

- an interim time period — perhaps the mid-1980s to the early 1990s — in which processing and storage capacity were no longer as great a constraint, and manufacturers began to understand possible ramifications of the Year 2000 problem, but some customers may not have aware of the issue; and

- a final period, in which processing and storage capacity were not a constraint and individual customers had

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learned, through their technical staffs, of the Year 2000 problem, or were chargeable with knowledge from press discussions.

Many of the Year 2000 remediation costs date from hardware or software purchased during the earliest period, where the technological justification for adoption of the two-digit year code applies with full force. At the other extreme, the period of potential liability under a tort theory comes to an end once the customer obtains knowledge of a defect. Sophisticated purchasers, such as federal agencies and major commercial purchasers with large in-house information technology staffs, likely are chargeable with knowledge of the Year 2000 problem earlier than other commercial customers or personal computer owners. For example, the Social Security Administration has testified before Congress that it began remediating the Year 2000 problem in 1989.

2. <u>Duty of Care</u>. In defining what constitutes the exercise of reasonable care, the seller may rely on a "state of the art" defense, which is based on the level of pertinent scientific and technical knowledge existing at the time of the alleged tort. Utilizing this defense, hardware and software manufacturers may argue that they did not act unreasonably in using a two-digit year code because this programming convention represented a reasonable accommodation in light of the storage and processing capacity limitations existing at the time it was adopted. Further, many large customers (notably Federal agencies) demanded that their suppliers use only two-digit years. This defense will allow the vendor to raise the development history of computer capacity and introduce cost-benefit studies on the adverse effects early adoption of a four-digit standard would have had.

3. <u>Foreseeability</u>. The high tech industry has evolved with unprecedented speed, with the capacity of critical components doubling every 18 months. In this environment, the expected useful life of products may be short, even though they are physically capable of operating for extended periods of time. For example, manufacturers may be able to argue effectively that it was not foreseeable that 386s and earlier generations of personal computers would still be in use in 2000.

In particular, vendors of systems sold to early mainframe users will be able to argue persuasively that is was not foreseeable that software written for earlier generations of computers would be ported over to new systems as a result of customer preferences when purchasing new hardware. These customer procurement decisions, designed to ease the transition for its information technology staff, had the unintended consequence of perpetuating the life of software with two-digit year codes long beyond reasonable expectations at the time of sale.

4. <u>Customer Knowledge</u>. The Year 2000 problem is unique because many commercial users will be chargeable with knowledge of the alleged "latent defect," thereby defeating their claim. Programmers learned about the two-digit year code in their first week of training. Thus, any company that maintains its own internal information technology staff will have difficulty claiming that it had no knowledge of the issue. The problem may not have been known to senior managers. But memoranda and e-mails generated by the technology staff, and the programming manuals they keep on their desks, will show that corporate employees had great familiarity with the two-digit year code. In litigation, defendants' discovery efforts will focus on demonstrating that the purchaser's technology staff had this knowledge.

5. <u>Customer Actions</u>. A substantial percentage of Year 2000 remediation costs involve the interaction between software packages installed by the user and the original software installed by the vendor. Similarly, another major complicating factor is that major companies have networked their computers with other internal systems and with external data exchange partners. A high-tech supplier will have good legal arguments, under either contract or tort theories, that it should not be responsible for the costs of remediating complicating factors that are due to intervening actions by its customer.

C. Damages and Documentation of the Remediation Process.

Even if the plaintiff prevails on the liability issue, it may fail to recover meaningful amounts if it fails, during the remediation process, to institute a proper cost accounting system and documentation program. There are substantial reasons to believe that many plaintiffs will be vulnerable on this ground.

First, many entities launched their Year 2000 remediation programs without setting up a cost accounting system to attribute separate buckets of costs to specific hardware or software flaws. Absent such an accounting system, any damages calculation will be subject to attack in negotiations or at trial.

Second, computer systems typically consist of many separate products provided by multiple vendors and many manufacturers. Each supplier should be liable only for the share of damages attributable to failure of its own products. Identifying the entities that supplied various products, and determining whether they are still in business, will not be simple tasks, especially for legacy mainframe systems.

