

Recent Developments in the Law

Vol. No. LVIII

November 2004

LETTER

*November 2004 Special Issue
Copyright Awards*

In order to keep you abreast of recent developments in the law, Saunders & Schmieler's *S&S Recent Developments in the Law* reports on the significance of current decisions of major import in the jurisdictions of Maryland, the District of Columbia, Virginia, and the federal Fourth Circuit.

This material is being provided for your general information only, and is not a substitute for obtaining legal advice. The information provided is not provided as legal advice, or in the course of an attorney-client relationship. You should always consult an attorney for advice about the specific circumstances of your case.

Recent Developments in the Law

Jeffrey R. Schmieler, Esquire
Saunders & Schmieler, P.C.
8737 Colesville Road
Suite L-200
Silver Spring, Maryland 20910
(301) 588-7717
www.sslawfirm.com

© Saunders & Schmieler, P.C. 2003

MARYLAND COURT OF APPEALS

Admissibility of Guilty Plea -

Crane v. Dunn, 382 Md. 83 (July 26, 2004).

The Court of Appeals of Maryland determined that a driver's guilty plea in traffic court to a charge of negligent driving was admissible in a civil trial as "its probative value is deemed to outweigh any prejudicial effect."

**A guilty plea
to a criminal
charge may be
introduced in
subsequent
civil actions**

Linda Crane and Annie Dunn were friends. They were traveling home together from a trip to Delaware. Dunn was driving her vehicle and Crane was the passenger. The facts of the accident were disputed.

However, both parties agreed that Dunn was driving at or below the posted speed limit, the accident occurred as a result of veering off the road to avoid hitting a deer, and no other vehicles or persons were involved in the accident.

Crane brought a civil action against Dunn to recover damages that resulted from Crane's negligent operation of the vehicle. Before the civil action commenced, Dunn pleaded guilty to a negligent driving charge in the District Court of Caroline County. In the civil action, Dunn moved to exclude any reference to the guilty plea. Dunn's attorney argued that Dunn did not understand the difference between pleading guilty and paying a fine. In Dunn's deposition, she stated that she plead guilty to avoid more serious charges that could have been prosecuted.

The trial judge stated that the District Court traffic proceedings were ambiguous concerning Dunn's admission of guilt; as a result, the judge granted Dunn's motion *in limine* to exclude evidence.

Maryland Rule 5-103, states, "error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling . . ." In review of the trial courts decision to exclude the evidence, the court of appeals determined whether the party was prejudiced as a result of the ruling.

The court stated, "a plea of guilty to a criminal charge may be introduced in a subsequent civil proceeding as an admission." The court reasoned that such an admission does "not conclusively establish liability" because a defendant has an opportunity to rebut or explain why the guilty plea was entered. The court refused to distinguish guilty pleas for crimes that are serious in nature from lesser crimes such as traffic violations.

The court stated that simply paying a fine "is not the evidentiary equivalent of a guilty plea in open court." The court stated that guilty convictions where admissions were made, "may be offered as evidence against the party." Further, the court reasoned that a guilty plea to a criminal charge that is admitted in a civil action will be viewed as an admission by a party opponent. To avoid an admissibility of the plea, a party may plead *nolo contendere*.

Discussing the rules of evidence, the court stated that, "a party may offer into evidence against his opponent anything said by him as long as it illustrates some inconsistency with the facts now asserted by the opponent in pleadings or in testimony." 4 *Wigmore on Evidence* Section 1048, at p. 4. Dunn answered questions about the plea in interrogatories and the interrogatories may be used for any purpose found in the Maryland Rules.

The court explained that even if there was ambiguity in the guilty plea, the issue would be for a jury to decide. "Dunn was in the best position to explain to the trier of fact the reasons for her answer to interrogatory number 26 and the conflict . . ."

The court said that mere payment of a fine for the sake of convenience is inadmissible as evidence. However, Dunn did more than just pay the fine; she openly and expressly acknowledged her guilt.

The court stated that a balancing test must be performed by the trial judge to be sure that evidence does not prejudice the defendant. Maryland Rule 5-403 states, "[a]ll relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

The court stated that the trial judge failed to use this balancing test and that Dunn, in pleading guilty, made an admission of responsibility for the act. The court further stated, that if this is not the case, it is not a judicial decision, rather it is a decision for the fact finder and the trial judge overstepped his

bounds in excluding the evidence.

