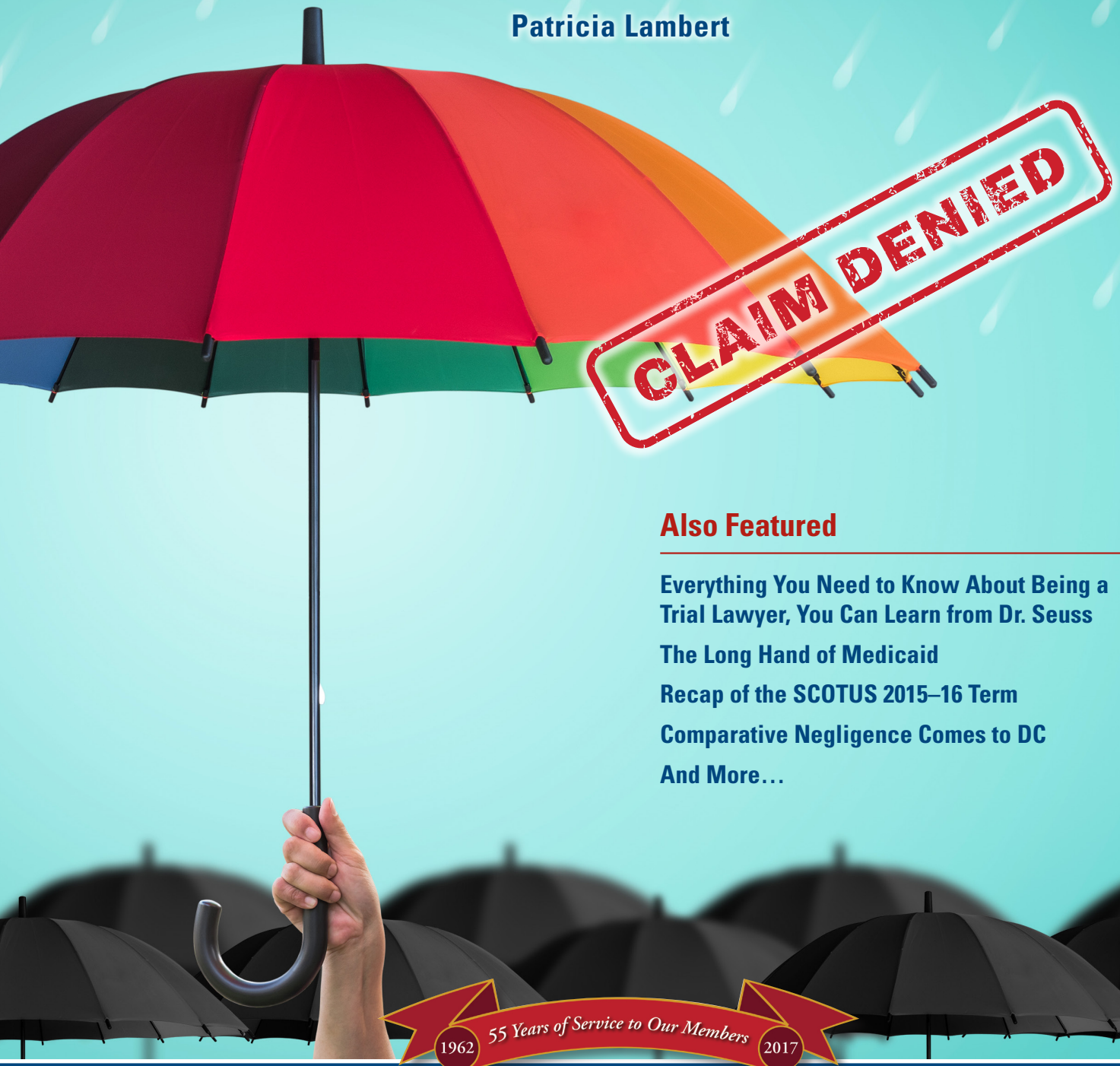
THE DEFENSE LINE

A Publication From The Maryland Defense Counsel, Inc.

Spring 2017

Top 10 things defense lawyers need to know about lack of good faith claims

Patricia Lambert



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From Court(s) to Tee to Green…

"**Hello Friends**," Jim Nance smoothly said to us at the Masters last week. Then, he dazzled us with sparkling tales of individual achievement by the players. Fittingly, this followed on the *Heels* of the NCAA National Championship, where it was the exciting play of the Nation's top basketball teams that ruled the courts during March Madness. We are treated to the consummate play of teams and individuals at the top of their games during this precious time of year.

Christopher Boucher, Esquire
Law Office of Christopher Boucher

And so it is with Maryland Defense Counsel and DRI all year long. As a team, we all spend our personal time and work hard together in these outstanding organizations. We do so as part of an effort to serve our Members, improve the law and promote a fair, efficient and just civil justice system. As individuals, we contribute as best we can as part of this work and, in Court, we also approach our respective cases with the same goals in mind. Together, we also champion causes like access to justice with Maryland Volunteer Lawyer's Service and advancement of a superior judiciary through initiatives such as the National Foundation for Judicial Excellence. MDC stands stalwartly for judicial independence and in support of all people and institutions advancing Constitutional ideals.

This has me thinking about how effective our team has been and continues to be during this very special 55th Year Anniversary Year. As one example of this, the Anniversary video, now in production, is being spearheaded by our stellar President Elect, Marisa Trasatti. All she and Bob Scott had to do was to ask DRI and DRI jumped in with both feet as an Anniversary Sponsor. Please visit the Anniversary Firm Sponsor list on page 23 to acknowledge all of the law firms that are lending their hearty support to the Anniversary Year celebration and, of course, all of our sponsors on page 3. MDC is extremely grateful for their long standing stewardship.

At the start of my journey as President last June, I quickly realized the value of our incredible Executive Committee team as they repeatedly put aside summer plans to endure phone calls and meetings to attend to some urgent and important MDC business when they had been told "the work really starts in September." They include Marisa, John Sly and Dwight Stone, and also Nikki Nesbitt as Immediate Past President, Mike Dailey as DRI State Rep. and Kathleen Shemer, our incredible Executive Director. You have been innovative and resourceful leaders to a person. You are so good that, as President, often I feel like I am walking a big dog… you are leading me. I thank all of you and our illustrious, hard working Board for being there and excelling early and often. I am proud to be an individual on our fantastic team.

The year started with a flurry of activity for Judicial Selections Chairman Tim Hurley and new Co-Chairman Winn Friddell, as they successfully enlisted the help of firms that graciously hosted interview sessions in or closer to the applicable jurisdiction, including: Miles and Stockbridge; Decaro, Doran, Sicillano, Gallagher & DeBlasis, LLP; Miles & Stockbridge, P.C. and Council, Baradel, Kosmerl & Nolan, P.A. Their judicial selections work is a valuable part of MDC's work and quite a contribution to the bar and the judiciary. Thank you all for your time, hard work and painstaking decision making.

Then, there was the grand finale of spectacular Past President's Receptions on Tydings and Rosenberg's beautiful Terrace. MDC thanks Tydings for hosting all of those great years, taking in that incredible view on (usually) gorgeous September evenings with good MDC friends, old and new! We will never forget them, even as we are making arrangements for this year's Anniversary Past Presidents' Reception.

We have been told that this year's Legislative Dinner was the best ever! Thank you to all that attended and participated. Working with the legislature and building relationships with members and other institutions is one of the finest things we can do at MDC. We welcome those that are joining the ranks of the legislative committee to do just that. The Legislative Committee has been working hard in Annapolis. Gardner Duvall, Nikki Nesbitt, John Sly, Mike Dailey, Ileen Ticer and John Stierhoff and Angel of our lobbying team, are seven individuals who have been making our MDC team look awfully good before the Maryland General Assembly. The PAC Chair, Katherine Lawler, and Treasurer, Colleen O'Brien do so much work behind the scenes that I hope they know how much we all value and appreciate them. The session just ended. But, it is not too early at all to acknowledge their efforts and thank them for their time and dedication. It's not unusual to see one or more of them still in committee, waiting to testify at 8 or 9 at night. John Sly implemented regular legislative updates to the membership so that you know what legislative matters are brewing that may affect you and your practice. Look for those and the end of year legislative summaries now that the session has ended. These have been sent to you in the last few years as part of an effort begun by Semmes and now pursued by the whole legislative team.