Third, much of the complexity and cost of fixing the Year 2000 problem is due to customization of software by users, the overlay of additional software on top of the programs installed by the manufacturer, the many points of interconnection among the users' different computer systems, and the many data exchange points with outside parties. The manufacturer of hardware or software that suffers from a Year 2000 problem will have good arguments that it should not be held responsible for Year 2000 costs caused by these customer actions.

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Finally, in many instances, it may not be possible for a company that experienced a Year 2000-related failure to hold any vendor liable for the costs of building Year 2000-compliant interconnection points between systems. This is because no entity may ever have agreed to assume a contractual or legal responsibility for making certain that the two computer systems had a Year 2000 compatible interchange.

D. Defending against Shareholder Suits.

Corporate officers and directors will be concerned about their personal liability in shareholder derivative suits or securities class action lawsuits for any Year 2000 failure that may affect the enterprise. Accordingly, most companies will institute a due diligence program that attempts to interpose the business judgment rule as a defense to Year 2000 liability. Conversely, plaintiffs' lawyers will investigate carefully any indication that management or the directors were not attentive to the Year 2000 problem.

The three keys to an effective Year 2000 due diligence program are to make certain (1) that the board of directors and senior management affirmatively focus on the important decisions to be made by the institution with respect to reducing the risks of a Year 2000 related failures, that they are informed periodically about the progress of the program, and that their consideration is duly documented; (2) that the company provides adequate funding for its Year 2000 efforts; and (3) that the institution maintains an active tracking/oversight/audit program for the Year 2000 project and that the oversight function generates documents and leaves fingerprints demonstrating that rigorous follow-ups were conducted. A fourth key due diligence principle is that the company must have a contingency plan in place, which can be deployed quickly in the event of a Year 2000 related failure.

Decisions in the First Year 2000 Lawsuits

By the end of 1998, only two Year 2000 cases had been litigated to a final court decision. In each instance, the court granted a motion to dismiss a class action complaint filed by Milberg Weiss, the leading plaintiffs' firm in the securities area. Ironically, although Milberg Weiss lost the suits, the practice it targeted — charging customers for a Year 2000 software upgrade — has virtually stopped due to the threat of litigation.

In *Issokson v. Intuit*, the complaint alleged that the software manufacturer had breached an implied warranty and committed fraud by marketing a non-Year 2000 compliant version of Quicken. In particular, the fraud allegation rested on a single statement in the user guide for the software, which stated that online banking may be used "for as long as you like." The plaintiff alleged that this constituted a representation that the product was Year 2000 compliant. On August 25, 1998, a Santa Clara, California judge dismissed the complaint on the ground that it alleged only that harm may occur in the future, rather than that the plaintiff had suffered actual damage, and that there was no showing that damage would occur before the manufacturer had provided a remedy.

In *Paragon Networks Int'l v. Macola, Inc.,* the plaintiff alleged that non-Year 2000 compliant software sold under the defendant's corporate motto — "Software You'll *Never* Outgrow" — breached an express warranty and constituted fraud. On December 16, 1998, a Marion, County Ohio judge dismissed the case. In language that was heartening to high-tech manufacturers, the court reasoned:

> [T]he parties entered into a valid and enforceable contract which was manifested in the license agreement contained in the packaging material which was shipped by the Defendant. . . . That license agreement contains an integration clause which states that the license agreement is the complete agreement between the parties and that there are no warranties except those expressly outlined in the license agreement. That license agreement contains a conspicuous disclaimer of warranties as well as the unambiguous integration clause. The 'express warranty' claimed by Plaintiff to exist in this case is not in the license agreement. As a consequence, Plaintiff has . . . failed to state a claim for breach of warranty or fraud.

The decision in *Macola* thus constitutes strong support for the proposition that in litigation between commercial entities, courts will be receptive to the defense argument that Year 2000 disputes should be resolved according to the terms of the contract between the parties.