In conclusion, the court stated, "Crane had a right to show the jury that, previously, Dunn had taken responsibility for the accident, and Dunn had every right to explain or rebut that assertion."

Civil Procedure: Limitations Under the Discovery Rule -
The Bank of New York v. Sheff, 382 Md. 235, (July 28, 2004).

The Court of Appeals of Maryland upheld the trial court's grant of summary judgment to the law firm of Piper & Marbury (now Piper Rudnick) ("P & M") on the grounds that bondholders' and bond fund's suit was time barred by the statute of limitations where the parties were on inquiry notice more than three years before the suit was filed.

The lawsuit revolved around the sale of almost \$50 million in tax-exempt revenue bonds by Prince George's County ("P.G. County"), Maryland in 1993. The ultimate recipients of the proceeds and true borrowers were health care providers in the District of Columbia and Prince George's County that comprised the Greater Southeast Healthcare System ("GSHS"). The County acted as a conduit and was under no obligation to the bondholders for repayment.

A portion of the security for repayment of the bonds was a lien on the assets of the individual health care providers and their subsidiaries, including their accounts receivable. However, in order to perfect that lien, it was necessary to file UCC Financing Statements with the Maryland State Department of Assessments and Taxation (SDAT), with the Clerk of the Circuit Court for Prince George's County and with the D.C. Recorder of Deeds. Five law firms were involved in planning and completing the transaction. Prince George's County assigned P & M to draft the financing statements.

P & M drafted and circulated the statements for filing with SDAT and the Circuit Court for P.G. County. The statements drafted by P & M instructed the filing officer to return the statement after recordation to P & M. However, P & M did not draft a financing statement for filing in D.C. P & M then filed the financing statement with SDAT and P.G. County Circuit Court and brought stamped copies of the filed statements to the closing of the transaction.

**Under Maryland's
Discovery Rule the
Statute of Limitations
begins to run when a party
is on "inquiry notice"**

At the pre-closing on May 12, 1993, all of the documents to be filed, including the financing statements for SDAT, and P.G. County Circuit Court. On May 13, 1993, P & M prepared and circulated to all parties, including the trustee, a "Closing Binder" that contained all transaction documents. Even though some parties knew that some of the borrowers were located in D.C., no one complained about the lack of a financing statement for filing in D.C.

The failure to file with the D.C. Recorder of Deeds resulted in the bondholders losing the opportunity to perfect against third parties a first lien on the receivables of the entities located in the District, one of which was the Greater Southeast Community Hospital ("GSCH"). This became an issue when GSHS defaulted on the bonds. After GSHS defaulted, the bondholders discovered that in April of 1997 another creditor, Daiwa Healthco-2 LLC, had obtained a first lien on the receivables of GSCH in 1997.

The Bank of New York, trustee for the bondholders, and four municipal bond funds that held the bonds filed suit against P & M in P.G. County Circuit Court, alleging legal malpractice and breach of fiduciary

obligation. The Circuit Court held that (1) P & M did not act as counsel to the bondholders and had no obligation to them, (2) P & M never assumed a duty to file the financing statement in the District, and (3) even if there was liability on P & M's part, the action was barred by limitations.

The Court of Appeals affirmed the Circuit Court's decision. The Court stated that litigants have three years from the date their action accrues to file a civil action and that Maryland applies the "discovery rule" in determining when an action accrues. Under that rule, the statute of limitations begins to run when the plaintiff has *knowledge of circumstances which would cause a reasonable person in the position of the plaintiff to undertake an investigation which, if pursued with reasonable diligence, would have led to knowledge of the alleged cause of action.*

The Court of Appeals went on to hold that "even if [P & M assumed a duty to record the financing statement in D.C.], the plaintiffs were on inquiry notice more than three years before suit was filed ... that the firm had not, in fact, filed such a statement, and that their actions were therefore barred by limitations." The Court pointed to two specific periods of time where the Bank of New York and the municipal bond funds were on "inquiry notice" that no financing statements were filed with D.C. and therefore that their interest in GSCH's receivables was not perfected.