That's not the only thing Semmes has begun. This year, they are stepping up to host the Trial Academy on April 24th. Semmes will bring this hallmark event to a very convenient and prominent downtown location. The Trial Academy is a herculean effort on the part of the phenomenal Programs and Sponsorships Committees' which include Colleen O'Brien and Jhanelle Graham, Andrew Gaudreau, Richard Medoff and Chris Lyon. We at MDC cannot sufficiently express our gratitude and thanks to these folks, all of the coaches and volunteers who will participate this year and to Semmes for hosting this event. So many at MDC contribute time, hard work and dedication of firm resources to make our two-time award winning Trial Academy better and better every year. Please get the word out to those firms and attorneys who would be good participants and please plan to attend or contribute as well.

Many more have contributed. Thanks to Miles and Stockbridge, Waranch and Brown and Semmes for hosting fall meetings last year. Thomasina Poirot and Caroline Willsey really gave the effort to engage and empower Young Lawyers a shot in the arm. Richard Flax, Chris Heagy and Derek Stikeleather did a wonderful job on Appellate Practice. Laurie Ann Garey and Leianne McEvoy have been doing great at publications, including this *Defense Line*. The Substantive Law Committee Chairs have provided great service on the Board throughout the year. Thank you! Things will not stop changing and MDC will be there "on it" as always thanks to each and every one of you. Just by way of example, you probably noticed the email from MDC crafted by Tracy Steedman, asking for your input on the possibility of Maryland adopting the Uniform Bar Exam. Tracy testified before the Court of Appeals on this crucial issue to all Maryland lawyers. Thank you Tracy.

So, what can we do even better as a team? Allow me to tee up one idea. We could do as the preeminent Dan Karp, managing partner at my former firm, did when too long ago he came through the office door and shouted "sign everybody up for MDC and DRI!" I am in his debt because joining MDC and DRI opened up incredible opportunities for me almost right away. The time I have spent, the people I have met, the wisdom and training received and the experiences and good times I have had being involved with MDC and DRI will be cherished and appreciated as long as I am around. Think of all the futures you could change for the better by doing the same thing at your firm.

Thank you for your time. As always, we will wrap up the year at Nick's at the Annual Meeting and Crab Feast at 5:30 on June 7th. I look forward to seeing you all there. In the meantime, we welcome the (hopefully) nice weather. Enjoy the green.

THE DEFENSE LINE

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Maryland Defense Counsel
1218 Broadway Road
Lutherville, MD 21093

Phone 410-560-3895
Fax 443-705-0217

E-mail:
kshemer@mddefensecounsel.org
www.mddefensecounsel.org

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Featured Articles

Columns

Top 10 things defense lawyers need to know about lack of good faith claims

Patricia Lambert

By now, every Maryland defense lawyer knows that there is a cause of action that can be leveled against insurers for lack of good faith. Most even know that this cause of action is based on MD. CODE ANN., CTS. & JUD. PROC. § 3-1701, which allows for "enhanced damages" when "an insurer failed to act in good faith." Under the statute, "good faith" means "an informed judgment based on honesty and diligence supported by evidence the insurer knew or should have known at the time the insurer made a decision on a claim."

Many defense lawyers have even read *Cecilia Schwaber Trust Two v. Hartford Acc. & Indem. Co.*, 636 F. Supp. 2d 481, 487 (D. Md. 2009), which sets forth what courts generally consider in assessing whether an insurer has acted in good faith. Courts review the "totality of the circumstances" including:

> (1) efforts or measures taken by the insurer to resolve the coverage dispute promptly or in such a way as to limit any potential prejudice to the insureds; (2) the substance of the coverage dispute or the weight of legal authority on the coverage issue; and (3) the insurer's diligence and thoroughness in investigating the facts specifically pertinent to coverage.

So what else do you need to know about lack of good faith causes of action?

The following ten things can help defense counsel advise insurers who face these types of claims.

1. Most lack of good faith claims have to be considered by the Maryland Insurance Administration first.

Lack of good faith claims are made by an insured against its own insurer. Such claims did not exist under common law. *Johnson v. Federal Kemper Ins. Co.*, 74 Md. App. 243, 246-47, 536 A. 2d 1211, 1212-13 (1988), *cert. denied*, 313 Md. 8, 542 A.2d 844 (1988); *Harris v. Keystone Ins. Co.*, Civil No. CCB-13-2839, 2013 WL 6198160, *2 (D. Md. Nov. 26, 2013) (unreported). Accordingly, lack of good faith claims are statutory creations.

As indicated in Section 3-1701, the insured must first exhaust its administrative remedies before the Maryland Insurance Administration ("MIA") pursuant to MD. CODE ANN., INS. § 27-1001 unless its action fits into one of three limited exceptions: (1) a small claim within the jurisdiction of a Maryland District Court; (2) where the insurer and insured agree to waive the MIA requirement; or (3) where a claim involves a commercial insurance policy with policy limits that exceed $1,000,000. If an insured's counsel attempts to file a lack of good faith claim in civil court before exhausting the prescribed administrative process, the insurer should pursue a motion to dismiss.

The intricacies of these exceptions to the exhaustion requirement are sometimes overlooked. First, it may be the amount of the claim (which is the case for small claims) or the limit of coverage (which is the case for the exception dealing with large commercial policies) that is determinative of the applicability of the exception. For example, if a commercial policy provides a property limit of $250,000 and an uninsured motorist coverage limit of $2 million, a claim for lack of good faith respecting the property claim would have to proceed before the MIA, while a lack of good faith claim relating to uninsured motorist benefits could proceed in civil court. Second, the statutory exceptions are very precise as to dollar amounts. For example, if the limit of the commercial policy is $1 million, then the lack of good faith claim must be pursued initially before the MIA. If the limit of the commercial policy is $1 million plus $1, then the lack of good faith claim can proceed in civil court. The $1 makes a world of difference. Third, it is sometimes difficult to determine the coverage amount for the claim at issue. In *Lanham Servs. Inc. v. Nationwide Prop. & Cas. Ins. Co.*, No. PWG-13-3294, 2014 WL 2772227, *4 (D. Md. June 18, 2014), the declarations page did not specify a precise and detailed limit of coverage. The court permitted the insured to aggregate the limits for each building insured under the policy in order to determine if the coverage limits for property damage totaled more than $1,000,000. This aggregation was allowed even though the claim itself was only for $637,100. Consequently, defense counsel must carefully review issues concerning jurisdiction and exhaustion.

Finally, it should be noted that a claim that fits one of the exceptions can still be instituted by the filing of a complaint with the MIA.

2. Not all lack of good faith claims are civil claims.

There are two types of lack of good faith claims: civil lack of good faith claims and administrative lack of good faith claims.

Civil lack of good faith claims are those set forth in Section 3-1701 of the Courts & Judicial Proceedings Article. Under this statute and the corollary statute contained in Section 27-1001 of the Insurance Article of the Maryland Annotated Code, these types of claims require a civil complaint filed with a specific form and information. *See* www.insurance.maryland.gov/Consumer/Documents/27-1001complaintinformationsheet06-09.pdf. In addition to the civil complaint, the insured complainant must provide MIA with each document that the insured has submitted to the insurer for proof of loss.

Once filed, there are particularized requirements regarding the response that must be filed by the insurer. The response must include all documents from the insurer's claim file (with the documents that are claimed to be privileged being submitted to the MIA in a separately sealed envelope). The insurer's response, which is often quite lengthy, must be filed within thirty days after the complaint is forwarded to the insurer by the MIA. Considering the scope and prescribed form of the response, the insurer's filing is oftentimes a difficult and herculean task. Counsel representing insurers should understand that the MIA cannot grant an insurer or its counsel an extension of time in which to file a response. The MIA, however, will allow extensions of time that have been consented to by the insured or the insured's counsel. After a review of the paper filed by both sides, the MIA will rule on whether the insured has, on paper, proven that the insurer acted with a lack of good faith. Once that decision has been made, there are various avenues for contesting the decision—primarily by the aggrieved party requesting a hearing or filing an appeal to the Circuit Court.

Continued on page 7

(LACK OF GOOD FAITH CLAIMS) *Continued from page 5*

Once a decision is final, the civil action can be filed.

Administrative lack of good faith complaints are also allowed. These complaints, which are filed under Section 27-303(9) of the Insurance Article follow an entirely different route within the MIA. Although these lack of good faith claims are also based on Section 27-1001, the administrative complaint process is not as rigid as the civil complaint process. For example, an insured's simple email to the MIA complaining that a claim was denied and that the insurer acted without good faith is enough to start the administrative complaint process. This administrative complaint triggers an administrative review which, unlike the civil complaint process, oftentimes has the MIA repeatedly requesting information from the insured and the insurer.

