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Insurance Law in
Maryland, Virginia and
the District of Columbia**

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Recent Developments in Insurance Law in Maryland, Virginia and the District of Columbia

By JOSEPH F. CUNNINGHAM

Much substantive insurance law has been made of late by the appellate courts in Maryland, Virginia and the District of Columbia, observes Mr. Cunningham. He selects several noteworthy cases to illustrate his contention that the truly remarkable ferment of intellectual and decisional activity in the higher courts in these jurisdictions gives promise of ultimate judicial preeminence of one or more of these courts.

CASE LAW EVOLUTION in the appellate courts of Maryland, Virginia and the District of Columbia pertaining to certain areas of insurance law has proceeded at a rapid, indeed accelerated, pace in the past few years. A practitioner in this area is tempted to conclude, in fact, that recent particular cases of note will undoubtedly shape and affect the course of insurance law in these three jurisdictions, and elsewhere, for decades to come. Thus, the aim of this article is to identify and discuss those individual decisions that would appear to posit new directions in the substantive body of case law guiding counsel, members of the industry, and, to some extent, the American consumer who, little noticed, spends literally billions of dollars each year in insurance protection. The selection of reported decisions in Maryland, Virginia and the District of Columbia reflects the author's locus of practice and the anticipated interest of most readers. Yet, the truly remarkable ferment of intellectual and decisional activity in the higher courts of both states and the District of Columbia, especially when compared with the generally unremarkable

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and relatively infrequent insurance law opinions that have gone before, suggests a potential growth and civil law reactivity in this area so basic to much commercial jurisprudence. It gives promise of ultimate preeminence of one or more of these courts to perhaps warrant comparison with the New York Court of Appeals of the 1920's under Cardozo.¹ Should the reader find this assertion too grand, a review of the following topics and instrumental precedents may challenge such reaction.

DUTY TO DEFEND

The leading case in the United States in terms of a carrier's broad-based duty to defend an insured is *Brohawn v. Transamerica Insurance Company*,² which has been almost incredibly neglected by most commentators. The Maryland Court of Appeals there rejected the insurer's contention that allegations in the plaintiff's pleading, which alleged certain intentional conduct by the insured (assault) clearly outside the terms of policy coverage, sufficed to preclude an otherwise required defense. The court pointed out that the obligation to defend is usually

determined by the allegations of the suit, regardless of its merit. Consequently, an existing claim of negligent conduct would invoke such obligation irrespective of other excluded claims. To that extent, the case presents no particular departure from the generally accepted principle that a policy of insurance controls the duties and obligations of the parties to it.³ However, the court went on to state, in response to the carrier's assertion that a conflict of interest existed between insurer and insured in cases where the allegations of a pleading included claims arguably within and without the ambit of policy language, that the answer was not to eliminate the contractual duty to defend. Rather, the insured has to be informed of the nature of the conflict and given the right to accept an independent attorney to be selected either by the insurer or the insured and, most importantly, who is to be paid by the insurer. Thus, the rule⁴ is established in Maryland that, when a potential conflict as to the existence of policy coverage arises, the carrier and its counsel are duty bound to advise the insured and retain separate counsel.

¹ As merely some examples of this preeminence among many, see *McAnaney v. Newark Fire Insurance Co.*, 247 NY 176, 159 NE 902 (1928), and *Rushing v. Commercial Casualty Co.*, 251 NY 302, 167 NE 450 (1929).
² 1974-1976 FIRE AND CASUALTY CASES 209, 276 Md. 396, 347 A2d 842 (1975).

To this, the court broadly added the criterion for determining whether a defense was required in any litigation as follows:

"... Even if a tort plaintiff does not allege facts which clearly bring the claim within or without the policy coverage, the insurer still must defend if there is a *potentiality* that the claim could be covered by the policy." (Citations omitted.)

The result of this double-barreled decision on behalf of the insured—to give this class what the court called "litigation insurance"—has predictably and properly been the diminution in coverage denials in Maryland based upon any but the most absolute allegations of exclusively uninsured conduct. And, incidentally, the litigation-employment of insurance counsel has correspondingly increased.

The rule is different and far from as broad in the District of Columbia. The *Brohawn* court cited *Boyle v. National Casualty Company*⁵ for the proposition that the obligation of a liability insurer to defend an action against its insured, as distinguished from its obligation to pay a judgment in such action, is determined by the allegations of the complaint against the insured and is not affected by subsequently developed facts, including the result of trial. But in *Boyle*, the D. C. Municipal Court of Appeals found no duty to defend at all when the allegation of assault by the insured, clearly not a covered occurrence, was not coupled with assertions of potentially covered conduct under the policy—and regardless of the in-

sured's ultimately successful defense of the claim at trial.