This conclusion was reinforced recently by the decision of a mediator in *Young v. J. Baker, Inc.* A client demanded that Andersen Consulting pay $3 million in compensation for the costs of remediating a non-Year 2000 compliant computer system that Andersen had implemented nearly 10 years ago and that Andersen allegedly knew was intended to be used "far into the twenty-first century." Andersen brought a declaratory judgment action in Massachusetts state court, arguing that it could not be held liable for negligently designing the system. No provision in the Andersen-Baker contract, design specifications or testing protocols referred to the Year 2000 or required use of anything other than two-digit fields. The mediator concluded that the parties' rights should be determined pursuant to their contract, which did not address the Year 2000 issue. Thereafter, Baker abandoned its claim, and Andersen dismissed its lawsuit.

These early decisions are straws in the wind. However, to this point in the Year 2000 litigation battle, there is reason to be hopeful that the courts will decide commercial Year 2000 disputes according to the contracts negotiated by the parties. ■

Recent Decisions

PRE-IMPACT FRIGHT DAMAGES HELD RECOVERABLE

In *Beynon v. Montgomery County Cablevision Limited Partnership*, 351 Md. 460 (1998), the Court of Appeals held that in a survival action, where a decedent experiences great fear and apprehension of imminent death before the fatal physical impact, the decedent's estate may recover for emotional distress and mental anguish that is capable of objective determination. Late one evening, Montgomery Cablevision discovered that one of its cables located at I-495 had fallen from a utility pole and needed repair. Pursuant to a blanket permit issued by the Maryland State Highway Administration, Montgomery Cablevision coordinated with the Maryland State Police to stop traffic on I-495 to repair the broken cable. Douglas Beynon, who was driving his employer's vehicle, crashed into the rear of a tractor-trailer stopped at the end of the traffic congestion. Beynon died instantly upon impact. In his unsuccessful attempt to avoid the collision, Beynon's vehicle left 71 1/2 feet of skid marks. At trial, the jury returned a verdict for Beynon and an award that included $1 million for pre-impact fright damages. The Court of Special Appeals reversed the jury award for $1 million, concluding that Maryland law required physical injury or injury capable of objective determination for an award, let alone a cause of action, to lie for mere fright.

In a split decision, the Court of Appeals reversed the intermediate court. After examining the law in Maryland and other jurisdictions, it held that recovery is available for pre-impact fright when it is the proximate result of a wrongful act and when it produces a physical injury or is manifested in some objective form. In applying this holding to the facts of the case, the Court concluded that Beynon's fright was accompanied by both physical injury and independent objective manifestations, which was evident by the fatal injuries sustained and the 71 1/2 feet of skid marks left by Beynon's vehicle. The Court further stated that the evidence of the skid marks was sufficient for a jury to infer that the Beynon feared the impending collision and death.

NO LOSS OF ENJOYMENT OF LIFE WITH PRE-IMPACT FRIGHT

In *Smallwood v. Bradford*, 1998 Md. LEXIS 881 (Nov. 20, 1998), the Court of Appeals reaffirmed that pre-impact fright damages may be recovered by a decedent's estate in a survival action. Damages for the loss of enjoyment of life, however, are not separately recoverable. In *Smallwood*, the decedent was instantly killed in an automobile accident when the appellee's vehicle, traveling in the opposite direction, crossed the centerline and struck the decedent's vehicle. Decedent's sister filed a survival action against appellee alleging that appellee's negligence had caused decedent's death. At trial, Appellee argued that the damages sought by appellant, which were based on pre-impact fright and loss of enjoyment of life, were not recoverable. The court granted the motion on the issue of damages. The jury subsequently entered a verdict finding appellee negligent and awarding decedent's estate the statutory maximum of $2,000 for funeral expenses. Decedent's sister appealed, and prior to review by the Court of Special Appeals she petitioned the Court of Appeals for Writ of Certiorari in light of the high court's decision in *Benyon v. Montgomery Cablevision Ltd.,* 347 Md. 683 (1998), which held that pre-impact fright damages were recoverable.

