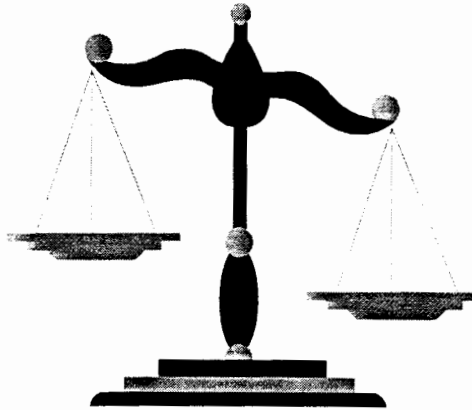


Law Letter

LAW OFFICES OF CUNNINGHAM & ASSOCIATES

Spring 1996 - Volume 2

We have not published this firm's newsletter as to current insurance law decisions in Maryland, Virginia and the District of Columbia for some time. However, a significant number of new and interesting decisions in both the trial and appellate courts in the three (3) jurisdictions where we practice suggest it may be appropriate to again begin reporting to our clients on cases we believe you would not otherwise learn of in the course of normal reading. Let us know if this effort is of value to you.



In Maryland, the Court of Appeals in Aetna v. Cochran, 337 Md. 98, 651 A.2d 859 (1995) recently held that the duty to defend is no longer determined by the "four corners" rule wherein the insurer's obligation under the policy is found by comparing the facts of the case to the terms and conditions of the policy. Rather, the highest court in the state determined that a trial court may now consider "extrinsic evidence" that goes beyond the pleadings and may include circumstances which potentially fit a claim under policy coverage. This unanimous decision was reaffirmed a few months later in Sullins v. Allstate, 340 Md. 503, 509, 667 A.2d 617 (1995) wherein the court determined that a commercial policy's pollution exclusion was ambiguous. The court found failure to specify lead paint an excluded pollution loss created fatal ambiguity and cited with approval the Cochran case.

Also in Maryland, our firm prevailed in the U.S. District Court in Baltimore in Admiral Ins. Co. v. American Nat. Savings Bank ___ F. Supp. ___, H95-1151 (N.D. Md. 1996) where we sued on behalf of our carrier to recover \$158,000.00 paid in error to a bank for water damages to commercial property in that city. The Bank refused to return the loss payment claiming Admiral's error was a mistake of law, and stemmed from its incorrect interpretation of its policy, for which restitution was unavailable. The Bank also claimed it had undergone a change in position upon receiving the loss payment such that restitution would be inequitable, and that Admiral had had the opportunity to discover the true nature of the property before making payment but failed to do so. On motion, Judge Harvey rejected the Bank's arguments and ruled in favor of Admiral, ordering restitution of the entire loss payment, \$158,000.00, plus costs.

In Virginia, the Supreme Court ruled in General Ins. v. Page, Va. ___, Rec. No. 950195 (1995) that failure of an insured to read the policy issued barred any subsequent claim against an agent for failing to obtain coverage ostensibly required. This case is an extension of existing law on the point in the Commonwealth but has received no appreciable attention for unknown reasons.

Conversely, a number of Circuit courts have ruled that a carrier's investigative files are partially discoverable despite arguments that statements of witnesses are clearly being taken in anticipation of litigation. *The Virginia Lawyer's Weekly* indicates in a recent report that at least one case settled for a significant amount once an incriminating statement taken by an adjuster shortly after an accident was required to be made available to plaintiff's attorney. Clearly this is an issue that will be resolved by the high court soon.

And in a trial court decision in which we prevailed in December on behalf of our carrier client, Rathner v. Dunn, Law No. 94-701, Arlington County, the Judge declined to exclude references in thousands of dollars of billings submitted to the jury related to insurance payments. The Court correctly reasoned that plaintiff had the responsibility to sanitize his exhibits and if he chose to not do so, the jury could draw its own conclusions as to the impact of such payments on any claimed damages. Apparently it did, to plaintiff's detriment.

In the District of Columbia, the Court of Appeals in American Continental ins. Co. v. Pooya, 666 A.2d 1193 (1995) held that a carrier's duty to defend exists when there is a "possibility" of coverage. This elastic criterion seems not to have yet been understood by the D.C. Circuit which in an unreported case, in which this office was involved, Davis v. Allstate, App. #94-7112, a panel of the federal court ruled that the absence of coverage, later determined after the demand for coverage was denied, also precluded a duty to defend despite evidence that the carrier's internal files indicated probable coverage. Apparently Emerson thinking as to "consistently being the hobgoblin of small minds" is taken seriously by the D.C. Circuit.

Finally, in a case involving Union Station, where our firm prevailed last month, Holley v. Interstate Cleaning Corp., et al., C.A.N. 94-09-691, a D.C. trial court granted our motions for judgment as to all counts and

claims in a wide-ranging Complaint

at the end of plaintiff's case but allowed the case to go to the jury on an unplead, unarticulated *inference* of negligence, which he formulated *sua sponte*, and then granted an *unrequested* motion to amend. Fortunately, the jury saw no merit in even such a phantom contention, and found in favor of defendants despite the Judge's best efforts. Very interesting!

Please let us know if any of these case reports are of value or if you desire additional information.

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