Recently, the *Boyle* principle was taken much further in an unexpected direction. In *S. Freedman & Sons, Inc. v. Hartford Fire Insurance Company*,⁶ a case involving allegations arguably both within and without the date (but not the terms) of policy coverage, the D. C. Court of Appeals stated:

"The distinction between alleged and proven facts requires that the duty to defend be larger than the duty to indemnify, but there is nothing here that requires that the duty to defend be larger than the scope of the policy. . . . Hartford promised to defend neither 'all suits' nor all 'groundless, false, or fraudulent' suits, but only suits arising on account of personal injuries listed in the policy."

Finding the personal injuries listed in the referenced policy to have occurred prior to policy inception, the court absolved Hartford of any obligation to defend. Yet in so concluding, the court was forced to find the claim of malicious prosecution, which under District of Columbia law only arose at a date *after* policy initiation, to be so intimately related to the tort of false arrest, allegedly occurring prior to the policy date, that the duty to defend failed to extend to either. The result and the analysis utilized in reaching it are almost breathtaking in the contrary emphasis placed on strict factual and policy construction when compared with *Brohawn* and Maryland law, neither of which, surprisingly, were even adverted to by the court in its decision.⁷

⁵ Cited above at footnote 3.
⁶ 1977-1979 FIRE AND CASUALTY CASES 1329, 396 A2d 195 (1978).

⁷ The court, however, did point out that the policy language, contrary to *Boyle*, did not require the carrier to defend "all suits" or all "groundless, false, or fraudulent" suits.

Virginia decisions of late place one foot in either camp. In *Travelers Insurance Company v. Obenshain*,⁸ the Virginia Supreme Court held that there was no carrier duty to defend when the motion for judgment⁹ is granted, and only, alleged an intentional shooting incident), which was obviously excluded by the policy from coverage. Such holding seems clearly correct, and the case is consistent with other earlier exclusions rulings in many jurisdictions. And even when a carrier undertakes the defense of a claim of intentional wrongdoing by the insured, protecting itself from judgment by the plaintiff to allege policy-covered conduct, an explicit reservation of rights precludes an insured's claim of waiver and/or estoppel as a result of such defense.¹⁰

Yet, a very different result was reached by the U. S. Court of Appeals the Fourth Circuit in reversing the S. District Court for the Eastern District of Virginia in *Alexandria in Donnelly v. Transportation Insurance Company*.¹¹ There, the plaintiff attorney brought suit under his professional liability insurance policy for the costs of his defense and settlement of claims against him involving misrepresentation, unauthorized sale of client property, and improper retention of client funds. Interestingly, the appellate court, by agreement of the parties, applied the law of the District of Columbia, beginning with *Boyle v. National Casualty Company*, *supra*, and concluded that the duty to defend was

measured solely by the allegations of the complaint,¹² which, in this case, required the carrier to act as it had. The policy excluded coverage of a "dishonest, fraudulent, criminal or malicious act," and the carrier defended by asserting that the insured was clearly alleged to have breached his fiduciary duty to his client and, thus, the conduct complained of fit within the policy exclusion. The court disagreed, intimating that breach of fiduciary duty by an attorney providing professional services might not necessarily fit the exclusion and that the attorney's alleged conduct regarding the sale of the client's property and retention of certain funds was "not clearly beyond the coverage of the policy," as the test was enunciated in *Boyle*. So long as the complaint alleged the defendant's liability in terms that are "potentially or arguably covered by the policy, the insured is entitled to a defense."

While the criterion laid down by the U. S. Court of Appeals for the Fourth District in *Donnelly* in interpreting and applying District of Columbia law is broadly liberal and sensibly correct, it seems clearly at odds with the rationale of the District's highest court in *S. Freedman & Sons, Inc. v. Hartford Fire Insurance Company, supra*.¹³ More significantly, from the perspective of the general principles guiding the Maryland and Virginia and, paradoxically, to some uncertain extent, the District of Columbia courts,

¹² A criterion the court suggested as of doubtful assistance in view of the increasing vagaries of notice pleading.

