

**CHUBB PRESENTATION ON RISK ASSESSMENT
INSURANCE CLAIMS EVALUATION**

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LIABILITY EXPOSURE ANALYSIS DAMAGE ASSESSMENT

PREPARED BY:

**JEFFREY R. SCHMIELER, ESQUIRE
LAW OFFICES OF
SAUNDERS & SCHMIELER, P.C.**

PRESENTED BY:

JEFFREY R. SCHMIELER, ESQUIRE

**LAW OFFICES OF
SAUNDERS & SCHMIELER, P.C.**

www.sslawfirm.com

**8737 Colesville Road, Suite L-200
Silver Spring, Maryland 20910
(301) 588-7717**

**Suite 600
1050 17th Street, N.W.
Washington, D.C. 20036**

**Suite 2700,
111 South Calvert Street
Baltimore, Maryland 21202**

**Suite 700
2111 Wilson Boulevard
Arlington, Virginia 22201**

**4900 Cutshaw Avenue
Richmond, Virginia 23230**

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LIABILITY EXPOSURE ANALYSIS

I. OVERVIEW OF THE DEVELOPMENT OF THE LAW

Legal Principles

A. Negligence - Reasonable man standard. A theory of liability predicated upon fault.

The most fundamental concept of American Jurisprudence is the principle of liability founded on fault. It is a concept deeply imbedded in the heritage and precedent of the law and is the cornerstone of all liability predicated upon **negligence**.

In order to validly state a cause of action sounding in **negligence**, four (4) elements must co-exist:

- (1) A duty owed to another;
- (2) A breach of that duty;
- (3) Damages or injury; and
- (4) A causal connection between the breach and the injury and damages.

Liability founded on negligence therefore depends primarily upon the existence of:

- (1) A legally recognized duty; and
- (2) A breach of that duty.

The basic concept of negligence is therefore liability premised upon a fault basis of liability, i.e., a duty and breach thereof. This basic **fault concept** is the gravamen of all tort liability based upon negligence.

Such a concept, i.e., **liability predicated upon fault**, is submitted to be a fundamentally fair concept. While the basic concept of liability predicated on fault is fundamentally fair, why then are the results of the application of the concept by the modern day jurisprudence system seen as largely unfair by the public? The answer to the question lies in the basic predicate itself i.e. **duty** and breach of duty, in that the Courts have defined **tort duty** in a manner which is not **co-extensive** with a **moral duty**.

In the case of the Village of Cross-Keys v. U.S. Gypsum, 315 Md. 741, 751, 556 A.2d 1126 (1989), the Maryland Court of Appeals stated that:

A tort duty... is an expression of the sum total of those considerations of policy which lead the law to say that the Plaintiff is entitled to protection, and that a tort duty is not necessarily co-extensive with a moral duty.

The Court further stated:

Among the factors to be considered in determining whether tort duty should be recognized are:

- (1) **The foreseeability of harm to the Plaintiff;**
- (2) **The degree of certainty that Plaintiff suffered injury;**
- (3) **The closeness of the connection between the Defendant's conduct and the injury suffered;**
- (4) **The moral blame attached to the Defendant's conduct;**
- (5) **The policy of preventing future harm;**
- (6) **The extent of the burden of the Defendant;**
- (7) **The consequences to the community of imposing a duty to exercise care with resulting liability for a breach; and**
- (8) **The availability, cost and prevalence of insurance for the risk involved.**

While the basic concept of negligence predicated on fault is a fundamentally fair concept, the incongruous and logically inconsistent application of the concept together with social engineering and legislation by the Court system, has resulted in the basic unfairness of the law of negligence as it exists and as it is applied today by the American judicial system. In the present day litigation of a premises liability case, as a general rule questions of whether or not an owner breached his duty of care to invitees and whether an invitee exercised reasonable care for his or her own safety are normally determined to be **jury questions** except in rare instances and undisputed cases where reasonable minds cannot differ as to the conclusion to be reached.

This tendency to present cases to a **jury for a liability determination** rather than a judicial determination has the effect of expanding liability and the associated risks of liability in an ever increasing fashion

rather than confining liability to an established standard which the law defines as constituting a clearly defined duty and breach thereof. It injects uncertainty in the law in an area where a clearly defined standard of care would not only assist businesses, owners/occupiers in establishing reasonable maintenance and operational policies and procedures but also obviate needless litigation. It breeds uncertainty in an area of the law which cries out for certainty.

B. The Collateral Development of Liability Without Fault - Strict Liability in Tort

In the past fifty (50) years, separate and apart from the developing law of negligence, the concept of *liability without fault*, i.e., *strict liability in tort* developed, principally in the area of products liability which imposed liability on product manufacturers even in those instances where there was no negligence under the public policy theory that public policy demanded that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the marketplace. The theory underpinning strict liability is that the product manufacturer is more able to bear the *risk of loss* by protecting itself with **insurance coverage** than an injured party.

Strict liability imputes liability on the commercial supplier of “unreasonably dangerous” products without the need to show any negligence on the part of the defendant. The general rule is stated in Restatement of Torts 2d, § 402A.

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his physical property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

- (a) The seller is engaged in the business selling such a product, and**
- (b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.**

(2) The rule stated in Subsection (1) applies although

- (a) The seller has exercised all possible care in the preparation and sale of his product, and**
- (b) The user or consumer has not bought the product from or entered into any contractual relation with the Seller.**

Strict liability is also imposed for inherently dangerous activity, as well as in certain legislative enactments inclusive of:

- (1) ADA (Americans With Disabilities Act);**
- (2) OSHA (Occupational Safety and Hazard Act);**
- (3) CERCLA (Comprehensive Environment Response, Compensation and Liability Act of 1980);**
- (4) Industrial Safety Act of the District of Columbia (Safe work Place); and**
- (5) Workers Compensation.**

II. LEGAL THEORIES OF LIABILITY

NEGLIGENCE

A. MARYLAND

Negligence has four (4) basic elements under Maryland Jurisprudence. They are as follows: (1) the defendant owed a duty to the plaintiff to protect the plaintiff from injury; (2) the defendant breached that duty; (3) the plaintiff suffered actual injuries; and (4) those injuries were proximately caused by the defendant's breach of duty.^[1]

If any one of these elements is lacking, the action will not lie.

B. DISTRICT OF COLUMBIA

Negligence actions in the District of Columbia require a showing: 1) that the defendant owed a duty to the plaintiff; 2) that the defendant breached the duty; 3) that the breach was proximate cause of; and 4) plaintiff's damages.^[2]

The existence of a legal duty is ordinarily a question of law for the Court to decide. That duty is usually held to be the reasonable care that is expected of others in the same field or situation. A person has the right to assume that others will exercise reasonable care. A person has the right to assume that others have normal sight, hearing and intelligence, and are exercising ordinary care when using these senses or abilities.

C. VIRGINIA

In Virginia,^[3] in order to recover for negligence, the plaintiff must establish: 1) that the defendant was under a duty to use care not to injure the plaintiff; 2) that the defendant breached this duty; 3) that this breach of duty was a legally recognized cause of and 4) actual injury to the plaintiff. In other words, to constitute actionable negligence, there must be a duty, a violation thereof, and a consequent injury.^[4]

D. NEW JERSEY

According to Endre v. Arnold, 300 N.J. Super 136, 142, 692 A.2d 97, 100, **“Three elements are essential for the existence of a cause of action in negligence: (1) a duty of care owed by defendant to plaintiff; (2) a breach of that duty by defendant; and (3) an injury to plaintiff proximately caused by defendant's breach. Whether a duty exists is solely a question of law to be decided by a court and not by submission to a jury.”** citing Anderson v. Sammy Redd and Assoc., 278 N.J. Super. 50, 56, 650 A.2d 376 (App.Div.), cert. denied, 139 N.J. 441, 655 A.2d 444 (1995); Wang v. Allstate Ins. Co., 125 N.J. 2, 15, 592 A.2d 527 (1991).

E. DELAWARE

Negligence is the lack of ordinary care; that is, the absence of the kind of care a reasonably prudent and careful person would exercise in similar circumstances. If a person's conduct in a given circumstance doesn't measure up to the conduct of an ordinarily prudent and careful person, then that person was negligent. On the other hand, if the person's conduct does measure up to the conduct of a reasonably prudent and careful person, the person wasn't negligent. The mere fact that an accident occurred isn't enough to establish negligence. Duphily v. Delaware Elec. Coop., Inc., Del. Supr., 662 A.2d 821, 828(1995); Culver v. Bennett, Del. Supr., 588 A.2d 1094, 1096-97 (1991); Robelen Piano Co. v. Di Fonzo, Del. Supr., 169 A.2d 240 (1961); Rabar v. E.I. duPont de Nemours & Co., Del. Supr., 415 A.2d 499, 506 (1980); DeAngelis v. U.S.A.C. Transport, Del. Supr., 105 A.2d 458 (1954); Kane v. Reed, Del. Supr., 101 A.2d 800 (1954).

F. PENNSYLVANIA

Pennsylvania defines negligence elements as duty or obligation recognized by law, breach of that duty, causal connection between conduct and resulting injury, and actual damages.^[5]Duty is determined by an examination of conduct of reasonable man under the circumstances.^[6]

G. WEST VIRGINIA

In order to establish a *prima facie* case of negligence in West Virginia, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. *Aikens v. Debow*, 208 W.Va. 486, 541 S.E.2d 576 (2000); *Jack v. Fritts*, 193 W.Va. 494, 457 S.E.2d 431 (1995); *Parsley v. General Motors Acceptance Corp.*, 167 W.Va 866, 280 S.E.2d 703 (1981).

CONTRIBUTORY AND COMPARATIVE NEGLIGENCE

A. MARYLAND

The State of Maryland is a contributory negligence state. Contributory negligence is the failure to observe ordinary care for one's own safety; it is the doing of something that a person of ordinary prudence would not do, or the failure to do something that a person of ordinary prudence would do, under the circumstances. *Union Mem. Hosp.*, 125 Md. App. 275, 724 A.2d 1272 (1999). A person is deemed contributorily negligent if he fails to observe ordinary care for his own safety. *Schweitzer v. Brewer*, 280 Md. 430, 374 A.2d 347 (1977). Contributory negligence is a complete defense if such negligence directly contributes to plaintiff's injury. *Baltimore County v. Keenan*, 232 Md. 350, 193 A.2d 30 (1963). The defendant has burden of establishing plaintiff's contributory negligence. *Atlantic Mut. Ins. Co. v. Kenney*, 323 Md. 116, 591 A.2d 507 (1991). The critical distinction between contributory negligence and assumption of risk is that, in the latter, by virtue of plaintiff's voluntary actions, any duty defendant owed plaintiff to act reasonably for plaintiff's safety is superseded by plaintiff's willingness to take chance. *Schroyer v. McNeal*, 323 Md. 275, 592 A.2d 1119 (1991). Further, where Plaintiff is guilty of contributory negligence, the Defendant's negligence is immaterial. *Miller v. Mullenix*, 227 Md. 229, 176 A.2d 203 (1962).

A child of tender years held only to that measure of care which children of same age and intelligence would be expected to exercise under similar circumstances. *Stein v. Overlook Joint Ven-ture*, 246 Md. 75, 227 A.2d 226 (1967). As matter of law, a child aged 4 cannot be held contributorily negligent. *Miller v. Graff*, 196 Md. 609, 78 A.2d 220 (1951). A child aged 5 or over may be contributorily negligent, but is only bound to exercise that degree of care of reasonable person of like age, intelligence, and experience under like circumstances. *Taylor v. Armiger*, 277 Md. 638, 358 A.2d 883 (1976).

B. DISTRICT OF COLUMBIA

The District of Columbia is a contributory negligence jurisdiction. Generally, contributory negligence is a good defense to action based on negligence. *Karma Constr. Co., Inc. v. King*, 296 A.2d 604 (D.C. 1972). Under the doctrine of contributory negligence, the plaintiff is barred from recovery if his negligence was a substantial factor in causing his injury, even if the defendant was also negligent. *Sinai v. Polinger Co.*, 498 A.2d 520 (D.C. 1985). In determining whether a minor is contributorily negligent, the jury must consider his age, education, training and experience. *Stevens v. Hall*, 391 A.2d 792 (D.C. 1978). The District of Columbia law does not recognize the doctrine of comparative negligence. *District of Columbia v. C.F. & B., Inc.*, 442 F. Supp. 251 (D.D.C. 1977); *National Health Lab. v. Ahmadi*, 596 A.2d 555 (D.C. App. 1991) (Medical Malpractice). Only exception to this rule is in actions by employee against common carrier. D.C. Code §44-402 (1998).

C. VIRGINIA

Contributory negligence is a complete defense in Virginia. Morris v. Dame's Ex'r, 161 Va. 545, 171 S.E. 662 (1933). Contributory negligence shall not constitute a defense unless pleaded or shown by plaintiff's evidence. Rule 3:16 (d) Rules of Supreme Court of Virginia. Contributory negligence and assumption of the risk are concepts which occasionally overlap but are generally distinguishable; "contributory negligence" connotes carelessness; "assumption of the risk" connotes venturousness voluntarily incurring risk, nature and extent of which are fully appreciated. VEPCO v. Winesett, 225 Va. 459, 303 S.E.2d 868 (1983).

Under seven years of age, a child is conclusively presumed incapable of contributory negligence. Between seven and fourteen years of age, there is a rebuttable presumption of incapacity. At ages fourteen and over, children lose the presumption of incapacity and are presumed to have adult capacity as to contributory negligence but the standard of conduct is of children of the same age, experience and maturity. Grant v. Mays, 204 Va. 41, 129 S.E.2d 10 (1963); Norfolk & Portsmouth R.R. v. Barker, 221 Va. 924, 275 S.E.2d 613 (1981).

D. NEW JERSEY

Contributory negligence shall not bar recovery in New Jersey unless the negligence of the plaintiff is greater than that of defendant or greater than the combined negligence of multiple defendants. N.J. Stat. Ann. §2A:15-5.1. The judge shall mold judgment by the percentage of each party's negligence or fault. N.J. Stat. Ann. §2A:15-5.2. The trier of fact must make findings in negligence actions as to the percentage of each party's negligence or fault. N.J. Stat. Ann. §2A:15-5.2. The total percentage of negligence or fault of all parties is to be 100%. N.J. Stat. Ann. §2A:15-5.2.

Historically, and prior to December 18, 1987 "Joint and Several Liability" in New Jersey meant that a plaintiff could collect the total award from any liable defendant irrespective of that defendant's percentage of negligence and the "paying" defendant could then seek the other defendants to pay their proportional share of award. N.J. Stat. Ann. §2A:15-5.3 applies to all non-environmental tort actions and states: 1) defendant 60% or more responsible can be compelled to pay entire award; 2) defendant less than 60% responsible can be compelled to pay only percentage of non-economic loss attributable to his negligence. The party paying more than his share may seek contribution from other joint tort-feasors under N.J. Stat. Ann. §2A:15-5.3. In environmental tort actions involving the manufacture, use, disposal, handling, storage or treatment of hazardous or toxic substances successful plaintiff may compel any liable defendant to pay entire award.

Where one defendant settled with the plaintiff prior to trial and at trial, the non-settling defendant was found 100% negligent, non-settling defendant was not entitled to pro tanto reduction of judgment under Comparative Negligence Act but rather joint tort-feasors share on the basis of percentage of negligence. Rogers v. Spady, 147 N.J. Super. 274, 371 A.2d 285 (App. Div. 1977); Cartel Capital Corp. v. Fireco, 81 N.J. 548, 410 A.2d 674 (1980); Lee's Hawaiian v. Safety First, 195 N.J. Super. 493, 480 A.2d 927 (App. Div.), cert. denied, 99 N.J. 205, 491 A.2d 703 (1984). See Ryan v. KDI Sylvan Pools, 121 N.J. 276, 579 A.2d 1241 (1990) for apportionment of damages between strictly liable defendant, negligent defendant and contributorily negligent plaintiff. Where one or more defendants settle, any verdict recovered by plaintiff against non-settling defendants will be reduced by percentage of negligence attributable to settling defendants. Cartel Capital Corp., *supra*; Young v. Latta, 233 N.J. Super. 520, 559 A.2d 465 (App. Div. 1989), *aff'd*, 123 N.J. 584, 589 A.2d 1020 (1991). New Jersey courts permit "high-low agreements" in which defendant agrees to pay plaintiff mini-mum recovery in return for plaintiff's agreement to accept maximum sum regardless of outcome. Benz v. Pires, 269 N.J. Super. 574, 636 A.2d 101 (App. Div. 1994). Failure of non-settling defendant to assert cross-claim against settling defendant will not bar jury from assessing proportionate liability of settling defendant but non settling defendant must give timely notice as to alleged liability of settling defendant. If no fact issue is presented to trier regarding settling defendant liability then trier cannot assess proportionate liability

against settling party. Young, *supra*.

E. DELAWARE

The doctrine of comparative negligence has been adopted by statute, replacing contributory negligence, and applies to all actions for wrongful death or injury to person or property. 10 Del. Code §8132 (effective July 17, 1984). The fact that a plaintiff may have been contributorily negligent will not bar recovery where such negligence was not greater than the negligence of the defendant or combined negligence of multiple defendants. Damages shall be diminished by the court in proportion to the amount of negligence attributed to the plaintiff. Passive assumption of risk is an aspect of comparative negligence, not a complete bar to recovery. No duty exists to anticipate the negligence of another. Levine v. Lam, Del. Supr., 226 A.2d 925 (1967). The defense is not available to a defendant whose conduct is wanton or willful. Gushen v. Penn Central Transp. Co., Del. Supr., 280 A.2d 708 (1971). However, “contributory wantonness” is a defense to a defendant’s willful or reckless misconduct. Wagner v. Shanks, Del. Supr., 194 A.2d 701 (1963).

F. PENNSYLVANIA

The comparative negligence doctrine was adopted by the Pennsylvania legislature in Act 152 of 1976, 42 Pa. Cons. Stat. §7102 (a) and applies to negligence resulting in the death or injury to persons on property, not purely financial loss. Wescoast v. Northwest Sav. Ass’n, 378 Pa. Super. 295, 548 A.2d 619 (1988). The section only applies to negligence actions, not strict liability. McMeekin v. Harry M. Stevens Inc., 365 Pa. Super. 580, 530 A.2d 462 (1987). Contributory negligence bars recovery only where a plaintiff’s negligence is greater than a defendant’s negligence. 42 Pa. Cons. Stat. §7102 (a).

G. WEST VIRGINIA

West Virginia abolished the contributory negligence doctrine. In West Virginia, a party is not barred from recovering damages in a tort action so long as his negligence or fault does not exceed or equal the combined negligence or fault of other parties involved in the accident. Bradley v. Appalachian Power Co., 163 W. Va. 332, 256 S.E.2d 879 (1979). Accord, Adkins v. Whitten, 171 W. Va. 106, 297 S.E.2d 881 (1982); Everly v. Columbia Gas, 171 W. Va. 534, 301 S.E.2d 165 (1982). The principles of comparative fault or negligence apply not only to actions in tort involving personal injury or property damages, but also to actions in tort involving pecuniary damage alone. Brammer v. Taylor, 175 W. Va. 728, 338 S.E.2d 207 (1985) (applying comparative negligence to actions based on bank’s alleged unauthorized practice of law and negligence in assisting with will preparation). The comparative negligence doctrine is fully retroactive. Sullivan v. Billey, 163 W. Va. 445, 256 S.E.2d 591 (1979). The apportionment of negligence is a question for the jury. Raines v. Lindsey, 188 W. Va. 137, 423 S.E.2d 376 (1992).

PRODUCTS LIABILITY/STRICT LIABILITY

A. MARYLAND

The State of Maryland adopted strict liability in tort in the landmark case of Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976). The Maryland Court of Appeals in Phipps specifically adopted strict liability in tort predicated upon Section 402A of the Restatement (Second) of Torts. Under the Restatement, in order to recover under a theory of strict liability in tort, a Plaintiff must show:

1. that the product was in a **defective condition** at the time it left the possession or control of the seller;
2. that it was **unreasonably dangerous** to the user or consumer;

3. defect was a **cause** of the injuries; and
4. that the product was expected to and did reach the consumer without substantial change in its condition.

Section 402A on its face, subjects a seller of a defective product to strict liability without regard to the knowledge of the defect and “even though (the seller) has exercised all possible care in the preparation and sale of the product.” [Restatement Second] of Torts at 402A comment (a) 1965.

In an action founded on strict liability in tort, as opposed to a traditional negligence action, the plaintiff need not prove any specific act of negligence on the part of the seller. **The relevant inquiry in a strict liability action focuses not on the conduct of the manufacturer but rather on the product itself.**

A products liability action may be based on the failure to warn. When a product is alleged to be defective because of a failure to give an adequate warning, the Court has held that the seller is not strictly liable for failure to warn unless the seller had “knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of of the danger.” The Court adopted comment (j) of Section 402A of the Restatement which is applicable to a strict liability cause of action where the alleged defect is a failure to give adequate warning(s) in so holding the Court adopted the “state of the art” theory of liability as espoused in comment (j), the Court held that a manufacturer of a product is held to the knowledge of an expert in the field and that the knowledge or state of the art component is an element to be proven by the Plaintiff. In a strict liability failure to warn case, the alleged defect is the failure of the seller to give an adequate warning. The seller, however, need not give any warning if the requisite **state of the art** or knowledge does not require it. Owens-Illinois v. Zenobia, 325 Md. 420, 601 A.2d 623 (1992).