In a split decision, the Court of Appeals reversed the trial court's decision with respect to damages for pre-impact fright, but affirmed it with respect to damages for the loss of enjoyment of life. In addressing the issue of pre-impact fright, the Court followed its reasoning in *Benyon* to conclude that damages for pre-impact fright were recoverable. The Court also found that the evidence of the decedent's defensive maneuvering satisfied the objective manifestation requirement of the pre-impact fright rule. In addressing the issue of damages for the loss of enjoyment of life, the Court stated that recovery for pre-impact fright was identical to recovery for pre-impact loss of enjoyment of life. The Court further stated that post-impact loss of enjoyment was not recoverable based on its recent ruling in *Shirley Jones, Personal Rep. v. Flood,* 351 Md. 120 (1998), which held that there is no recovery for future lost earnings when the injured party dies instantly. Therefore, the Court refused to grant recovery for loss of enjoyment because the decedent did not survive the impact with appellee's vehicle.

In dissent were Judges Raker, Chasanow, and Wilner. Judges Raker and Chasanow agreed with the majority's decision regarding damages for the loss of enjoyment. However, both disagreed with the pre-impact fright decision and sided with the Court of Special Appeals opinion in *Montgomery Cablevision v. Benyon*, 116 Md. App. 363, *rev'd*, 351 Md. 460 (1998). Similarly, Judge Wilner disagreed with the majority's decision regarding pre-impact fright on the basis of his dissenting opinion in *Benyon*.

AFFIRMATIVE DEFENSES MUST BE PLED TO BE RAISED AT TRIAL

Although modern rules of civil procedure have largely abolished common law technical pleadings requirements, in *Liberty Mut. Ins. Co. v. Ben Lewis Plumbing, Heating & Air Cond., Inc.,* 121 Md. App. 467 (1998), the Court of Special Appeals held that an affirmative defense not pled in a defendant's answer could not be asserted at trial, even though the legal and factual issues had been raised on summary judgment.

Plaintiff Liberty Mutual Insurance Company ("Liberty") delivered an insurance proposal to Defendant Ben Lewis Plumbing, Heating & Air Conditioning ("Lewis"). Lewis accepted the proposal allegedly on Liberty's assurance that the contract remained unchanged from past years. In actuality,

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the proposal contained provisions allowing Liberty to increase Lewis's premiums. Liberty did in fact increase the premiums, allegedly without notification to Lewis. Lewis refused to pay the additional amounts, and Liberty filed a one-count complaint in the Circuit Court for Montgomery County.

In its answer, Lewis included every defense listed in Maryland Rule 2-323 that might be applicable to a contract case, but did not include negligent misrepresentation. In response to Liberty's subsequent motion for summary judgment, Lewis asserted negligent misrepresentation for the first time. Liberty's motion for summary judgment was denied on the grounds that there was a dispute of fact over whether a negligent misrepresentation occurred. At trial, the jury found, among other things, that Lewis had proven a negligent misrepresentation. In light of this finding, the court struck the jury's award to Liberty for the premium.

The Court of Special Appeals reversed on the grounds that the negligent misrepresentation defense should not have been put to the jury because it had not been pled in the answer. "By pleading everything, the defendant informed the plaintiff of nothing," according to the Court, even though Liberty had been put on notice of the defense during the summary judgment phase. The Court held that a defense cannot be asserted for the first time on summary judgment if an answer has already been filed.

PLAIN ERROR DOCTRINE REJECTED IN CIVIL CASES

In *Gitten v. Haught-Bingham*, 123 Md. App. 44 (1998), the Court of Special Appeals declined to extend the "plain-error" doctrine to appeals in civil cases, holding that the plaintiff in a negligence action failed to preserve for appeal his challenge to the jury's verdict against him. Plaintiff Vaughn Gitten filed suit against Jan Marie Haught-Bingham for injuries resulting from an automobile accident. Following a one-day trial, the jury returned a verdict in favor of the defendant on the basis that the plaintiff had been contributorily negligent and the defendant had not been negligent.