¹³ The Fourth Circuit pointed out that the professional liability policy in question (as in the *Freedman* case) made no reference to any obligation to defend or not defend dishonest, fraudulent, criminal or malicious acts—but the court saw this omission as having favorable rather than unfavorable implications for the insured.

the Fourth Circuit nicely summarized those principles, manifestly favorable to insureds, that it concluded control judicial determination of a carrier's duty to defend:

"... First, whether or not there is a duty to defend is usually determined from the pleadings in a case, but whether there is a duty to pay a judgment or to indemnify an assured who has paid usually cannot be determined until the evidence has been heard. Second, with the great latitude with which pleadings are construed today, and the great latitude of amendment, an insured's right to a defense should not be foreclosed unless such a result is inescapably necessary. Third, if part of a plaintiff's claims against an insured fall within the coverage of a policy and part do not, the company should defend all, although it might eventually be required to pay only some, claims. Fourth, while there may be some policy considerations which preclude protecting a wrongdoer from having to pay for an intentional injury he has caused, those same policy considerations do not foreclose the defense of an accused party who has not yet been found to be guilty...."

DUTY TO PAY

We have seen the general proclivity of many courts to view an insurance company's duty to defend under a variety of policies as extremely broad, with the Maryland Court of Appeals decision in *Brohawn v. Transamerica Insurance Company, supra*, as perhaps on the frontier of expanding the carrier's responsibilities in this area. Conversely, the same court, in *Aragona v. St. Paul Fire and Marine Insurance Company*,¹⁴ issued another seminal opinion regarding the obligation of the insurance company to pay

an insured's loss, with distinctly non-expansive implications. As in the *Donnelly* case, *Aragona* involved a lawyer's malpractice insurance policy, sometimes known as an errors and omissions (E&O) policy. The insured practiced law in a partnership with another attorney who, unfortunately, and without the insured's knowledge, misappropriated client funds. The plaintiff's clients, a husband and wife, sued the insured, alleging vicarious liability for his partner's dishonesty and negligence in failing to inspect partnership records and discover the misappropriation. The policy typically excluded from coverage dishonest, fraudulent, criminal or malicious acts or omissions of the insured, any partner or employee. The plaintiffs recovered against the insured on all counts and sought satisfaction of their judgment against the insured's carrier, who invoked the exculpatory clause and refused to pay. In the ensuing declaratory judgment action, the trial court held the insured's negligent conduct, as found by the jury, to be the primary cause of the plaintiffs' loss, and thus within the ambit of policy coverage.

The Court of Special Appeals reversed, finding no ambiguity in the policy language and concluding that the plaintiffs' loss was due to the dishonest acts of the partner, which were clearly excluded by the policy. The negligence of the insured, although an alternate ground for liability, did not bring the policy into force on these facts when they likewise clearly presented evidence of specifically excluded conduct.

The Court of Appeals, speaking through Chief Judge Murphy, unanimously affirmed, rejecting the theory advanced by the claimants that when

¹⁴ 1977-1979 FIRE AND CASUALTY CASES 79, 281 Md. 371, 378 A2d 1346 (1977).

is more than one ground of liability and one ground is covered by the subject policy, while others may be specifically excluded, the insurer is obligated to pay the loss. The court gave short shrift to this narrowing of the terms and conditions and, quoting Learned Hand, indicated that if the intentions of the parties to the insurance contract required an applicable exclusionary clause, regardless of equally applicable coverage provisions, the exclusionary provision prevailed. Admittedly, some discussion was also addressed to the proximate cause of the loss theory various cited cases and the pres- dispute as being attributable to excluded rather than policy in- cluded conduct. Yet such a subjective tuation provides slight guidance to er courts when faced with this problem, and its evanescent nature, an articulated, simply points up actual difficulty in prospective ap- plication. Indeed, the Chief Judge, r a rather exhaustive review of the proximate cause cases, which gener- support exclusion, and after con- sulting that the defalcating partner's duct directly caused the present mants' loss, nonetheless sought er intellectual ground to conclude matter; he stated:

... the terms of the policy de- termine the reach and extent of its erage. In this connection, prin- ces of causation will not be applied defeat the intent of the parties, manifested in the insurance con- t; indeed, as our predecessors ed in *Automobile Ins. Co. v. Thomas*, s of proximate causation afford e aid in determining whether a icular loss was intended to be nder the insurance policy. think the parties intended, from language used in the insurance

contract construed as a whole, that any loss which resulted from any dishonest or criminal act of the insured's partner was excluded from coverage, and that the exclusionary clause of the policy was all-encompassing in this respect. Apropos of the instant case is the Court's statement in *Par- ker v. St. Farm Mut. Auto. Ins.*, 263 Md. 206, 216, 282 A.2d 503 (1971), in commenting on exclusionary clauses in insurance contracts, that 'the in- surance carrier contracted to under- write a specific coverage and should not subsequently be expected to as- sume liability for a risk which it expressly excluded,' it being clear that '[t]he law generally will not per- mit by indirection or circuitry what it will not allow directly.'

