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Recent Developments: Aetna Casualty & Surety Co. v. Cochran: Extrinsic Evidence May Be Used by Insured to Establish Insurer's Duty to Defend under Liability Policy

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ence in these Fund approved payments and the claim of Advance. *Id.*

The court concluded by giving specific judicial recognition to Advance's argument, holding that it is consistent with the purposes of the Fund to recognize that the fiduciary ethical obligation embodied in Conduct Rule 1.15 is a fiduciary obligation under the Fund's statutes and rules. *Id.* at 210-11, 652 A.2d at 667. The court vacated the Fund's decision and remanded for a determination on reimbursement. *Id.* at 211, 652 A.2d at 667-68.

In its simplest form, the court's decision in *Advance Finance Co. v. Trustees of Clients' Sec. Trust Fund of Bar of Md.* expands a non-client's eligibility as a claimant against the Fund. However, *Advance* derives its true impact from the court's recognition that a non-client's loss from an attorney's defalcation, at least where a client has instructed the attorney to disburse the client's funds to the non-client, is no less damaging to the legal profession's credibility that the same loss to the client. This is precisely the situation the Fund was established to address, and although the court's decision may increase the potential for recovery, it should be welcomed by attorneys at a time when the term "legal ethics" is all too often, whether justifiably or not, considered a misnomer.

-Mark L. Miller

Aetna Casualty & Surety Co. v. Cochran:

EXTRINSIC EVIDENCE MAY BE USED BY INSURED TO ESTABLISH INSURER'S DUTY TO DEFEND UNDER LIABILITY POLICY.

In *Aetna Casualty & Surety Co. v. Cochran, 337 Md. 98, 651 A.2d 859 (1995),* the Court of Appeals of Maryland held that an insured may use extrinsic evidence to establish a potentiality of coverage under an insurance policy when the plaintiff's complaint is silent as to possible defenses entitled to coverage. The court rejected an earlier decision by the court of special appeals which mandated that determining the possibility of coverage of an insured tort defendant be made solely by reference to the language of the insurance policy and the complaint made against him. In so holding, the court remedied any inequities in the interpretation of coverage under liability insurance policies and addressed public policy concerns regarding an insured's reasonable expectations.

Victoria and Robert Beyer sued Robert Cochran for assault, battery, and loss of consortium for injuries Victoria received during a March 19, 1990 altercation between Cochran and his brother at Cochran's office. At the time of the alleged incident, Cochran was covered under two office liability policies issued by Aetna. Although the policies provided no coverage for intentional or expected bodily injury or property damage caused by the acts of the insured, both provided coverage for intentional acts of self-defense. Despite Cochran's contention that Beyer's injuries occurred while he was defending himself against his brother's assault, Aetna refused to provide him with counsel to defend against the Beyer ac-

tion. Aetna based its refusal on the policies' exclusion for intentional torts not committed in self-defense.

After hiring his own private counsel to defend against the Beyer suit, Cochran filed a declaratory judgment action against Aetna in the Circuit Court for Allegany County seeking a determination that Aetna had a duty to defend him in the Beyer action. Cochran contended that the allegations contained in the Beyer complaint established the potential for coverage due to self-defense. The circuit court held that Aetna had no duty to defend Cochran in the Beyer action because the Beyer's complaint alleged intentional torts neither covered nor potentially covered by the Aetna policies.

The court of special appeals reversed the circuit court, holding that Aetna had a duty to defend Cochran because of the potentiality of coverage on the face of the Beyer complaint. In an effort to clarify the ambiguity surrounding an insurer's duty to defend an insured from tort claims, the Court of Appeals of Maryland granted certiorari.

The court began its analysis by explaining that an insurer has "a duty to defend its insured from all claims which are potentially covered under an insurance policy." *Cochran*, 337 Md. at 102, 651 A.2d at 861, (quoting *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 347 A.2d 842 (1975)). The *Brohawn* court interpreted the term "potentially" to encompass when a plaintiff's allegations against an insured in a tort suit allege a claim covered by the policy in addition to any claim potentially covered by the policy. *Id.* at 102-03, 651 A.2d at 861.

The court then applied a two prong test to determine whether Aetna was under a duty to defend Cochran in accordance with the spirit of the *Brohawn* decision. *Id.* at 103, 651 A.2d at 862 (citing *St. Paul Fire & Marine Ins. Co. v. Pryseski*, 292 Md. 187, 438 A.2d 282 (1981)). The first prong necessitated an examination of the language of the policy, construing its terms in their "customary, ordinary and accepted meaning," *Id.* at 104, 651 A.2d at 862 (quoting *Mitchell v. Maryland Casualty*, 324 Md. 44, 56, 595 A.2d 469, 475 (1991)) "unless a statute, a regulation, or public policy is violated thereby." *Id.* at 104, 651 A.2d at 862 (quoting *Pacific Indemnity Co. v. Interstate Fire & Casualty Co.*, 302 Md. 383, 488 A.2d 486 (1985)). The court found that the terms of Cochran's policy covered all bodily injury resulting from defense of persons or property, even if the bodily injury was intended by the insured. *Id.* at 104-05, 651 A.2d at 862.