Under Maryland law, **contributory negligence** is not a defense to a strict liability claim. However, **misuse of a product** may bar recovery where the misuse is the sole proximate cause of damage, or where it is the intervening or superseding cause. For example, a high speed electric drill may be defective because a manufacturing defect causes it to short circuit and produce a shock during normal usage. A plaintiff who attaches a brush to that drill and in attempting to clean his teeth suffers injury to his mouth from the high speed of the brush will lose because his misuse is the sole cause of his misfortune, and the defect in the drill is not in any way related to the harm Ellsworth v. Sherne Lingerie, Inc., 303 Md. 581 495 A.2d 348 (1985).

In Maryland, in determining whether a manufacturer should be held strictly liable for injuries sustained by the design of a particular product is a decision that involves the consideration of important policy issues. Lundgren v. Ferno-Washington Company, Inc., 80 Md. App. 522 (1989). For the most part, the strict liability doctrine does not apply to cases where liability is depended upon an existence of a design defect. Frericks v. General Motors Corp., 274 Md. 288, 336 A.2d 118 (1975). It is when the product involves an inherently unreasonable risk when the court examines the issue of strict liability.

Under the doctrine of strict liability, the defect of a product can be of manufacture or of design but for the most part, the question of whether a particular design is defective depends upon a balancing of the **utility of the design** verses the **magnitude of the risk**. Anthony Pools v. Shehan, 295 Md. 285, 455 A.2d 434 (1983). Under such test, a product is defective as to design if the risk or danger of the product outweighs the product's utility. Simpson v. Standard Container Company, 72 Md. App. 199, 527 A.2d 1337 (1987). In some instances, where risks in the design are inherently unreasonable, no balancing test is necessary in strict liability actions. Troja v. Black and Decker Manufacturing Company, 62 Md. App. 101, 488 A.2d 516 (1985).

B. DISTRICT OF COLUMBIA

The District of Columbia **recognizes** strict liability in tort. D.C. has adopted a strict liability standard in products liability cases. Product misuse and assumption of the risk are defenses to strict liability, whereas contributory negligence is not. "Product Misuse" is defined as the use of a product in a manner that could not reasonably be foreseen by the Defendant.^[7] In some situations, a Plaintiff's failure to read a warning may be a manufacturer's defense in a products liability action.^[8] This defense may be overcome; however, by evidence that a properly worded warning would have been verbally communicated to Plaintiff in, for example, his or her work place.^[9] An injured party has a cause of action against all parties who participated in placing the defective product into the stream of commerce.^[10] The Plaintiff need not be a purchaser of the product, but can be an intended user of the consumer.^[11]

C. VIRGINIA

Virginia does not recognize a cause of action for strict liability arising out of a design defect. Sensenbrenner v. Rust, Orling & Neale, Architects, Inc., 236 Va. 419 (1988). A products liability action brought in Virginia must be based either on negligence, or be based on a breach of an implied or expressed warranty. These would include warranties of merchantability and fitness for a particular purpose. If a product is unreasonably dangerous, then the courts would generally find that there is a breach of warranty. The main difference between a breach of warranty claim for strict liability and a Restatement of Tort Section 401 (a) claim for strict liability, is that, in Virginia, it is still possible to, under the appropriate circumstances, disclaim warranties. Lack of privity of contract is not a defense for a breach of warranty claim.

D. NEW JERSEY

Products liability law in New Jersey is governed by statute N.J.S.A. 2A:58C-1 et seq. Punitive Damages in New Jersey are also governed by statute N.J.S.A.2A:15-5.9 et seq. The following excerpts from the statute describe fully the extent of the law in New Jersey:

Liability

A manufacturer or seller of a product shall be liable in a product shall be liable in a product liability action only if the claimant proves by a preponderance of the evidence that the product causing the harm was not reasonably fit, suitable or safe for its intended purpose because if: a. deviated from the design specification, formula, or performance standards or the manufacturer or from otherwise identical units manufactured to the same manufacturing specifications or formulae, or b. failed to contain adequate warnings or instructions, or c. was designed in a defective manner.

Defenses

- a. In any product liability action against a manufacturer or seller for harm allegedly caused by a product that was designed in a defective manner, the manufacturer or seller shall not be liable if:
 - (1) At the time the product left the control of the manufacturer, there was not a practical and technically feasible alternative design that would have prevented the harm without substantially impairing the reasonably anticipated or intended function of the product; or
 - (2) The characteristics of the product are known to the ordinary consumer or user, and the harm was caused by an unsafe aspect of the product that is an inherent characteristic of the product that is common to the class of persons for whom the product is intended, except

that this paragraph shall not apply to industrial machinery or other equipment used in the workplace and it is not intended to apply to dangers posed by products such as machinery or equipment that can feasibly be eliminated without impairing the usefulness of the product; or

(3) The harm was caused by an unavoidably unsafe aspect of the product and the product was accompanied by an adequate warning or instruction as defined in section 4 of this act.

b. The provisions of paragraph (1) of subsection a. of this section shall not apply if the court, on the basis of clear and convincing evidence, makes all of the following determinations:

(1) The product is egregiously unsafe or ultra hazardous;

(2) The ordinary user or consumer of the product cannot reasonably be expected to have knowledge of the product's risks, or the product poses a risk of serious injury to persons other than the user or consumer; and

(3) The product has little or no usefulness.

c. No provision of subsection a. of this section is intended to establish any rule, or alter any existing rule, with respect to the burden of proof.

Adequate product warning or instruction:

rebuttable presumption of adequacy after approval

In any product liability action the manufacturer or seller shall not be liable for harm caused by a failure to warn if the product contains an adequate warning or instruction or, in the case of dangers a manufacturer or seller discovers or reasonably should discover after the product leaves its control, if the manufacturer or seller provides an adequate warning or instruction. An adequate product warning or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates adequate information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons by whom the product is intended to be used, or in the case of prescription drugs, taking into account the characteristics of, and the ordinary knowledge common to, the prescribing physician. If the warning or instruction given in connection with a drug or device or food or food additive has been approved or prescribed by the federal Food and Drug Administration under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040, 21 U.S.C. § 301 et seq. or the "Public Health Service Act," 58 Stat. 682, 42 U.S.C. § 201 et seq., a rebuttable presumption shall arise that the warning or instruction is adequate. For purposes of this section, the terms "drug", "device", "food", and "food additive" have the meanings defined in the "Federal Food, Drug, and Cosmetic Act."

Punitive Damages

Punitive damages may be awarded to the plaintiff only if the plaintiff proves, by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by

a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions. This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence.

In determining whether punitive damages are to be awarded, the trier of fact shall consider all relevant evidence, including but not limited to, the following:

- (1) The likelihood, at the relevant time, that serious harm would arise from the defendant's conduct;
- (2) The defendant's awareness of reckless disregard of the likelihood that the serious harm at issue would arise from the defendant's conduct;
- (3) The conduct of the defendant upon learning that its initial conduct would likely cause harm; and
- (4) The duration of the conduct or any concealment of it by the defendant.

If the trier of fact determines that punitive damages should be awarded, the trier of fact shall then determine the amount of those damages. In making that determination, the trier of fact shall consider all relevant evidence, including, but not limited to, the following:

- (1) All relevant evidence relating to the factors set forth in this section
- (2) The profitability of the misconduct to the defendant;
- (3) When the misconduct was terminated; and
- (4) The financial condition of the defendant.

Punitive damages shall not be awarded if a drug or device or food or food additive which caused the claimant's harm was subject to pre-market approval or licensure by the federal Food and Drug Administration under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040, 21 U.S.C. § 301 et seq. or the "Public Health Service Act," 58 Stat. 682, 42 U.S.C. § 201 et seq. and was approved or licensed; or is generally recognized as safe and effective pursuant to conditions established by the federal Food and Drug Administration and applicable regulations, including packaging and labeling regulations. However, where the product manufacturer knowingly withheld or misrepresented information required to be submitted under the agency's regulations, which information was material and relevant to the harm in question, punitive damages may be awarded. For purposes of this subsection, the terms "drug", "device", "food", and "food additive" have the meanings defined in the "Federal Food, Drug, and Cosmetic Act."

While there are some exceptions, punitive damages are capped at five times the liability of that defendant for compensatory damages or \$350,000, whichever is greater.

Environmental tort action; inapplicability of act:

The provisions of this act shall not apply to any environmental tort action.

Burden of proof in product liability action; establishment or alteration of existing rule:

Except as otherwise expressly provided in this act, no provisions of this act is intended to establish any rule, or alter any existing rule, with respect to the burden of proof in a product liability action.

Medical devices; liability of provider

In any product liability action against a health care provider for harm allegedly caused by a medical device that was manufactured or designed in a defective manner, or for harm caused by a failure to warn of a danger related to the use of a medical device, the provider shall not be liable unless: (1) the provider has exercised some significant control over the design, manufacture, packaging or labeling of the medical device relative to the alleged defect in the device which caused the injury, death or damage; or (2) the provider knew or should have known of the defect in the medical device which caused the injury, death or damage, or the plaintiff can affirmatively demonstrate that the provider was in possession of facts from which a reasonable person would conclude that the provider had or should have had knowledge of the alleged defect in the medical device which caused the injury, death or damage; or (3) the provider created the defect in the medical device which caused the injury, death or damage.

E. DELAWARE

The Delaware Courts recognize products liability actions, but they do not recognize products liability actions based on the theory of strict liability. The Supreme Court of Delaware held that the theory of strict liability is precluded by the Uniform Commercial Code. Cline v. Prowler Indus. of Maryland, Inc., 418 A. 2d 968 (Del. 1980).

F. PENNSYLVANIA

In Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966), the Courts accepted that a manufacturer or supplier should be liable for sale or distribution of a product "in a defective condition unreasonably dangerous" to the user or consumer or his property. Webb also extended the rule of strict liability to defective products by adopting the Restatement of the Law of Torts 2d. § 402A.

G. WEST VIRGINIA

West Virginia has adopted strict liability in products liability cases to recover for property damage when a defective product damages property only. Star Furniture v. Pulaski, 171 W.Va. 79, 84, 297 S.E.2d 854, 859 (1982). However the defense of assumption of the risk is available against the Plaintiff in a products liability case, King v. Kayak Mgt. Corp., 387 S.E. 2d 511 (1989), and the W. Va. Courts have held generally that "the doctrine that conditions or activities which are intrinsically dangerous will result in liability without proof of negligence will not be adopted into the state's tort products liability law." Morning Star v. Black and Decker, 253 S.E. 2d 666 (1979).

JOINT & SEVERAL LIABILITY

A. MARYLAND

Maryland has codified its rules regarding joint tort-feasors in its Courts & Judicial Proceedings Volume, Title 3, Subtitle 14. According to the **Uniform Contribution Among Tort-feasors Act (UCATA)**, a release by an injured person of one tort-feasor does not release additional tort-feasors unless they are released by the injured party. However, any amount paid by a single tort-feasor reduces the total consideration available to the injured party by the amount paid. Section 3-1404 titled "Effective Release on Injured Person Claim":

A release by the injured person of one joint tort-feasor, whether before or after judgment, does not discharge the other tort-feasors unless the release so provides; but **reduces the claim** against the other tort-feasors in the **amount the consideration paid** for the release, **or in any amount or proportion** by which the release provides that the total

claim shall be reduced, if greater than the consideration paid.

According to § 3-1405, titled "Effect of release on right of contribution":

a release by the injured person of one joint tort-feasor does not relieve him from liability to make contribution to another joint tort-feasor unless the release is given before the right of the other tort-feasor to secure a money judgment for contribution has accrued, and provides for a reduction, to the extent of the pro rata share of the released tort-feasor, of the injured person's damages are recoverable against all other tort-feasors.

The Court of Appeals of Maryland first considered the application of these sections, previously codified as §19 and §20 of the Maryland UCATA, in Swigert v. Welk, 133 A.2d 428 (1957). The Maryland Court, posing a hypothetical situation, indicated that if a plaintiff received a consideration from one joint tort-feasor for a pro rata release, then the amount of consideration, if greater than the released tort-feasors' pro rata share, will reduce the judgment entered against the remaining tort-feasor by the amount that consideration paid exceeded the pro-rata share.

In a subsequent case, Chilcote v. Von Der Ahe Van Lines, 476 A.2d 204 (1984), the Court held that where a released joint tort-feasor paid a settlement amount less than his ultimate pro rata share of the subsequent judgment, then the subsequent judgment would be set-off by the released Defendant's pro rata share rather than the consideration paid by him in settlement.

Another important case which interpreted §19 and §20 of the Act is Martinez v. Lopez, 476 A.2d 197 (1984). The Martinez Court held that where the amounts paid by the settling joint tort-feasor is more than the ultimate judgment, the pro rata reduction produces a negative result which fully satisfies the judgment and the plaintiff may not recover anything from the defendant against whom the judgment was entered. The rationale for this theory is that an injured party is entitled to only one satisfaction for an injury. It is clear that under the facts of Martinez, the non-settling defendant enjoys a windfall since the settling defendant pays the entire judgment. The following hypotheticals will provide clarification.

Example No. 1: Plaintiff v. Defendants I and 2.

Plaintiff enters into a valid joint tort-feasor release with Defendant 1 for the consideration of \$60. The plaintiff proceeds against Defendant 2 and obtains a judgment in the amount of \$100. Pursuant to Swigert, plaintiff may only recover \$40 from defendant 2 since the amount paid by the settling defendant exceeds the pro rata share (\$50).

Example No. 2: Plaintiff V. Defendants 1 and 2.

Plaintiff enters into a valid joint tort-feasor release with Defendant 1 in the amount of \$20 and obtains a judgment against Defendant 2 in the amount of \$100. Pursuant to Chilcote, Plaintiff may only recover \$50 from defendant 2 since the judgment is reduced by the pro rata share (\$50) notwithstanding that the Plaintiff recovered less than the pro rata share from the settling tort-feasor.

Example No. 3: Plaintiff v. Defendants 1 and 2.

Plaintiff enters in a joint tort-feasor release with Defendant 1 in the amount \$150 and obtains a judgment against Defendant 2 in the amount of \$100. Pursuant to Martinez, Plaintiff may recover nothing from Defendant 2 since the amount of the consideration paid by the settling tort-feasor, \$150, exceeds the amount of the judgment.

Further, according to Chilcote, in a situation involving a master-servant relationship, and the liability of the master is vicarious, the master-servant represent but one pro rata share. For example, a driver of an automobile and an owner who is not the pro rata share. Moreover, Martinez (Example No. 3) held that the

settling tort-feasor had no right of contribution from the nonsettling tort-feasor even though he paid in excess of the judgment subsequently obtained against the non-settling tort-feasor.

However, one should not conclude from the mere existence of two or more tort-feasors that they are necessarily deemed to be "joint tort-feasors," a judicially crafted term of art. Generally, two or more tort-feasors are considered joint tort-feasors when they act in concert or concurrently to cause one harm. Morgan v. Cohen, 523 A.2d 1003 (1987). In Cohen the claimant who was injured in a car accident settled her case against the other driver and executed a general release whereby for consideration she released all of mankind. Subsequently, the claimant instituted a malpractice action against Dr. Cohen. The Court held that the action against Dr. Cohen was not barred as a matter of law even though the plaintiff executed a general release since the injuries inflicted by the doctor were not caused by the accident. The Court reasoned that Dr. Cohen caused separate and additional harms for which he could be held independently liable. This is so despite the fact that the original tort-feasor could be held jointly liable for the harms allegedly caused by Dr. Cohen. This case has been widely criticized and has caused considerable confusion within the legal community. Nevertheless, it serves as an example, albeit a contentious one, where two concurrent or successor tort-feasors have been held not to have caused the same harm and the latter tort-feasor not necessarily subject to the terms of a general release.

B. DISTRICT OF COLUMBIA

D.C. has not adopted the Uniform Tort-Feasor Act. In cases where the Plaintiff has settled the claim prior to trial with one or two or more joint tort-feasors, the Defendant remaining at trial is entitled to a set-off from the judgment based on the settlement. If the trier of fact has found the settling Defendant liable, a **pro rata** (based on the number of tort-feasors) reduction may be ordered.^[12] The credit may be limited in a low verdict situation such that a Defendant found liable at trial at least will have to pay his or her **pro rata** share of the verdict.

C. VIRGINIA

The law in Virginia was stated in Maroulis v. Elliott, 207 Va. 503 (1966). "Where separate and independent acts of negligence of two parties are the direct cause of a single injury to a third person and it is impossible to determine in what proportion each contributed to the injury, either or both are responsible for the whole injury." Maroulis, 207 Va. at 511. The negligence of those two parties need not occur simultaneously, as long as they concur in proximately causing a single indivisible injury for joint and several liability for the entire damage claimed. The question of whether there is such concurring negligence that proximately causes a single indivisible injury is a question for the jury to decide. Dickenson v. Tabb, 208 Va. 184, 193 (1967).

Virginia has adopted the rule that allowed for one joint tort-feasor to enter into a release with the Plaintiff without releasing any other tort-feasor. Under Virginia Code Section 8.01-35.1., a Plaintiff may settle with one joint tort-feasor, without releasing any other joint tort-feasor.

Va. Code Ann. § 8.01-35.1 states:

A. When a release or a covenant not to sue is given in good faith to one of two or more persons liable in tort for the same injury, or the same property damage or the same wrongful death:

1. It shall not discharge any of the other tort-feasors from liability for the injury, property damage or wrongful death unless its terms so provide; but any amount recovered against the other tort-feasors or any one of them shall be reduced by any amount stipulated by the covenant or the release, or in the amount of the consideration paid for it, whichever is the

greater. In determining the amount of consideration given for a covenant not to sue or release for a settlement which consists in whole or in part of future payment or payments, the court shall consider expert or other evidence as to the present value of the settlement consisting in whole or in part of future payment or payments. A release or covenant not to sue given pursuant to this section shall not be admitted into evidence in the trial of the matter but shall be considered by the court in determining the amount for which judgment shall be entered; and

2. It shall discharge the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

B. A tort-feasor who enters into a release or covenant not to sue with a claimant is not entitled to recover by way of contribution from another tort-feasor whose liability for the injury, property damage or wrongful death is not extinguished by the release or covenant not to sue, nor in respect to any amount paid by the tort-feasor which is in excess of what was reasonable.

C. For the purposes of this section, a covenant not to sue shall include any "high-low" agreement whereby a party seeking damages in tort agrees to accept as full satisfaction for any judgment no more than one sum certain and the party or parties from whom the damages are sought agree to pay no less than another sum certain regardless of whether any judgment rendered at trial is higher or lower than the respective sums certain set forth in the agreement and whereby such party provides notice to all of the other tort-feasors of the terms of such "high-low" agreement immediately after such agreement is reached.

D. A release or covenant not to sue given pursuant to this section shall be subject to the provisions of §§ 8.01-55 and 8.01-424.

E. This section shall apply to all such covenants not to sue executed on or after July 1, 1979, and to all releases executed on or after July 1, 1980. This section shall also apply to all oral covenants not to sue and oral releases agreed to on or after July 1, 1989, provided that any cause of action affected thereby accrues on or after July 1, 1989. A release or covenant not to sue need not be in writing where parties to a pending action state in open court that they have agreed to enter into such release or covenant not to sue and have agreed further to subsequently memorialize the same in writing.

D. NEW JERSEY

New Jersey recognizes the theory of joint and several liability, in which two or more people who owe a duty, which each performs negligently, are held jointly liable. This remains true even though their duties may have been diverse or disconnected, as long as the acts caused an injury to the plaintiff. Melone v. Jersey Cent. Power & Light Co., 18 N.J. 163, 113 A.2d 13 (1955). New Jersey also adheres to the alternative liability theory, in which the plaintiff is unable to determine which tort-feasor is actually liable for the injury, or what share the tort-feasors are liable. Lyons v. Premo Pharmaceutical Labs, Inc., 170 N.J. Super. 183, 406 A.2d 185 (1979).

E. DELAWARE

Delaware recognizes joint and several liability. See 10 C.A. 6301 et esq. "Joint tort-feasors' means two (2) or more persons jointly or severally liability in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them." Id. Neither the basis of liability nor the relationship among the joint tort-feasors is relevant. Blackshear v. Clark, 391 A.2d 747 (Del. Supr.

978).Joint tort-feasors do have the right to recover amongst themselves under the theories of contribution and indemnification.

F. PENNSYLVANIA

Pennsylvania law holds joint tort-feasors jointly and severally liable to a plaintiff for the injury caused by their negligence. Rau v. Marko, 17 A.2d 422, 341 Pa. 17 (1941). Under Pennsylvania statutory law, recovery is allowed against each defendant for that portion of the total dollar amount of their causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed.

G. WEST VIRGINIA

Joint tort-feasors are jointly and severally liable, and if sued jointly both are liable to the extent proved. Kvdom v. Frazier, 412 S.E. 2d 219 (1991). A judgment against one tort-feasor is not necessarily an acquittal of the other. Plaintiff may only obtain satisfaction against one joint tort-feasor and that will bar recovery against the remaining tort-feasor, however, payment of a judgment by a party who is secondarily liable confers upon that party a right to reimbursement by the party which is primarily liable.

INDEMNIFICATION

A. MARYLAND

It is first important to note that the Uniform Contribution Among Tort-Feasors Act previously set forth under the topic of Joint Several Liability, does not impair any right of indemnity under existing laws. In Maryland, indemnity requires that when one of the wrongdoers is primary liable, that wrongdoer must bear the whole loss.^[13] Under this analysis, a party is only entitled to indemnification when the parties actions, although negligent, are considered to be passive or secondary to those of the primary tort-feasor. According to Hanscome v. Perry,^[14] the right of indemnification may arise by express agreement or implication. Thus, assuming a valid indemnity agreement exists, the court would then apply the active passive test to determine whether or not one of the defendants is entitled to be indemnified by the other.