The decision is legally well reasoned and, in the guise of ostensibly ex- tending the dubious proximate cause doctrine as applied to variegated fact situations involving insurance policy coverage, extends a literal contractual reading of policy language and ex- clusionary provisions to Maryland law. While the apparent strictness of the *Aragona* rule governing a car- rier's duty to pay contrasts markedly with the same court's liberality in *Brohaven* in respect to other policy obligations, there is patently no in- consistency in the well-thought-out bases for either opinion.

It is tempting in comparing certain passages in *Aragona* with the analysis applied by the D. C. Court of Ap- peals in *S. Freedman & Sons, Inc. v. Hartford Fire Insurance Co.*, supra, to conclude that the D. C. court simply confused general insurance law con- cepts governing the duty to pay with those involving the insurer's obliga- tion to defend. Yet no such apparent confusion can ever be suggested in the lucid *International Brotherhood of Painters and Allied Trades v. Hartford*

*Accident and Indemnity Company.*¹⁵ There, Judge Gallagher, speaking for the court, reversed a trial court grant of summary judgment in favor of the carrier based upon the claimed ex- press terms and conditions of the policy—specifically, a cancellation pro- vision, invoked by the insurer, permit- ting it to change premiums unilaterally on each annual anniversary date of the policy. The appellant union relied upon an alleged oral representation of a five-year fixed premium guarantee significantly included in written pro- visions in the specimen policies sub- mitted to the union by the insurer but omitted from the actual policy ultimately issued to it. Additionally, the carrier seemingly admitted in its brief that the premium guarantee in fact had been agreed to by the par- ties. The court, therefore, concluded the plain meaning of the policy lan- guage (controlling in the *Aragona* case) under the existing facts pre- sented could not be determined from the face of the document. The court said:

"We are aware that we must not seek out ambiguities when the lan- guage has just one clear meaning. *Belland v. American Automobile Insur- ance Co.*, D. C. Mun. App., 101 A2d 517, 518 (1953), and that when the meaning of a provision is unambig- uous 'its construction is a matter of law for the court. . . .' *Rich v. Sills*, D. C. App., 130 A2d 920, 922 (1957); *United Services Life Insurance Co. v. Ringsdorf*, D. C. App., 91 A2d 717, 719 (1952). However, giving to the phrase '5 year guaranteed rate' the plain meaning which common speech imports, *Dryer v. Liberty Mu- tual Insurance Co.*, D. C. App., 248 A2d 504, 505 (1968), we think it reasonably susceptible of different con- structions when considered in con-

junction with the broad cancellation provision. Consequently, there is am- biguity. See *United Services Life In- surance Co. v. Ringsdorf*, supra at 719. The question may arise as to what bene- fit inures to an insured who specifi- cally bargains for a five-year premium rate when the insurer may cancel at any time and for any reason—includ- ing the failure of the insured to agree to a substantial premium rate increase after less than two years, which is what happened here. The Union ar- gues that Hartford is only authorized to cancel, pursuant to the contract, for nonpayment of premiums, or simi- lar breaches of the contract's provi- sions. Hartford argues, on the other hand, that the guarantee clause only refers to the necessity for the insurer to secure the insured's consent to changes in the premium rate, rather than the insurer being able to change the rate unilaterally. Hartford's ex- planation of the meaning of the guar- antee clause is not apparent from the plain language in the policy. Thus, Hartford, too, is stating in necessary effect that the meaning of the clause is ambiguous and must be explained by extrinsic evidence.