Gitten appealed, requesting that the Court of Special Appeals determine as a matter of law that he was not contributorily negligent and that the appellee, Haught-Bingham, was negligent. In response, the appellee argued that appellant had failed to preserve the issues for appellate review. Specifically, appellant had not filed a motion for judgment at the close of evidence, pursuant to Maryland Rule 2-519, nor did appellant note exceptions to the trial court's jury instructions pursuant to Maryland Rule 2-520(e).

Appellant conceded his failure to preserve the errors for appellate review, but nevertheless argued that the Court should review the record for errors by the trial court on the basis of "plain error" review in order to avoid a "manifest miscarriage of justice," as provided in Maryland Rule 4-325(e). Appellant, while acknowledging that there is "little precedent in Maryland appellate courts for his claim," urged the court to apply the concept to this case.

The Court declined to apply the "plain error" doctrine in this case on two grounds. First, no Maryland court has adopted the "plain error" approach in a civil action. Although pursuant to Md. Rule 4-325(e) the Court is permitted to take cognizance of and correct any plain error in the instructions material to the rights of the accused, despite a failure to object in criminal cases, there is no corresponding provision in Md. Rule 2-520(e) for civil cases. The Court declined to follow the rulings in the Fourth Circuit Court of Appeals and other federal courts applying the doctrine in civil cases.

Secondly, the Court declined to exercise its limited discretion to consider unpreserved issues pursuant to Md. Rule 8-131(a) because the Court was not persuaded that the facts and circumstances of this particular case were such that would "require a departure from established precedent."

INDEMNIFICATION BARRED BY ANY ACTIVE NEGLIGENCE

In *Franklin v. Morrison,* 350 Md. 144 (1998), the Court of Appeals held that a tortfeasor whose negligence was found to be active was not entitled to indemnification from a joint tortfeasor. Plaintiff's wife and their minor children were killed when her car, stopped behind defendant Franklin's disabled car, was struck from behind by a tractor-trailer. Plaintiff sued Franklin, Jiffy Lube, and the truck company for negligence. Franklin cross-claimed against Jiffy Lube for indemnification and contribution, alleging that Jiffy Lube's negligent repair of his automobile was the cause of its malfunction.

A settlement in the amount of $3.7 million was reached among all parties except Franklin, and trial was conducted only on Plaintiff's claim against Franklin and on the cross-claim between Franklin and Jiffy Lube. Although the jury determined that Jiffy Lube was negligent, it also found that Franklin acted negligently in failing to take reasonable steps to remove his disabled car from the road. Therefore, judgment was entered jointly and severally against the defendants, over Franklin's objection that he was entitled either to indemnity from Jiffy Lube or that the judgment should be reduced pursuant to the Maryland Uniform Contribution Among Joint Tort-Feasors Act.

On appeal, the Court upheld the trial court's ruling that Franklin could not prevail on his cross-claim for indemnification because Franklin had been found to be negligent in his conduct after the vehicle malfunctioned. This, according to the Court, was active negligence and barred indemnification from Jiffy Lube.

The Court also rejected Franklin's argument that he should be permitted indemnification from Jiffy Lube because the degree of his negligence was far outweighed by Jiffy Lube's negligence. According to the Court, such an argument is little

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different from the theory of comparative fault, something the Maryland legislature has not yet adopted.

NEGLIGENT ENTRUSTMENT — FATHER NOT LIABLE FOR ACTIONS OF ADULT DAUGHTER

In *Robb v. Wancowicz*, 119 Md. App. 531, *cert. denied,* 350 Md. 278 (1998), the Court of Special Appeals upheld the trial court finding that Peter Wancowicz, the defendant, bore no liability for his daughter's allegedly negligent driving even though there was evidence that he supplied her with expired license plates. Richard B. Robb, Jr. was injured when his automobile was struck head-on by the vehicle driven by Carol Lunner, Wancowicz's daughter. Both persons suffered serious injuries as a result of the accident. Robb asserted claims against Wancowicz based on negligence and negligent entrustment. At trial, Lunner claimed that the steering wheel of her vehicle locked, limiting her ability to control the vehicle, but there was evidence both that she had been speeding and had consumed alcohol earlier that day. Additionally, there was evidence that Lunner was operating the vehicle with expired license plates belonging to Wancowicz's son and that Lunner had a history of negligent driving, of which Wancowicz was aware.