The first instance occurred in May, 1993 when P & M gave the trustee the Closing Binder that contained all of the closing documents, including financing statements filed with SDAT and the P.G. County Circuit Court, but not including a financing statement for D.C. Had the trustee made an inquiry at the time, it would have discovered immediately that the financing statement had not been filed in D.C. and therefore it did not have a perfected lien on the GSCH receivables.

The second instance occurred in April, 1997 when the trustee learned of the proposed Daiwa transaction. The trustee was given documents from the Daiwa transaction that stated that Daiwa would receive valid ownership of the receivables that were not subject to any third-party claims and that there was no effective financing statement covering any of the GSCH receivables. The Court held that the Bank of New York was "unquestionably ... on inquiry notice that it did not have a perfected lien on GSCH receivables." That circumstance necessarily raised the question of whether a proper financing statement had been filed in D.C.

Thus, because the trustee and the municipal bond funds were on "inquiry notice" more than three years before they filed suit, the Court held that they were barred from bringing an action against P & M.

Maryland Courts' Jurisdiction under the Federal Telephone Consumer Protection Act -
Ponte Architects v. Investors' Alert, 2004 WL 1900381 (Md. August 26, 2004).

The Court of Appeals of Maryland held that trial courts may entertain and have jurisdiction over private causes of action created by the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227.

In this case, Plaintiff, R.A. Ponte Architects, Ltd. ("Ponte") received unsolicited facsimiles that advertised a paid subscription to an investment newsletter and also promoted the purchase of stock of small corporations. The sender of the facsimiles was Investors' Alert ("Alert") in conjunction with Access Financial Consulting, Inc. ("Access").

In response to the unsolicited faxes, Ponte filed a complaint in the Circuit Court for Montgomery County against Alert and Access. A motion to dismiss was filed and granted; the trial court stated that "no private cause of action exists within the State of Maryland to allow these claims to proceed." On appeal, the Maryland Court of Special Appeals affirmed the circuit court's decision.

The intermediate court stated that Maryland Code 14-1313 of the Commercial Law Article is similar to

the TCPA, and reasoned that because Maryland law does not permit a private right of action for a violation, the legislature intended that such right not be granted. Therefore, a right of action for violation of the TCPA should not be allowed in Maryland.

The Maryland Court of Appeals granted the Plaintiff's writ of certiorari. The issue they agreed to hear was whether "a Maryland trial court is authorized to entertain the federal cause of action created by Congress in the TCPA, 47 U.S.C. Section 227."

**Maryland courts
have jurisdiction
over unsolicited fax
cases under the
TCPA**

To begin their analysis, the court reviewed the law concerning Maryland courts' jurisdiction over civil cases where the cause of action is created by federal law. The court stated that Maryland courts have jurisdiction over actions even when "identical causes of action could not be brought under Maryland law."

The court also said that unless the Maryland General Assembly specifically limited a civil cause of action under another jurisdiction's law, Maryland Circuit Courts have subject matter jurisdiction.

The exception to this rule exists when the cause of action comes under another jurisdiction's laws, and there is "a strong public policy against its enforcement in Maryland." (emphasis added). However, the exception does not apply to causes of action brought under federal law.

The court stated that, "[a] state court may not deny a federal right, when the parties in controversy are properly before it, in the absence of 'valid excuse.'" Further, the court stated that disagreement between state and federal law is not a valid excuse."

Next, the court looked to the specific issue of whether the Maryland court's have jurisdiction over private causes of action arising under the TCPA. The purpose of the act was to control the amount of unsolicited faxes and telephone calls. The Act made sending unsolicited advertisement faxes illegal. Under the act, a cause of action is established and allows "[a] person or entity . . . if otherwise permitted by laws or rules of court of a State, [to] bring [an action] in an appropriate court of that State."

The court concluded that the phrase, "if otherwise permitted by the ... State merely acknowledges the principle that States have the right to structure their own court systems"

In support, the court looked at the legislative history, and specifically at Senator Holdings' comments, "[t]he provision would allow consumers to bring an action in State court against any entity that violates the bill."

The court reasoned that, "the language of 47 U.S.C. Section 22(b)(3), coupled with the sponsor's explanation of the provision, leaves little doubt concerning its meaning." "The substantive issue of whether the federal cause of action should be entertained in the appropriate state court was not a matter left to state legislators."

