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Recent Developments in the Law.®

INSURANCE:

WAIVER OF DEFAULT UNINSURED MOTORIST COVERAGE BY DESIGNATED FIRST NAMED INSURED

Swartzbaugh v. Encompass Ins. Co. of Am., No. 946, 2011 Md. App. LEXIS 126 (Md. Ct. Spec. App. Sept. 7, 2011).

In the 2011 case of *Swartzbaugh v. Encompass Insurance Co. of America*, the Maryland Court of Special Appeals considered whether the Maryland Circuit Court had erred in holding that an uninsured motorist insurance waiver signed by the second of two insureds listed on a motor vehicle insurance policy satisfied the § 19-510 of the Maryland Code's Insurance Article. *Swartzbaugh v. Encompass Ins. Co. of Am.*, No. 946, 2011 Md. App. LEXIS 126 (Md. Ct. Spec. App. Sept. 7, 2011).

Generally, uninsured motorist insurance benefits the insured in the event that they or their property are

injured because of an accident with an uninsured motorist. Maryland requires its motorists carry uninsured motorist insurance meeting certain legislatively determined minimums. Insured motorists may carry uninsured motorist coverage above these statutory minimums based on a contractual agreement with their insurer. 1981 Md. Laws, Chap. 510 (providing that in 1981 the General Assembly added language to the statute requiring insurance companies to provide an insured with "the opportunity to contract for higher amounts than those provided under Title 17 of the Transportation Article [as long as] amount [did] not exceed the amounts of motor vehicle liability coverage provided by the policy"). While the 1989 version of the statute only required insurer's to "take reasonable steps to inform" insureds that coverage extensions were available, the 1992 version required companies to provide "uninsured motorist coverage in the same amount of liability coverage unless waived

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by the insured.” *Swartzbaugh*, 2011 Md. App. LEXIS 126 at *15 (citing 1992 Md. Laws, Chap 641.) The 1992 change responded directly to legislative concern regarding a perception that the public was not aware of the importance of having sufficient uninsured motorist coverage to protect the insured. *Id.* at 16 (citing Andrew Janquitto, *Maryland Motor Vehicle Insurance*, § 8.7 (2008 Supp.)). From this, the legislature sought to make the “default” insurance situation one perpetuating “full recovery” for the insured. *Id.*

In *Swartzbaugh*, a Maryland insured sought to invalidate an uninsured motorist waiver signed by the second-listed insured on the motor vehicle policy. *Swartzbaugh* sought this invalidation to gain access to the full amount of the liability policy rather than the much smaller amount of recovery perpetuated by a valid waiver. Specifically, *Swartzbaugh* claimed the waiver was invalid because the waiver was signed by the second-listed insured on the policy, not the physical first named insurer pursuant to the use of the term “first named insured in § 19-510(b) of the Maryland Insurance Article. The Maryland Court of Special Appeals searched for uses of “first named insured” in uninsured motorist legislation

nationally after a search of Maryland legislative history. This search revealed no insight or commentary as to the definition of “first named insured” in the uninsured motorist legislation or about the PIP legislation wording on which it was based. Nationally, only Pennsylvania used the term but had no commentary to support a definition of “first named insured.” The only definition of “first named insured” occurring nationally was from the Pennsylvania Superior Court which defined the term but cited no authority. *Id.* (citing *Jones v. Prudential Prop. & Cas. Ins. Co.*, 856 A.2d 838 (Pa. Super. Ct. 2004).

Relying upon tools of construction and the premise that parties may designate the “first named insured,” the Maryland Court of Special Appeals ruled that “first named insured” under § 19-510 “means the person designated as such in a motor vehicle policy or in a document executed as part of the insurance or renewal of such policy.” *Id.* at 27-28. The Court found that despite the husband's name being listed first on the application and policy in question, the wife represented that she was the “first named insured” by both: 1) signing the waiver containing the statement “I am the first named insured/applicant,” and 2)

signing on the line above the words “Signature of First Named Insured.” *Id.* at 30-31. Thus, the Maryland Court of Special Appeals provides that a party not listed first on a motor vehicle policy can effectively waive the default uninsured motorist coverage provisions if they represent that they are the “First Named Insured.”

**CIVIL PROCEDURE:
APPROPRIATE FORUM FOR
LAWSUIT BROUGHT BY
CHINESE CITIZENS AGAINST
MARYLAND-BASED MULTI-
NATIONAL CORPORATION**

Jiali Tang v. Synutra Int'l, Inc., No. 10-1487, 2011 U.S. App. LEXIS 18490 (4th Cir. Sept. 6, 2011) (applying Maryland law).

In the 2011 case of *Jiali Tang v. Synutra Int'l, Inc.*, the Fourth Circuit considered whether the district court abused its discretion by holding that the *forum non conveniens* doctrine allowed for a dismissal of a lawsuit brought by a number of Chinese plaintiffs against the defendant Maryland-based company. *Jiali Tang v. Synutra Int'l, Inc.*, No. 10-1487, 2011 U.S. App. LEXIS 18490 (4th Cir. Sept. 6, 2011) (applying Maryland law).