Unlike the civil complaint process, there are no rigorous timelines for the MIA to consider and decide the issues relating to the administrative complaint. The investigatory process can — and oftentimes does — take months. At the end of the process, the MIA issues an administrative determination that is less formal than what is required for decisions on civil complaints. Generally, the administrative determination is in the form of a letter. After the administrative determination is made, the aggrieved party may request an administrative hearing. After such a hearing, an administrative law judge renders a decision, which can be appealed to the Circuit Court. This administrative procedure does not allow for the awarding of enhanced damages. Importantly, a decision on an administrative Section 27-303 complaint has no relationship to the filing of a Section 27-1001 civil complaint. Specifically, a ruling on an administrative complaint does not constitute exhaustion of administrative remedies under Section 3-1701.

Defense counsel must clearly review a lack of good faith complaint to determine whether the civil complaint procedure or the administrative process procedure applies.

3. The MIA may not rule on a lack of good faith civil claim.

Under Section 3-1701 and otherwise, the MIA is given the authority to determine, as a tribunal, whether an insurer failed to act in good faith. Under the statute, the MIA has ninety days from the receipt of the civil complaint alleging that the insurer failed to act in good faith to make a determination. The MIA's decision must contain the following five findings:

Continued on page 17

Editor's Corner

The Editors are proud to publish this latest edition of *The Defense Line*, which features several interesting articles and case spotlights from our members. The lead article, submitted by **Patricia Lambert** of Pessin Katz Law, P.A. illuminates the many issues that must be considered when handling a "lack of good faith claim" on behalf of an insurer. An article by **Peggy Ward** of Ward & Herzog, LLC, provides pearls of wisdom from a seasoned litigator on how to prepare cases for trial all inspired by Dr. Seuss. **Marissa A. Trassati** and **Caroline E. Willsey** of Semmes, Bowen & Semmes provide what is now becoming a "annual" recap of the Supreme Court's Term for 2015–2016. **John Sly** of Waranch & Brown, LLC provides guidance regarding upcoming changes to the Maryland Medicaid law regarding liens. Finally, **Mary Malloy Dimaio** of Crosswhite, Limbrick & Sinclair, LLP outlines DC's adoption of comparative negligence for motor vehicle accidents involving pedestrians and bicyclists.

The past year has been action-packed for Maryland Defense Counsel. We enjoyed our last **Past President's Reception** on the "Terrace" at Tydings and Rosenberg. Their "award winning" view will be missed and we thank Tydings and Rosenberg for sharing it with MDC all these years. We are proud to present the upcoming **Trial Academy** on April 24, 2017. Finally, please make plans to join us for the always and ever popular Annual **Crab Feast** which will be held on June 7, 2017. The editors encourage our readers to visit the Maryland Defense Counsel website **(www.mddefenscounsel.org/events)** for full information on the organization of 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.

Editor — Laurie Ann Garey
Progressive House Counsel • (410) 753-6494

Assistant Editor — Leianne S. McEvoy
Miles & Stockbridge P.C. • (410) 385-3823

Please Welcome MDC's New Members

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Everything You Need to Know About Being Trial Lawyer, You Can Learn from Dr. Seuss

Margaret Fonshell Ward

Who knew that Dr. Seuss could give us guidance on how to be an excellent trial lawyer? Wisdom, though, is anywhere you choose to find it and Theodor Geisel was wise to the interactions among people in ways that too many of us overlook in both our personal and professional lives. I have found in my many readings of Dr. Seuss (courtesy of three children!) that there are snippets that can guide a strong and successful practice as a trial lawyer, with a little perspective thrown in. Away we go!

Green Eggs and Ham

You do not like them so you say.
Try them! Try them! And you may.
Try them and you may I say.

There was several years ago an ad campaign for the insurer St. Paul/Travelers that said — "To err is human. To get sued for it is pretty much a given." This is the beauty of being a trial lawyer, there is so much out there. While practices have become increasingly specialized across time, for the new and learning trial lawyer, there is no better experience than to find a way to branch out your practice. The best way to take, or prepare for, a great deposition and trial testimony of a bank president is to also be able to take or prepare a great deposition of a truck driver with an 8th grade education.

If you need to do so, find that new area in *pro bono* efforts. Those will give you more opportunities in court and hearings. Also take every opportunity to be a counselor to your clients. Tell them how you, as an outsider, see that the event or dispute developed and how they might mitigate future litigation. Make it one of your missions to be this "value added" to the client.

One Fish, Two Fish, Red Fish, Blue Fish

Today is gone. Today was fun. Tomorrow is another one. Everyday from here to there, funny things are everywhere.

Start every case by remembering that it is one case and that it isn't "yours." Trial lawyers stumble when they get too personally invested, whether by failing to see and act objectively or by injecting personality in harmful ways.

Get Involved with MDC Committees

mddefensecounsel.org/leadership.html

Stop yourself every time you say "we" or "I" or "our case" in discussing the matter. Remember and repeat often that **you cannot change the facts. DON'T EVEN TRY.** Spinning those facts to the best advantage within the context and the law is a trial lawyer's stock in trade, but it is a very thin line. Taking even the smallest liberties with the facts can be fatal to your case and to your credibility.

Revisit frequently what you think you know and what habits you have developed about evidence. When you are preparing for trial, look again at every piece of evidence you want to get in and every piece of evidence the plaintiff wants to get in. Review every word of them before trial. It is nearly certain that you will have overlooked something in one of your documents that, now that trial has approached, is more dangerous, ambiguous, or simply irrelevant than it seemed six months ago. By the same respect, there is undoubtedly something in the plaintiff's proposed exhibits that you will now find immensely helpful.

On every case, make a part of your trial preparation to get another viewpoint. Though there is exceptional value in knowing every square inch of your case, every nuance and personality involved, there is just as much value in getting an outsider's view, because you will become jaded and blind to both strengths and weaknesses in your case.

Take something of value from every trial — and then share it with your colleagues. Listen with interest to everyone else's war stories during the breaks. You haven't seen it all and you will learn something, guaranteed. It may be about your judge, another judge, a lawyer, a technique, but it will be there. Also, start from the beginning making a list of every case you try, no matter how small. This becomes not only a fantastic resource for your progress as a trial lawyer, but a valuable tool in convincing prospective clients and superiors that you have the experience to serve them well.

Oh, the Places You'll Go

The waiting place . . . for people just waiting
Waiting for a train to go or a bus to come,
or a plane to go or the mail to come,
or the rain to go or the phone to ring, or the snow to snow
or waiting around for a yes or no or waiting for their hair to grow.
Everyone is just waiting.
Waiting for the fish to bite or waiting for the wind to fly a kite,
or waiting around for Friday night
or waiting, perhaps, for their Uncle Jake,
or a pot to boil, or a Better Break,
or a string of pearls, or a pair of pants,
or a wig with curls, or Another Chance.

Being a trial lawyer is not a career ladder, it's a jungle gym. There will be slumps, indecision, stress, and, of course, defeat. Trials come and trials go; it is okay to lose sleep over them — both before and after, but learn to not rest on your wins or your losses.

Rather, schedule into your practice some rejuvenators that put spark into your files and your efforts. Start with **The Great File Cabinet Fumigation**. Trial lawyers are well familiar with high/low agreements and other such creative resolutions to cases, but they don't happen often enough. Go through your entire inventory of cases, particularly those in which you believe that you really have the upper hand, and make a decision about whether some sort of creative approach might be a means towards reaching a more streamlined and efficient resolution, satisfactory to all parties.

Learn to delegate, delegate, delegate. As we all learned in kindergarten, sharing is a virtue. If there is some part of a case that has you stuck in "ignoring mode" or mired in uncertainty about how to manage it, pass that on to a colleague who can move it forward.

A few times per month, give yourself the gift of the magic Off Button. Turn off your phone, your computer; close your door. Let a thought enter your brain and stay there for a little while. Puzzle though a case, an opening

Continued on page 21

MINNESOTA LAWYERS MUTUAL'S

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The Long Hand of Medicaid

John T. Sly

In 2006, the United States Supreme Court upheld the Eight Circuit's decision in *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268 (2006), which sharply limited the ability of State Medicaid programs to recover against Medicaid beneficiaries in third party lawsuits. As a result of *Ahlborn*, Medicaid's recovery of third party settlement proceeds, at most, is limited to the amount of the settlement attributable to past medical expenses. In other words, Medicaid cannot seek more than what the parties attributed to past medical expenses paid by Medicaid.