"When confronted with an inte- grated insurance agreement which contains ambiguous terms, the court must examine and interpret the policy 'through the eyes of the reasonable purchaser.' *1901 Wyoming Avenue Co- operative Ass'n v. Lee*, D. C. App., 345 A2d 456, 461 & n.9 (1975), cit- ing *Messina v. Mutual Benefit Health and Accident Association*, 228 F.Supp. 865, 868 (D. D. C. 1964), aff'd, 121 U. S. App. D. C. 328, 350 F2d 458 (1965), cert. denied, 383 U. S. 908 (1966). In interpreting ambiguous provisions, there must be resort to parol evidence and an exploration of extrinsic circumstances. *Rich v. Sills*,

¹⁵388 A2d 36 (D. C. Ct. App. 1978).

tempting to enforce asserted policy obligations of the insurer.¹⁶

However, and as difficult as it may be for some to comprehend the reverse of this proposition, substantial injustice may likewise be visited on the insurer by an insured attempting to take advantage of policy coverage in circumstances wherein the equities suggest a contrary result. Such a case is *Aetna Casualty and Surety Company v. Harris*,¹⁷ involving an insured who had been sent a renewal policy in the normal course of business by the carrier's agent, but who neither requested the policy, paid any premium thereon, nor even explained her failure to pay. The reason, of course, was apparent on the record in that the insured had earlier taken out duplicate fire, workmen's compensation and general liability coverage with another carrier. Yet, after suffering a fire loss on the subject property, the insured filed a claim with both carriers and sought to avail herself of the additional fire policy coverage afforded by the Aetna policy. A jury agreed with her claim to entitlement and awarded a verdict in excess of \$33,000, reflecting the proportion of the Aetna coverage to the total fire insurance in force. The plaintiff, however, never filed a proof of loss as required by the Aetna policy, claiming none was ever provided her by Aetna.¹⁸ She nonetheless admitted to the carrier that she was aware that an "itemization" of the loss was required of her and, although she promised to provide it, she never did so. Such extracontractual admission by the otherwise shrewd insured was too much for the Virginia Supreme Court, which reversed and entered final

¹⁶ She did file a proof of loss with the other carrier, who settled her claim for \$75,000 (the face value of the applicable policy) without being advised by the insured that other coverage existed.

judgment for Aetna. Assuming but not deciding that the unrequested, unpaid Aetna policy was in force, the court found sufficient extraneous evidence to establish as a matter of law that there had been a failure to comply with the policy's terms and conditions. It found the fling by the insured of a completed and timely proof of loss as a condition precedent to coverage. And the insured's acknowledgment of this requirement shortly after the fire, as well as other conduct, indicated an awareness by her of such an obligation, which was never fulfilled.

The *Harris* case is interesting in the present context in that it reflects the court's literal reading of an exclusionary policy clause, as in *Aragona*. At the same time and by the very nature of the dispute, it literally mandates the court, as in the *International Brotherhood of Painters* case, to resort to extrinsic evidence in determining fairly the rights and liabilities of the parties as they affect the duty to pay.

THE AGENT'S DUTY

As indicated above, the Maryland Court of Appeals has established illuminating precedents in the immediate past in the two topic areas so far discussed. But as regards the constantly evolving duties and obligations of the middleman to most domestic and commercial insurance transactions—the insured's broker and the carrier's agent, frequently one and the same individual or entity—the D. C. Court of Appeals has recently set the pace.

Before reviewing two instances of such progress in the law of insurance agency, it is worth noting an illustrative case from Virginia that reflects the frequently pivotal role of the agent/

¹⁷ 218 Va. 59, 235 SE2d 450 (1977).

¹⁸ The broker also testified that the agent affirmed coverage to be in effect immediately, as did a member of the plaintiff's family. The agent denied such a promise was ever made.

broker in dealing with the insured. In *Dickerson v. Conklin*,¹⁹ the plaintiff and the defendant agent met for the first time, along with the plaintiff's broker, at the plaintiff's home to discuss obtaining a performance bond necessary to plaintiff's business. The question of automobile insurance coverage came up, and the agent, in response to the plaintiff's request for immediate coverage, promised to put together a proposal and return same with a bill for premiums due. While the plaintiff asserted that the agent thrice assured him auto insurance was bound as of that date,²⁰ it was admitted that no one discussed the carrier involved, the period of coverage, the types of coverage, the listed drivers, the amount of the premium payments, and when they were due. No application form or other document was completed or even produced. After a subsequent accident within weeks, suit was brought on an alleged oral contract of auto insurance by the plaintiff, contending that the agent had become his insurer by the promise of immediate coverage made at their single meeting. Judgment in favor of the plaintiff was reversed by the Virginia Supreme Court who, in entering final judgment for the agent, indicated that an oral insurance contract had sufficient vitality in Virginia to be enforceable in law or in equity. But it found the trial court's findings of coverage clearly wrong and without evidence to support it in the absence of the essential elements of an insurance agreement. Referring to the Virginia Insurance Code, Section 38.1-333, the court pointed out that no policy can exist without enumerated elements, including the parties' names, the subject of the insurance, the risks insured against, the time coverage begins, the period of