The Court of Special Appeals, in affirming the decision of the trial court, rejected Robb's argument that, by supplying expired license plates to his daughter, Wancowicz "enabled Lunner to use a chattel (her car) and that she then did so negligently, so as to cause [Robb's] physical injuries." Relying heavily on *Broadwater v. Dorsey,* 344 Md. 548 (1997), the Court determined that Wancowicz could not be held liable under a theory of negligent entrustment because he had no legal right to exercise control over his daughter's actions because she was an adult. Moreover, there was not a special relationship that existed between Wancowicz and Lunner from which a trier of fact could reasonably infer that Wancowicz had the authority to exercise such control. Finally, the Court recognized that Wancowicz had no right to control Lunner's use of the expired plates, which did not belong to either of the two.

§5-107 STATUTE OF LIMITATIONS HELD INAPPLICABLE IN ADMINISTRATIVE PROCEEDINGS

In *Maryland Securities Comm'r v. U.S. Securities Corp.,* 122 Md. App. 574 (1998), the Court of Special Appeals held that the one-year statute of limitations on suits for fines, penalties or other forfeitures, as codified in Section 5-107 of the Courts and Judicial Proceedings article of the Maryland Annotated Code, does not apply to administrative proceedings. The appellee, the U.S. Securities Corporation, was found by an administrative law judge ("ALJ") and the Maryland Securities Commissioner ("Securities Commisioner") to have violated the Maryland Securities Act by engaging in a scheme to defraud twenty Maryland investors in connection with an offering of stock in September 1991. In late 1993, the Maryland Securities Division began to investigate the appellees' actions after being informed of possible illegal activity.

In January 1995, an administrative action was brought against appellees for fraud. Appellees filed a motion to dismiss, arguing that the claim was barred by the one-year limitation period set forth in Section 5-107. The opposition argued that Section 5-107 did not apply to administrative proceedings, and the ALJ ultimately determined that the appellees had engaged in nine different violations. The Securities Commissioner basically adopted the ALJ's findings and appellees sought judicial review of the Securities Commissioner's decision in the circuit court. The circuit court reversed the decision against appellees on the ground that the one-year limitation under Section 5-107 did in fact bar this administrative proceeding. This appeal followed.

The Court, relying upon its holding in *Nelson v. Real Estate Comm'n,* 35 Md. App. 334 (1977), reversed the judgment of the trial court, holding that Section 5-107 applies only to judicial proceedings. The Court found that the proceedings before the ALJ and the Securities Commission had as their objective the protection of the public from the fraudulent and misleading practices of securities brokers. Additionally, the Court stated that administrative board meetings, while sometimes characterized as quasi-judicial, "are not judicial at all" in the sense that they are neither civil nor criminal in nature, and therefore do not fall under the ambit of Section 5-107.

EX PARTE CONTACTS WITH OPPOSING PARTY'S FORMER EMPLOYEES

In *Sharpe v. Leonard Stillman Enterprises Limited Partnership,* 12 F. Supp. 2d. 502 D. Md. (1998), the United States District Court for the District of Maryland ruled that Plaintiffs could use the affidavits and testimony of defendant's former employees obtained in a prior suit. According to the Court, such ex parte communications did not violate Maryland Rule of Professional Conduct 4.2, which prohibits a lawyer, while representing a client, from communicating about the subject of the representation with people who have managerial responsibility on behalf of a defendant organization and with any person whose act or omission may be imputed to the organization.