Also, the court reasoned that when "Congress is silent concerning state court jurisdiction over federal causes of action, there is a 'deeply rooted presumption in favor of concurrent state court jurisdiction.'" As a result, the court held that Maryland trial courts have jurisdiction over the cause of action created

under 47 USC § 27(b)(3).

Telephone Consumer Protection Act Granting Exclusive Jurisdiction Does Not Violate Commerce Clause -

Levitt v. Fax.com, 2004 WL 2021429 (Md. September 13, 2004).

The Court of Appeals of Maryland held that the Federal Telephone Consumer Protection Act ("TCPA"), granting exclusive jurisdiction to entertain the federal cause of action arising under the TCPA, does not violate the 10th amendment or the Commerce Clause.

This case contains issues that are similar to those decided in *Ponte Architects v. Investors' Alert*, 2004 WL 1900381 (Md. August 26, 2004), discussed *infra*. In that case, the Court of Appeals held that Maryland courts do have jurisdiction to hear cases created under the TCPA.

Smoke does not create a "hidden danger" for firefighters

The only different issue, in the case *sub judicata*, is whether "Congress' creation of a private action, with exclusive jurisdiction in state courts, and without a state right to 'opt out' of such jurisdiction, exceeds Congress's authority under Article I, Section 8, of the United States Constitution and the Tenth Amendment to the United States Constitution."

To resolve this issue, the court stated that the Defendant's failed to show how "required state court exclusive jurisdiction violates 'a state's right to determine how its resources will be utilized.'" The court also rejected the argument that exclusive jurisdiction creates an unconstitutional burden when concurrent jurisdiction does not.

The court then looked to history, and pointed out that federal court jurisdiction historically was appellate and not until 1875 were federal trial courts vested with general federal question jurisdiction.

For the aforementioned reasons, the Court of Appeals held that neither the Commerce Clause nor the Tenth Amendment was violated when Congress gave state courts exclusive jurisdiction for claims brought under the TCPA.

**MARYLAND COURT OF
SPECIAL APPEALS**

Fireman's Rule -

Shastri Narayan Swaroop, Inc., v. Hart 158 Md. App. 63 (July 19, 2004).

The Court of Special Appeals of Maryland held that the fireman's rule precluded the tort action where a firefighter brought an action against a motel owner for injuries sustained in the course of responding to a fire.

The Plaintiff, a Lieutenant with the Baltimore County Fire Department, along with other members of his unit, responded to a call for a fire at the motel. Fire and smoke was coming from the second story of the motel. The building itself was not visible due to the amount of heavy smoke.

The Plaintiff was ordered to search for victims. The Plaintiff used a thermal imaging device to isolate where he would enter the building. However, once he located the direction of where he would enter the building, he ceased using the thermal imaging device. Instead, he used a railing to guide himself blindly

through the thick smoke. He followed the railing and then suddenly fell several feet into a stairwell. Mr. Hart sustained severe injuries from the fall.

The circuit court denied the motel owner's motion for summary judgment and entered a jury award of \$454,396.00 in favor of the firefighter.

The Court of Special Appeals decided the applicability of the fireman's rule by looking at (1) public policy, (2) injury during a period of anticipated risk and (3) duty to warn.

First, the court reasoned that the fireman's rule is best explained by looking at public policy. Generally, fire and police officers cannot recover under tort actions for injuries sustained in the line of duty. The rationale behind the rule is that there is a special relationship between firemen and police and the public that requires firemen and police to confront hazards on behalf of the public.

Further, the court reasoned that most fires are due to some negligence but because firemen are trained and paid to deal with such hazards, they assume the risk and are precluded from recovery under tort law.

Also, the court stated that the theory of assumption of the risk is important in understanding the fireman's rule. Further, the court stated that it is foreseeable from the viewpoint of the firefighter, that in the inherently dangerous occupation of firefighting, firefighters are often injured by the 'inherent risk' associated with the occupation. Thus, because they are being paid to assume such risk, it is inappropriate to allow a firefighter to recover damages for doing exactly what he is paid to do.