B. DISTRICT OF COLUMBIA

In D.C., indemnity is a common-law remedy which shifts the monetary loss from one compelled to pay it to another whom equity dictates should bear it instead.^[15] Implied indemnity is essentially an equitable remedy that arises without agreement, and by operation of law to prevent result which is regarded as unjust or unsatisfactory.^[16] In D.C., where the language of an indemnification agreement is broad and sweeping, the Court will construe the agreement liberally so as to encompass losses incurred in whole or part by the negligence of the indemnitee.^[17] A cause of action for indemnity accrues on the date payment is made by the party seeking indemnity, which is three (3) years in D.C. for indemnification and contribution.

C. VIRGINIA

Virginia Code section 8.01-249 (5) provides that an action for indemnity is deemed to accrue when the indemnitee has paid or discharged a legal obligation. A third party claim for indemnity cannot be asserted before the cause of action is deemed to have accrued.^[18] Absent a contract, equitable principles may allow an innocent party to recover from the negligent act for the amounts paid and the discharge of liability.^[19] For active/passive negligence it is not the form of the act or omission that defines the character of negligence as active or passive, for indemnity purposes, it is the relationships between the parties involved and the nature of the legal obligation violated by the negligence that decides the issue.^[20]

D. NEW JERSEY

In New Jersey, common law indemnification shifts cost of liability from one who is constructively or vicariously liable to tort-feasor who is primarily liable.^[21] The party seeking indemnification must be free from fault.^[22]

E. DELAWARE

Delaware recognizes a cause of action for equitable indemnification.^[23] In order for a party to recover under equitable indemnity that party's negligence must be passive and seek indemnification from the active party.^[24]

F. PENNSYLVANIA

Indemnity is an equitable remedy founded in the common-law that shifts loss from one defendant to another.^[25] In Pennsylvania, an indemnification relationship may be formed in three (3) ways: implied contract, expressed contract, or by operation of law, or other circumstances which justify this equitable relief. If an indemnitee made a good faith settlement and notice is given to the indemnitor, the indemnitee still assumes the risk of proving liability and the reasonableness of the settlement in any subsequent litigation.^[26]

G. WEST VIRGINIA

Under West Virginia law, implied indemnification is an equitable remedy whereby:

[O]ne defendant, who has committed no independent wrong, is held liable for the entire loss of a plaintiff while another entity, which may or may not be named as a defendant in the plaintiff's suit to establish liability, would be allowed to escape liability even though it actually caused or was responsible for causing the wrongdoing.^[27]

Implied indemnity prevents the party who is primarily liable from being unjustly enriched and allows the party that is without fault restitution.^[28] A party can be indemnified only if that party is without fault.^[29]

CONTRIBUTION

A. MARYLAND

Under Maryland statutory law, the right of contribution exists among joint tort-feasors. The issue of contribution depends on joint tort-feasors' liability to third parties.^[30] Under the Maryland Uniform Contribution Among Joint Tort-Feasors Act, the amount recoverable from the non-settling defendant when added to the amount recoverable from the settling defendant cannot exceed the plaintiff's verdict.^[31] The Act defines "joint tort-feasors" as "two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them."^[32]

According to § 3-1402 of the Maryland Uniform Contribution Among Tort-Feasors Act:

- (a) The right of contribution exists among joint tort-feasors.
- (b) A joint tort-feasor is not entitled to a money judgment for contribution until the joint tort-feasor has by payment discharged the common liability or has paid more than a pro rata share of the common liability.
- (c) A joint tort-feasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tort-feasor whose liability to the injured person is not extinguished by the settlement.^[33]

According to § 3-1405 of the Maryland Uniform Contribution Among Tort-Feasors Act, a release by the injured person of one joint tort-feasor does not relieve the joint tort-feasor from liability to make contribution to another joint tort-feasor unless the release:

- (1) Is given before the right of the other tort-feasor to secure a money judgment for contribution has accrued; and
- (2) Provides for a reduction, to the extent of the pro rata share of the released tort-feasor, of the injured person's damages recoverable against all other tort-feasors.^[34]

B. DISTRICT OF COLUMBIA

Both contribution and indemnification are available under D.C. law.^[35] However, neither contribution nor indemnity can be awarded to a party who is not a joint tort-feasor.^[36] In other words, the District of Columbia permits a party to enforce contribution against one who shares common liability to the original Plaintiff.^[37] Under the principal of contribution a tort-feasor against whom a judgment is rendered is entitled to recover proportional shares of a judgment from the other joint tort-feasor(s) whose negligence contributed to the injury and who were also liable to the Plaintiff.^[38] For contribution to be available, two (2) or more Defendants must have acted in concert, or independently, causing a single injury in an indivisible manner. Just because the acts are not simultaneous but successive doesn't mean that contribution is improper where acts concur in causing injury. The contribution among joint tort-feasors is pro-rata in the District of Columbia. The fact that the negligence of one tort-feasor may be greater than that of another does not change the method of equally apportioning contribution, since D.C. law does not recognize degrees of negligence.^[39]

C. VIRGINIA

By statute in Virginia, one joint tort-feasor can seek contribution of another joint tort-feasor as a result of payment of a judgment.^[40]

According to Va. Code. Ann. § 8.01-35.1:

A. When a release or a covenant not to sue is given in good faith to one of two or more persons liable in tort for the same injury, or the same property damage or the same wrongful death:

1. It shall not discharge any of the other tort-feasors from liability for the injury, property damage or wrongful death unless its terms so provide; but any amount recovered against the other tort-feasors or any one of them shall be reduced by any amount stipulated by the covenant or the release, or in the amount of the consideration paid for it, whichever is the greater. In determining the amount of consideration given for a covenant not to sue or release for a settlement which consists in whole or in part of future payment or payments, the court shall consider expert or other evidence as to the present value of the settlement consisting in whole or in part of future payment or payments. A release or covenant not to sue given pursuant to this section shall not be admitted into evidence in the trial of the matter but shall be considered by the court in determining the amount for which judgment shall be entered; and
2. It shall discharge the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

B. A tort-feasor who enters into a release or covenant not to sue with a claimant is not entitled to recover by way of contribution from another tort-feasor whose liability for the

injury, property damage or wrongful death is not extinguished by the release or covenant not to sue, nor in respect to any amount paid by the tort-feasor which is in excess of what was reasonable.^[41]

D. NEW JERSEY

By statute in New Jersey, a joint tort-feasor can seek contribution against another joint tort-feasor.^[42] New Jersey is a comparative negligence state, therefore each defendant is only liable for the pro rata share equaling the percentage of his negligence.

According to the New Jersey Joint Tort-Feasors Contribution Law: “Where injury or damage is suffered by any person as a result of the wrongful act, neglect or default of joint tort-feasors, and the person so suffering injury or damage recovers a money judgment or judgments for such injury or damage against one or more of the joint tort-feasors, either in one action or in separate actions, and any one of the joint tort-feasors pays such judgment in whole or in part, he shall be entitled to recover contribution from the other joint tort-feasor or joint tort-feasors for the excess so paid over his pro rata share; but no person shall be entitled to recover contribution under this act from any person entitled to be indemnified by him in respect to the liability for which the contribution is sought.”^[43]

E. DELAWARE

Delaware recognizes the right of contribution in 10 Del.C.A. § 6302, which states the following:

- (a) The right of contributions exists among joint tort-feasors.
- (b) A joint tort-feasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro rata share thereof.
- (c) A joint tort-feasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tort-feasor whose liability to the injured person is not extinguished by the settlement.
- (d) When there is such a disproportion of fault among joint tort-feasors as to render inequitable an equal distributor among them of common liability by contribution, the relative degree of fault of the joint tort-feasors shall be considered in determining their pro-rata share.

F. PENNSYLVANIA

Pennsylvania is a comparative negligence state and adheres to the Uniform Contribution Among Tort-Feasors Act. 42 Pa.C.S.A. § 8321 et seq. According to § 8324 of the Act:

- (a) General rule.--The right of contribution exists among joint tort-feasors.
- (b) Payment required.--A joint tort-feasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro rata share thereof.
- (c) Effect of settlement.--A joint tort-feasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tort-feasor whose liability to the injured person is not extinguished by the settlement.

According to § 7102(b.1):

- (1) Where recovery is allowed against more than one person, including actions for strict

liability, and where liability is attributed to more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of that defendant's liability to the amount of liability attributed to all defendants and other persons to whom liability is apportioned under subsection (b.2).

(2) Except as set forth in paragraph (3), a defendant's liability shall be several and not joint, and the court shall enter a separate and several judgment in favor of the plaintiff and against each defendant for the apportioned amount of that defendant's liability.

(3) A defendant's liability in any of the following actions shall be joint and several, and the court shall enter a joint and several judgment in favor of the plaintiff and against the defendant for the total dollar amount awarded as damages:

(i) Intentional misrepresentation.

(ii) An intentional tort.

(iii) Where a defendant has been held liable for not less than 60% of the total liability apportioned to all parties.

(iv) A release or threatened release of a hazardous substance under section 702 of the act of October 18, 1988 (P.L. 756, No. 108), known as the Hazardous Sites Cleanup Act.

(v) A civil action in which a defendant has violated section 497 of the act of April 12, 1951 (P.L. 90, No. 21), known as the Liquor Code.

(4) Where a defendant has been held jointly and severally liable under this subsection and discharges by payment more than that defendant's proportionate share of the total liability, that defendant is entitled to recover contribution from defendants who have paid less than their proportionate share. Further, in any case, any defendant may recover from any other person all or a portion of the damages assessed that defendant pursuant to the terms of a contractual agreement.

(b.2) Apportionment of responsibility among certain nonparties and effect. For purposes of apportioning liability only, the question of liability of any defendant or other person who has entered into a release with the plaintiff with respect to the action and who is not a party shall be transmitted to the trier of fact upon appropriate requests and proofs by any party.^[44]

G. WEST VIRGINIA

The West Virginia courts have recognized both an inchoate right of contribution, as well as a statutory right of contribution. W.Va. Code §55-7-13 holds, "Where a judgment is rendered in an action ex delicto against several persons jointly, and satisfaction of such judgment is made by any one or more of such persons, the others shall be liable to contribution to the same extent as if the judgment were upon an action ex contractual." Comparative contribution between joint tort-feasors is based upon relative degrees of negligence. Sitzes v. Anchor Motor Freight, 289 S.E. 2d 679 (1982) . The right of inchoate contribution arises under any theory of liability which results in a common obligation to the Plaintiff, Board of Education v. Zando, 390 S.E. 2d 796 (1990). If there is no allocation of negligence, apportionment is made on a pro-rata basis. "Mary Carter" agreements are enforceable and not per se contrary to public policy, however such agreements must be promptly disclosed to both the court and opposing parties.

VICARIOUS LIABILITY

A. MARYLAND

Under Maryland law, the tortious conduct of one person may equate to the civil culpability of another. Generally speaking, however, there must exist some relationship between the two (2) such as employer and employee, or principal and agent. Most often, this situation arises in the context of an employer and employee, under the doctrine of *respondeat superior*.^[45]

It is well settled under the law of Maryland, that the acts for which the employer is being held liable must be those which the employee committed **within the scope of their employment**.^[46] The scope of employment factor is generally the most litigated issue presented by a *respondeat superior* claim. An employee's tortious conduct is considered to be within the scope of his employment when the conduct is in furtherance of the business of the employer and/or is authorized by the employer.^[47] An employee's tortious conduct is not considered within the scope of employment when the employee's actions are **personal**.^[48]

The Sawyer decision was also instructive in that it set forth a host of factors that apply to ascertain whether the conduct of the employee at issue was so similar or incidental to the conduct authorized by the employer to be considered within the scope of employment. These factors are as follows:

- (a) whether the act is one commonly done by such servants;
- (b) the time, place and purpose of the act;
- (c) the previous relations between the master and the servant;
- (d) the extent to which the business of the master is apportioned between different servants;
- (e) whether the act is outside the enterprise of the master or, of within the enterprise, has not been entrusted to any servant;
- (f) whether the master has reason to expect that such an act will be done;
- (g) the similarity in quality of the act done to the act authorized;
- (h) whether the instrumentality by which the harm is done had been furnished by the master to the servant;
- (i) the extent of departure from the normal method of accomplishing an authorized result; and
- (j) whether the act is seriously criminal."^[49]

If the answer to these questions indicates that the employee's conduct at the time of the tort are in fact in furtherance of the employment relationship or to the benefit of the employer, than the employee will be deemed to have been acting within the scope. The natural consequences of such a determination will be the liability of the employer for the actions of the employee. Additionally, it is worth noting that the party wishing to invoke the doctrine bears the burden of establishing the existence of the relationship.

As to principal and agent relationship, the principal will be liable for the tortious acts of an agent if that agent was acting within the scope of the principal-agent relationship **or** with the authority of the principal.^[50]

B. DISTRICT OF COLUMBIA

In order to recover under this doctrine, a plaintiff must first establish that an employee/ employer

relationship does indeed exist.^[51]To decide whether an employee is employed by the Defendant, the fact finder determines if the defendant had the right to control^[52] the employee's conduct in the performance of his job.

Once the relationship has been established, the fact finder must then determine whether the acts or wrongs were committed in furtherance of the business of the employer. If the employee does an act in furtherance of the business of the employer and his actions are at least partly motivated by a desire to further the employer's interest, then the doctrine can be applied. Thus, making the employer responsible for the employee's actions.

For the intentional use of force, the fact finder must find that:

a) the employee's conduct was of the same general nature as that conduct which the employer has authorized, or that it was incidental to authorized conduct; and b) that the employee's use of force was foreseeable by the employer.

C. VIRGINIA

Vicarious liability is the situation created when a person or entity is held liable for the injuries caused by another even though that person or entity itself was not actually at fault or committed any wrong. When a person or entity is held vicariously liable that person or entity is being held liable despite the fact that he/it is not guilty of any wrongdoing; he/it is being held liable for what someone else did. A finding of vicarious liability depends upon the existence of some relationship between the actual wrongdoer and the person or entity being deemed vicariously liable.

MINORS

A. MARYLAND

Maryland follows the common law standard regarding the liability of children which holds that a child is not to be held to the same standard/degree of care that an adult would have used. He is to be held to that standard/degree of care which ordinary prudent children of his age, intelligence, experience and development would have used under the same circumstances.^[53]Children under the age of five (5) are as a matter of law, incapable of contributory negligence.^[54]According to article one statute §24 of the Maryland Annotated Code, a person of 18 years of age or more is an adult for all purposes whatsoever and has the same legal capacity rights, powers, privileges, duties, liabilities, and responsibilities. The term minor refers to persons who has not attained the age of 18 years.

B. DISTRICT OF COLUMBIA

The age of majority in D.C. is **eighteen (18)**.^[55]The District of Columbia adopts the tender years doctrine, not the common law, wherein a child of tender years, depending on his age and knowledge, may not be charged with contributory negligence.^[56]

In the District of Columbia, a child is liable for his torts as if he were an adult except where his **tender years** preclude him from framing the mental attitudes necessary to complete the tort in question.^[57]In cases of tort requiring malice as an essential element, a very young child may be considered as a matter of law incapable of determining the requisite evil intent and no liability would attach to his act.^[58]Lastly, with respect to negligent torts, the age of a child may prove to be a mitigating factor, since he is held liable only where he has failed to exercise a degree of care equal to that governing the ordinary child of comparable age, knowledge and experience.^[59]

C. VIRGINIA

The age majority in Virginia is **eighteen (18)**.^[60] Virginia follows the common law rule concerning negligence by a minor. A minor under the age of seven (7) cannot be responsible for negligence. Between the ages of seven (7) and fourteen (14), there is a rebuttable presumption that a minor cannot be responsible for negligence.^[61] A minor over the age of fourteen (14), can be responsible for negligence.^[62] For a minor to be determined negligent, "The evidence must show that the plaintiff's conduct did not conform to the standard of what a reasonable person of like age, intelligence, and experience would do under the circumstances for his own safety and protection."^[63]

While an individual is a minor, the statute of limitations does not run against that minor, except in medical malpractice cases. In medical malpractice cases, the injured minor has two (2) years after reaching the age of ten (10) within which to bring a claim.

D. NEW JERSEY

New Jersey holds the age of majority to be 18 years old.^[64] Minors are liable for intentional torts (acts of violence).^[65] Minors in New Jersey are held to the standard of care applicable to reasonable persons of like age, intelligence and experience under like circumstances.^[66] Certain activities performed by minors are so hazardous that the courts will hold them to adult standards (driving car or boat).^[67]

E. DELAWARE

In Delaware the age of majority is eighteen (18).^[68] Delaware provides statutory authority to recover up to \$5,000.00 from the parents or guardian of a minor who intentionally or recklessly destroys personal or real property.^[69] Delaware statutory law also holds the owner of a car jointly and severally liable with a minor who is permitted to use that car and does so in a negligent manner, causing injury and/or damage.^[70]

Under Delaware law, a child's negligence is to be determined by a standard of care which "is based upon an individualized assessment of the child's age, intelligence, maturity, and other factors relevant to the conduct involved."^[71] Although Delaware has adopted a comparative negligence standard rather than a contributory negligence, a minor's negligence is determined by the same common law standard.^[72]

F. PENNSYLVANIA

Pennsylvania falls in line with the common law rule that minors are held to a different standard of care than adults. The yardstick measuring a minor's standard of care is by comparing the conduct to other minors of like age, experience, capacity, and development to see if they would ordinarily exercise the same conduct under similar conditions.^[73] There is a conclusive presumption that children under seven cannot be contributorily negligent.^[74] There is a rebuttable presumption that children between the ages of seven and fourteen cannot be contributorily negligent, but this presumption is generally a matter for a jury determination.^[75] After the age of fourteen, there is no presumption. Furthermore, these age demarcations as to capacity are equally applicable to minor defendants as they are to minor plaintiffs.^[76]

G. WEST VIRGINIA

The age of a majority in West Virginia is eighteen (18) years of old.

West Virginia law holds that a minor under the age of seven (7) years cannot be responsible for negligence.^[77] For children between the ages of seven (7) and fourteen (14) years, there is a rebuttable presumption that the minor cannot be responsible, and over the age of fourteen (14) years the courts have held that a minor can be shown to be responsible for negligence.^[78]

DRAM SHOP LIABILITY

A. MARYLAND

To date, the State of Maryland has yet to pass legislation enacting Dram Shop Laws. Maryland is one of the Five States that take the position that there can be no civil liability for serving alcoholic beverages in the absence of a dram shop act. More than forty years ago, in State v. Hatfield,^[79] the Court of Appeals of Maryland held that "the law, (apart from statute) recognizes no relation of proximate cause between a sale of liquor and a tort committed by a buyer who has drunk the liquor." In Felder v. Butler,^[80] the court refused to abandon its holding in Hatfield and to adopt the modern trend of cases which recognizes a cause of action against a tavern owner by a party injured as a result of the negligent acts of a patron to whom alcoholic beverages were served while the patron was visibly intoxicated. Although the Court recognized that a number of jurisdictions impose civil liability upon vendors of intoxicating liquors for damages caused by their intoxicated customers, it declared that "we decline, for now, to join the new trend of cases..."^[81]

As to the care required of innkeepers in general, an innkeeper is not strictly liable for his invitees and does not insure their safety, but is only required to take reasonable care in providing for their safety.^[82]

B. DISTRICT OF COLUMBIA

The District of Columbia does not have a Dram Shop Act per se.^[83] However, the District of Columbia does prohibit the sale of alcoholic beverages to minors or already intoxicated persons.^[84] D.C. Code Section 25-481 states in pertinent part that the sale, service or delivery of beverages to any intoxicated person, or to any person of notoriously intemperate habits, or to any person who appears to be intoxicated is prohibited.^[85] While this section imposes an obligation upon commercial vendors of liquor to refrain from providing alcoholic drinks in circumstances indicating that a person is intoxicated and reasonably likely to cause harm to others, it has never been held to impose that duty upon social hosts.^[86]

C. VIRGINIA

Virginia does not recognize Dram-Shop Liability. However, Virginia does prohibit the sale of alcoholic beverages to persons under 21 years of age or an interdicted and/or intoxicated person.^[87] In Virginia, there is no liability on the seller of intoxicating liquor for negligence resulting in personal injuries sustained by a third party.^[88] Section 4.1 - 304 of the Virginia Code and the Virginia Common Law does not recognize Dram Shop Liability on the part of the person who purveys an alcoholic beverage to someone else who then causes a tort to occur.^[89]

D. NEW JERSEY

New Jersey does have a Dram Shop Act, which holds alcohol beverage servers liable to third parties. "This act shall be the exclusive civil remedy for personal injury or property damage resulting from the negligent service of alcoholic beverages by a licensed alcoholic beverage server."^[90] The licensed alcohol server may not be sued under any other theory or statute by the injured party. Furthermore, N.J.S.A. 2A:22A-5 states the precise conditions for which damages can be recovered:

a. A person who sustains personal injury or property damage as a result of the negligent service of alcoholic beverages by a licensed alcoholic beverage server may recover damages from a licensed alcoholic beverage server only if:

- (1) The server is deemed negligent pursuant to subsection b. of this section; and
- (2) The injury or damage was proximately caused by the negligent service of alcoholic beverages; and
- (3) The injury or damage was a foreseeable consequence of the negligent service of

alcoholic beverages.

b. A licensed alcoholic beverage server shall be deemed to have been negligent only when the server served a visibly intoxicated person, or served a minor, under circumstances where the server knew, or reasonably should have known, that the person served was a minor.