Plaintiffs in this case brought suit in the U.S. District Court for the District of Maryland under the Federal Fair Housing Act, alleging that the defendants discriminated against them on the basis of their race by "steering" them to less desirable units. This suit followed a nearly identical state court action against the same defendants by Baltimore Neighborhoods, Inc. ("BNI"). After discovery had begun in that case, and upon informing defendant's counsel of their intent to do so, BNI's counsel obtained affidavits from three former employees of the defendant, in which they confirmed that supervisors had instructed them to "steer" African Americans to units at the rear of the apartment complex. Defendants and BNI subse-

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quently settled their suit; however, plaintiffs in the instant case brought suit alleging similar "steering," and retained the representation of the same law firm which had represented BNI in the previous suit.

Attempting to preclude Plaintiffs' use of the affidavits obtained in the prior case, Defendants filed a motion in limine, seeking to exclude the anticipated use of the affidavits or testimony by Plaintiffs' counsel pursuant to Rule 4.2. Judge Legg determined, in attempting to reconcile the Court's previous opinions dealings with this issue, that those previous opinions all concurred that the rule either on its face or as applied does not prohibit ex parte communication with former employees who do not possess confidential or privileged information and whose statements or actions cannot be imputed to their former employer. The Court denied defendant's motion because it found that the employees who provided affidavits in the prior case did not possess confidential information and their actions could not be imputed to their former employer.

WORKERS' COMPENSATION AWARDS MUST BE BASED ON WAGE AT TIME OF INJURY

In *Jung v. Southland Corp.*, 351 Md. 165 (1998), the Court of Appeals addressed the issue of whether the Maryland Workers' Compensation Commission (the "Commission") has the power to adjust the amount of a workers' compensation award for temporary total disability when an employee makes a subsequent claim for such disability benefits and that employee's average weekly wage has increased. The Court held that the Commission is not authorized to recalculate an award to reflect the employee's wage increase.

Jung was an employee of the Southland Corporation. On July 30, 1992, he sustained an accidental personal injury which resulted in his being awarded total temporary disability benefits. Jung's period of temporary total disability, and payment with respect thereto, terminated in December 1992. In July 1995, he experienced a recurrence of the injuries associated with his 1992 accident. He again sought, and was given, the same disability payments he received in 1992. He requested that the Commission also adjust his award to reflect his wage increase from 1992, and the Commission granted his request.

Southland, after an unsuccessful appeal to the Commission, sought judicial review of the Commission's ruling in the Circuit Court for Montgomery County, arguing that the Commission did not have the statutory power to increase Jung's disability award. The Circuit Court agreed, and granted Southland's motion for partial summary judgment. Jung appealed to the Court of Special Appeals, which affirmed the ruling of the lower court.

The Court of Appeals found the meaning of "average weekly wage," as set forth in §9-602(a) of the Labor and Employment Article, to be a critical issue in determining whether the Commission had the authority to take into account Jung's wage increase. The Court, in examining §9-602, which proscribes the method of computing the average weekly wage of a covered employee, as well as §9-621, which governs the amount of benefit payments resulting from temporary total disability, gleaned four things. First, it found that the language of §9-602 clearly and unambiguously provides that the average weekly wage of a covered employee is computed, and thus is fixed, at the time of the accidental personal injury. The Court found support for its view in both the Commission's regulations, as well as §9-602(a)(3), which provides an exception for computing the average weekly wage that is personal injury-specific.

Second, the Court stated that the benefits paid with respect to a temporary total disability claim are calculated on the basis of the claimant's average weekly wage and are capped by the average weekly wage of the State. Third, in the case of a reopened temporary total disability claim, the claimant's benefits are two-thirds of the claimant's average weekly wage, and thus only the State's average weekly wage is tied to the date of reopening. Finally, the Court found that the express provisions of §9-622(a)(1)(ii) state that "the average weekly wage . . . be computed by determining the average wages of the covered employee . . . at the time of the accidental personal injury."

ENFORCEMENT OF SETTLEMENT AGREEMENTS REQUIRE FULL EVIDENTIARY HEARING

In *Thompson v. Cotter*, No. 53 (September Term 1998, *unreported*), the Court of Special Appeals held that a trial court erred when it did not conduct a full hearing on motions to enforce a settlement agreement. Despite holding that appellant was entitled to a full hearing, the Court concluded in the appellee's favor because the appellant's attorney failed to preserve the issues presented for appeal.