Second, the court examined whether the fireman was injured during a period of anticipated occupational risk. The court stated that there must be a "nexus between the injury and any negligence for which the officer's presence on the premises was required. For example, in *Rivas v. Oxen Hill Joint Venture*, 130 Md. App. 101 (2000), a deputy sheriff slipped and fell on a patch of ice as he was going to serve a subpoena. The court distinguished *Rivas*, which stated that, "a . . . firefighter who is injured while entering upon property, but before the period of anticipated risk also would be owed a duty of care." Unlike in *Rivas*, the Plaintiff in this case was clearly injured "during the period of anticipated occupational risk."

**Neighbor
gave the
universal sign
of disrespect**

Finally, the court looked at whether a duty to warn existed. There is a duty to warn a firefighter of a 'pre-existing hidden danger' where (1) knowledge of the danger existed and where (2) there is an opportunity to warn the firefighter of the danger. The court determined that "in no sense could the stairwell be construed as a 'hidden danger.'" The court reasoned that because the stairway was not a hidden danger before the fire, it did not become a hidden danger simply because it was hidden by smoke.

The court held that "the injury occurred while performing his duties, the negligence did not constitute an independent act and the open stairwell did not constitute a 'hidden danger.'" Therefore the court reversed the lower court's decision.

Common Law Nuisance

Echard v. Kraft, 2004 WL 2192398 (Md. App. October 1, 2004).

The Court of Special Appeals held that a neighbor's actions did not rise to the level of common law

nuisance under the law.

The facts of this case are as follows. William Echard ("Echard") and Richard ("Kraft") and Karen Kraft (together the "Krafts") were neighbors. Both neighbors' lots were 40 feet wide and twenty feet separated the two homes. The Krafts obtained a permit to build a fence. This upset Echard and his mother as they believed the fence would interfere with their right to use their driveway. Echard filed an appeal to have the fence permit revoked. The appeal was rejected. The fence was then constructed.

About a year later, on February 26, 2002, Echard sued the Krafts in circuit court. Echard alleged that the Krafts had defamed him when statements were made to the police about Echard's words and actions made after Echard learned the fence would be built. The Krafts counterclaimed, alleging that Echard interfered with his "peaceful possession of their property."

The jury returned a verdict for the Krafts on the nuisance claim and awarded them \$25,000 in damages. Echard filed an appeal.

On appeal, the court focused on six incidents to determine whether Echard's actions rose to the level of common law nuisance.

The first incident occurred after Echard had found out about the plan to erect the fence. Echard invited Kraft to his house and asked, "What kind of an asshole would do this?" Echard called Kraft other defamatory names as well.

The second occurrence consisted of Echard trespassing on the Krafts' land and speaking to the workmen who were constructing the fence. Kraft told Echard to leave and he refused. Eventually Echard did leave.

The third occurrence was a confrontation with the Krafts' housekeeper. When she was emptying a dustbuster, Kraft "yelled at her that she shouldn't be putting garbage on his property."

The fourth occurrence consisted of Echard displaying the Universal Sign of Disrespect (Kraft called it a "very emphatic finger), in response to a waive from the Krafts.

Notice provisions in an excess liability policy were complementary to one another

The fifth and sixth occurrence consisted of Echard shouting at night and during the day, waking up the Krafts and putting them in fear when Echard yelled, "Come down here . . . [j]ust let me see you somewhere."

In its analysis the court cited the Restatement (Second) of Torts (1979) which defines a private nuisance as "a nontrespassory invasion of another's interest in private use and enjoyment of land." To be considered a private nuisance, the interference must be both (1) substantial and (2) unreasonable. To have a cause of action under private nuisance, the interference must (1) "diminish materially the value of the property" and (2) "seriously interfere with the ordinary comfort and enjoyment of it." Further, the interference must cause significant harm.

Examples of interference that have been found to be nuisances in the past are, "polluting smokestacks,

corroded tanks leaking hazardous waste into the groundwater, barking dogs, noisy trains, and smelly hog farms."

The court ruled in favor of the defendant because his actions did not decrease the value of the Plaintiff's property, nor did his actions cause "'serious interference with the ordinary comfort and enjoyment' of the Kraft's property."

Notice and Duty to Indemnify -

Prince George's County v. Local Government Insurance Trust, 2004 WL 2255325 (Md. App. October 8, 2004).

The Court of Special Appeals of Maryland held that Prince George's County was not entitled to indemnity from its excess liability insurer for an underlying judgment because the County failed to comply with the notice provisions of its excess liability policy.