The statute limits the alcohol beverage server's liability for damages, which is the percentage of negligence attributable to the alcohol beverage server.^[91]

E. DELAWARE

At one time, the state of Delaware did recognize a cause of action by a third-party against a tavern owner for injuries caused by a drunk patron.^[92] The Delaware Court reversed itself holding that an action based on "Dram Shop" principles should be legislatively created and not created by the judiciary.^[93] There is a Delaware statute which creates a duty for alcohol licensees and their employees to stop serving patrons who are visibly intoxicated.^[94] The Court expressly stated in DiOssi that this section does not create a cause of action by a third party against a tavern owner.^[95]

F. PENNSYLVANIA

Pennsylvania does not hold a liquor licensee liable to third parties for damages caused by a customer off the licensed premises unless the customer was visibly intoxicated.^[96] Under any condition, the licensee can be held liable to third parties when they sell alcohol to minors.^[97] A social host may also be liable for furnishing minors with alcohol.^[98] The test for determining whether a social host is liable for injuries sustained by a minor as a result of alcohol is whether the host intentionally rendered substantial assistance to the minor's consumption, not whether the host actually served the minor.^[99]

G. WEST VIRGINIA

West Virginia statute recognizes a cause of action in tort for injuries proximately caused by the sale of alcohol to intoxicated persons or persons who are "physically incapacitated from drinking" which results in personal injury to a third party.^[100] The sale of liquor to a person under twenty-one (21) years of age also gives rise to a cause of action against a licensee in favor of a purchaser or third party injured as a proximate result of the unlawful sale.^[101]

PROFESSIONAL LIABILITY

A. MARYLAND

(1) Medical Practitioners

A prima facie case of medical negligence must establish: (a) the standard of medical skill and care ordinarily exercised in the particular locality, (b) that this standard of care has been violated, and (3) a showing that the defendant's failure to observe the proper standard was a direct cause of the malpractice action.^[102]

The medical practitioner is held to the standard of care of members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.^[103] The standard varies with the physician's degree of specialization.^[104] Thus, a specialist might be held liable where a general practitioner would not.

Except in instances where the medical negligence alleged is of such a gross and obvious nature that a layman can comprehend the breach of care, the standard of care and the breach thereof must be shown by expert testimony.^[105]

Maryland requires that all claims by a person against a health care provider for medical injury in which damages are greater than the limit of the concurrent jurisdiction of the District Court shall be brought pursuant to the Maryland Health Care Malpractice Claims Act^[106] and may not be brought in any court of this State except in accordance with that statute.

A physician proposing a course of treatment or a surgical procedure has a duty to provide the patient with enough information about its risks to enable the patient to make an “informed consent” to the treatment. In order to impose liability upon the physician, the plaintiff must prove that a reasonable person in the patient’s position would not have consented if properly informed.^[107]

(2) Lawyers

A lawyer is negligent if the lawyer does not use the degree of care and skill which a reasonably competent lawyer acting in similar circumstances would use.

The elements of a legal malpractice action are: (1) employment of a lawyer; (2) his or her neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of the loss of the client.^[108]

(3) Other Professionals

A professional is negligent if he or she does not use the degree of care and skill which a reasonably competent professional person acting in similar circumstances would use.^[109]

B. DISTRICT OF COLUMBIA^[110]

A professional^[111] is negligent if their conduct drops below the standard of care in their respective fields. The plaintiff has the burden of proving by a preponderance of the evidence:

- (1) What is the standard of skill and care that reasonably competent professionals follow when acting under the same or similar circumstances;
- (2) That the defendant did not follow that standard of skill and care; and
- (3) That by not following that standard of skill and care, the defendant’s conduct was a proximate cause of the injury to the plaintiff.

The relevant question is did the professional do what a reasonable and prudent professional would have done in his/her field under the circumstances.

C. VIRGINIA

In Virginia, medical malpractice actions are generally controlled by Virginia Code, Title 8.01, Chapter 21.1.

DIRECTORS & OFFICERS LIABILITY

GENERAL OVERVIEW

In today’s litigious society, the actions of directors and officers of all companies both private and public, large and small, profit and non-profit, are subject to liability arising out of their relationship to the company, its shareholders, its employees, its competitors and its regulators. Fluctuations in stock value frequently results in law suits that allege wrongdoing on the part of a corporate officer or director. Such claims often include a wide variety of tort claims which range from negligence predicated upon a claim that the officer or director should have been more diligent in disclosing bad economic news to stockholders to intentional torts inclusive of fraud, conversion of corporate assets and breaches of a

fiduciary relationship. What years ago would have been characterized as an economic downturn, today may often lead to claims of corporate wrongdoing.

Similarly, what once was a routine employment termination for poor performance, often subjects directors and officers to potential liability based on allegations of discrimination as well as defamation and intentional infliction of emotional distress. While no separate cause of action is recognized in tort law for legal actions against corporate officers and directors, the liability asserted against them cover the gauntlet of recognized torts and include fraud, fraudulent misrepresentation, breach of fiduciary duties, negligence, conversion, a variety of intentional torts as well as a panoply of wrongful acts and tortious mis-conduct.

Civil actions brought by minority shareholders who expect directors and officers to safeguard their interests are commonplace in today's court rooms and pose a substantial risk exposure to the officers and directors. Such claims represent an enormous risk exposure not only to the individuals themselves, but also to the corporations which they represent. Not only do such suits often result in substantial judgments in the six, seven and eight figures, but the costs of defense can be enormous.

Claims and litigation against officers and directors, which once were viewed as novel are now considered commonplace. Actions against corporate officers and directors can accurately be described as the "tort de jure".

INTELLECTUAL PROPERTY LIABILITY

A. MARYLAND

The most prevalent claims involving intellectual property include: Misappropriation of a trade secret or infringement of a trade mark/name, patent or copyright, and Unfair Competition. Trade mark, Patent, and Copyright law are governed by federal statute. Misappropriation of a trade secret is governed by state statute, and Unfair Competition by state common law.

Trade Mark Infringement – The Lanham Act

The Lanham Act is the Trademark Act of 1946 as amended, 15 U.S.C. § 1051 et seq. The Lanham Act deals with trademarks and related concepts, such as service marks, collective marks and certification marks.^[112] The Act also provides a framework for protection of trade names and trade dress.^[113] The "Trademark Counterfeiting Act of 1984" is a part of the Lanham Act enacted to aid businesses and law enforcement in stopping activities which involve the violation of Intellectual Property Rights associated with Trademarks, Copyrights and related concepts.^[114] However, the Lanham Act does not protect trade secrets protection and it does not deal with the protection of other intellectual property such as patents and copyrights.

The extent of federal trademark protection from infringement is measured by Section 45 of the Lanham Act, 15 U.S.C. § 1127 which provides, in pertinent part:

The term "trademark" includes any work, name, symbol, or device, or any combination of :

- (1) used by a person, or
- (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter,

to identify and distinguish his or her goods, including a unique product, from

those manufactured or sold by others and to indicate the source of goods, even if that source is unknown.

Section 43 (a) of the Lanham Act is directed to **false designation** and **false advertising**. It is a broad section of the Trademark Act, and provides:

Any person who, on or in connection with any goods or service, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which :

(1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.^[115]

Patent Infringement

Under the Patent Act,^[116] The United States will grant three types of patents to inventors: (1) Utility, (2) Design and (3) Plant patents. In order to qualify for a patent, the invention or discovery must be new and useful (or a new and useful improvement of a) process, machine, manufacture or composition of matter that is deemed to be "novel"^[117] and "non-obvious."^[118] A patent is essentially the granting of a legal monopoly over the invention for 20 years by the government in exchange for the inventor's public disclosure of the workings of his or her invention.^[119] Violation of this right is a tort^[120] analogous to trespass^[121] for which the patent holder may bring a civil action^[122] in a Federal Court. Injunctive relief, damages, and other remedies for violation of this right are available.

Violation of this right to exclude others by making, using, or selling the patented invention in the United States is direct infringement. In accordance with general tort theory, liability is also imposed for actively inducing infringement and for contributory infringement by aiding, abetting, encouraging, or contributing to direct infringement by another.

Copyright Infringement

Patent law gives monopoly rights in inventive concepts, or ideas, but requires that the ideas meet rigorous substantive standards as a precondition to protection. Copyright only grants monopoly rights in one particular way of expressing an idea, which is less of an intrusion on the competitive marketplace than granting rights in the idea itself. Therefore, the standards for obtaining a copyright are lower than those for obtaining patents.

The United States Constitution authorizes Congress to give authors exclusive rights in their "writings" in order to promote the progress of science and the useful arts.^[123] Congress and the courts have construed the term "writings" broadly, to refer to much more than literary works, such as books or magazine articles. "Writing" is construed to refer to the original expression of ideas. It encompasses just about any tangible form of expression. In the Copyright Act of 1976,^[124] Congress provided copyright protection for an author's original "works of authorship," rather than in an author's "writings." However, in enacting the 1976 Act, Congress made it plain that it did not intend to extend protection to every kind of work that the Constitution authorized it to protect.

Temporary and permanent injunctions, compensatory damages, as well as monetary awards are available remedies for infringement.^[125] In addition, criminal penalties apply felony provisions to all types of copyright infringement.^[126]

Even valid copyrights which are being infringed are subject to the usual equitable defenses, including laches and estoppel. In addition, a use in violation of antitrust laws, or in inequitable and unjust ways, may constitute misuse and hence result in unenforceability. Moreover, failure to disclose all relevant facts when obtaining a copyright may result in unclean hands or even fraud on the Copyright office, making the copyright unenforceable.

Misappropriation of a Trade Secret

The Maryland Uniform Trade Secrets Act ("MUTSA")^[127] and the D.C. Trade Secrets Act are modeled after the Uniform Trade Secrets Act. As a result, there are only minor differences between the two Acts; the law governing misappropriation of a trade secret is more developed in Maryland and therefore MUTSA will be examined in greater detail.

Prior to the enactment of the MUTSA, the Court of Appeals of Maryland adopted certain the factors for determining whether a trade secret exists. These factors are set forth in the Restatement of Torts:

- (1) the extent to which the information is known outside of his business;
- (2) the extent to which it is known by employees and others involved in his business;
- (3) the extent of measures taken by him to guard the secrecy of the information;
- (4) the value of the information to him and to his competitors;
- (5) the amount of effort or money expended by him in developing the information; [and]
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.^[128]

According to comment b of section 757 of the Restatement,

[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which given him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating, or preserving materials, a pattern for a machine or other device, or a list of customers.^[129]

The Maryland statutory definition of a trade secret is based on the Restatement comment^[130] and the Maryland appellate courts have held that, although the Restatement factors are no longer a necessary part of the analysis, the "factors still provide helpful guidance to determine whether the information in a given case constitutes 'trade secrets' within the definition of the statute."^[131] In addition, "To the extent that the Restatement presents a narrower view, the [MUTSA] pre-empts that definition."^[132]

"Misappropriation" is defined in MUTSA as the: (1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or (2) Disclosure or use of a trade secret of another without express or implied consent by a person who:

- (i) Used improper means to acquire knowledge of the trade secret; or
- (ii) At the time of disclosure or use, knew or had reason to know that the person's knowledge of the trade secret was

- (1) Derived from or through a person who had utilized improper means to acquire it;
- (2) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
- (3) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
 - (iii) Before a material change of the person's position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.^[133]

Unfair Competition

Maryland's common law concept of unfair competition is found in Gai Audio of New York, Inc. v. CBS, Inc.^[134] In Gai, the Court of Special Appeals of Maryland noted that the United States Supreme Court in International News Service (INS) v. Associated Press^[135] "established 'misappropriation' as a new concept of unfair competition – emphasizing the competitive relationship and stressing the reciprocal rights and duties arising from it,"^[136] and listed the "constituent elements of the 'misappropriation' cause of action postulated in the INS case [as] elements of unfair competition as: (1) time, labor, and money spent in the creation of the thing misappropriated; (2) a competitive relationship between plaintiff and defendant; and (3) commercial damage to the plaintiff."^[137] The holding of INS noted that "The essential element of unfair competition is deception, by means of which the goods of one dealer are passed off as the goods of another, and the seller receives the profit which he would not have received except for such deception."^[138]

In a case handed down this past year (1999), Electronics Store, Inc. v. Cellco Partnership,^[139] the Court of Special Appeals of Maryland cited to two Court of Appeals' rulings and one of its own in defining a claim for unfair competition in Maryland: Baltimore Bedding Corp. v. Moses,^[140] Edmonson Village Theatre, Inc. v. Einbinder,^[141] and Gai, *supra*.

In Baltimore Bedding, the Court of Appeals of Maryland explained that the common law action of unfair competition has been extended to "all cases of unfair competition in the field of business,"^[142] and added:

What constitutes unfair competition in a given case is governed by its own particular facts and circumstances. Each case is a law unto itself, subject, only, to the general principle that all dealings must be done on the basis of common honesty and fairness, without taint of fraud or deception.^[143]

In Edmonson Village Theatre, *supra*, the Court of Appeals of Maryland wrote:

Like most doctrines of the common law, the law of unfair competition is an outgrowth of human experience. The rules relating to liability for harm caused by unfair trade practices developed from the established principles in the law of torts. These rules developed largely from the rule which imposes liability upon one who diverts custom from another to himself by fraudulent misrepresentation . . .^[144]

The Gai was noted for the proposition that "The legal principles which are controlling here are simply the principles of old-fashioned honesty. One man may not reap where another has sown, nor gather where another has strewn."^[145]

In Maryland, "Unfair competition" then remains a common law offense surviving the MUTSA, and is a flexible cause of action designed to address a variety of grievances caused by the improper conduct of a competitor in the marketplace.

B. DISTRICT OF COLUMBIA

The same is true for the District of Columbia, where a claim for common law unfair competition is broad. See B & W Management, Inc. v. Tasea Investment Co.,^[146] where the District of Columbia Court of Appeals noted that the following may constitute unfair competition at common law: defamation, disparagement of a competitor's goods or business methods, intimidation of customers or employees, interference with access to the business threats of groundless suits, commercial bribery, inducing employees to sabotage, false advertising or deceptive packaging likely to mislead customers into believing goods are those of a competitor.^[147]

C. VIRGINIA

Misappropriation of a Trade Secret

In Virginia, Misappropriation of a trade secret is a recognized common law tort which can result in an award of punitive damages, as well as attorneys fees.

Va. Code § 59.1-338.1 authorizes a court to award punitive damages in cases where willful and malicious misappropriation of trade secrets has occurred. An award of attorney's fees is permitted when an action under this Act is brought or resisted in bad faith or willful or malicious misappropriation of trade secrets has occurred.

59.1-338.Damages. - A. Except where the uses of a misappropriated trade secret has made a material and prejudicial change in his position prior to having either knowledge or reason to know of the misappropriation and the court determines that a monetary recovery would be inequitable, a complainant is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation that is not taken into account in computing actual loss. If a complainant is unable to prove a greater amount of damages by other methods of measurement, the damages caused by misappropriation can be measured exclusively by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

B. If willful and malicious misappropriation exists, the court may award punitive damages in an amount not exceeding twice any aware made under subsection A of this section, or \$350,000 whichever amount is less.(1986, c. 210; 1990, c. 344.)

Unfair Competition

Words or symbols used in connection with one's goods or services acquire secondary meaning when they have become associated in mind of public with origin of goods or services.Unfair use of trade name or simulation of it, constitutes unfair competition. In unfair competition case confusion or likelihood of confusion is fundamental issue.^[148]

DISCRIMINATION CLAIMS

Under a panoply of state and local laws and ordinances applicable to the state of Maryland, the District of Columbia and the Commonwealth of Virginia liability is established for Discrimination and civil rights claims in favor of the protected classes.

The civil right claims are discrimination claims patterned after the post-civil war Federal Civil Rights Acts, namely 42 USCS § 1981; 1982; 1983; 1985 & 1986.

The discrimination claims are patterned after the provisions of Title VII (employment discrimination) Title VIII (discriminatory housing practices) and Title IX (educational discrimination).

These statutes protect certain classes of individuals who are defined under the respective acts. For

instance the protected classes as defined under the Fair Housing Law as amended includes race, color, religion, sex, national origin, as well as families with children and disabled persons.

LOSS OF CONSORTIUM/SOLATIUM CLAIMS

A. MARYLAND

The loss of consortium, as used in the cases in Maryland and elsewhere, means the loss of society, affection, assistance and conjugal fellowship. It includes the loss or impairment of sexual relations.^[149] Solatium damages, on the other hand, are awarded "[f]or the death of a spouse . . . [and] may include damages for mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education where applicable."^[150]

In a tort action where a family member has been injured through the tortious action of a third-party, the marital entity has a claim for damages for the loss of the spouse's consortium.^[151] Consortium is the services, affection, assistance, conjugal fellowship, and society that is part of the marital relationship.^[152] Consequently, the parties must be married at the time the injury is sustained.^[153] If the injured spouse has a valid tort claim against a third-party, the marital entity has a consortium claim. Conversely, if an injured spouse does not have a valid tort claim against the third-party, then the marital entity has no viable consortium claim against that third-party.^[154]

Consortium claims on behalf of a parent for injury to a child, as well as claims on behalf of a child for injury to a parent, are not allowed.^[155] However, parents do have a limited common law right to recover for the economic value of the loss of the injured child's services.^[156] There is no reciprocal right for a child to recover for the injured parent's loss of services.^[157]

B. DISTRICT OF COLUMBIA

The District of Columbia recognizes the common law loss of consortium claims of the parties to a marriage. Recent case law has expanded the loss of consortium claims in the District of Columbia by prohibiting the contributory negligence of one party to the marriage from prohibiting the loss of consortium claim of the other spouse.

On September 16, 1999, in the case of Massengale v. Pitts, 737 A.2d 1029 (D.C. 1999) the District of Columbia Court of Appeals held that the injured spouse's contributory negligence does not bar the other spouse's claim for loss of consortium, that resulted from the defendant's proven negligence.

Brief Facts:

The facts of this case reveal a basic automobile collision at an intersection. The appellant was properly proceeding into the intersection west bound with a green traffic signal when she was struck by the appellee, who was traveling east bound and failed to yield to the appellant. The appellee was negligent for her failure to yield, which the lower court did find.

However, the lower court also found that the appellant was contributory negligent as she was not wearing her eye glasses at the time of the accident although her license was restricted to require the use of corrective lenses. Additionally, the appellant was speeding and testified that she was in the midst of saying a prayer. It was noted by a witness driving next to the appellant that he was able to slow his car to avoid hitting the appellee whom the appellant also stated that she saw as she approached the intersection. Thus the trial court found the plaintiff's actions unreasonable and that she failed to exercise reasonable care, and thus was contributorily negligent.

Contributory negligence is a complete bar to recover in the District of Columbia. However, the Court of

Appeals did not apply the doctrine to the loss of consortium claim.

In its discussion of the law, the Court of Appeals noted that a loss of consortium claim stands separate and independent from a negligence claim, and a judgment against the spouse who was contributorily negligent is not a bar to an action by the spouse claiming loss of consortium.

However, the Court held that the loss of consortium claim depends upon whether the underlying claim of negligence against the defendant has been proven.

District of Columbia does not allow recovery predicated upon parent-child consortium loss.^[158]

C. VIRGINIA

There is no action for consortium allowable under Virginia law.^[159]

COMPENSATORY DAMAGES

A. MARYLAND

Maryland does not have a per se cap on damages. However, by Statute §11-108 of the Courts and Judicial Proceedings Article of the Maryland Annotated Code, in any action for damages for personal injury in which the cause of action arises on or after July 1, 1986, **an award for non-economic damages may not exceed \$350,000.00.** (The Maryland cap on non-economic recovery) §11-108 was amended in 1994, and the non-economic damages cap was raised to \$500,000.00 for causes of action and extended to wrongful death actions arising after October 1, 1994 with an increase of \$15,000.00 each year beginning October 1, 1995 for causes of action arising between October 1 of each year and September 30 of the following year. Under the statute, non economic means pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, or other non pecuniary injury. Furthermore, noneconomic damages does not include punitive damages. If the jury awards an amount for non-economic damages that exceeds the limitation the Court shall reduce the amount to conform to the limitation.

In a wrongful death action in which there are two or more claimants or beneficiaries, an award for noneconomic damages may not exceed 150% of the limitation established above.

B. DISTRICT OF COLUMBIA

The District of Columbia does **not** have a cap on compensatory damages.

C. VIRGINIA

While Virginia does not have a cap on compensatory damages, there is a limitation on recovery in certain medical malpractice actions.

In any verdict returned against a health care provider in an action for malpractice where the act or acts of malpractice occurred on or after August 1, 1999, which is tried by a jury or in any judgment entered against a health care provider in such an action which is tried without a jury, the total amount recoverable for any injury to, or death of, a patient shall not exceed \$1.5 million. The maximum recovery limit of \$1.5 million shall increase on July 1, 2000, and each July 1 thereafter by \$50,000 per year; however, the annual increase on July 1, 2007, and the annual increase on July 1, 2008, shall be \$75,000 per year. Each annual increase shall apply to the act or acts of malpractice occurring on or after the effective date of the increase. The July 1, 2008, increase shall be the final annual increase.

D. NEW JERSEY

New Jersey does not statutorily limit the amount that is recoverable by a plaintiff. Furthermore, New

Jersey trial courts are directed not to disturb jury verdicts unless it shocks judicial conscience or is manifestly unjust. See Curey v. Lovett, 132 N.J. 44, 622 A.2d 1279 (1993).

E. DELAWARE

The purpose and object of awarding compensatory damages is to impose satisfaction for injury done. Jardel Co., Inc. v. Hughes, 523 A. 2d 518 (Del. Super 1987). There is no statutory law in Delaware which restricts the amount that can be awarded for compensatory damages and in this regard, Delaware policy favors recovery by injured parties and disapproves of any limitations placed on recovery. Marks v. Messick & Gray Construction, Inc., 2000 WL 703657 (Del. Super. Ct.)