Appellant, Lisa Wilson, brought suit in the Circuit Court for Baltimore City against Theodore Goles, Thomas Cotter, and B.B.G. Management Co., on behalf of her minor child Donnell Thompson for injuries allegedly due to lead paint poisoning. Throughout the trial, the parties conducted negotiations to settle the matter. Five days after trial began, the parties reached an agreement. Soon afterwards, a dispute arose over the amount to which the parties agreed. As a result, both parties filed motions to enforce the settlement agreement. Ms. Wilson alleged that the parties settled for a total amount of $105,000, whereas Goles claimed that agreement was for $100,000. It was undisputed that the codefendant, Cotter, was to pay $60,000 of the settlement. However, Goles alleged that he was only responsible for $35,000 of the settlement instead of $40,000 as claimed by Ms. Wilson. The trial court, during a hearing in which no witnesses were sworn or called, and no affidavits produced, heard oral arguments by counsel and decided in favor of Goles.

On appeal, Ms. Wilson argued that the circuit court erred

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in failing to conduct a full plenary hearing on the motions to enforce the settlement. The Court of Special Appeals agreed and found Maryland law clear in establishing that a full evidentiary hearing is required when addressing disputes to enforce a settlement agreement. However, the Court held that appellant's attorney failed to properly preserve the issue for appeal, because the attorney failed to object to the lower court's error in failing to conduct a plenary hearing. In so holding, the Court reasoned that Maryland Rule 8-131(a) definitively states that an appellate court shall not render a decision on an issue not raised before the trial court. ■

PROGRAM COMMITTEE REPORT

The Program Committee of MDC has sponsored two Brown Bag Lunches on District Court practice. The first was in Montgomery County on November 4 and included a discussion by Judge Mary Beth McCormick and Judge Eric Johnson on the use of non-medical experts in District Court and handling cases with pro se parties. The second Brown Bag Lunch was on November 18 in Baltimore City, with a talk by Judge Audrey Carrion and John Glynn on the topics of the use of non-medical experts and discovery disputes. Both of these lunches were very well attended, particularly by MDC's target audience for the lunches – newer and younger lawyers.

The next Brown Bag Lunch will be in Baltimore City on Thursday, February 18 and will be on the topic of Case Evaluation and Settlement. MDC will also be hosting a dinner program on Tuesday, February 9 at the Renaissance Harborplace Hotel. Our speakers for the night will be John Wolf of Ober, Kaler, Grimes & Shriver and the Honorable Paul W. Grimm, Magistrate Judge of the United States District Court for the District of Maryland. Their topic will be preparing and trying the business litigation case. We look forward to seeing all of our members and any other interested people there. ■

NEW MEMBERS

The Association welcomes the following new members:

Alphonzo Jerome Butler
Robert Cawood
Michael L. Dailey
C. Carey Deeley, Jr.
H. Bruce Dorsey
Caroline Griffin Ellis
Julie A. Furst
Diarmuid F. Gorham
Matthew G. Hjortsberg
Stuart Lesser
Steuart G. Markley, Jr.
Rachel Theora McGuckian
Dana Moylan
George Ritchie
John P. Rufe
Thomas G. Walsh
Bambi L. Wilson
Jeffrey A. Wothers
John H. Zink, III

Spotlights . . .

MARK GATELY and **J. MARK COULSON** of MILES & STOCKBRIDGE successfully defended an internist in a wrongful death case brought by Marvin Ellin in Baltimore County. The Plaintiffs alleged that the defendant doctor was negligent in failing to treat unstable angina appropriately. Defendant argued that the decedent had stable angina and was treated appropriately, notwithstanding his sudden cardiac death. Defendant also argued that decedent was contributorily negligent. The jury found that the doctor did not breach the standard of care and therefore did not reach the contributory negligence question.

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