On June 28, 1997, Prince George's County Police Officer Robert McDaniel inflicted serious injuries upon Freddie McCollum, Jr. during a routine traffic stop. McCollum, his wife, and his daughter brought suit against the County and three police officers in the United States District Court for the District of Maryland. The complaint alleged assault, battery, false arrest, malicious prosecution, and violations of both federal and state civil rights act.

The jury awarded McCollum over \$4.1 million in damages. The District Court reduced the damages and entered judgment against the officers and County in the total amount of \$1,597,670. The Fourth Circuit Court of Appeals upheld the award on appeal. Prince George's County paid the judgment and sought indemnification from its excess liability insurer, Local Government Insurance Trust (the "Trust").

From July 1, 1996 until July 1, 1998, the Trust provided the County with excess liability insurance. Under the terms of the policy, the County, which was self-insured for \$1 million, was covered by the Trust for losses that exceeded the limits of its self-insurance up to \$5 million. The Trust denied the County's request for indemnification, alleging that the county had violated the terms of the policy by failing to notify the Trust of McCollum's claim before a verdict was rendered. Subsequently, the County filed suit in Prince George's County Circuit Court, and alleged breach of contract and sought a declaratory judgment that the Trust owed a duty to indemnify the County for the amount paid in the McCollum judgment that exceeded \$1 million.

The coverage dispute between the County and the Trust essentially came down to the interpretation of two documents within the policy: the Excess Liability Scope of Coverage ("Scope of Coverage") and the Self-Insurance Excess Coverage Endorsement ("Endorsement"). The Scope of Coverage required the County to "see to it that the Trust is notified promptly of an Occurrence, Wrongful Act or Accident, which is likely to create an obligation under this Scope of Coverage." It further required that, "[i]f a Claim is made or Lawsuit is brought against any Insured, the Named Insured must see to it that the Trust receives prompt written notice of the Claim or Lawsuit." Finally, it required the County to, "immediately send the Trust "copies of any demands ... or legal papers in connection with a Claim or Lawsuit."

The Endorsement required the County to report certain "losses" within "sixty (60) days" of learning of them. The losses included specific types of injuries and violations of federal and Maryland civil rights statutes. The County never notified the Trust of McCollum's claim or his lawsuit before the verdict was rendered, as the Scope of Coverage required, but it did notify the Trust of the verdict or "loss" as required by the Endorsement.

The circuit court concluded that the County was not entitled to indemnity from the Trust under the

policy because it breached its duty under the policy to give the Trust the required notice of the claim against the County. The court further ruled that McCollum's injuries were not the result of an occurrence and therefore did not fall within the terms of coverage in the policy. Thus, the court granted summary judgment in favor of the Trust.

On appeal, the County argued that the notice requirements in the Scope of Coverage conflicted with those in the Endorsement. The County pointed out that "loss," which was not defined in the Endorsement, was defined in the Scope of Coverage as "all sums legally paid or sums which the Insured is legally obligated to pay in the settlement or satisfaction of Claim to which this Scope of Coverage applies."

The County argued that unlike the Scope of Coverage, the Endorsement required only a notification of a loss after one had actually been suffered, which in the underlying case was after the verdict had been rendered. Further, the County argued that since the notice requirements in the Scope of Coverage were in conflict with those in the Endorsement, the Endorsement should control the matter. As the County had provided notice to the Trust in accord with the Endorsement, it argued that it was in fact entitled to indemnification under the policy.

The Maryland Court of Special Appeals did not find the County's argument persuasive. In fact, the Court found that the two notice provisions were complementary to one another, as they served a similar purpose at two different stages of a claim. It held that each notice provision reinforced the requirements of the other as the claim passed from origination to disposition.

Thus, it held that the County breached the terms of the policy because of its failure to notify the Trust promptly of McCollum's claim and lawsuit, and its failure to provide the information and assistance required by the Scope of Coverage. Because the Trust did not receive notice of the McCollum lawsuit until after the verdict, the Trust lost an opportunity to take action that might have lessened or eliminated its loss. Thus, the Trust was prejudiced by the County's untimely notification of the McCollum lawsuit. Therefore, the County was not entitled to indemnification under its excess liability policy.