This is all set to change. With he enactment of the Bipartisan Budget Act of 2013, Congress responded to the limitation created by *Ahlborn*, and amended the ***Medicaid*** recovery laws to expand Medicaid's recovery rights. Congress passed the Medicare Access and CHIP Reauthorization Act of 2015. Section 220 of this act delays the effective date of the Medicaid recovery amendments to **October 1, 2017**. (www.congress.gov/bill/114th-congress/house-bill/2) "(Sec. 220) Amends the Bipartisan Budget Act of 2013, as amended by the Protecting Access to Medicare Act of 2014, to delay until October 1, 2017, the effective date for certain Medicaid amendments relating to third-party liability settlements and judgments received by Medicaid beneficiaries from all portions of which a state may recover Medicaid payments."

Medicaid is often supplemented by federal funding. As a condition to receiving federal funding, the Federal Medicaid laws mandate:

> 1. (A) That the State or local agency administering such plan will take all reasonable measures *to ascertain the legal liability of third parties*…to pay for care and services available under the plan.

42 U.S.C.S. §1396a(a)(25)(A) (emphasis added). Going further:

> 1. (B) that in any case *where such legal liability is found* to exist after medical assistance has been made available on behalf of the individual and where the amount of reimbursement *the State can reasonably expect to recover exceeds the costs of such recovery, the State or local agency will seek reimbursement for such assistance to the extent of such legal liability*.

42 U.S.C.S. §1396a(a)(25)(B) (emphasis added).

In order to enable the State programs to recover third party liability proceeds, federal law requires states to have their own laws in place that force the assignment of the right to recovery for medical costs incurred:

To the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services.

42 U.S.C.S. §1396a(a)(25)(H). In fact, as a condition of the individual's Medicaid eligibility:

As a condition of eligibility for medical assistance under the State plan to an individual who has the legal capacity to execute an assignment for himself, the individual is required—

(A) to assign the State any rights . . . to support (specified as support for the purpose of medical care by a court or administrative order) and to payment for medical care from any third party;

(B) to cooperate with the State . . . in obtaining support and payments (described in paragraph (A)) for himself . . . ; and

(C) to cooperate with the State in identifying, and providing information to assist the State in pursuing, any third party who may be liable to pay for care and services available under the plan…

42 U.S.C. §1396k(a). This statute forces Medicaid recipients to assign their rights to recovery against a third party to the State Medicaid program as a condition of receiving those benefits.

The effect of the Medicare Access and CHIP Reauthorization Act of 2015 is to make it much harder to negotiate liens with Medicaid and may create real problems in setting up special needs trusts which are designed to protect a person's eligibility for Medicaid while permitting them to take advantage of funds placed into the trust. This is because Medicaid may demand upfront payments and may be less inclined to compromise the liens.

Anyone practicing in areas of law that may result in payments to persons for whom Medicaid has made payments for medical services must be aware of this statute and that its effective date is fast approaching.

John T. Sly is a trial attorney and partner at Waranch & Brown, LLC. His practice focuses on the aggressive defense of physicians and health care facilities, and product manufacturers and retailers throughout Maryland. Since becoming a trial attorney he has served on the Executive Board of the Maryland Defense Counsel and is actively involved with ABOTA, the Maryland State Bar Association, the Defense Research Institute and the MD-DC Society for Healthcare Risk Management.

The MDC Expert List

The MDC expert list is designed to be used as a contact list for informational purposes only. It provides names of experts sorted by area of expertise with corresponding contact names and email addresses of MDC members who have information about each expert as a result of experience with the expert either as a proponent or as an opponent of the expert in litigation. A member seeking information about an expert will be required to contact the listed MDC member(s) for details. The fact that an expert's name appears on the list is not an endorsement or an indictment of that expert by MDC; it simply means that the listed MDC members may have useful information about that expert. MDC takes no position with regard to the licensure, qualifications, or suitability of any expert on the list.

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

Recap of the SCOTUS 2015–16 Term

Marisa A. Trasatti and Caroline E. Willsey

With the United States Supreme Court 2016–2017 term well underway, we wanted to provide a recap of some of the most high-profile cases from last term. The untimely passing of Justice Antonin Scalia in February left the Court ideologically split between four (4) "liberals" — Justices Sotomayor, Kagan, Ginsburg, and Breyer — and four (4) "conservatives" — Justices Roberts, Kennedy, Alito, and Thomas. Indeed, this eight-person Court was unable to reach a majority on several cases last term — namely the major immigration case, *United States v. Texas*. This ideological split may come to an end during the 2016–2017 term, as the Hon. Neil Gorsuch, President Trump's nominee to fill Justice Scalia's seat, awaits confirmation.

Immigration — *United States v. Texas*, 579 U.S. ____ (2016)

One of the most buzzed-about cases of the 2015–2016 term was *United States v. Texas*. There, the Supreme Court heard a challenge to two (2) of President Obama's executive actions on immigration. The first executive action — issued on November 20, 2014 — expanded Deferred Action for Childhood Arrivals (DACA+), a 2012 executive action deferring deportation of certain undocumented immigrants who arrived in the U.S. while under the age of sixteen (16). The second executive action — known as Deferred Action for Parents of Americans (DAPA) — deferred deportation of certain undocumented immigrants with U.S.-citizen children. Together, these two (2) executive actions affected an estimated 4.7 million undocumented immigrants.

Twenty-six (26) states joined in a lawsuit in the U.S. District Court for the Southern District of Texas challenging the constitutionality of DACA+ and DAPA. The district court issued a preliminary injunction halting the implementation of DACA+ and DAPA while litigation was pending. The Fifth Circuit upheld the injunction. While the preliminary injunction was based solely upon the federal government's failure to adhere to the procedural requirements of the Administrative Procedure Act, the Supreme Court indicated, when it took the case, that it would also consider the underlying constitutionality of the executive actions under the Take Care Clause of the Constitution.

Unfortunately, the Supreme Court never got the chance to address the substantive constitutionality of the executive actions. The Court split 4-to-4 and on June 23, 2016, the Supreme Court issued a one-line *per curiam* opinion stating that the lower court's judgment was affirmed. With the preliminary injunction firmly in place, the case will now proceed to trial in the Southern District of Texas.

1) Voting Rights — *Evenwel v. Abbot*, 578 U.S. ___ (2016)

In *Evenwel v. Abbot*, two (2) Texas voters challenged the 2011 redistricting of thirty-one (31) seats in the Texas Senate. The Texas voters alleged that they were placed into state senate districts where their votes would count less than the votes cast in another district, despite the fact that both districts had relatively equal populations. The Texas voters contended that the state should have used the registered-voter population, rather than the total population as the measure of district size because urban districts have proportionally fewer votes.

The Supreme Court was asked to determine whether a three-judge panel of the U.S. District Court for the Western District of Texas correctly held that the Equal Protection Clause's "one-person, one-vote" principle allowed the states to use total population (rather than registered voter population) when apportioning legislative districts.

In a unanimous decision (8-0), issued on April 4, 2016, the Court affirmed the lower court's decision. The decision maintained the status quo and was, in a sense, more memorable for what it did not do. Writing for the Court, Justice Ginsburg explained, "[n]onvoters have an important stake in many policy debates — children, their parents, even their grandparents, for example, have a stake in a strong public-education system — and in receiving constituent services, such as help navigating public-benefits bureaucracies." By upholding one-person, one-vote, the Court ensured that "each representative is subject to requests and suggestions from the same number of constituents," thus promoting, "equitable and effective representation."

2) Public-Sector Unions — *Friedrichs v. California Teachers Association*, 578 U.S. ___ (2016)

Under California law, the state may decide whether workers — even those who choose not to join unions — are contractually obligated to pay union representation fees. Currently, public teachers in California are contractually obligated to pay union dues, and may only opt-out of the roughly thirty (30%) of dues that are devoted specifically to

Continued on page 25

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Comparative Negligence Comes to DC

Mary Malloy Dimaio

The District of Columbia enacted a new law affecting contributory negligence in cases involving collisions between motor vehicles and pedestrians or bicyclists.

Effective November 26, 2016, the Motor Vehicle Collision Recovery Act of 2016 amended the definition of contributory negligence as follows:

> (a) The negligence of a pedestrian, bicyclist, or other non-motorized user of a public highway involved in a collision with a motor vehicle shall not bar the plaintiff's recovery in any civil action unless the plaintiff's negligence is:
>
> (1) A proximate cause of the plaintiff's injury; and
>
> (2) Greater than the aggregated total amount of negligence of all of the defendants that proximately caused the plaintiff's injury.

Id., D.C. Code Ann. ST § -3.