F. PENNSYLVANIA

The Pennsylvania Constitution, Art. 3 § 18 prohibits the General Assembly from limiting the amount of recovery for injuries to people or property except for worker's compensation. The Courts are not so limited and may set aside jury awards if the excessive award shocks the Court's conscience or sense of justice, or is clearly beyond reason, or is founded on prejudice or sympathy or a misconception of the law. Weed v. Kerr, 205 A.2d 858, 416 Pa. 233 (1965); Brown v. Ouaker City Cab, 117 A.681, 274 Pa. 289 (1922).

G. WEST VIRGINIA

Section 55-7B-8 Sets forth the limit on liability for noneconomic loss against Health Care providers:

(a) In any professional liability action brought against a health care provider pursuant to this article, the maximum amount recoverable as compensatory damages for noneconomic loss shall not exceed two hundred fifty thousand dollars per occurrence, regardless of the number of plaintiffs or the number of defendants or, in the case of wrongful death, regardless of the number of distributees, except as provided in subsection (b) of this section.

(b) The plaintiff may recover compensatory damages for noneconomic loss in excess of the limitation described in subsection (a) of this section, but not in excess of five hundred thousand dollars for each occurrence, regardless of the number of plaintiffs or the number of defendants or, in the case of wrongful death, regardless of the number of distributees, where the damages for noneconomic losses suffered by the plaintiff were for: (1) Wrongful death; (2) permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system; or (3) permanent physical or mental functional injury that permanently prevents the injured person from being able to independently care for himself or herself and perform life sustaining activities.

(c) On the first of January, two thousand four, and in each year thereafter, the limitation for compensatory damages contained in subsections (a) and (b) of this section shall increase to account for inflation by an amount equal to the consumer price index published by the United States department of labor, up to fifty percent of the amounts specified in subsections (b) and (c) as a limitation of compensatory noneconomic damages.

(d) The limitations on noneconomic damages contained in subsections (a), (b), (c) and (e) of this section are not available to any defendant in an action pursuant to this article which does not have medical professional liability insurance in the amount of at least one million dollars per occurrence covering the medical injury which is the subject of the action.

(e) If subsection (a) or (b) of this section, as enacted during the regular session of the Legislature, two thousand three, or the application thereof to any person or circumstance, is found by a court of law to be unconstitutional or otherwise invalid, the maximum amount recoverable as damages for noneconomic loss in a professional liability action brought against a health care provider under this article shall thereafter not exceed one million dollars.

PUNITIVE DAMAGES

A. MARYLAND

In product liability cases, the “actual malice” necessary to support an award of punitive damages is actual knowledge of defect and deliberate disregard of consequences; the standard looks to state of mind of the defendant. AC&S, Inc. v. Godwin, 340 Md. 334, 667 A.2d 116 (1995). The Court must strike down as violative of due process a punitive damages award that is out of all proportion to both harm caused and perniciousness of conduct. Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs. Inc., 88 Md. App. 672, 596 A.2d 687 (1991), cert. denied, 326 Md. 435, 605 A.2d 137 (1992). To support an award for punitive damages, there must first be an award of at least nominal compensatory damages. Montgomery Ward Stores v. Wilson, 101 Md. App. 535, 647 A.2d 1218 (1994), aff’d in part, rev’d in part, 339 Md. 701, 664 A.2d 916 (1995); see also Shell Oil Co. v. Parker, 265 Md. 631, 291 A.2d 64 (1972); Caldor, Inc. v. Bowden, 330 Md. 632, 625 A.2d 959 (1993). Punitive damages are prohibited in pure breach of contract cases. Schaefer v. Miller, 322 Md. 297, 587 A.2d 491 (1991).

Malice is an absolute prerequisite to the recovery of punitive damages. Palmer Ford, Inc. v. Wood, 65 Md. App. 390, 500 A.2d 1055 (1985). Punitive damages are not recoverable unless the plaintiff proves actual malice, as opposed to gross negligence or implied malice, by clear and convincing evidence. Ellerin v. Fairfax Savings, 337 Md. 216, 652 A.2d 1117 (1995); see also Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 601 A.2d 633 (1992). Actual malice is an act performed with evil or rancorous motive influenced by hate, the purpose being deliberately and wilfully to injure the plaintiff and may be inferred from circumstantial evidence. K&K Mgmt., Inc. v. Lee, 316 Md. 137, 557 A.2d 965 (1989); see also Battista v. Savings Bank of Baltimore, 67 Md. App. 257, 507 A.2d 203 (1986). Actual malice in a product liability case is evidenced by actual knowledge of a product defect and deliberate disregard of the consequences. Owens-Illinois, Inc. v. Zenobia, 325 Md. 665, 602 A.2d 1182 (1992). However, punitive damages cannot be recovered in action under the wrongful death statute. Cohen v. Rubin, 55 Md. App. 83, 460 A.2d 1046 (1983).

The purpose of punitive damages is not only to punish defendant for egregiously bad conduct toward the plaintiff, but also to deter defendant and others contemplating similar behavior. Owens-Corning Fiberglass Corp. v. Garrett, 343 Md. 500, 682 A.2d 1143 (1996). Punitive damages are assessed against each defendant individually and not as joint and several liability among joint tort-feasors. Owens-Illinois v. Armstrong, 87 Md. App. 699, 591 A.2d 544 (1991), aff’d in part, rev’d in part, 326 Md. 107, 604 A.2d 47 (1992).

In the tort of interference with contract, the award of compensatory damages in a nominal amount is sufficient to support recovery of punitive damages. Rite Aid Corp. v. Lake Shore Investors, 298 Md. 611, 471 A.2d 735 (1984). A plaintiff may not recover both punitive damages on a common law claim and treble damages on a statutory claim based on same wrong. Natural Design, Inc. v. Rouse Co., 302 Md. 47, 485 A.2d 663 (1984).

Maryland courts have never awarded punitive damages in a non-intentional tort action involving only property damage. U.S. Gypsum Co. v. Baltimore, 336 Md. 145, 647 A.2d 405 (1994).

B. DISTRICT OF COLUMBIA

In the District of Columbia, punitive damages are not favored in law. Sere v. Group Hospitalization, Inc., 443 A.2d 33 (D.C. 1982), cert. denied, 459 U.S. 912 (1982). The purpose of punitive damages is to punish a person for outrageous conduct which is malicious, wanton, reckless, or in willful disregard for another's rights and to deter him and others from similar activity in the future. Nepera Chem. Inc. v. Sea-Land Service, Inc., 794 F.2d 688 (D.C. Cir. 1986); see also Vassiliades v. Garfinckel's, 492 A.2d 580 (D.C. 1985). Where the basis of a complaint is breach of contract, punitive damages will lie only where the alleged breach merges with, and assumes a character of willful tort. Srouf v. Barnes, 670 F. Supp. 18 (D.D.C. 1987); Hammerman v. Peacock, 607 F. Supp. 911 (D.D.C. 1985). Punitive Damages for a tortious act are available when a defendant's unlawful conduct is accompanied by fraud, ill will, disregard of a plaintiff's rights or other circumstances tending to aggravate the injury. Dyer v. William S. Bergman, 657 A.2d 1132 (D.C. 1995). A plaintiff's claim for punitive damages requires proof by clear and convincing evidence of the commission of the tort and of the outrageousness of the conduct. Jonathan Woodner Co. v. Breeden, 665 A.2d 929 (D.C. 1995). The death of a tort-feasor terminates liability for punitive damages. Id.

Whether actual damages are a prerequisite to punitive damages is an issue on which there is a split of opinion between the D.C. Court of Appeals and the U.S. Court of Appeals for D.C. Circuit. The local court holds that actual damages are prerequisite to an award of punitive damages. Zanville v. Garza, 561 A.2d 1000 (D.C. 1989); Dresser v. Sunderland Apt. Tenants Ass'n, 465 A.2d 835 (D.C. 1983). The federal court holds that compensatory damages need not be shown to establish a basis for the assessment of punitive damages. Camalier & Buckley - Madison, Inc. v. Madison Hotel, Inc., 513 F.2d 407 (D.C. Cir. 1975); Butsee Jordan v. Medley, 711 F.2d 211 (D.C. Cir. 1983) (award of punitive damages impermissible without valid a basis for compensatory damages). However, a plaintiff need not prove anything more than nominal actual damages to justify the imposition of punitive damages. Robinson v. Sarisky, 535 A.2d 901 (D.C. 1988).

C. VIRGINIA

Punitive damages are recoverable "only where there is misconduct or actual malice, or such recklessness or negligence as to evince a conscious disregard of the rights of others." Giant of Virginia, Inc. v. Pigg, 207 Va. 679, 685, 152 S.E.2d 271, 277 (1967). A defendant's conduct will support punitive damages where the blood alcohol is 0.15 percent and other conditions are met. Va. Code Ann. §8.01-44.5.

In actions accruing on or after July 1, 1988, there is a \$350,000 limit on punitive damage awards. Va. Code Ann. § 8.01-38.1. The plain meaning of the section dictates that the cap on punitive damage awards applies to the action as a whole and not to each defendant. Al-Abood v. El-Shamari, 217 F.3d 225 (4th Cir. 2000).

Public policy in Virginia permits the purchase of insurance coverage for punitive damages arising from negligence, including willful and wanton negligence, but not intentional acts. Va. Code Ann. §38.2-227. Punitive damages are also available where the plaintiff was subject to intimidation, harassment, violence, or vandalism motivated by the plaintiff's race, ethnicity or religion, Va. Code Ann. §8.01-42.1, and stalking. Va. Code Ann. §8.01-42.3.

Generally, punitive damages not allowed for breach of contract. However, where the conduct constituting breach amounts to criminal indifference or an independent willful tort, due to oppressive, malicious, or wanton behavior by the breaching party, punitive or exemplary damages may be recoverable. Morgan v. American Fam. Life Assur. Co., 559 F. Supp. 477 (W.D. Va. 1983). See also Booth v. Robertson, 236 Va. 269, 374 S.E.2d 1 (1988); Kamlar Corp. v. Haley, 224 Va. 699, 299 S.E.2d 514 (1983).

A finding of compensatory damages is a prerequisite to an award of punitive damages. Gay v. American Motorists Ins. Co., 714 F.2d 13 (4th Cir. 1983). A 1982 amendment to Code allows the recovery for punitive damages in wrongful death actions where death resulted from willful or wanton conduct,

although the amendment is not retroactive. Estate of Armentrout v. International Harvester Co., 547 F. Supp. 136 (W.D. Va. 1982). Punitive damages not recoverable upon the death of a party liable for injury. Va. Code Ann. §8.01-25.

D. NEW JERSEY

The New Jersey “Punitive Damages Act,” N.J. Stat. Ann. §2A:15-5.9, applies to cases filed after October 29, 1995 and imposes limitations on the amount of punitive damages in certain civil cases. The Act caps punitive damage awards in all civil cases except those involving discrimination, civil rights, bias crimes, AIDS testing, disclosure, sexual abuse and injuries caused by drunk drivers. Id. In all other civil cases punitive damages are limited to \$350,000 or five times the compensatory damages, whichever is greater. All other aspects of the Act apply to all civil cases. The Act sets forth the standard for awarding punitive damages and provides that a plaintiff must prove by clear and convincing evidence that the harm suffered was the result of the defendant’s acts or omissions, coupled with willful wanton disregard of persons who may be harmed or by actual malice. Factors for a jury’s consideration of a punitive damage award include:(1) the likelihood serious harm would arise from a defendant’s conduct (2) the defendant’s awareness or reckless disregard that such harm would occur (3) the defendant’s actions upon learning its initial conduct would likely cause harm and (4) the duration of the conduct or concealment of it by the defendant.

When assessing the amount of punitive damages a jury may consider: Profitability of misconduct to the defendant, when the misconduct terminated, and the defendant’s financial condition. The Act provides defendants with the right to bifurcated trial upon request.

E. DELAWARE

Punitive damages may be awarded if a jury finds that the defendant’s actions were motivated by some form of malice. The defendant’s conduct must reflect conscious indifference or an “I don’t care” attitude towards the rights of the plaintiff. Chloroben Chemical Corp. v. Comegys, Del. Supr., 464 A.2d 887 (1983). If an error of judgment is involved, the danger must be readily apparent and consciously ignored. Jardel Co. v. Hughes, Del. Supr., 523 A.2d 518 (1987). The amount of such damages should be reasonably related to all of the surrounding circumstances. Guthridge v. Pen-Mod, Del. Super., 239 A.2d 709 (1967).

As a general rule, punitive damages are not recoverable for breach of contract. White v. Metropolitan Merchandise Mart, Del. Super., 107 A.2d 892 (1954). If a breach of contract amounts to tort, however, punitive damages may be available. Casson v. Nationwide, Del. Super., 455 A.2d 361 (1982). The Delaware Supreme Court has found that it is not against public policy for insurance contracts to cover punitive damages. Whalen v. On-Deck, Del. Supr., 514 A.2d 1072 (1986).

F. PENNSYLVANIA

Punitive damages are damages other than compensatory damages or nominal damages, awarded against a person to punish him for his outrageous conduct, in accordance with Restatement (Second) of Torts §908 (1977). Chambers v. Montgomery, 411 Pa. 339, 192 A.2d 355 (1963). Punitive damages will be allowed for torts committed wilfully, maliciously or so carelessly as to indicate the wanton disregard of the rights of the parties injured. Thompson v. Swank, 317 Pa. 158 176 A. 211 (1934).

There is no insurance coverage as matter of public policy for a tort-feasor personally guilty of intentional or of wanton misconduct resulting in punitive damages. Esmond v. Liscio, 209 Pa. Super. 200, 224 A.2d 793 (1966). The liability for punitive damages imposed upon a principal on a vicarious basis may be shifted to the insurer. Esmond, *supra*. However, one court has held that punitive damages do not constitute “damages” pursuant to the policy language. Creed v. Allstate Ins., 365 Pa. Super. 136, 529

A.2d 10 (1987).

Punitive damages may not be recovered absent a showing of actual damages. Thomas v. American Cystoscope Makers, Inc., 414 F. Supp. 255 (E.D. Pa. 1976). Punitive damages need not bear a reasonable relationship to compensatory damages. Kirkbride v. Lisbon, 521 Pa. 97, 555 A.2d 800 (1989). Punitive damages are not available under the Human Relations Act. Hoy v. Angelone, 554 Pa. 134, 720 A.2d 745 (1998).

Punitive damages cannot be imposed upon an insurer for the alleged negligent infliction of emotional distress or “bad faith” arising simply from a breach of contract of insurance, prior to July 1, 1990. D’Ambrosio v. Pennsylvania Nat’l Mut. Cas. Ins., 494 Pa. 501, 431 A.2d 966 (1981); McClaine v. Allstate Ins., 317 Pa. Super. 154, 463 A.2d 1131 (1983). The Pennsylvania legislature enacted a “bad faith” statute, 42 Pa. Cons. Stat. § 8371, effective July 1, 1990, which permits the recovery of interest (prime rate plus 3%), punitive damages, attorneys’ fees and costs if “bad faith” is proven against an insurer by an insured. Punitive damages may be imposed and collected from the estate of a deceased defendant; there is no per se prohibition. G.J.D. v. Johnson, 713 A.2d 1127 (Pa. 1998).

Because the No-Fault Motor Vehicle Insurance Act abolishes tort liability except in enumerated instances, the tort right for punitive damages in an action arising from a motor vehicle accident does not exist for an accident prior to October 1, 1984. Reimer v. Delisio, 501 Pa. 662, 462 A.2d 1308 (1983). Punitive damages are not recoverable under the statutory uninsured and underinsured motorist provisions of the MVFRL. Robson v. EMC Ins. Cos., 785 A.2d 507 (Pa. Super. 2001).

G. WEST VIRGINIA

In West Virginia, a jury will not be permitted to return a verdict of punitive damages without a finding of compensatory damages. Punitive damages must bear reasonable relationship to the potential of harm caused by the defendant’s actions. Garnes v. Fleming Landfill, Inc., 186 W. Va. 656, 413 S.E.2d 897 (1991). A jury must consider five factors in awarding punitive damages: 1) punitive damages should bear reasonable relationship to the harm that is likely to occur from the defendant’s conduct as well as to harm that actually has occurred; 2) jury may consider reprehensibility of the defendant’s conduct; 3) whether the defendant profited from his wrongful conduct; 4) punitive damages should bear a reasonable relationship to compensatory damages; and 5) the defendant’s financial position. TXO Production Corp. v. Alliance Resources Corp., 187 W. Va. 457, 419 S.E.2d 870 (1992). When the trial court reviews an award of punitive damages, the court should, at a minimum, consider those five factors given to jury to consider, as well as the following additional factors: (1) the costs of litigation; (2) any criminal sanctions imposed on the defendant for his conduct; (3) any other civil actions against the same defendant based on the same conduct; and (4) the appropriateness of punitive damages to encourage the fair and reasonable settlements when a clear wrong has been committed. Garnes v. Fleming Landfill, Inc., 186 W. Va. 656, 413 S.E.2d 897 (1991).

An insurer may be held liable for punitive damages for the refusal to pay an insured’s property damage claim if such refusal is accompanied by malicious intention (actual malice) to injure or defraud. “Actual malice” may be demonstrated by evidence that the insurer actually knew that the insured’s claim was proper, but willfully and intentionally denied the claim. Hayseeds Inc. v. State Farm Fire & Cas., 177 W. Va. 323, 352 S.E.2d 73 (1986); See also, Berry v. Nationwide Mut. Fire Ins. Co., 181 W. Va. 168, 381 S.E.2d 367 (1989). Actual malice may also be demonstrated by evidence that the insurer actually knew the claim was proper, but nonetheless acted willfully, maliciously and intentionally in failing to settle the claim on behalf of the insured. Shamblin v. Nationwide Mut. Ins. Co., 183 W. Va. 585, 396 S.E.2d 766 (1990).

In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative

enactment authorizes it, a jury may assess exemplary, punitive, or vindictive damages. Goodwin v. Thomas, 184 W. Va. 611, 403 S.E.2d 13 (1991). In assessing punitive damages, the trier of fact should take into consideration all circumstances surrounding a particular occurrence including the nature of the wrongdoing, the extent of harm inflicted, the intent of the party committing the act, the wealth of the perpetrator, as well as any mitigating circumstances. Id.

Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as the harm that has actually occurred. If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit so that the award discourages future bad acts. Punitive damages should bear a reasonable relationship to compensatory damages, however, ratios of 500 to 1 are not *per se* unconstitutional. TXO Prod. Corp. v. Alliance Resources Corp., 187 W. Va. 457, 419 S.E.2d 870 (1992).

WRONGFUL DEATH/SURVIVAL CLAIMS

A. MARYLAND

According to § 3-904 of the Courts and Judicial Proceedings Article of the Maryland Annotated Code, a wrongful death action shall be for the benefit of the wife, husband, parent, and the child of the deceased person. If there are no persons who qualify under these aforementioned beneficiaries, an action shall be for the benefit of any person related to the deceased person by blood or marriage or who was totally dependent upon the deceased. As to limitations of damages, for the death of a spouse, minor child, or parent of the minor child, damages awarded are not limited or restricted by the pecuniary loss or the pecuniary benefit rule, but may include damages for mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education where applicable. For the death of an unmarried child, who is older than 21 years of age, or the parent of a child, who is not a minor child, the damages awarded under this section are not limited or restricted by the pecuniary loss or pecuniary benefit rule, but may include damages for mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital care, parental care, filial care, attention, advice, counsel, training, or guidance. Furthermore, the Act only allows one action with respect to the death of a person. The action must be brought within three years of the death of the injured person, unless the death was caused by an occupational disease, in which case the action must be brought within 10 years of the time of death or within 3 years of the date when the cause of death was discovered - whichever is shorter.

It should be noted that according to the Estates and Trusts Article of the Maryland Annotated Code §7-401, a Personal Representative is entitled to bring a "survival action" on behalf of the deceased for injuries suffered just as if the deceased were alive.

§ 3-904. Action for wrongful death.

- (a) **Primary beneficiaries.** - An action under this subtitle shall be for the benefit of the wife, husband, parent and child of the deceased person.
- (b) **Secondary beneficiaries.** - If there are no persons who qualify under subsection (a), an action shall be for the benefit of any person related to the deceased person by blood or marriage who was wholly dependent upon the deceased.
- (c) **Damages to be divided among beneficiaries.** - In an action under this subtitle, damages may be awarded to the beneficiaries proportioned to the injury resulting from the wrongful death. The amount recovered shall be divided among the beneficiaries in shares directed by the verdict.
- (d) **Damages if spouse or minor child dies.** - For the death of a (1) spouse, (2) minor child, (3)

parent of a minor child, or (4) an unmarried child who is not a minor child if the child is 21 years old or younger or a parent contributed 50% or more of the child's support within the 12 month period immediately before the date of death of the child: the damages awarded under subsection (c) are not limited or restricted by the "pecuniary loss" or "pecuniary benefit" rule but may include damages from, mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education where applicable.

(e) Damages if unmarried child, who is not a minor, dies.- For the death of child not described under subsection (d) or a parent of a child, who is not a minor child, the damages awarded under subsection (c) are not limited or restricted by the "pecuniary loss" or "pecuniary benefit" rule but may include damages for mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, care, attention, advice, counsel, training or guidance where applicable.