The second prong of the test required the court to determine whether the allegations of a tort complaint against an insured could potentially bring the tort action within policy coverage. *Id.* at 105, 651 A.2d at 862. Because the Beyer complaint failed to allude to the affirmative defense of self-defense, the paramount issue became whether Cochran could use extrinsic evidence of self-defense to show that his actions could potentially be covered by the policies. Relying on a past decision of the court of special appeals, Aetna argued for adoption of the exclusive pleading rule which would mandate that a determination of a potentiality of coverage be made solely by reference to the insurance policy and the complaint and not by use of extrinsic evidence. *Id.* at 105, 651 A.2d at 863 (citing *Eastern Shore Financial v. Donegal Mut.*, 84 Md. App. 609, 581 A.2d 452 (1990), cert. denied sub nom. *Insley v. Old Guard Mut. Ins. Co.*, 322 Md. 131, 586 A.2d 13 (1991)).

The court of appeals rejected the application of the exclusive pleading rule to insurance contracts and determined that insurance policies and allegations in complaints "are not the sole means of establishing a potentiality of coverage." *Id.* at 108, 651 A.2d at 864. The court added that an application of the exclusive pleading rule to insurance contracts would unfairly leave the insured at the mercy of the plaintiff's complaint and would virtually preclude him from proving a potentiality of coverage in assault and battery cases, where coverage could only be established by tendering a defense to the claims. *Id.* at 108-09, 651 A.2d at 864. The court further supported its rejection of the

exclusive pleading rule by citing a decision which held that an insured receives the benefit of the doubt when potential coverage is uncertain from the allegations in the complaint. *Id.* at 107, 651 A.2d at 863-64 (citing *U.S.F. & G. v. Nat. Pav. Co.*, 228 Md. 40, 178 A.2d 872 (1962)). The exclusive pleading rule, the court opined, can often deprive the insured of the benefit of his bargain in an insurance contract by permitting the insurer to look exclusively at the complaint and ignore valid defenses to avoid coverage. *Id.* at 110-11, 651 A.2d at 865.

The court noted an exception for frivolous defenses made by the insured solely to establish an insurer's duty to defend. *Id.* at 111-12, 651 A.2d at 866. In combatting potential abuse, the court limited an insured's use of extrinsic evidence to establish a potentiality of coverage to situations where the insured can demonstrate a "reasonable potential that the issue triggering coverage will be generated at trial." *Id.* at 112, 651 A.2d at 866. Because Cochran had presented corroborating testimony and other evidence supporting the potentiality of coverage, the court found that Cochran's claim of self-defense was not frivolous. *Id.* at 112, 651 A.2d at 866.

Aetna Casualty & Surety Company v. Cochran clearly reinforces the public policy concern that insurance policy holders should not be unreasonably precluded from receiving the coverage bargained for in their insurance contracts. The court's holding will make it considerably more difficult for insurers to avoid their obligations to defend insureds, while simultaneously providing a safeguard against frivolous claims of potential coverage.

- Jeffrey A. Friedman

Curry v. Hillcrest Clinic, Inc.:

COURT OF APPEALS REAFFIRMED MARYLAND'S ACCEPTANCE OF THE "FROW DOCTRINE" - DEFAULTING CO-DEFENDANTS INURE TO THE BENEFIT OF JUDGMENTS IN FAVOR OF NON-DEFAULTING CO-DEFENDANTS.

In *Curry v. Hillcrest Clinic, Inc.*, 337 Md. 412, 653 A.2d 934 (1995), the Court of Appeals of Maryland held that where a common basis of liability is alleged against co-defendants, one of whom has been found in default, a finding in favor of the non-defaulting co-defendant automatically inures to the benefit of the defaulting co-defendant. In such cases, despite an original order of default, damages cannot be assessed against the defaulting co-defendant. Consequently, the order in default must be stricken. This holding signified the court of appeal's recognition, affirmance, and continued acceptance of the *Frow* doctrine, first enunciated in the United States Supreme Court decision *Frow v. De La Vega*, 82 U.S. (15 Wall.) 552 (1872).

Curry involved a malpractice claim filed with the Health Claims Arbitration Office (HCAO) alleging the negligence and liability of Dr. Sharma and the liability of Hillcrest Clinic (Hillcrest), Sharma's employer, under the doctrine of respondeat superior. Hillcrest failed to answer Curry's complaint, and an order of default was entered by the HCAO Director against Hillcrest stating that the amount of damages owed by Hillcrest was to be determined by the HCAO arbitration panel.