Thus, DC has introduced "modified" comparative negligence in cases involving collisions between motorized and non-motorized highway users only; contributory negligence continues to apply to all other negligence cases. Under the new law, for example, if the factfinder determines that plaintiff was 40% at fault in an accident, he or she would collect 60% of the determined verdict. If the plaintiff was found to be 60% at fault, he or she would collect nothing. ("Pure" comparative negligence would be a discount on the recovery for the actual percentage of plaintiff's negligence in causing the injury, without regard to whether it is more than the defendants' total percentage.)

A "non-motorized user" includes a person "using a skateboard, non-motorized scooter, Segway, tricycle, and other similar non-powered transportation devices." *Id.*

The law specifically states that it does not affect the doctrines of joint and several liability or of last clear chance.

Hopefully, this law is simply a recognition of DC's urban landscape and is not a harbinger of things to come in the District or Maryland, which are two of the five jurisdictions which recognize contributory negligence as a complete bar to a plaintiff's recovery.

Mary Malloy Dimaio is a partner at Crosswhite, Limbrick & Sinclair, LLP in Baltimore. She is a past president of MDC.

Expert Information Inquiries

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

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

(LACK OF GOOD FAITH CLAIMS) *Continued from page 7*

> 1. whether the insurer is obligated under the applicable policy to cover the underlying first-party claim;
>
> 2. the amount the insured was entitled to receive from the insurer under the applicable policy on the underlying covered first-party claim;
>
> 3. whether the insurer breached its obligation under the applicable policy to cover and pay the underlying covered first-party claim, as determined by the Administration;
>
> 4. whether an insurer that breached its obligation failed to act in good faith; and
>
> 5. the amount of damages, expenses, litigation costs, and interest, as applicable and as authorized under paragraph (2) of this subsection.

MD. CODE ANN., INS. § 27-1001(e)(1)(i).

Despite the prescribed deadlines, the MIA might not make a decision within the time frame set forth by statute. This failure to act may be because of an overbearing workload (the MIA is a busy agency), changes in personnel, or other constraints. It is important for an insurer's counsel to understand what happens if a decision on the civil complaint is not rendered by the MIA within the ninety-day period.

As indicated in Section 27-1001(e)(1)(ii), if the MIA does not make a decision on the Section 3-1701 complaint in a timely manner, then the insurer is deemed to have prevailed on the complaint. If the insured does not contest that deemed decision, then the decision is final and a civil action can be filed. An insured that wants to contest the deemed decision must do so between the ninetieth day and the 120 days after the civil complaint was filed. If no such request for hearing or appeal is made by the insured within that time, the decision in favor of the insurer is considered to be a final. After the decision is final, a civil action may be filed.

4. It is not clear whether a lack of good faith claim may be pursued where an insurer continues to investigate a claim.

Claims investigations often take a significant amount of time. This is particularly true if there are issues of coverage, scope, and valuation to be considered. Sometimes insureds (or their counsel) jump the gun and file a lack of good faith claim even though the claim is still being investigated. When an insured files a lack of good faith complaint prior to the time that a final determination on a claim is made, an insurer's counsel must determine whether or not the filing of such a claim is appropriate or filed prematurely.

Section 3-1701 defines "good faith" as "an informed judgment based on honesty and diligence supported by evidence the insurer knew or should have known at the time the insurer made a decision on a claim." The MIA considered the definition of the term decision in *D.E. v. State Farm Mutual Automobile Insurance Company*, Case No. 27-1001-11-00016 (2011) (Goldsmith, admin review), stating:

> The plain language of "decision of a claim" necessarily implies that a claimant has the right to bring a §27-1001 action when the insurer has made a final decision on a claim. An insurance company makes any number of decisions about a claim during the process of investigation and making a determination on a claim. The Maryland General Assembly did not intend to provide insureds with a right to bring an action each time an insurance company makes any type of decision regarding a claim, such as a request for prior medical records. Therefore, the Commissioner finds that "decision on a claim" refers to an insurance company's ultimate determination on a claim.

Under this interpretation of the statue, insureds cannot pursue a claim under §27-1001 if no final decision has been made on a claim. *Lanham Servs., Inc. v. Nationwide Prop. & Cas. Ins. Co.*, No. PWG-13-3294, 2014 WL 2772227 (D. Md. June 18, 2014), appears to present a contrary result because the Court in that case refused to grant a motion to dismiss where an insurer had not made a final decision on a claim.

Consequently, it is unclear whether or not a lack of good faith claim is maintainable where the claim is still being investigated.

5. There are filings that an insurer must make with the MIA if a lack of good faith civil claim is pursued in a civil case.

An insurer is expected to notify the MIA if a Section 3-1701 action is filed in any civil court. The type of notice depends on whether there has been a previous determination by the MIA on the civil complaint. *See* http://insurance.maryland.gov/Insurer/Documents/bulletins/16-30-New-Reporting-Instructions-and-forms-27-1001.pdf. An insurer that does not file the requisite notice can be fined and subject to other administrative action by the MIA.

If the civil action is filed after there has been a determination by the MIA under Section 27-1001 of the Insurance Article, an insurer must complete and file a Notice of Disposition form. This form must be filed within thirty days after the adjudication of the Section 3-1701 claim by an adjudicatory body. It is not clear whether this filing requirement would relate to non-final orders or only to final orders of a court. Because the form requires a listing of the disposition of each count in the complaint, it appears that only final decisions are subject to reporting. The notice must list the court, the type of coverage at issue, the prior dispositions of claims, the amount sought in the complaint, the determination made, the amounts of any awards, and whether any further proceedings (i.e. appeals) are to be filed. If the matter is appealed, another notice must be filed at every adjudicatory level.

There is also a notice requirement for civil complaints that were not filed initially with the MIA. The form that must be filed for these complaints is a Notice of Pending Complaint form. The information that is required to be included in such form is essentially the same as the Notice of Disposition form. However, the form also requires information as to why the Section 3-1701 complaint did not have to be initially filed with the MIA.

These notice requirements only apply to Section 3-1701 lack of good faith claims. If an insured files a common law bad faith claim, an insurer is not required to file a notice with the MIA.

6. Information on lack of good faith claims is reported to the Maryland general Assembly.

Pursuant to Section 27-1001(h), the MIA must report to the Maryland General Assembly various information regarding lack of good faith actions on a yearly basis. The information contained in the MIA's report includes the number of lack of good faith complaints filed, the administrative and judicial disposition of such complaints, and the number and type of regulatory enforcement actions taken by the MIA for unfair settlement practices under Section 27-303(9). The report for 2015 can be found at http://insurance.maryland.gov/Consumer/Appeals%20and%20Grievances%20Reports/2015-Absence-

Continued on page 19

(LACK OF GOOD FAITH CLAIMS) *Continued from page 15*

of-Good-Faith-Cases-Report.pdf. Insurers that have been found to have violated their statutory good faith obligations are specifically named and the specific actions that constitute "lack of good faith" are described. For example, in the 2015 report, an insurer's failure to investigate, an insurer's failure to notify the insured of information, and an insurer's actions that were in the avoidance of payment of a claim are specifically noted.

7. There is information on the MIA website regarding lack of good faith claims.

The MIA's website has a multitude of information that a lawyer may want to consider in a lack of good faith case. In addition to information contained in the annual reports to the Maryland General Assembly mentioned above, such reports include statistical information regarding the types of claims giving rise to Section 27-1001 complaints. There is also information pertaining to the legislative history of the statue and the MIA's interpretation of the statute. Such information can be useful in civil cases as the breadth and construction of the statutory language. The website also includes MIA decisions, some of which contain learned discussions of coverage issues.

An insurer's counsel should also be aware of information that an insured's counsel can learn from the MIA's website. Although somewhat difficult to find, the website contains all lack of good faith decisions rendered against each specific insurance company (Quick Links → Orders and Exams Search). These orders may describe processes used by an insurer, information regarding practices of particular claims adjusters, and coverage arguments that insurers have used to defend claim decisions. Defense counsel may want to review such decisions to prepare the defense of their lack of good faith case.

8. Decisions on lack of good faith claims trigger concerns that are more than just the decision on the claim itself.

For those who do not practice regularly in the field, it may be perplexing as to why so much time and effort is used to defend a lack of good faith claim. Adverse decisions on such claims can, however, trigger concerns regarding administrative investigations, class actions, and punitive damages awards.

The legislative history of the lack of good faith statute makes clear that the General Assembly was concerned about some insurance companies "disregarding" their legal obligation to adequately pay claims. Due to this concern, the legislature required the MIA to provide information to it regarding administrative action taken under the Unfair Claims Settlement Practices Act. Insurers would prefer to avoid administrative investigations, market conduct examinations, and enforcement actions that could conceivably be triggered by an adverse finding on Section 27-1001 complaints.