The non-economic damages cap of § 11-108 of the Court's and Judicial Proceedings article of the code applies to wrongful death cases.^[160]

<u>Cause of Action Arising On or After:</u>	<u>Non-Economic Cap on Damages</u>	<u>Wrongful Death Two or More Beneficiaries</u>
July 1, 1986	\$350,000	N/A
October 1, 1994	\$500,000	\$750,000.00
October 1, 1995	\$515,000	\$772,500.00
October 1, 1996	\$530,000	\$795,000.00
October 1, 1997	\$545,000	\$817,500.00
October 1, 1998	\$560,000	\$840,000.00
October 1, 1999	\$575,000	\$862,500.00
October 1, 2000	\$590,000	\$885,000.00
October 1, 2001	\$605,000	\$907,500.00
October 1, 2002	\$620,000	\$930,000.00
October 1, 2003	\$635,000	\$952,500.00
October 1, 2004	\$650,000	\$975,000.00
October 1, 2005	\$665,000	\$997,500.00

In an action instituted by the personal representative against a tort-feasor for a wrong which resulted in the death of the decedent, the personal representative may recover the funeral expenses of the decedent up to \$2,000 in addition to other damages recoverable in the action.^[161]

B. DISTRICT OF COLUMBIA

A wrongful death action shall be brought by the personal representative of the Decedent.^[162] A wrongful death action shall be brought within one (1) year after the death of the injured person.^[163]

Damages under the Wrongful Death Act go solely to the benefit of the spouse and next of kin.^[164] The first element is pecuniary loss, calculated as the annual share of the decedent's dependents in the decedent's earnings, multiplied by the decedent's work life expectancy, and discounted to present value.^[165] The second element compensates for the value of services lost to the family as a result of the decedent's death.^[166] The reasonable expenses of the last illness and burial are also included in the damage calculation.^[167]

A survival action is brought by the legal representative of the decedent.^[168] The damages in a survival action go to the benefit of the estate of the decedent, and are limited to the loss of the decedent's prospective net lifetime earnings discounted to present worth.^[169] The Plaintiff may also recover for conscious pain and suffering suffered by the decedent prior to death.^[170]

C. VIRGINIA

Virginia allows a personal representative to bring an action for a claim for wrongful death.^[171] The general class of beneficiaries for a wrongful death claim are the surviving spouse, the children of the deceased, and any child of the deceased's children, or if there be none such, then the parents, brothers and sisters of the deceased, or if the decedent has left both surviving spouse and parent or parents, but no child or grandchild, the award shall be distributed to the surviving spouse and such parent or parents.^[172] Damages include sorrow, mental anguish and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent, compensation for the recently expected loss of income of the decedent, and service protection and care and assistance provided by the decedent (there must be some showing that the decedent provided funds, money or support to the beneficiaries) expenses for the care, treatment, hospitalization of the decedent, incident to the injury resulting in death, reasonable funeral expenses and punitive damages.^[173] There is no cap on damages for wrongful death in Virginia.

§ 8.01-56 provides that the right of action under the Wrongful Death Statute shall not determine, nor the action, when brought, abate by the death, dissolution, or other termination of a defendant. When a person who has brought an action for personal injury dies pending the action, such action may be revived in the name of his personal representative. If death resulted from the injury for which the action was originally brought, a motion for judgment and other pleadings shall be amended so as to conform to §8.01-50, and the case proceeded with as if the action had been brought under such section. In such cases there shall be but one recovery for the same injury.^[174] And such recovery cannot include mental anguish, pain or suffering of the deceased.^[175]

D. NEW JERSEY

New Jersey has a statutory cause of action for wrongful death.^[176] The beneficiaries of a wrongful death action are those persons that could have had an intestate interest in the decedent's estate and in the proportion that they were entitled to take.^[177] Any action brought under the New Jersey Act must be commenced within 2 years after the death of the decedent.^[178] The New Jersey wrongful death statute is remedial in nature rather than penal, therefore punitive damages are not awarded.^[179]

E. DELAWARE

Delaware has codified its wrongful death action.^[180] The beneficiaries of such an action shall be a spouse, parent and children.^[181] If there are no beneficiaries as named above, an action can then be brought by any person related to the deceased by blood or marriage.^[182] The statute of limitations for a wrongful death action is two (2) years.^[183] In a wrongful death action, a plaintiff is not limited to simply recovering

pecuniary damages and in determining the amount of an award, a jury can consider such factors as loss of contribution for support, loss of parental, marital, and household services, reasonable funeral expenses, and mental anguish to the surviving spouse and next-of-kin.^[184]

F. PENNSYLVANIA

In Pennsylvania a wrongful death action must be commenced within one (1) year after death.^[185] A wrongful death action may only be brought by the personal representative of the decedent until six months after the death of the decedent.^[186] After that time, a personal representative or any person entitled by law may bring the action and act as trustee ad litem on behalf of all persons entitled to damages.^[187] Beneficiaries include the following: spouse, children, or parents of the deceased and the damages recovered shall be distributed to the beneficiaries in the proportion they would take the personal estate of the decedent in the case of intestacy and without liability to creditors of the deceased person under the Pennsylvania law.^[188] The plaintiff shall be entitled to recover, in addition to other damages, damages for reasonable hospital, nursing, medical, funeral expenses and expenses of administration necessitated by reason of injuries causing death.^[189]

G. WEST VIRGINIA

In West Virginia a personal representative can bring a wrongful death action on behalf of the deceased.^[190] There is a two year statute of limitations on wrongful death actions.^[191] The court or jury, may award such damages as to it may seem fair and just, and, may direct in what proportions the damages shall be distributed to the surviving spouse and children, including adopted children and stepchildren, brothers, sisters, parents and any persons who were financially dependent upon the decedent at the time of his or her death or would otherwise be equitably entitled to share in such distribution after making provision for those expenditures.^[192] A jury or court can consider mental anguish, and solace, loss of services and income, costs of final illness, reasonable funeral expenses suffered "dependents."^[193] *i.e.*, surviving spouse, children, stepchildren, brothers, sisters, parents and any persons who were financially dependent on the deceased.

CONSIDERATION OF STATUTORY LIABILITY AND STANDARDS

In addition to common law standards which may impose liability, certain statutory provisions exist which serve to impose strict liability in one form or another on the owners and operators of malls, retail establishments and commercial enterprises.

A. Liability of Owners, Managers & Occupants Under CERCLA

In recent years, the development of a body of federal statutory law dealing with environmental hazards and the imposition of liability for the existence of these hazards, has imposed upon owners, managers and occupants of real property an additional group of liabilities that the parties cannot always avoid by contractual provisions or the exercise of due care. Under the **Federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)** it gives the Environmental Protection Agency (EPA), the power to recover its costs in cleaning up a hazardous waste site from, among others, the "owners and operators" of the facility. This is also known as the **Superfund Law** and as amended by the **Superfund Amendment and Reauthorization Act of 1986 (SARA)**, both Federal and State Governments have authority to respond to releases and threatened releases of hazardous substances and thereby protect the public and environment.

The term "hazardous substances" is broadly defined under CERCLA and accompanying regulations and include toxic pollutants, hazardous air pollutants under the Federal Clean Air Act and any "eminently hazardous chemical substance or mixture". Courts interpreting CERCLA have concluded that the statute allows for the imposition of joint and several liability among all potentially responsible parties (PRP).

The Court's construing CERCLA held that parties identified as responsible persons in CERCLA §107(a), are **strictly liable** for the release of a hazardous substance. Recent judicial decisions have dealt with a range of factual situations evidencing broad application of the statute for imposing upon landlords and tenants as "tenants and operators." Liability under CERCLA is imposed upon both current owners and operators and past owners and operators of facilities on which a release of hazardous substance has taken place. Accordingly, an owner/operator of a commercial facility, must constantly police all tenants in order to prevent the tenant from causing any environmental impact on the property. Lease terms should require that pre-lease and post-lease environmental audits of the property be conducted and under the law an owner must exercise due care to prevent a tenant from contaminating the property.

The bottom line for owners/operators of commercial facilities is to make certain that the tenant is in full compliance with the law and that indemnification provisions protect the owner/operator from liability.

B. The Americans With Disability Act (ADA)

Title III of the ADA took effect on January 26, 1992, and prohibits discrimination against individuals with disabilities in the "full and equal enjoyment" of all public facilities and services. Places of public accommodation includes places of lodging, convention centers, cultural facilities, retail sales establishments, service establishments (such as laundromats, banks and doctors' and lawyers' offices) and any business in which the public is allowed access (presumably including insurance companies).It is discriminatory under the ADA to fail to remove structural, architectural and communication barriers in existing facilities where such removal is "readily achievable, easily accomplished, and carried out with little difficulty or expense. In determining whether removing a structural barrier is readily achievable, such considerations as the nature and cost of the modification and the size, financial resources, and type of business are pertinent.If the removal of a barrier is not readily achievable, the goods or services must be made available through alternative methods, where doing so is readily achievable.

New facilities must be readily accessible and usable by individuals with disabilities except where it is structurally impractical to do so. Regulations have been issued by the Architectural and Transportation Barriers Compliance Board which must be utilized prior to making any structural changes.

Title III of the ADA may be enforced by the Attorney General or by private lawsuit.The Attorney General must investigate complaints and undertake compliance reviews. Title III's remedies can include ordering the alteration of facilities to make them accessible, monetary damages to aggrieved persons and civil penalties of up to \$50,000.00 for a first violation and \$100,000.00 for subsequent violations. This section of the ADA states that "the monetary damages and other such relief as courts may grant" does not include punitive damages.

C. Occupational Safety and Health Act (OSHA)

In 1970, Congress enacted the Williams-Steiger Occupational Safety and Health Act of 1970.The stated policy of the Act is to assure, so far as possible, every man and woman in the nation safe and healthful working conditions and to preserve the nation's human resources. Thus, the purpose of OSHA is to eliminate dangerous conditions in the work place, and to prevent the first accident-, and it has been said that avoidance of minor injuries, as well as major ones, was intended to be within the purview of the statute. The Act represents a decision to require safeguards for the health of employees even if such measures substantially increase production costs. The Occupational Safety and Health Act has been called the most revolutionary piece of labor legislation since the National Labor Relations Act, and it has been hailed as a new "bill of rights" for employees, and as for the most part a sound and constructive law.

OSHA attempts to accomplish its broad objectives through many means, including the stimulation of employers and employees to institute new, and to perfect existing programs for providing safe and healthful working conditions, providing that employers and employees have separate but dependent

responsibilities and rights with respect to achieving safe and healthful working conditions; authorizing the Secretary of Labor to set mandatory occupational standards; providing continuing occupational health and safety research, including research into psychological factors involved; providing training programs; providing an effective enforcement program; and by encouraging the states to assume responsibility for occupational safety and health to the greatest extent possible. It is thus clear that OSHA provides a broad spectrum of powers for use by the Secretary of Labor in reducing exposure to hazardous conditions in the workplace, and that cooperation among all levels of government and the voluntary compliance of both employers and employees are essential ingredients for success. As with any highly complex legislation, untempered by the forge of judicial review, only time - and cases - will reveal judicial reaction and philosophy relating to the statute as particular factual settings arise. It must be emphasized that the criminal and civil penalty provisions of the Act are severe; that the time periods for contesting or appealing the decisions of the effectuating agencies are very short; and that the rules and regulations promulgated under OSHA are being frequently expanded, deleted, or modified.

The Occupational Safety and Health Act of 1970 (OSHA) is extremely broad in its coverage. Because of the broad definition of "employer" under the Act, it has been estimated that the Act applies to more than five (5) million businesses and about sixty (60) million employees, or about three-fourths of the civilian labor force. The size of a business, for purposes of the Occupational Safety and Health Act, is irrelevant, and the type of activity of a business is similarly of no consequence in deciding whether an employer is covered by the Act.

It has been held, however, that since Congress' intent was to protect working men and women from hazards at their place of employment, a standard promulgated pursuant to the Act cannot be extended to provide protection for pedestrians or other non-employees. And OSHA does not apply where a worker is an independent contractor and not an employee of the owner.

An employer may carry out its statutory duties through private arrangements with third parties, but if it does so and those duties are neglected, it is up to the employer to show why he cannot enforce the arrangements he has made, if he cannot make this showing he must take the consequences and his further remedy lies against the private party with whom he has contracted and whose breach exposes the employer to liability.

Congress has defined "employer" for purposes of the Act to mean a person engaged in a business affecting commerce who has employees, other than the United States or any state or political subdivision of a state.

STATE STATUTORY LIABILITY

A. MARYLAND

Under Maryland law, the violation of a statute or ordinance may constitute "negligence per se." In order for the statutory violation to be negligence per se, the violation must be the proximate cause of the plaintiff's injury. Maryland also has a number of statutes which are patterned after Federal law which imposes similar liability such as the Maryland Occupational Safety Act (MOSH).

Liability may also be established by showing that the wrongdoer failed to comply with a codified law. In Maryland, a violation of a statute or ordinance is generally *evidence of negligence*, and does not constitute negligence as per se.^[194]

For example, a pedestrian who crosses a street between intersections containing crosswalks is not negligent per se.^[195] A pedestrian is merely required to look for, and yield to traffic of which the pedestrian should be aware.^[196] As an anomaly to this general rule regarding violation of a statute, violation of the statute prohibiting a pedestrian from crossing a street against a "Don't Walk" signal is negligence per se

due to the wording of the statute itself.^[197]

For traffic accidents, Maryland follows the boulevard rule.^[198] Under this rule, a driver at an intersection who is required by statute to stop before entering the intersection (i.e., the unfavored driver) must yield the right-of-way to a driver who is not so required (i.e., the favored driver). Where the unfavored driver fails to follow this rule, he is liable to the favored driver for a resulting accident unless the favored driver engaged in unlawful conduct (e.g., speeding) and that conduct was a proximate cause of the accident. It should be noted that this rule does not protect the favored driver from a suit by a passenger in the favored driver's car.^[199]

B. DISTRICT OF COLUMBIA

VIOLATION OF REGULATION/STATUTE - CAN BE NEGLIGENCE PER SE^[200]

The District of Columbia allows this doctrine where:

- (1) There is a statute or regulation which was enacted to protect persons in the plaintiff's position or prevent the type of accident that occurred.
- (2) The plaintiff can establish his relationship to the statute or regulation (i.e. the statute applies to him or her).
- (3) The defendant has not put forth evidence excusing his violation of the statute or regulation.

The Courts allow the statute or regulation to set the standard of care, which the insured's conduct will be measured against.

EXAMPLE:

The District of Columbia Industrial Safety Statute

Section 36-228 of the District of Columbia Code (1981) states:

Every employer shall furnish a place of employment which shall be reasonably safe for employees, shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonable safe and adequate to render such employment and place of employment reasonable safe.^[201]

The Code goes on to define "Employer" as: "Includes every person, firm, corporation, partnership, stock association, agent, manager, representative, or foreman, or other persons having control or custody of any place of employment or of any employee."^[202] For this statute to be applicable, The District of Columbia Court of Appeals has held that there must not only be ownership of the construction site, but the Owner must **reserve the requisite and specific authority of control over the construction work and the workers, to such a degree that it establishes its [the Owner's] control of the place of employment sufficient to make the Owner the employer of the Plaintiff for purposes of the statute.**^[203]

One of the leading cases on point regarding this statute and the requisite amount of control necessary to render a finding against the owner is **Traudt v. Potomac Electric Power Company**, supra. In that case the District of Columbia Court of Appeals did find that PEPCO did retain control of the workplace to a sufficient degree to find the statute applicable to the Defendant; and thus the defendants' violation of the statute allowed the plaintiff to recover for the damages sustained.^[204] However, the Court noted that PEPCO **specifically contracted** with the contractor to retain authority to perform other work itself or through others on the job site, and could adjust the subcontractors schedule.^[205] The Court noted that,

“This combination of circumstances establishes the requisite employer-employee relationship even though PEPCO did not hire or pay Traudt or otherwise control the terms of his employment.”^[206]

Traudt cites the case of Martin v. Hyman Constr. Co.^[207] to further emphasize that the duty of due care imposed by the statute is broader than its common law counterpart because it is incumbent not only upon employers as defined at common law, but also upon every person having control or custody of the place of employment.^[208]

C. VIRGINIA

Under Virginia law, violation of a statute or ordinance may constitute “negligence per se.”^[209] In order for the statutory violation to be negligence per se, the violation must be the proximate cause of the plaintiff’s injury. Where the statutory violation is the proximate cause of the injury, the violation will support a recovery because the violation “is the failure to exercise that standard of care prescribed by a legislative body.”^[210] Although negligence per se is a common-law doctrine, the General Assembly of Virginia has codified it in Virginia Code Section 8.01-221.

BAD FAITH

GENERAL OVERVIEW

In a recent bad faith claim in which the insureds brought action against liability insurer to recover for bad-faith failure to settle within policy limits, fraud, and intentional infliction of emotional distress, the United States Supreme Court held that an award of \$145 million in punitive damages on a \$1 million compensatory judgment violated due process by taking property without due process of law. (State Farm Automobile Insurance Company v. Campbell, 538 U.S. 408, 155 L.Ed. 2d 585, 123 S.Ct. 1513 (2003)). The court stated that in most cases, punitive damages awards that are 10 times the size of compensatory damages awards will violate due process requirements.

Moreover, in such cases in which substantial compensatory damages are awarded, punitive damage awards that are more than the compensatory damages may be constitutionally infirm. In this case, State Farm had determined that liability was likely but refused to settle the claims for \$25,000.00 a piece. State Farm also advised the Campbell’s that they did not need to retain separate counsel. A Utah jury returned a verdict of \$185,849 and State Farm refused to cover the portion of the judgment in excess of its liability limits, refused to post a bond to enable the Campbell’s to appeal and advised the Campbell’s to put for sale signs on their property. The Campbell’s sued State Farm for bad faith, fraud and intentional infliction of emotional distress.

The Campbell’s introduced evidence that State Farm’s decision to take the case to trial was a part of a national scheme to meet corporate goals by capping payouts of claims. The jury awarded the Campbell’s \$2.6 million in compensatory damages and \$145,000,000.00 in punitive damages.

BMW v/ Gore

The Supreme Court relied upon its previous decision in BMW of North America v. Gore, which set forth three guideposts which should be considered when reviewing punitive damage awards: (1) the degree of reprehensibility of the defendant’s conduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded and the civil penalties authorized in comparable cases. Although the Court declined to impose a bright line ratio that a punitive damages award can not exceed, it declared that few awards exceeding nine to one will satisfy due process. Additionally, when compensatory damages are substantial, the Court stated that a lesser ratio, perhaps only equal to compensatory damages should be the outermost limit. The court also indicated that

misconduct that results only in economic harm will usually support a smaller punitive damages award than conduct that causes personal injury.

New evidence rules

The Campbell Court criticized the trial court's admission into evidence of State Farm's nationwide pattern of claims adjustment. The Court concluded that the case had been used as a platform to expose and punish State Farm for its operations throughout the country rather than focusing on State Farm's mistreatment of the Campbells. The Court also determined that a state may not, as a general rule, impose punitive damages to punish a defendant for unlawful acts committed outside of its jurisdiction. Otherwise a defendant could be subjected to punitive damage awards for the same misconduct.

The Court also questioned the practice, permitted in most states, of allowing a jury to consider the wealth of a defendant in determining the appropriate size of a punitive damages award. The Court stated that the wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award and emphasized that the focus must remain on the relationship between the size of the award and the harm suffered by the Plaintiff.

The impact of Campbell

The Campbell decision will have the effect of restricting the scope of cases brought by individuals against Insurance Companies to the specific alleged wrongdoing applicable to the individual case as opposed to suspected practices generally. The decision will also serve to prevent astronomical damage awards that have recently been awarded by juries.