¹⁹ 218 Va. 59, 235 SE2d 450 (1977).
²⁰ The broker also testified that the agent affirmed coverage to be in effect immediately, as did a member of the plaintiff's family. The agent denied such a promise was ever made.

verage, the premium to be charged, and various conditions of coverage. Where the alleged oral contract of insurance admittedly lacked most of those elements, evidencing as a matter of law no meeting of the minds of plaintiff and the agent. And in words arguably applicable in every jurisdiction, whether guided by statutory insurance policy requirements or not, Justice Harrison stated:

"For affirmation in this case to be meaningful and to provide the parties with an enforceable contract, we would have to supply virtually every element of a liability insurance contract other than possibly the maximum personal injury limits, and this the Court is without authority to do."

As a protective judicial shield against the obvious danger of falsely made claims of an agent's binding oral contracts of insurance immediate to a loss, the *Conklin* case states a wise rule.²¹

An agent, however, may well promise particular coverage, as occurred in *National Indemnity Company v. Executive Limousine Service, Inc.*,²² where the insured's broker sought comprehensive insurance coverage for commercial vehicles that the agent agreed to furnish. The policy ultimately issued by the defendant carrier upon application completed by the agent included the desired coverage, and neither the broker nor the insured noticed this omission. After a loss, the carrier denied coverage; oddly, the insured sued only his broker, who

²¹ The rule stated, of course, is not unique to Virginia and has been adopted, if not in as instructive detail, in states where no statutory guide exists. Cf. *Boston Camping Distributor Co. v. Lumbermen's Mutual Casualty Co.*, 1972-1974 FIRE AND CASUALTY CASES 141, 282 NE2d 374 (Mass. 1972).

²² 105 WashLRept 2197 (D. C. Ct. App. 1977).

²³ The agent was never made a party.

readily admitted both his own and his client's intention to obtain the desired insurance. The trial court concluded the respective duties of the insured and the broker varied as to their mutual failure to check the policy received—the court found no contributory negligence by plaintiff but negligence as to the broker in not acquainting himself with the policy's variance from the intended coverage and then advising his client. It then awarded full indemnification over to the broker from the third-party defendant carrier²³ whose agent had promised the requisite insurance on behalf of his principal. It was undisputed that the agent had the authority to bind the desired coverage and his principal was disclosed to all the parties.

The D. C. Court of Appeals affirmed, *per curiam*, rejecting the insurer's contention, *inter alia*, that the terms and conditions of its policy governed, in that the policy contained a material variance from the understanding earlier arrived at by the parties as to broader coverage. Parol evidence was therefore admissible to vary the terms of the insurance contract in order that the actual understanding of the parties could be discovered. And then, in a precedent-setting step, the court affirmed the insurance broker's right to indemnification.²⁴ It determined that the agent's failure to provide the broker a copy of the requested application and failure to obtain the promised coverage was primary negligence attributable to the carrier. It then concluded that the carrier's mak-

²⁴ It is worth noting, however, that insurance agents have been awarded complete attorneys' fees when the insurance carrier, by its negligent conduct, fails to properly provide and/or honor the desired and expected coverage promised by the agent, which resulted in the suit. *Emersons, Ltd. v. Mar Wolman Co.*, 1974-1976 FIRE AND CASUALTY CASES 596, 388 F.Supp 729 (DC D. of C. 1975).

ing whole the negligent broker was proper in that the trusting broker's conduct was comparatively less onerous than that of the carrier through its agent. Citing District of Columbia cases solidly upholding the obligation of one tortfeasor to another when the defendants are not *in pari delicto*, the court did not advert to any insurance law precedents. There are none, and this case, in making new law, creates a proper, heretofore unavailable remedy for a substantial class of small businessmen in dealing with the larger corporate entity and product supplier—the insurance company.