Adverse decisions could also conceivably prompt some creativeness by plaintiff attorneys. For example, a creative plaintiff's attorney could review an adverse Section 27-1001 decision and contemplate a class action. While such class actions might be difficult to pursue in Maryland under existing law, other states might allow such an action, particularly if the action at issue could be described as a pattern or practice of an insurer. Similarly, while punitive damages cannot be awarded on a Section 3-1701 claim, other state laws are more plaintiff-friendly. Some insurers are concerned that an adverse lack of good faith decisions could be used in civil cases outside of Maryland to support, in a similar case, an award of punitive damages.

Insurers are also concerned about the impact of an adverse decision on their brand. No insurer wants to be known as callous or unprofessional. In the digital world, an adverse decision can have an impact on an insurer's image by the almost instantaneous distribution of adverse determinations by twitter, blogs, and email.

9. In order to win a lack of good faith claim, the insured must show there was a breach of the insurance contract.

An insured will not be able to pursue a lack of good faith claim unless the insured can prove that there is a breach of the insurance contract. *Cecilia Schwaber Trust Two* at 488, n. 6; *All Class Const. LLC, Mut. Ben. Ins. Co.*, 3 F. Supp. 3d 409, 416 (2014). Thus, if an insurer correctly denies a claim, the insured cannot recover under Section 3-1701. This is contrary to what many insureds and their counsel believe. They wrongly believe that the law allows a lack of good faith claim to be pursued merely because the insured perceives that an adjuster has acted in a rude, disrespectful or unprofessional manner. While no insurer would ever want an adjuster acting in a manner that is not professional, the lack of good faith law does not apply to situations where a rude adjuster makes a correct claims decision.

10. There are numerous issues that remain unexplored concerning lack of good faith claims.

Maryland's lack of good faith law is approaching the ten-year mark. Despite this, there are many issues respecting lack of good faith that are relatively undeveloped. For example, how is a lack of good faith trial to be handled? How does the statute apply when an insured believes that the defense of a third party liability claim is being handled inappropriately? Are the coverage issues to be bifurcated from the lack of good faith claim, particularly since coverage must be found in order for such a claim to be pursued? What jury instructions are to be provided with respect to such claims? How does the final administrative decision impact the civil case, particularly considering issues of *res judicata* and collateral estoppel? These and other issues remain. All of this means those who practice in the field will remain busy.

Ms. Lambert has over 25 years of experience in handling complex commercial litigation and insurance matters. Ms. Lambert has worked on national class actions, significant litigation and regulatory matters for Fortune 500 companies. She has also assisted small and mid-sized companies and business executives with contract, real estate and commercial disputes that needed to be resolved quickly and efficiently. Ms. Lambert is best known as an attorney who knows the field of insurance. She has represented insurers, policyholders, and insurance producers in disputes both in court and before the Maryland Insurance Administration.

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(DR. SEUSS) *Continued from page 9*

statement, a contention with an adversary, anything that needs some committed time.

Find a way to be a mentor to the one down the line. There aren't enough cases being tried now to make good trial lawyers just happen. Take what you know and share it, because that will make you better, too, and will kick start your joy in trying cases again.

"Sometimes the questions are complicated and the answers are simple."

Trials have a lot of moving parts. You really do have to know all of the evidence, all of the contents of the exhibits, all of the deposition testimony. In the courtroom you need to engage your several sets of eyes and ears to follow what is happening, anticipate the next event, and object when necessary. The division of your attention is overwhelming.

All of that is why your preparation has to be complete and exacting. Start from the beginning — have a system. Mine is to have an old school outline of the trial, from preliminary matters, motions in limine, voir dire, opening, plaintiff witnesses, etc. Every single stage or element of the trial is on that outline and I check it off as I have completed its preparation. I then have a folder for every single stage, holding the transcripts, the anticipated exhibits, the notes, the research, whatever pertains to that issue. Some people use binders; some use a tablet or computer. Whatever system works for you is fine, as long as you have one.

Take that preparation system and then adapt it for the actual trial. What do you need to know when you arrive and get underway? Every aspect of the courtroom — research the judge, know her courtroom rules; know the layout and technology of the room; have a plan for what kind of jurors you want. Make sure your plan for trial includes your theory of defense, know what objections are likely to occur and have them ready to go in detail, to preserve your record. Prepare your witnesses deeply and more than once. Give them an outline of the questions you plan to ask and rehearse with them. The best way to simplify a complex effort like a trial is to leave nothing to chance or uncertainly. Factor in a minimum of twelve hours of preparation time for each day you anticipate the trial to take.

Horton Hears a Who

"This" cried the Mayor, "is your town's darkest hour! The time for all Whos who have blood that is red to come to the aid of their country!" he said. "We've got to make noises in greater amounts! So open your mouth, lad! For every voice counts."

You will have disagreements in trial with your clients, your witnesses, the other attorneys, and the court. Be brave and stand up for what you know is the right way to proceed. Don't get trapped into thinking "I have to appear before/represent/oppose this guy again, so I don't want to get him mad at me." Be willing to be yelled at if you are right. Develop the reputation that you know your case, know its value, and are confident in and will stand by your decisions.

Don't allow a judge or adversary to bully or shame you into not making objections or not fully stating the basis to support them. Do not presume the court will pick up on liberties taken or misrepresentations made by your adversary. If those affect your client and your case, you have a duty to raise them, politely and professionally. If you see it coming, head it off by raising the issue with the attorney first, so that you have taken every opportunity to keep the trial free of such distractions. Be proactive, not reactive.

Cat in the Hat

Look at me! Look at me! Look at me now! I can hold up the cup and the milk and the cake! I can hold up these books! And the fish on a rake! I can hold the toy ship and a little toy man! And look! With my tail I can hold a red fan! I can fan with the fan as I hop on the ball! But that is not all. Oh no. That is not all . . . That is what the cat said . . . Then he fell on his head!

As mentioned above, a critical aspect of being an excellent trial lawyer is involving others. Of course, a top notch paralegal can be a life saver in the preparation and organization, but you don't need to be the sole hero attorney. Find a way in the budget and the client relationship to add help. Learn when and how to delegate, by adding another attorney who can be assigned witnesses or motions.

When you are entering trial mode, foster an atmosphere around you where your staff, colleagues, and family can take the initiative, freeing you up to focus on the trial. In your other commitments, personal and professional, decide up front and communicate that you cannot be all things to all people while you are in trial. Become comfortable with the fact that while you are in trial, the trial comes first, second probably is all of the rest of your clients who are yammering for your attention, notwithstanding your unavailability, and then third and maybe even fourth if you have some other professional obligation, comes your family. For the period of time that you are in trial, they will probably survive. Their father/grandparents/caregiver will most likely do a pretty good job of making sure that they are fed, bathed and get to school on time. If you try to give one hundred percent to both putting your family first and your trial needs, neither one of them is going to be getting the real attention necessary.

Keep in mind — laundry will wait very patiently!

The Lorax

Unless someone like you cares a whole awful lot, nothing is going to get better. It's not.

The bemoaning of the demise of civility and professionalism in the trial bar surrounds us. Nowhere is the demand more important, though, than in the courtroom. There, it really is all about you with regard to how the trial will go.

The best and effective trial lawyers are on the high road all the time; they are professional all the time. Once you enter the courtroom, you and the adversarial counsel must put aside past differences and establish a congenial relationship. Notwithstanding a perhaps contentious pre-trial relationship, with an adversarial counsel or party who may have been unprofessional and unpleasant, or may be pursuing an utterly meritless case, to the vast expense of your client, the advent of trial changes everything. There are witnesses to be scheduled, exhibits to be discussed, and minor ordinary trial disagreements to be worked out. The fact is, since we have no control over the length of the plaintiff's case, it is most often the defense counsel who needs to ask for the accommodation of the plaintiff's attorney in putting on a defense witness out of turn, disrupting the plaintiff's flow of evidence and sometimes damaging it by inserting an unhelpful witness smack in the middle of the plaintiff's compelling presentation. There are going to have to be bargaining sessions over evidence. There is almost always something you want in that might not get in without the other side's agreement. You have to be willing to not only broach the topic, but to be offering something in return and to present the deal in an appealing and accommodating way. You may also find that both sides of the case are victimized by the court, who might have no respect (and even some contempt) for the schedules of the parties and their witnesses. As mutual casualties of an unpredictable schedule or unappeasable judge, you will be forced to work together as closely and congenially as possible to get through the matter.

Don't let the creeping casualness of business life in general seep into your professionalism. Be on time. All the time. No matter what.