A. MARYLAND

In Maryland, an insurer can be sued by its insured in tort for the wrongful failure to settle a claim.^[211] An insurer is obligated to act fairly and in good faith in settling third-party liability claims within the policy limits, and its action in refusing to settle must consist of an informed judgment based on honesty and diligence.^[212] This obligation of fair dealing and good faith is a fiduciary duty which arises out of the insurer's exclusive control of the investigation, settlement and defense of the claim against its insured.^[213] The insurer's exclusive control over the litigation creates an actual or potential conflict of interest between insurer and insured.^[214] The duty to act fairly and in good faith requires the insurer to give equal weight to its own interests and those of the insured and therefore the insurer must act honestly, exercise reasonable care, diligently investigate and appraise the case, and keep its insured reasonably well-informed of the progress of the case, including settlement offers.^[215] Normally the measure of damages in a bad faith failure to settle case is the amount by which the bonafide judgment rendered in the underlying action exceeds the amount of insurance coverage.^[216] Maryland Courts have limited the scope of the tort of bad faith to the insurer's duty to settle and have expressly refused to expand the tort to situations involving an insurer's bad faith failure to pay an insurance claim that arise directly out of the insurance contract.^[217] As to the existence of a statutory duty, [Maryland courts] have previously (and *expressly*) held that an insurer's failure to comply with the mandates of the statute *presently can* support a viable cause of action to the benefit of an insured.^[218]

B. DISTRICT OF COLUMBIA

To recover under the tort of Bad Faith refusal to pay, the Plaintiff must show that the insurer did not have a reasonable basis for denying benefits under the policy of insurance and that it knew or recklessly disregarded it and there existed a lack of a reasonable basis when it denied the claim.^[219] Note: Equitable Estoppel prevents insurance companies from asserting the statute of limitations defense where the insurance company has made misleading representations to the insured and the insured has relied on those

representations to his detriment.^[220]

C. VIRGINIA

There should be no claim for an insurance company's alleged bad faith refusal to pay a claim until the insured first establishes that the insurance company breached its duty under the contract of insurance.^[221] This requires that the loss be covered.^[222] However, the Fourth Circuit Court of Appeals has ruled that Virginia does not recognize a tort remedy for the bad faith refusal of an insurance company to honor a first-party insurance contract.^[223] Therefore, under Virginia law, liability for a bad faith is apparently grounded in contract law rather than tort law and the Virginia Supreme Court has ruled that it springs from the relationship of "trust and confidence" between the parties resulting from the insurer's contractual right to control the settlement of claims.^[224]

D. NEW JERSEY

New Jersey recognizes bad faith causes of actions based on both contract and tort theories.^[225] Under New Jersey law, the insurer's obligation with respect to settlement is to exercise good faith in dealing with offers of settlement.^[226] Having both the insured's and its own best interest in mind, the insurer must make reasonably diligent efforts to determine the facts and theories upon which a good faith judgment can be made as to an appropriate settlement.^[227] This duty is increased when the insurer reserves full control, under the policy, to handle the claim.^[228]

E. DELAWARE

Delaware does recognize a cause a action against an insurer for bad faith handling of a claim. The insurer is liable if it "fail[ed] to use good faith or due care in settlement negotiations with plaintiff prior to trial."^[229] When the insurer has sole control of the defense and the insurer tortiously settles a claim over the policy limits, the insured or excess insurer has a cause of action.^[230] In order for an insurer to avoid this type of action, it must enter into a settlement only if it is reasonable and made in good faith.^[231]

F. PENNSYLVANIA

An insurer is required to act in good faith and determine the interest of the insured when deciding whether to litigate or settle.^[232] An insurer may refuse to settle in good faith and has no absolute duty to settle a claim when the possible judgment against the insured exceeds the amount of coverage.^[233] Neither the excess insurer nor the insured can recover from the primary insurer, when the insured approved the latter's decision to go to trial.^[234] But a primary insurer can be held liable to an excess carrier for an amount in excess of the limits if the handling of the claim or settlement is evidenced by bad faith.^[235]

G. WEST VIRGINIA

An agreement of insurance to pay lawful damages on behalf of the insured constitutes a contract for the benefit of the person insured and may be enforced in an action, however, where the insurer acts reasonably, and without negligence in refusing proper settlement it meets its obligations to the insured.^[236] Punitive damages may be awarded to an insured against its insurer for failure to settle a claim within policy limits, but the policy holder must establish a high threshold of actual malice in order to prevail.^[237]

III. NEGLIGENCE CLAIMS - PREMISES LIABILITY

GENERAL CONCEPT - NEGLIGENCE/PREMISES LIABILITY NATURE AND TYPES OF CLAIMS:

Background and Summary of the Law:

It has historically been an accepted principle of negligence law that the mere existence of a defective condition in a commercial building, a store or public place of business does not, as a matter of law, render the proprietor liable for an injury caused by the defective condition unless the proprietor knew, or in the exercise of reasonable care ought to have known, of the defect. Thus the owner or occupant of the premises must have *actual or constructive notice* of the defect in order to be charged with negligence.

The above-stated rule historically has been applied in cases considering the liability of the proprietor of a store or other place of business for injuries suffered by customers in falls caused by the existence of a transitory condition upon the premises. Thus, where the transitory condition is one which is traceable to the proprietor's own act, that is, a condition created by the proprietor or under this authority-or is a condition in connection with which the proprietor is shown to have taken action, the proprietor is deemed to have actual notice of the condition and no proof of notice is necessary.

However, where it appears that the transitory condition is traceable to persons for whom the proprietor is not ordinarily responsible, proof that the proprietor was negligent in relation to the transitory condition requires a showing that the proprietor had actual notice thereof, or that the condition existed for such a length of time that in the exercise of reasonable care the proprietor should have known of the condition, or in other words, a showing that the proprietor had constructive notice of the condition.

As a consequence of the development of the concept of strict liability in tort, i.e. liability without fault, the public perception which exists in today's society is that if a person is injured then someone else is responsible for the injury. The end result of such a concept, as well as the development of the law of premises liability so as to impose greater duties on the owners and occupiers of property is a tremendous liability exposure from the risk management standpoint on the part of the owners and operators of real property inclusive of malls, retail establishments and commercial enterprises.

The field of premises liability is an enormous one involving a myriad of cases. It is also a significant area of tort law. At one time, in the earlier part of the twentieth century, premises liability cases were ordinary "run of the mill" and largely "nuisance type" cases disposed of by small settlements. Those cases proceeding to trial resulted in mainly defense verdicts. They were aptly described as a "defense attorney's dream." Such is no longer the case. Premises liability cases today often involve sizeable verdicts and judgments and are a factor to be reckoned with in assessing liability risk exposure.

The liability of owners/occupiers of real property to an individual injured on their property is dependent upon the standard of care owed to the individual. That standard of care differs in that Maryland Courts have adhered to the position that the standard of care owed by an owner/occupier depends upon the status of the Plaintiff as a **trespasser, licensee or invitee**. This also holds true for the Commonwealth of Virginia. However, in the District of Columbia the courts have abolished the distinction between a Plaintiff's status as invitee or licensee in favor of the adoption of a duty of reasonable care under all circumstances.

An **invitee** is one invited or permitted to enter or remain upon another's property for purposes connected with or related to the owner's business. The owner must use reasonable and ordinary care to keep his premises safe for the invitee and to protect the invitee and to protect the invitee from injury caused by an unreasonable risk which the invitee, by exercising care for his own safety, will not discover.

A **licensee** is one privileged by virtue of proper consent to enter for his own purpose or convenience onto another's property. A licensee takes the property as he finds it and like the trespasser is owed no duty by the owner of whatsoever except that he may not be willfully or wantonly injured or entrapped by the owner once his presence is known.

It is the duty to the business invitee owned by an owner-occupier of property which governs the liability of the owners and operators of real property, malls, retail establishments and commercial properties.

It is an axiomatic legal principle as reflected in nearly every premises liability case that mere ownership or occupation such as a building does not render the owner/operator liable for injuries sustained by third parties as the owner/occupier is not an insurer of such persons. The duty of an owner/operator is to use reasonable and ordinary care to keep the premises safe. It is also a fundamental principle of law that the mere existence of a defective condition or danger in a store or public place of business, does not, as a matter of law render the proprietor liable for injury caused by the defective condition unless the proprietor knew or in the exercise of reasonable care ought to have known of the defect, i.e., the owner/occupant of the premises must have actual knowledge or constructive notice of the defect and have either failed to remedy the defect or defective condition or warn third parties of the existence of the dangerous condition in order to impose liability on the owner/occupier of business premises.

Generally, a presumption of negligence on the part of an owner or lessee does not arise merely by showing that an injury has been sustained by a person rightfully on the premises as the owner is not the insurer of safety of such persons.

The owner or occupant of premises is liable to a person injured on the premises when the perilous instrumentality or dangerous condition is known to the owner or occupant and not known to person injured.

A. HISTORICAL BASIS - PREMISES LIABILITY/BUSINESS PREMISES

Tort Liability of Owners Managers & Operators of Real Property and Owners & Operators of Retail Establishments and Commercial Enterprises

At the time that the traditional principles of tort liability applied to the liability, vel non, of owners and operators real property and business establishments and commercial establishments, i.e. liability predicated upon fault, for instance in the area of premises liability, small, medium and large business and retail establishments operated on Main Street America where clear demarcations existed between public services provided by municipal governments and service provided to members of the public invited on to private business premises. The law reflected the respective legal responsibilities of the public bodies and private enterprise to third parties and was rather routinely and consistently applied. The law also clearly reflected the liability of the owner/operator of businesses to the business invitee.

As increased crime in the inter-cities occurred and a migration to the suburbs resulted as a consequence partly of the crime in the inter-cities, as well as the goal of the "American dream" of owning a home in the "burbs", the modern phenomenon of the shopping mall emerged. Later large retail and commercial establishments returned to the inter-cities and many office buildings now have commercial and retail establishments contained within the buildings and of course the inter-city malls have become common place. With the emergence of the mall and large retail establishments and commercial enterprises, came the congestion, and the presence of enormous numbers of potential and actual shoppers on premises which are as large as small cities and which share many of their characteristics. The modern shopping mall has enormous facilities inclusive of large surrounding parking lots, utilities, inclusive of water supply and sewerage systems, environmental systems and controls, streets, a myriad of walkways, public access areas and transportation systems. Most large malls also furnish police protection. The modern shopping mall is in essence a **quasi city** as it has many of the attributes of a municipality.

Then large professional sports facilities and complexes emerged such as FedEx Field - a state of the art sports entertainment facility. One of the largest Cities and the most densely populated city in Maryland for twelve (12) weeks during professional football season and on FedEx Field event days. The owners of professional sports and entertainment facilities have been confronted with increasingly unpredictable areas of law which effect every facet and manner in which they conduct business and operate the commercial property they own.

The liability exposure of Professional sports facilities has been expanded due to the fact that the Courts have defined legal duty in a manner which is inconsistent with moral duty. Additionally, Courts too often submit liability issue to a jury for a determination rather than adjudicating the liability issue as a matter of law. The tendency of the judicial system to submit the liability issue to the jury for a determination, in those cases where there is no material fact in dispute rather than rule as a matter of law that no liability exists has had the effect of tremendously expanding the risk exposure of the owners of Sports teams and sports facilities. Another such factor which has significantly expanded the risk exposure of professional sports and entertainment facilities has been the development of strict liability in tort. The advent of liability without fault has “spilled over” in the minds of the public to the extent that in the event of injury of a patron at a sports event, it is assumed that the injury gives recourse to the injured person to recover civil damages from the owner and operator of the sports facility and the sports team hosting the event.

As patrons of malls, retail establishments, commercial enterprises and professional sports teams and facilities begin to seek civil restitution for a myriad of injuries which occur on malls and commercial property, **new vistas in the concept of tort liability have arisen.** Commercial land owners are confronted with unpredictable areas of law which effect every facet and manner in which they conduct business and operate the commercial property which they own. The new vistas in tort liability is not more evidenced than the development of the liability of the owner and operator of a sports facility for the Criminal Acts of third persons.

B. LIABILITY FOR THE CRIMINAL ACTS OF THIRD PERSONS

The Tort Liability of Owners, Operators & Managers of Real Property for the Criminal Conduct of Third Parties

A woman carrying her packages walks across a mall parking lot to her vehicle. As she approaches her vehicle she is assaulted and robbed by an unidentified assailant. Such a scenario is all too familiar to the owners and operators of malls and retail establishments. The shopping mall and large shopping center is a microcosm of the community in which it is located and reflects many of the same crime problems.

As modern commercial phenomenon known as the shopping mall has emerged, the same crimes which caused the initial migration from the city to the suburbs are the ones associated with patron attacks; assault; rape and murder. As the victims of these crimes begin to receive civil restitution a new vista in the concept of tort liability presents itself. Commercial land owners and owners of malls and shopping centers are confronted with unpredictable areas of potential liability.

A visiting football fan who had consumed alcoholic beverages prior to the game and during the game exists the game after his team defeats the local NFL team and gets involved in a confrontation with some local fans which results in serious injuries to the fan when a disgruntled local fan throws an empty bottle of beer at him sticking him in the head causing him to fall and sustain a serious brain injury.

The owners and operators of large sports and entertainment facilities are constantly being sued for alleged failure to provide security, as well as on standard premises liability grounds.

The general rule is that an owner or occupier of property is under no special duty to protect another from criminal acts by a third person in the absence of a statute or a special relationship. The underlying rationale, which also applies to the liability of landlords, is that the mere ownership of a building does not render the owner liable for injury sustained by third parties as the owner is not an insurer of such person.

That language appears nearly universally as a preface to whatever duty the Court ultimately decides may be applicable in a given instance. The duty is articulated as a duty to use reasonable and ordinary care and keep the premises safe.

Maryland Law

One of the first cases to espouse such a duty in a landlord/tenant situation in the State of Maryland was the case of Scott vs. Watson, 278 Md 160, 359 A2d 548, which held that if a landlord knows or should know of criminal activity against persons or property in the common areas of his building, he has a duty to take reasonable measures in view of the existing circumstances and to eliminate the conditions contributing to the criminal activity. The duty arises primarily from criminal activities existing on the landlord's premises and not from knowledge of the general criminal activities in the neighborhood. The Court went on to state that even if no duty existed to employ the particular level of security measures which were provided by a landlord in a particular case, improper performance of voluntary acts of the landlord could, in particular circumstances, constitute breach of the landlord's duty to use reasonable care or to keep the premises safe and to protect the tenants from criminal activity in common areas.

In Tucker v. KFC National Management Co., 689 F.Supp. 560 (D. Md. 1988), Tucker was standing in a restaurant waiting for an order when he became engaged in a fight with Reeves, another patron. Reeves brandished a knife and stabbed Tucker. Tucker sued the restaurant alleging that it did not provide an adequately safe place for business invitees. Specifically, Tucker focused on the allegation that the restaurant failed to have a security guard on the premises, and that this failure, in light of prior fights and robberies, constituted negligence on the part of the restaurant owner. As part of his claim, Tucker presented expert testimony that a security guard would have mitigated the injury.

The Tucker court also considered the issue of proximate cause and concluded that the absence of private security was not the proximate cause of the Plaintiffs injury. The Tucker court observed:

[T]hat the absence of private security guard service was not the proximate cause of plaintiffs injuries ... The incident occurred spontaneously when the two customers were standing in line waiting for service. Once the altercation started, it would be sheer speculation to determine how the security guard would have prevented the injury; considering the spontaneity and brevity of the incident, he most likely could not have prevented it. If he were wearing a gun, would he have used it or would the courts have expected him to have used it? In the face of an assault, he might have been justified in taking action, but his failure to do so could not be the cause of the incident.

F. Supp. at 563.

The Tucker court held that no special duty is imposed on storekeepers to protect their customers and rationalized.

[w]ere the Court to hold otherwise, every newsstand, drug store, fast food establishment, gas station and similar establishment would be required to provide security guard service for its business invitees. The articulation of a duty so broad and with such extensive consequences rests on the legislation and will not be imposed judicially. Would one guard be enough? What procedures would be necessary for the guard to prevent criminal activity? Could the requirement to have a security force or guard not lead to greater harm and exposure to business invitees by confrontation? These are not questions of reasonableness for the jury to decide, but are questions of duty.

F. Supp. at 564.

In Nigido v. First Nat'l Bank of Baltimore, 264 Md. 702, 288 A.2d 127 (1972), the Court of Appeals considered an action brought against a bank for injuries sustained in a bank robbery. In this case, the

Plaintiff went to the branch of the Defendant to make a deposit, and while he was there, armed robbers entered the bank and shot him. The Plaintiff alleged that the bank was negligent because: The bank's "cameras and other protective devices were not functioning, "the bank's building was not "properly guarded," the bank "failed to take proper precautions to guard" its building, and because "in view of the history of bank robberies" at that location, the robbery was "foreseeable." *Id.*

In holding that the Plaintiff failed to state a cause of action, the Court first determined that the Plaintiff was "an invitee to whom was owed the same duty a shopkeeper owes his customer, i.e., to use reasonable care for his protection."*Id.* at 128. The Court stated the following:

We see in the declaration not an allegation that the bank's premises, per se, were unsafe for the purpose for which they were being used, but rather that the bank was negligent in failing to have its premises "properly guarded" against "foreseeable" robberies. The allegation that this robbery was "foreseeable" is supported only by the further allegation that there is a "history of bank robberies at the said location." But even if it could be said that the robbery was foreseeable, it does not follow that the shooting of a customer was foreseeable.

Id. Regarding the allegation that the bank's premises were not "properly guarded," the Court further held the following:

If the words "properly guarded" are intended to connote measures designed to bar the entry of robbers such measures could well turn out to be counter-productive, in that they might keep out most of the customers as well. It will be observed that appellants do not allege a total absence of guards or a complete lack of any precautions. It is the failure to "properly" guard, the failure to take "proper precautions" to guard upon which they rely. But, in appellants' declaration, "properly" is but an adverb and "proper" but an adjective and, as we have said many times, naked adjectival or adverbial words, phrases or expressions can never take the place of facts. This is not to say however, that alleging a total absence of guards would have saved the day. Indeed, it has occurred to us that not providing armed guards might very well reflect the exercise of sound judgment rather than negligence. If it is the rationale of the bank that armed guards might provoke gunplay and that it is better to lose cash than lives, then the total absence of guards would seem to be justified.

Id. at 128-29.

Maryland law provides that only where a special relationship exists will a private person owe a duty to another to protect from criminal assaults by third persons. *In Rock vs. Danley*, 93 Md App. 411, 633 A2d 485 (1993), a case involving a breach of promise by an owner and management agent of rental property to investigate a potential security breach which resulted in an initial intruder assaulting a tenant, the Maryland Court of Special Appeals articulated the "**assumed duty" theory of liability** in holding that "**a person who volunteers or agrees to do something to protect another even though there was no preexisting duty to protect, must exercise reasonable care in doing what was volunteered or agreed to be done.**"

The case was predicated upon the **good Samaritan doctrine** which the Court indicated has been an integral part of the tort law of Maryland.

The case of *Rock v. Danley*, *supra*, is problematic in that in theory it imposes potential liability on the part of an owner/occupier of malls, retail establishments and commercial enterprises for improperly providing mall security even though they had no duty to do so in the first instance.

In Southland Corporation v. Griffith, 332 Md 704, 633 A2d 84, (1993), the Maryland Court of Appeals held that an owner of a retail establishment has a **legal duty to come to the assistance of an endangered business visitor** on the premises if there is no risk of harm to the proprietor or its employees. The Court adopted §314A of the Restatement of Torts Second and embraced the proposition that an employee of a business has a legal duty to take affirmative action for the aid or protection of a business invitee who is in danger while on the businesses premises provided that the employee has knowledge of the injured invitee and the employee is not in the path of danger.^[238]

Assumption of Duty

The duty to protect others is set forth in Restatement of Torts 2d, §314 and states:

The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.

Unless there is some factor^[239] creating a duty, an actor has no responsibility to protect another.

“There is rarely an absolute duty to secure the other's protection.”^[240]

However, once a party voluntarily renders assistance or protection to another, they have assumed a duty. Once a duty arises or once a duty is assumed a standard of care is imposed. This standard is found in the Restatement of Torts 2d, §323,

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

- (a) his failure to exercise such care increases the risk of harm, or**
- (b) the harm is suffered because of the other's reliance upon the undertaking.**

The theory of voluntary assumption of duty also applies to third parties. This position is stated in Restatement of Torts 2ds, §324A, which states as follows:

One who undertakes, gratuitously or for consideration to render services to another which he should recognize as necessary for the protection of a third person or things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if:

- (a) his failure to exercise reasonable care increases the risk of such harm, or**
- (b) he has undertaken to perform a duty owed by the other to the third person, or**
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.**

Accordingly, in the State of Maryland the owner/occupier's duty to protect against third party criminal activity under the existent Maryland law is that such an owner/occupier has a duty to exercise reasonable care for the safety of tenant and/or business invitees. If an owner/occupier knows or by the exercise of ordinary care should know criminal activity against person or property has occurred on the owner/occupier's property, the owner/occupier has a duty to take reasonable measures to protect tenants

against these criminal activities.

In determining whether the measures taken by the owner/occupier were sufficient, the owner/occupier's acts can be measured only by the criminal activities occurring on the owner/occupier's property and of which the owner/occupier knew or should have known and not by those criminal activities occurring generally in the surrounding neighborhood. An owner/occupier has no duty to protect invitees against criminal activity occurring on the public streets. Buck v. Acme Mkts., Inc., 53 Md App 151, 456 A2d 47 (1982).

The difficulty with the modern day rule as it applies to liability of an owner/occupier for the failure to protect against third party criminal activity is that liability vel non of the owner/occupier in accordance with established authority of premises liability law, depends upon foreseeability. **In today's climate everyone can foresee the commission of crime virtually anywhere and at anytime.** The law as it presently is enunciated breeds uncertainty as to when the duty to furnish police protection arises, as well as what measures adequately discharge any such duty. Furthermore, requiring a business property owner to supply enough guards to prevent crime puts the owner in the position of an insurer which is also contrary to the common law and the established law of premises liability in the State of Maryland.

The modern day law of premises liability, as it is being applied, puts the mall owner/operator on the horns of a dilemma. Liability for the criminal acts of third persons is predicated currently on the concept of foreseeability. This is so under the traditional concept of premises liability and sound legal precedent. Premises liability is thus established on the owner/operator of malls and commercial facilities, but it has absolutely nothing to do with a natural or artificial condition of the premises, but rather a **public safety function**, i.e. protecting business invitees from the criminal acts of third parties.

It is suggested that such a duty cannot be predicated logically on foreseeability, otherwise liability of the owner/operator is strict liability in tort as it is axiomatic that criminal activity is foreseeable at any time and at any place to any person.

Consider the practical consequences of establishing liability of owners, operators and managers of real property, commercial enterprises and the owners and operators of malls to protect invitees from the criminal acts of third parties. Such a liability is non-existent when it comes to public authority. Is the liability of owners, operators and managers of real property and mall owners/operators which is greater than public authorities a fair concept under the law? It is submitted that such a concept results in the breakdown of the traditional negligence concept of negligence predicated upon fault and is the advent of **strict liability in tort** on the part of mall owners for the criminal conduct of third parties.

At the present time there is no reported case in the State of Maryland that clearly answers the question of liability of the owners of malls, retail establishments and commercial enterprises to protect against third party criminal activity insofar as establishing a duty to protect its patrons. However, Maryland has adopted sections of the Restatement of Torts Second in enunciating premises liability duties, i.e. §314A of the Restatement was specifically adopted in Southland Corporation v. Griffith, supra.