Brokers alone are not so favored in the District of Columbia. In *Max Holtzman, Inc. v. K & T Company, Inc.*,²⁵ the Court of Appeals extended further marketplace protection to agents in their dealings with carriers. There, Holtzman, acting as both broker and agent, bound jewelry coverage (watches) for his retailer client on behalf of his carrier principal. The policy ordered mistakenly excluded watches, and neither Holtzman nor the insured noticed the omission. Again, under the facts of the case, the failure to read the policy was not fatal to the plaintiff's case; the court found the policy, which both insured and agent admittedly intended to be in force, required application of the contract reformation doctrine (also a first in District of Columbia insurance law). The carrier, not unexpectedly, cross-claimed against its agent for orally binding coverage not requested nor contained in the issued policy. Significantly, it was undisputed that Holtzman could have bound and the carrier provided insurance for watches.

²⁵ 1976-1977 FIRE AND CASUALTY CASES 1317, 375 A2d 510 (D. C. Ct. App. 1977).

²⁶ The claim by the carrier against the agent was remanded for determination as to any breach of duty by the agent and, if found, the difference in premiums between

In another application of well-tested tort principles, the court indicated that the carrier could only recover from its agent, if at all, those damages proximately caused by the agent's negligence. Since the carrier would have issued the desired insurance if requested, and then paid the loss under the broader coverage in force, it could not point to any conduct of the agent exposing it to additional unacceptable risk—except the difference in premium between the policy ordered and the policy which might have been ordered.²⁶ Stated another way, the Court of Appeals adopted for the District of Columbia a measure of recoverable damages in litigation involving a carrier against its authorized agent, limited to extraneous premium costs and not the amount of the plaintiff's loss. The rule is equitable, protective of an economically disadvantaged class in such disputes and the minority rule in the United States. Its adoption shows a judicial sophistication as to insurance transactions worth following elsewhere.

INSURER'S DUTY— PUNITIVE DAMAGES

The majority rule in the United States in regard to insurance coverage extending to perfected claims of punitive or exemplary damages is that an insured generally cannot indemnify himself against the consequences of his wanton, malicious, fraudulent or intentional misconduct. Simply put, the idea of a wrongdoer contracting beforehand with a carrier to avoid the monetary costs of his subsequent improper conduct is considered to be against public policy.²⁷ The policy sought and the one provided the carrier dropped the matter.

²⁷ See, for example, *City Products Corp. v. Globe Indemnity Co.*, 88 CalApp3d 31, 15 CalRptr 494 (1979), and cases discussed therein.

businessman could be crippled or virtually wiped out by an assessment of exemplary damages in a malicious prosecution action where he proceeded with what he regarded as good reason to prosecute a shoplifter but the courts found that he lacked probable cause for such pursuit. The same would be true of the small businessman who is angered at being given a bad check for a past due account and then proceeds to swear out a warrant for the arrest of that individual, not being cognizant of the fact that to constitute a violation of our statute there must be a present consideration.

... It is not an adequate answer to such concerns to say that the trier of fact assessing such damages has before it the net worth of the offending party, because insofar as many small business people are concerned that net worth will to a large degree be composed of their home and the stock in trade or other assets of their business. We suspect that in such situations the common sense of the entire community would not construe such insurance contracts to be against public policy. In fact, we strongly suspect that the common sense of the community as a whole would expect a judgment including exemplary damages to be satisfied through the insurance policies for which such small business people had paid. It would be outraged and have substantial difficulty in comprehending reasons for a holding to the contrary."

Concluding that the payment of punitive damages by a carrier would not eliminate the deterrence concept relied upon by insurers in attempting to place this burden on the insured, the court turned at last to the policy. Absent a specific exclusion of exem-

plary damage awards therein, the court inferred that the premium rate for such coverage had already been calculated and paid by the insured. It then ruled the insurer was obligated to pay both the compensatory and punitive damages awarded against the insured bank.

It is apparent, if one merely reads the majority and dissenting opinions in the *St. Mary's* case, that the punitive damage issue is far from resolved in Maryland or elsewhere. Indeed, commentators are only now beginning to address it.²⁹ But besides a truly well-reasoned exposition of the firmly enunciated opposing points of view and the limited holding, the case raises many questions. Will the insertion in a policy of a punitive damage exclusionary clause end the debate? Does a personal liability policy aimed at risks normally involving the threat of punitive damage claims warrant dissimilar treatment from, say, an errors and omissions policy? Or would conduct more outrageous than malicious prosecution of a bank's customer demand a conclusion that the actor alone must pay? These questions and many more beyond the scope of this note remain as the unresolved progeny of this most significant decision.