When ruling on a motion to dismiss under the *forum non conveniens* doctrine, the court must consider whether there is

an alternative forum that is “(1) available; (2) adequate; and (3) more convenient in light of the public and private interests involved.” *Id.* at *8 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981)). The burden of establishing that an adequate alternative forum exists rests with the moving party. In order to satisfy the “availability” requirement, the defendant must be “amenable to process in the other jurisdiction.” *Id.* at *9 (quoting *Piper Aircraft Co.*, 454 U.S. at 241). Determining the second factor, “adequacy” of the alternative forum, is a two-step analysis. First, the court must determine whether all parties are subject to the alternative forum’s jurisdiction. Second, the court must determine whether the parties will receive fair treatment and be awarded remedies. It is not required that the court be satisfied that the parties will receive the same benefits in the alternate forum as they would in an American court. *Id.* (citing *Fid. Bank PLC v. N. Fox Shipping N.V.*, 242 F. App’x 84, 90 (4th Cir. 2007) (unpublished)). Finally, if the court is satisfied that the alternative forum satisfies the first two considerations, it must then decide whether the public and private interests factors weigh in favor of dismissal. Generally speaking, private interests include the convenience and cost efficiency of having a

trial in the foreign jurisdiction while public interests include public policy considerations. *Id.* at *10.

In *Synutra*, the Chinese plaintiffs sued the Synutra International, Inc. and Synutra, Inc., corporations principally operating in Maryland, in U.S. District Court for the District of Maryland. The plaintiffs alleged that their children were injured when they ingested contaminated infant formula that had been manufactured, marketed, and distributed in China by a Chinese subsidiary of Synutra. The Court first considered the factors weighing in favor of dismissal. First, in 2008 the Chinese government established a fund to compensate the affected children and their families (the fund was financed by the companies that had manufactured the contaminated formula). Second, Chinese courts were available to the plaintiffs. Third, the president of Synutra stated in an affidavit that Synutra would not contest service of process in China. Factors weighing against dismissal included evidence that the Chinese government had been actively attempting to prevent the contaminated formula cases from going forward in Chinese courts. *Id.* at *5-7.

The Court then analyzed these facts under the *forum non*

conveniens factors: (1) availability; (2) adequacy; and (3) public and private interests. The Court held that the district court had not abused its discretion with regard to any of these factors. The defendants stated that they would be amenable to service of process in China, satisfying the availability prong. As to adequacy, despite the evidence that Chinese officials were stalling the lawsuits in China, other evidence suggested that Chinese courts were capable and willing to hear the plaintiffs’ claims. Further, because the alternative remedy need not necessarily be a judicial remedy, the compensation fund was adequate even though it was not a judicial remedy. Finally, the Court noted that private interest would best be served in terms facilitating the litigation because the relevant witnesses and evidence would all be located in China. Public interests would also best be served by having a Chinese court handle a Chinese claim, rather than inconveniencing Maryland citizens to serve on a jury to decide this case.

**INSURANCE:
INTERPRETATION OF AN
INSURANCE POLICY CLAUSE
REGARDING THE INSURED’S
ABILITY TO RECOVERY OF
ATTORNEY’S FEES**

Nat'l Cas. Co. v. Lockheed Martin Corp., No. AW-05-1992, 2011 U.S. Dist. LEXIS 82797 (D. Md. July 28, 2011).

In the 2011 case of *National Casualty Co. v. Lockheed Martin Corp.*, the U.S. District Court for the District of Maryland, Southern Division, was faced with the question of whether a clause in a hybrid marine insurance policy permitted the insured to recover attorney's fees from the insurer where the insured had prevailed against the insurer's declaratory judgment action.

The law in Maryland with regard to the recovery of attorney's fees follows the common law "American Rule." This rule states that unless the parties to a contract expressly agree otherwise, the default position is that the prevailing party may not recover attorney's fees. While courts will apply normal contract interpretation principals to determine whether the contract allows for the recovery of attorney's fees, courts will also strictly construe fee provisions so as to not create a duty where the parties did not intend for one to exist. Courts will also construe a contract in accordance with the plain meaning of its terms, unless the language of the contract is ambiguous and lends itself to more than one interpretation. In such cases, the court will

consider extrinsic evidence to determine the intent of the parties. *Id.* at *7-9.

In *National Casualty Co.*, the contract between the parties contained a provision (titled GC2(a)) that the policy would cover "costs, charges and expenses reasonably incurred by the Assured in defense and/or investigation of any claim coming within the scope of this policy. . . ." *Id.* at *11-12. In this case, the insurer, National Casualty Company (NCC), filed an action against the insured, Lockheed, seeking a declaratory judgment that Lockheed would not be able to recover on a claim against the insurer. After Lockheed prevailed on the declaratory judgment action, NCC filed a motion for a judgment notwithstanding the verdict (JNOV) and Lockheed filed a cross-motion to recover attorney's fees. *Id.* at *11-13.

The Court determined that the "costs, charges and expenses" language, combined with the "defense . . . of any claim" language could reasonably be construed in favor of Lockheed's position; the insured could recover its "expenses reasonably incurred" (i.e. attorney's fees) from the "defense . . . of any claim" (i.e. the defense of the declaratory judgment action). *Id.* at *14-15. However, ambiguity in this case arose out of the fact that while

Lockheed was technically classified as the nominal defendant, it actually was the de facto plaintiff. Therefore, because the Court was required to construe fee shifting provisions strictly, this ambiguity with regard to Lockheed's awkward position as nominal defendant/de facto plaintiff allowed the Court to consider extrinsic evidence to determine the intent of the parties with regard to the recovery of attorney's fees. The Court considered conventional practices with regard to form contracts in third-party liability insurance policies and property insurance policies. As NCC noted, third-party liability policies regularly contain fee shifting provisions akin to GC 2(a), while property insurance policies regularly do not. As the contested portion of the policy in this case was the property insurance section, the Court held that it would be error to read a fee shifting provision into the property insurance policy when the language of the policy was ambiguous and the intent of the parties could not be readily determined. *Id.* at *17-22.