Continued on page 23

(DR. SEUSS) *Continued from page 21*

Always give your client and your colleagues and the court the best — don't permit typographical and citation errors. Don't ever publicly blame your staff for errors — even when it is their fault — it is your work.

Remember that a great jury makes a world of difference. Take credit for putting on a good case, for making the right decision to try it in the first place, and for being lucky in getting a defensible one. Never lose sight of the fact that juries have made shockingly wrong or bad decisions. Don't take it personally when they do. Don't steal all their credit when they get it right, as they usually do — whether you won or lost.

"Today I shall behave, as if this is the day I will be remembered."

Never be unprofessional, or disrespectful of the court, parties, or witnesses. Be scrupulously honest — your word and your name are your stock in trade. Be accountable. Be the person in the room whom the judge and jury trusts absolutely, even if they don't necessarily agree with your position.

Don't gloat. When you have prevailed over a meritless case, an unprepared or careless lawyer, or an unpalatable party, you are a true professional, a true grownup, and a very good trial lawyer when you can immediately march right over, shake his hand, and wish him well.

Don't brand judges and don't brand lawyers. Chances are there will be another day with both. Learn from those interactions, but don't burn your bridges. Apologize immediately and ungrudgingly when you have crossed the line.

There you have it. Dr. Seuss's easy steps to trial lawyer greatness: 1) try new things; 2) be objective; 3) be creative; 4) work hard; 5) stay focused; 6) be good and do good.

Ms. Ward is a graduate of Georgetown University Law Center and is admitted in Maryland and the District of Columbia. As a principal of Ward & Herzog, LLC, a women-owned litigation firm, Ms. Ward's practice includes commercial litigation, professional liability, long term care, and insurance coverage and defense, employment, risk management, trademark, and commercial litigation. Ms. Ward has been an active leader of state and national professional organizations, including the Board of Directors of DRI and former President of Maryland Defense Counsel.

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(SCOTUS) *Continued from page 13*

political lobbying. In *Friedrichs v. California Teachers Association*, Rebecca Friedrichs, a California teacher, asked the Supreme Court to overturn its prior ruling in *Abood v. Detroit Board of Education*. The Supreme Court had previously ruled in Abood that states could require all public-sector employees represented by a public-employee union to pay an equal share of the bargaining costs related to wages, benefits, and working conditions.

The case was widely anticipated, because it presented the opportunity for the Court to rule broadly in a manner that would impact all unions representing public-sector employees. Instead, the Court was deadlocked in another 4-to-4 tie. This was an unexpected outcome in the wake of Justice Scalia's death. It was widely anticipated that the conservative justice would have voted to overturn Abood, marking a 5-to-4 victory for Friedrichs. Instead, the tie vote left the Ninth Circuit's decision upholding the California law in place.

3) Racial Preferences — *Fisher v. University of Texas at Austin*, 579 U.S. ___ (2016)

The Supreme Court considered the legitimacy of the University of Texas' race-conscious admissions program for the second time in *Fisher v. University of Texas at Austin*. Abigail Fisher brought a lawsuit against the University of Texas, claiming that she was denied admission because she is white. The University of Texas uses an admission program known as the ten (10%) percent plan — students in the top ten (10%) of their high school class are automatically admitted, which fills approximately seventy-five (75%) percent of the seats in each class. The remaining twenty-five (25%) percent of seats are filled through a "holistic" process that considers the applicant's entire record. Minority applicants are not admitted through the use of quotas, but an applicant's minority status may be considered as part of the "holistic" process.

In 2013, when the Supreme Court considered *Fisher* for the first time, it ruled that the Fifth Circuit had not applied a sufficiently strict level of scrutiny in judgment the University of Texas' race-conscious admissions policy. On remand, the University of Texas was required to demonstrate that its admissions program was "necessary" to further a "compelling" state interest. Under this new standard, the Fifth Circuit upheld the University of Texas' admissions program for a second time.

The Court voted 4-to-3 in favor of the University of Texas. Justice Kagan recused herself from the case because she had worked on it during her time as Solicitor General. Justices Sotomayor, Ginsburg, Breyer, and Kennedy were in the majority, while Justices Roberts, Alito, and Thomas were the dissenters. The vote in favor of the University of Texas was a surprise from Justice Kennedy who had never before voted to uphold an affirmative-action plan.

4) Abortion — *Whole Woman's Health v. Hellerstedt*, 579 U.S. ___ (2016)

In the first abortion rights case heard in nearly a decade, the Supreme Court considered a challenge to a Texas law requiring (1) abortions to be performed in ambulatory surgical centers, (2) by doctors with admitting privileges at nearby hospitals. The Texas law would have required more than half of Texas' forty (40) abortion clinics to close. Proponents of the Texas law argued that its purpose was not to place an "undue burden" on women's access to abortions — previously declared unconstitutional by the Supreme Court in *Planned Parenthood v. Casey* — but to ensure the abortions were conducted safely.

The Supreme Court voted 5-to-3 against the Texas law, holding that both provisions violated *Casey*'s prohibition on placing an "undue burden" on the ability to obtain an abortion. Writing for the majority, Justice Breyer held that neither provision of the Texas law "offers medical benefits sufficient to justify the burdens upon access that each imposes." Because each provision "places a substantial obstacle in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access, and each violates the Constitution." Justices Kennedy, Ginsburg, Sotomayor and Kagan joined in the majority. Justices Alito authored a dissenting opinion, which was joined by Justices Thomas and Roberts. Justice Thomas also authored his own dissent.

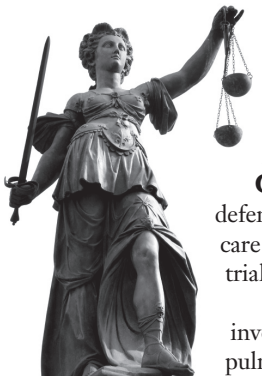
5) Religious Exemption — *Zubik v. Burwell*, 578 U.S. ___ (2016)

The Supreme Court heard a challenge to the Affordable Care Act's (ACA) contraceptive mandate for the second term in a row, previously having decided *Burwell v. Hobby Lobby Stores* in its 2014–2015 term. In the wake of *Hobby Lobby*, the Department of Health and Human Services ("HHS") developed an "accommodation" for religious institutions seeking to be exempt from the ACA's contraceptive mandate. The religious institution seeking an exemption was to file a request with HHS, and the government would ensure that the employees of the exempt institution continued to receive access to contraceptives by working with the religious institution's health insurer. In *Zubik v. Burwell*, a coalition of exempt religious institutions challenged the contraceptive mandate itself, arguing that the current system of applying for an accommodation did not sufficiently protect their religious liberty. The coalition argued that having to file for an accommodation "sufficiently burden[ed]" religious employers' free exercise of religion in violation of the Religious Freedom Restoration Act of 1993 (RFRA).

Yet again, the Supreme Court did not reach a decision on the merits in this highly-anticipated case. The Court announced in an unsigned decision on May 16, 2016, that it would not rule again on access to contraception. Instead, the Court remanded the cases before it to the respective United States Courts of Appeals for the Third, Fifth, Tenth, and D.C. Circuits, urging those courts to consider whether compromise between the parties was possible, consistent with the supplemental briefing submitted by the parties in the weeks after oral argument. Some commentators viewed this as a sign that the Court was trying to avoid another 4-to-4 split in the wake of Justice Scalia's passing.

Marisa A. Trasatti is a partner at Semmes, Bowen & Semmes in Baltimore, Maryland. She is also outside General Counsel of the California-based dermatological laser and light medical device company, Sciton, Inc. Her practice focuses primarily on civil litigation, with an emphasis on products liability litigation. She is president-elect of the Maryland Defense Counsel, president of the Maryland CLM chapter, Co-Chair of the FDCC's 2017 Corporate Counsel Symposium Program, and past chair of the FDCC's Drug, Device and Biotechnology Committee. She is a member of the Character Committee of the Court of Appeals of Maryland for the Sixth Appellate Circuit, as well as the Maryland Judicial Disabilities Commission.

Caroline E. Willsey joined Semmes, Bowen & Semmes as an associate in September 2016. Her practice focuses on civil litigation and pharmaceutical/medical device law.



Spotlights

Mary Alane Downs and Morgan Carlo Downs, P.A. recently secured two defense verdicts on behalf of an intensivist/critical care physician and a hand surgeon following jury trials in the Circuit Court for Baltimore City.