In Virginia, which the Maryland court indirectly suggested would not follow its lead in the matter of insurable punitive damages, the supreme court recently followed its own lead in favor of the policyholder and required a carrier to reimburse the insured for attorney's fees expended in a successful defense of a plaintiff's claim for punitive damages. The defendant retail store owner insured against bodily injury under a "blanket

liability" policy, which provided, *inter alia*, that the carrier:

"... shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury . . . , even if any of the allegations of the suit are groundless, false or fraudulent"

Upon appropriate demand, the insurer provided a defense as to compensatory damage claims (\$50,000), but declined to extend this defense to the punitive claims (\$500,000). The trial court concluded no duty to defend the latter claims existed in that public policy prohibited insurance against assessed punitive damages. In *Lerner v. Safeco*,³⁰ the Virginia Supreme Court reversed, holding that while the decision as to public policy was best left to the legislature, it was an unnecessary consideration to the issue at hand. Rather, the court, in good lawyer-like fashion, turned to the policy and read it literally. In that the duty to defend is clearly broader than the duty to pay in Virginia and the punitive damage claim was one "ancillary" to the compensatory claim, it followed that the broad policy guarantees controlled and compelled an equally broad defense.

While in most respects an easier case to decide than *St. Mary's*, the *Lerner* opinion deftly touches certain of the issues explored in depth in the Maryland case and resolves them with finality. Of course, it does not indicate the scope of the defense when the policy language is more restrictive, as in the *S. Freedman* decision, nor when the punitive damages claim is crucial to the action and not merely "ancillary." From an insured's public policy standpoint, *Lerner* reinforces the

²⁹ See "Mischief With Malice: A Review of Liability for Punitive Damages and the Insured's Right to Indemnity Against an Exemplary Award," 8 *University of Baltimore Law Review* 222 (Winter 1979).
³⁰ 219 Va. 101, 245 SE2d 249 (1978).

tentions that an insurance policy reimburse the ever-escalating costs and expenses of litigation unless claims or the policy language are automatically uncommon. And from a broader public policy perspective, the law strongly suggests legislative action on the carrier's duty to pay punitive damages will place both parties to an insurance policy at some certain risk for the present.

CONCLUSION

Hopefully, the above discussion of insurance law decisions in the jurisdictions, although selective, reflects the increasingly active level of ferment, of judicial rule-making, large part, the new cases are well-reasoned and innovative, responsive to the evolving commercial needs of society. The scope of this note includes review in areas where only one or the other of the referenced appellate courts have ruled in significant areas of development. But, as an example, the D. C. Court of Appeals records infrequently heard in their instruction stated in *Metropolitan Life Insurance Company v. Johnson*,³¹ that:

It is the law of this jurisdiction that an insured has a duty to read an application which he signs (or, if necessary, to have it read to him) and to sign any misrepresentations or omissions to the insurer. He is held to know the contents of his application and is bound thereby, regardless whether he has actual knowledge of such at the time he signs the form. [omitted] In short, the insured is obligated to exercise the ordinary care that is required in every business transaction."

The implications of this dicta are worth pondering as to the potential standard of care to be imposed upon insureds in future cases.

Likewise, in *Lahocki v. Contee Sand & Gravel Company*,³² the Maryland Court of Special Appeals determined for the first time in any of the three jurisdictions the validity and impact of the so-called "Mary Carter"³³ agreement—a device sometimes resorted to by one of a number of defendants in insurance litigation to limit its liability as to an assumed-to-be successful plaintiff. Although the case did not directly involve an insurance policy dispute, it held that one defendant may properly settle with a plaintiff, remain in the case, and not thereby compromise the integrity of the fact-finding process at trial. The court further determined that while the agreement ought to be promptly disclosed to the other defendants so as to avoid prejudicial surprise at trial, it need not be disclosed to the jury. Left open for determination on a case-by-case basis was the jury admissibility of such agreements in the future. Consequently, the role of the players may not always be known in future insurance litigation in Maryland.

These and other current opinions of the respective courts reinforce the already expressed sentiments that much substantive insurance law has been made of late, particularly in regard to the discussed opinions, and foretell a maturation of contemporary judicial attitudes in Maryland, Virginia and the District of Columbia, literally unmatched elsewhere. [The End]

³¹ 1975-1978 LIFE CASES 705, 363 A2d 984 (D.C. Ct. App. 1976).

³² The name comes from *Booth v. Mary Carter Paint Company*, 202 So2d 8 (Fla. Ct. App. 1967).