The first case was a wrongful death claim involving a patient who died from a massive pulmonary embolism. The main issue in this case whether or not it was appropriate to administer thrombolytic therapy (Alteplase/tPA). The plaintiffs argued that the standard of care required that the patient receive tPA due to her persistent respiratory distress and hemodynamic instability. The defense argued that tPA was not indicated during the relevant time period because the patient remained hemodynamically stable. After a five-day jury trial, the Court was forced to declare a mistrial when the jury could not reach a verdict after four days of deliberation. The case was re-tried in front of a jury in the Circuit Court for Baltimore City. After a five-day trial, the jury returned a verdict in favor of the defense in short order.

The second matter involved a claim against a hand surgeon. The plaintiff, who had accidently severed the tendons in two of his fingers with a box cutter at home, alleged that the surgeon negligently crossed the tendons during the flexor tendon repair surgery. The defense argued that the tendons were not crossed and that the plaintiff's limited range of motion was due to the development of adhesions, which is a known complication. After a four-day jury trial, the jury returned a verdict in favor of the defense within one hour.

MDC members, Tina Billiet and John Sly, successfully defended to verdict a general surgeon alleged to have negligently cut the common (and hepatic) duct during a laparoscopic cholecystectomy. The patient underwent subsequent failed stent placement and was eventually transferred to a tertiary care facility where she underwent a Roux-en-Y procedure to reconstruct her biliary tree. The matter was tried before the Honorable Leo Green in the Circuit Court for Prince George's County. No appeal was filed.

MDC — Providing Food and Thought

The Maryland Defense Counsel was honored to sponsor a **Lunch and Learn program** for approximately 90 participants at the **2016 Maryland Workers' Compensation Educational Association convention** held in Ocean City, Maryland. The program, entitled, "A Glimpse into the Other Side's Thinking" presented tips and tricks for early resolution of compensation cases. The presenting panel consisted of Matt Trollinger, Esq., Steven Schenker, Esq., Chris Vandergrift, MCRS, Barbara Zeronick, Esq. (certified mediator) and was moderated by Edward Goldsmith, Esq. and Maryland Workers' Compensation Commissioner Jeffrey T. Weinberg.

This distinguished panel provided insights into windows of opportunities to settle worker compensation cases early in the process with an emphasis as to what the opposing sides are thinking at crucial turning points. The discussions include issues from initial compensability to causal connection issues through the vocational rehabilitation process. Additionally, when, why, and how to involve both a mediator and the Subseqent Injury Fund were addressed.

Mary Malloy Dimaio of **Crosswhite, Limbrick & Sinclair, LLP** recently obtained a defense verdict after a three-day jury trial in the Circuit Court for Howard County. Plaintiff, a major property/casualty insurer and the two medical practices it insured, sought damages as a result of a freeze-burst event in a sprinkler system in the attic of a commercial building in Elkridge, Maryland. Mary successfully moved to exclude plaintiff's liability expert, a structural engineer, as unqualified to render opinions on the standard of care of a fire protection service provider and on the cause of the incident. Other key pieces of evidence were also excluded on motion as not having been provided in discovery, leaving the jury with little to work with in terms of liability or damages.

Goodell DeVries Attorneys Obtain Defense Verdict in Wrongful Death Case Against Prince George's County Orthopedic Surgeon

March 2017 — Goodell DeVries attorneys **K. Nichole Nesbitt** and **Meghan Hatfield Yanacek** obtained a defense verdict in the Circuit Court for Prince George's County for their clients, an orthopedic surgeon and her practice group in Prince George's County. The plaintiff was the family of a 39 year old patient who died several weeks after orthopedic surgery, allegedly from a blood clot that formed after the surgery and traveled to the patient's pulmonary system. The plaintiff alleged that the surgeon should have given the patient anticoagulation drugs following surgery to prevent problematic blood clots from forming, arguing that the patient had several risk factors for forming clots. The defense argued that anticoagulation drugs were not indicated for this patient and carried their own risks. After a six-day trial, the jury unanimously decided that the orthopedic surgeon acted appropriately and entered a verdict in favor of the defendants.

Goodell DeVries Appellate Team Secures Trial Court Win Upholding Maryland's 20% Rule on "Hired Gun" Experts

September 2016 — In a reported opinion, Maryland's Court of Special Appeals has applied Maryland's 20% Rule for expert witnesses in personal injury cases and affirmed summary judgment in favor of a prominent OB-GYN practice group. At trial in 2015, **Kelly Hughes Iverson** and **M. Peggy Chu** convinced the trial judge in the Circuit Court of Howard County that Plaintiff's expert, Dr. Lawrence S. Borow, devoted more than 20% of his professional time to activities that directly involve testimony in personal injury claims. By statute, Maryland limits such experts to 20% to prevent the use of "Hired Gun" professional witnesses in personal injury cases. Finding that Dr. Borow did not comply with the 20% Rule, the trial court entered judgment in all Defendants' favor without a trial.

For years, certain expert witnesses have dodged the 20% Rule by obfuscating, testifying inaccurately about their activities, and refusing to produce records that would substantiate (or refute) their signed certificates of compliance. Here, Dr. Borow, who has testified in hundreds of cases and earned millions of dollars in litigation as a paid medical-expert witness, fought discovery of how much professional time he spent in activities that directly involve testimony in

personal injury claims. He gave vague and inaccurate testimony and produced financial records only after a court order to do so. Even then, his relevant earnings records were incomplete, and he never produced his redacted office calendar, which would have shown how much, if any, medicine he actually practices.

On appeal, Plaintiff argued that the trial court had made a legal error. Assisted by Derek M. Stikeleather, Kelly Hughes Iverson showed the appellate court that the ruling excluding Dr. Borow was a proper exercise of discretion by a trial judge who was given a "messy and hotly disputed record." The three-judge panel affirmed that "the burden of persuasion never shifts in a medical malpractice case" and the plaintiff must carry this burden. It is not the defense's burden to disqualify the plaintiff's expert. Given Dr. Borow's resistance to basic discovery, serious gaps in the records he did produce, and his lack of credibility, the trial court "was well within its discretion to find that" Dr. Borow did not show that he complied with the 20% Rule.

MDC Celebrates 55th Birthday with a Very Special Anniversary Year!

The Association was founded in 1962 by a small group of attorneys to exchange ideas on common defense problems and keep abreast of changes in the law. At the first annual meeting the following officers were elected: President — John H. Mudd; Vice-President — M. King Hill, Jr.; Secretary — Edward J. Thompson; and Treasurer — Raymond A. Richards. Four standing committees were created: *Program and Education; Legislation; Public Relations; and Membership*.

In our inaugural year the organization had approximately 30 members, and most were associated with the law firms Whiteford, Taylor; Smith, Somerville & Case; Semmes, Bowen and Semmes; Ober, Grimes; O'Doherty, Gallagher and Nead; Rollins, Smalkin; and Lord, Whip. The membership fee was $10.

In 1983 the Association published the inaugural issue of *Defense Line* and formed an Appellate Practice Committee. In 1997, the Maryland Association of Defense Trial Counsel officially changed its name to Maryland Defense Counsel, Inc.

MDC has had a long commitment to projects and programs serving the bench and bar. For example, we worked with the judiciary in ASTAR — the Advanced Science and Technology Adjudication Resources project and hosted a symposium entitled *Great Strides, Great Struggles: The Continuing Case for Diversity 70 Years after Murray 2008*.

In recent years, the Maryland State Bar Association has twice awarded MDC the *Best Service to the Bar Award* for our annual Trial Academy, a full day devoted to trials and the skills needed to win them. A full history is available on the website at **www.mddefensecounsel.org/history.html**.

In this Anniversary Year, a video with interviews of MDC Past Presidents and more is in the works, thanks to the generous support of MDC law firms and DRI. Throughout the year, we will be recognizing the people who have made the organization flourish, at the Trial Academy on April 24, the ever popular Crab Feast on June 7 and the Past Presidents Reception in the Fall. For a full list of Past Presidents go to **www.mddefensecounsel.org/pastpres_names.html**.

The many law firms that have contributed by becoming Anniversary Sponsors are listed at **www.mddefensecounsel.org/index.html**. Contact Kathleen Shemer at **kshemer@mddefensecounsel.org** for more information as it is not too late to sponsor. Please join us in supporting Maryland Defense Counsel.

Happy 55th Anniversary!

Maryland Defense Counsel, Inc. Presents

Annual Meeting and Crab Feast

June 7, 2017
5:30 p.m. – 7:30 p.m.

Nick's Fish House
2600 Insulator Drive
Baltimore MD 21230

For More Information:

Kathleen Shemer
(410) 560-3895
kshemer@mddefensecounsel.org

Learn more at www.mddefensecounsel.org