However, another section, namely §344 contravenes the long existing Maryland law and general rule that a business property owner has no duty to protect their patrons. §344 states that an owner/occupier of property who holds it open for business purposes is liable for physical harm to patrons caused by **accidental, negligent or intentional harmful** acts of third persons by the failure of the owner/occupier to **exercise reasonable care** to discover that such acts are being done or are likely to be done or give a warning adequate to enable the visitor/business invitee to avoid harm or otherwise protect them against it. ^[241]

An opinion authored by Judge Chasanow of the United States District Court of the District of Maryland on July 31, 1995, serves as a significant limitation on premises liability in the State of Maryland

predicated upon the criminal acts of third persons. In the Kay Jewelers, et al. v. Bias case, the owner of the mall, (Equity Property Management Corp.) a business owner, (Kay Jewelers), and the mall security company, (IPC International Corporation) all were sued by the survivors of Jay Stanley Bias, Jr., [242] who was killed as a consequence of a criminal act of a third person while both the assailant and the victim were exiting the mall after an altercation had occurred.

The significance of the decision is that Judge Chasanow relied upon two (2) earlier Maryland cases, namely, Tucker v. KFC Nat'l. Management Co., 689 F. Supp. 560, 563 (D. Md. 1988) an opinion written by Judge Neimeyer and Nigido v. First Nat'l. Bank of Baltimore, 264 Md. 702, 704, 288 A.2d 127 (1972), in making the rulings denying the liability of all three (3) defendants. The Court stated that Maryland Law is clear that in most circumstances there is no special relationship between a store keeper and its invitee to protect them from the random criminal acts of third parties.

The case is deemed significant in the Judge Chasanow relied heavily upon the **Doctrine of Proximate Causation** in denying liability against all three (3) defendants. Of particular import is the Court's language which indicated that "generally a landowner will not be held liable to its invitees for the random criminal acts of a third party, even if the negligence provided the criminal with the opportunity to perform a crime, because the particular criminal act is not foreseeable." The Court cited Giant Food, Inc. v. Mitchell, 334 Md. 633, 640 A.2d 1134 (1994).

Finally, liability was determined in favor of the security company on the grounds that while there was evidence of a contractual responsibility (an existence of a duty) the evidence was insufficient to establish liability predicated upon the random criminal act of the criminal assailant and the failure of the Plaintiff to prove that the negligence, vel non of the security company was the proximate cause of the occurrence. The Court indicated that the evidence did not rise above "speculation and conjecture."

The Bias case is viewed as the most significant case decided on Maryland Law to be decided in the last decade on the issue of the liability exposure of the owners and operators of Malls, retail establishments and commercial enterprises. It represents a significant decision which imposes a definitive limitation on the expanding liability exposure which has directly resulted from the failure of the Judicial system to impose strict evidentiary and legal standards in this area of premises liability.

District of Columbia

In the District of Columbia, for negligence to exist on the part of the landlord for criminal activity in common areas of a building which causes injury to tenants, the landlord not only must have foreseen the danger, but also must have failed to take security measures ***reasonable under the circumstances***. What measures are reasonable is determined by a ***jury assessment*** of protective measures taken in buildings of similar character and class as compared and contrasted to those measures which are maintained by the landlord at the accused building. Some important considerations when determining whether or not a landlord may be held accountable for crimes against tenants on the premises are the following: (1) whether the landlord had actual or constructive notice of prior criminal activity in and/or around the building; (2) were the tenants sufficiently warned; (3) were appropriate security measures introduced; (4) whether security measures had been decreased during the time the tenant was present on the property; and (5) whether the landlord took steps within the power to minimize predictable risks to a tenant.

A **security survey** must be performed by a qualified security expert analyzing both the crime history in the area, as well as the security measures utilized by similar apartment complexes in the area, in order to properly perform the analysis needed and to express a competent expert opinion with regard to the security level on the property at the time the alleged occurrence took place.

Recent District of Columbia Court of Appeals case law stands for the proposition that a heightened level of foreseeability is necessary in order to create a duty in property owners and managers for the liability of

criminal acts of unknown third parties. The most recent case, *Potts v. District of Columbia*, 697 A.2d 1249, 1252 (D.C. App. 1997) granted summary judgment to the District of Columbia based on the Plaintiff's failure to meet their burden of a heightened level of foreseeability on the part of the defendant which is the basis for any duty that can be invoked against a property owner or manager.

Commonwealth of Virginia

Virginia recognizes the general rule that a business owner is under no duty to protect an invitee from personal injuries sustained by the criminal acts of a third party on the owner's property except in the very limited circumstances where the owner knows that criminal assaults against persons are occurring, or are about to occur and pose an imminent probability of harm to the invitee on the premises. This rule is premised on the Virginia courts' belief that under ordinary circumstances it would be difficult to anticipate when, where, and how a criminal might attack an invitee, and where a business owner and invitee are both innocent victims of a violent crime, it is unfair to place the burden on the business owner. *Wright v. Webb*, 234 Va. 527, 531, 362 S.E.2d 919 (1987).

Consistent with the Virginia courts rationale for their general rule imposing no liability for criminal acts of third parties, the Virginia courts have construed the exception to this rule very narrowly. Unless the owner is engaged in a business that attracts or provides a climate for assaultive crimes, or the owner has notice of a specific danger, the exception will not apply, and consequently liability will not be imposed upon the business owner. The general rule which is asserted in the case of *Wright v. Webb* by the Virginia Supreme Court clearly sets forth a very narrow exception to the accepted premise that a business owner is under no duty to protect an invitee from the criminal act of third parties.

This point is further exemplified by the Virginia Supreme Court's holding in *Burns v. Johnson*, 250 Va. 41, 458 S.E.2d 448 (1995) in which the plaintiff was a patron of a self-serve gas station. The employee of the self-serve gas station was verbally accosted by a drunk customer who the employee recognized as a regular customer of the self-serve gas station. After denying the drunk customer's sexual advances another customer pulled in the station in order to obtain two dollars worth of gas. After the female customer paid her two dollars, the employee went to the back of the attendant's booth in order to update inventory maintained in the booth. Shortly afterward she returned to the window she noticed that both the female customer's and the drunk customer's vehicles remained on the property and that there was no sign of either of them. A friend of the female customer arrived at the service station and inquired as to the whereabouts of the female customer. After a brief, unsuccessful search for the female customer, both the employee and the friend realized that the female customer may have been in some type of trouble. In fact, the drunk customer, who had earlier verbally accosted the employee, had abducted the female customer, dragging her to an adjacent property and physically assaulted her before releasing her and returning to the service station to retrieve his vehicle and leaving the property.

The Virginia Supreme Court in *Burns v. Johnson* stated, "the question of whether a duty of care exists in a negligence action is pure question of law. *Fox v. Custis*, 236 Va. 69, 74, 372 S.E.2d 373, 375 (1988)." *Burns v. Johnson*, 250 Va. 41, 44, 458 S.E.2d 448 (1995). In ruling as a matter of law, the Virginia Supreme Court held that the owner and the employee of the service station did not owe a legal duty to the plaintiff who was brutally sexually assaulted after being abducted from the service station premises. *Id.* The Virginia Supreme Court in reversing the trial court's judgment in favor of the plaintiff, relied on *Wright v. Webb* and stated,

In *Wright* we fashioned a narrow, limited exception to the general rule. There, we held that an owner or occupier of land, 'whose method of business does not attract or provide a climate for assaultive crimes, does not have a duty to take measures to protect

an invitee against criminal assault unless he knows the criminal assaults against persons are occurring, or about to occur, on the premises which indicate an imminent probability of harm to an invitee.’ 234 Va. at 533, 362 S.E.2d at 922. This exception requires ‘notice of a specific danger just prior to the assault.’ *Id.* (emphasis added) *Id.*

The Virginia Supreme Court is absolutely clear regarding its application of the narrow exception to the general rule which does not impose liability on to property owners for criminal acts of third parties. As quoted above in the *Burns* case, the exception requires and is implied only when “notice of a specific danger just prior to the assault” is known by the property owner. In *Bangelsdorf v. Underwood Enterprises, Inc.*, 18 Va. Cir. 491 (Circuit Court of Spotsylvania County 1990), the Circuit Court of Spotsylvania County sustained a demurrer filed on behalf of Underwood Enterprises, Inc. The basis of the demurrer was that the plaintiff had failed to state a cause of action upon which relief can be granted in alleging that the owner and operator of a Burger King restaurant owed a legal duty to protect the plaintiff from the criminal acts of a third party. Virginia law is clear, that a legal duty on the part of the premises owner is construed very strictly and narrowly.

The bottom line to owners, operators and managers, as well as the owners and occupiers of malls, retail establishments and commercial enterprises is to **expect the unexpected**. Under the current existing law in Maryland and the District of Columbia, negligence can be established for failing to provide security to protect invitees from the criminal conduct of third parties and may also be established by the failure to prevent crime by means of a security force as a consequence of the improper provision of security or the failure of the security force to prevent crime.

Simply stated, the current law is one of "**your damned if you don't and your damned if you do.**" Such is the concept of liability for the criminal acts of third persons predicated upon a "negligence standard." In each and every case that a **jury issue** is presented, liability is a distinct possibility.

The bottom line and end result is that a clearly enunciated legal standard should be adopted and strictly enforced by the Courts in order that liability vel non can be established as a matter of law.

LANDLORD LIABILITY FOR CRIMINAL ACTS OF THIRD PARTIES

A. MARYLAND

The leading cases regarding a landlord is duty to protect against Criminal Acts of Third Parties in Maryland is *Scott v. Watson*, 278 Md. 160; 359 A.2d 548 (1976), and *Henly v. Prince George's County*, 305 Md. 320; 503 A.2d 1333 (1986).

According to *Scott*, Maryland law does not impose upon the landlord of an urban apartment complex any special duty to tenants to protect them from the criminal acts of third parties committed in common areas within the landlord's control; a landlord's duty is to exercise reasonable care for the tenants' safety and traditional principals of negligence regarding proximate or intervening causation will determine whether the landlord is liable for an injury resulting from a breach of the duty, including injury caused by criminal acts of third parties. If the landlord knows, or should know, of criminal activity against persons or property in the common areas of his building, he has a duty to take reasonable measures, in view of the existing circumstances, to eliminate the conditions contributing to the criminal activity. *Id.*

In *Henley*, the Court dealt with the concept of foreseeability and adds the concept that all persons owe a duty to all other persons to use reasonable care to protect them from harm must be limited to avoid liability for unreasonably remote consequences.

The state of Maryland has adopted § 314 A of the Restatement (Second) of Torts to define the duty owed

to business invitees by a business. See Southland Corp. v. Griffith, 332 Md. 704, 719 (1993). Under the Restatement, and the progeny of case law supporting it, the law is clear that a defendant is not required "to take precautions against a sudden attack from a third person which he has no reason to anticipate. . . ." Restatement (Second) of Torts § 314 A cmt. e, Jackson, 128 F. Supp.2d at 311.

B. DISTRICT OF COLUMBIA

The leading case regarding a Landlord's duty to protect against Criminal Acts of Third Parties in the District of Columbia is Graham v. M&J Corp., 424 A.2d 103 (1980).

According to Graham, for negligence to exist on part of landlord for criminal activity in common area of building which causes injury to tenant's landlord, the landlord not only must have foreseen danger, but also, he must have failed to take security measures reasonable under circumstances. What measures are reasonable is determined by a jury assessment of protective **measures taken in buildings of similar character and class**.

The landmark case in D.C. by which recent similar cases have been measured is Klien v. 1500 Massachusetts Ave. Apt. Corp., 141 U.S. App. D.C. 370 (1970). In Klien, the landlord's duty of care is held to be similar to the innkeeper-quest standard: "reasonable care in all the circumstances."The landlord is held especially accountable for crimes against tenants and properly related to the landlord's negligence to control the common areas properly. Important considerations are: a) whether the landlord had actual or constructive notice of prior criminal activity in the building; b) were the tenants warned; c) were appropriate security measures Introduced. Another consideration is whether security measures had decreased from the time the injured lessee became a tenant to the present. This is especially important if criminal activity had been on the rise. Most important in Klien is whether the landlord took "those steps within his power to minimize predicable risks to the tenant."

In addition, Lacy v. D.C. , 424 A. 2d 317 (1980), should be considered when assessing a landlord's liability with regard to criminal acts by third parties. The test is still a proximate cause test, but, the substantial factor test was introduced which is an element of the proximate cause analysis. In Lacy, the Court said that the general rule of foreseeability is that the Defendant is liable, despite the intervening act of a third party if the intervening act should have been reasonably anticipated and protected against. In Lacy, the Court perceived a criminal act as an extraordinary act and the Court articulated that the criminal act is a precise act and must be precisely foreseen. See also Doe v. D.C., 524 A.2d 30 (1987), wherein the Court to expanded Lacy to broaden the foreseeability requirement. while it is true that, because of the extraordinary nature of criminal conduct, the law in D.C. requires that the foreseeability of the risk of such conduct must be "more precisely shown" than as usually required in a typical negligence situation, (Lacy at 323), Doe, holds that this heightened showing does not require previous occurrences of the particular type of harm. A showing of foreseeability can be met instead by a combination of factors which give Defendants an increased awareness of the danger of a particular criminal act.

In the District of Columbia, each crime district is described as a "carney block" in view of the standard of care and prevailing law in the District of Columbia on landlord liability for criminal acts of third parties being dependent upon what, if any, protective measures are taken in buildings of a similar character and class in the neighborhood. As a practical matter it is necessary to obtain a security survey of the carney block in which the building is located in order to establish the applicable standard of care. This proves to be expensive in the defense of a claim predicated upon the landlord's liability for the criminal acts of third parties.

C. VIRGINIA

The law in Virginia for Criminal Acts of Third Parties was articulated in the case of Gulf Reston, Inc. v. Rogers, 215 Va. 155 (1974). The Court in Gulf held that there is no general duty on the part of a landlord

to protect a tenant from isolated criminal acts of third persons merely because of their relationship. In determining whether a duty exists, the Court examined the likelihood of injury, the magnitude of the burden of guarding against such injury, and the consequences of placing the burden on the Defendant must be taken into account. The Court in Gulf noted the general rule that a landlord is not an insurer, and owes a duty to maintain the premises in a reasonably safe condition, free of latent defects. Traditionally, this did not include a duty to police, and the Court stated the general rule:

A landlord does not owe a duty to protect his tenant from a criminal act of a third person, citing the Restatement of Torts 2d Section 315, which imposes no duty to prevent another from continuing a crime unless a special relationship exists. Section 314 (a) and 320 of the Restatement 2d cites innkeepers, guests, and other "special relations", but not landlord-tenant relationships.

In Klingbeil Mgt. Group v. Vito, 233 Va. 445 (1987), the Court relied on Gulf and held that, as a general rule, a landlord does not owe a duty to protect his tenants from criminal acts of third persons. In Klingbeil, Plaintiff tenant was raped in her apartment by an unknown assailant and sued the apartment complex for failure to maintain proper security measures. Likewise, the Court in Richmond Medical Supp. v. Clifton, 235 Va. 584 (1988) also cited the doctrine of Gulf that a landlord is not liable in tort to a tenant for failure to protect the tenant from criminal acts of third parties. In Richmond a commercial property owner was sued when thieves broke in the tenant's premises and stole both money and equipment.

Additionally, the case of Wright v. Webb, 234 Va. 527 (1987) held that a business invitor owes the same duty of reasonable care to an invitee that a landlord owes to his tenant (no obligation to protect his tenant from criminal acts or third parties).

Specifically, the Court in Wright said that "a business invitor, whose business does not attract or provide a climate for assaultive crimes had no duty to take measures to protect an invitee from criminal assault, unless he has knowledge that criminal assaults are occurring or about to occur, indicating an imminent probability of harm to an invitee." In Wright it is also important to note that there were two prior acts of violence in or near the parking lot, where the criminal assault on the Plaintiff occurred. The Court held that these prior incidents would not lead a reasonable person to conclude there was an imminent danger of criminal assault, which required the invitor to take action to protect the Plaintiff.

An intervening cause in Virginia must so entirely supersede Defendant's negligence that it alone produces injury. An intervening cause is not a superseding cause if it is put into operation by the Defendant's wrongful act. Coleman v. Blankenship Oil Corp., 221 Va. 124 (1980). In Banks v. City of Richmond, 232 Va. 130 (1986), the Plaintiff sued the city for a gas explosion in her apartment. The Court held that the alleged negligence of the city was nothing more than mere circumstance of explosion. Further, the Court said the conduct of the maintenance man in applying an open flame to an area where gas had collected was a superseding, intervening and not reasonably foreseeable cause. See also Huffman v. Sorensen, 194 Va. 932 (1953), where the Court held that no responsibility for wrong attaches when there intervenes independent acts of third persons which is the immediate cause. "There can be not causal connection between the negligence of the Defendant, and the injuries sustained by the Plaintiff from the causes shown the by evidence. The negligence of the Defendant and the injuries so received by the Plaintiff are entirely separated and the chain of causation interrupted by several intervening events. Those events constituted new, efficient and independent causes which superseded the original act of negligence of the Defendant." Id. at 940.

D. NEW JERSEY

New Jersey courts have held that based strictly on the relationship between a landlord and a tenant, without more, the landlord does not owe that tenant the duty to protect the tenant from the crimes of third parties. Braitman v. Overlook Terrace Corp., 132 N. J. Super 51, 332 A. 2d 212, aff 'd 68 N. J. 368, 346

A. 2d 76 (19 74). Although there is no duty based on the relationship alone, it may arise under certain circumstances. See Trentacost v. Brussel, 164 N.J. 214, 412 A.2d 436 (1978). Essentially, the courts have not precluded such a cause of action.

In Dwyer v. Erie Inv. Co., 350 A.2d 268 (N.J. 1975) the court held that even though it might have been foreseeable that, because of building owner's failure to repair hole in outside wall, an intruder might utilize the hole to enter the premises, it was not foreseeable that an intruder would exit from that opening and, being seen by subcontractor who was working in the building, would shoot the subcontractor after the subcontractor flung a garbage can at the intruder.

In Genovay v. Fox, 143 A.2d 229 (N. J. 1958) the court held that the fact that risk of harm to a business invitee was attributable to voluntary activity of others, not under the control of the proprietor, does not of itself preclude liability if harm by human intervention was foreseeable and a reasonable man so situated would take precautions to prevent it, and this is so even though the harmful activity was criminal, although this fact ordinarily militates against its being held foreseeable.

E. DELAWARE

In Jardel Co. v. Hughes, 523 A.2d 518, 524 the court held, "While a property owner is no more an insurer or guarantor of public safety than are police agencies, there is a residual obligation of reasonable care to protect business invitees from the acts of third persons. We adopt the Restatement standard, which approves the concept that incidents of criminal activity provide a duty to foresee specific criminal conduct. Whether the conduct of a particular property owner meets the standard of reasonable care is, of course, a matter for jury determination." In making this ruling the court adopted the Restatement (Second) of Torts § 344 (1965), which states:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to

(a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

F. PENNSYLVANIA

There is no general duty for a landlord to protect tenants from criminal acts, but if the landlord does provide security, the landlord may incur a voluntary duty or a duty by agreement. Feld v. Merriam, 485 A.2d 742, 596 Pa. 383 (1984); See Reider v. Martin 519 A. 2d 507, 359 Pa. Super. 586, app. den. , 535 A. 2d 83, 517 Pa. 594 (1986). "Owners of land who hold their property open to public for business purposes are subject to liability for accidental, negligent or intentionally harmful acts of third persons, as are common carriers, innkeepers and other owners of places of public resort and, under section 344 of the Restatement (Second) of Torts, must take reasonable precaution against that which might be reasonably anticipated." See Feld at 390-91.

In Rosa v. 1220 Uncle's Inc., 2001 WL 1113016, a bar was held liable for damages that a patron suffered during an assault by another patron, because the bar had a duty to protect its patrons from the actions of third parties where one of its own bartenders had been the victim of a robbery a year before. In Harvey v. Durling, 1998 WL 1160216, the court held that a Defendant could not be held liable for the attack upon one of its employees by a non-employee who worked in the building, where the harm suffered by plaintiff was not foreseeable and because defendant had no duty to control the conduct of an individual who was not its employee.

However, in Farley v. Sley System Garages, Inc., 13 Pa. D. & C.2d 680 (1958), the court held that the

owner of a parking lot on which cars must be left with unlocked ignitions is not liable to the driver of a motor vehicle who is injured in an accident with a motor vehicle driven by one who has stolen it from that parking lot, even though the theft occurred by reason of the negligence of the owner of the lot, because that owner owes no duty of care to the injured parties since the manner in which their injuries occurred was not a foreseeable consequence of his negligence.

G. WEST VIRGINIA

West Virginia law does not make the landlord the insurer. of tenant safety for criminal acts of third parties. In such cases the standard negligence rules of foreseeability and knowledge are applied. The intentional committing of a crime is a superseding cause, although the Defendant's negligence created a situation which afforded the opportunity for a third person to commit such a crime, unless the Defendant realized, or should have realized the likelihood that such person would commit the crime. State of W.Va. ex rel Poulos v. Fidelity & Cas. Co. of N.Y., 263 F. Supp. 81 (P.C. W.Va. 1967).

West Virginia notes that under common law a person usually has no duty to protect others from the criminal activity of a third party because the foreseeability of risk is slight, and because of the social and economic consequences of placing such a duty on a person. Jack v. Fritts, 193 W.Va. 494, 498-9, 457 S.E.2d 431, 435-6 (1995). However, West Virginia recognizes that there are a couple of exceptions in which a person has an obligation to protect others from the criminal actions of another: (1) when a person has a special relationship which gives rise to a duty to protect another person from intentional misconduct or (2) when the person's affirmative actions or omissions have exposed another to a foreseeable high risk of harm from the intentional misconduct. Id. Notwithstanding, the court noted that there are circumstances which may give rise to such a duty, and these circumstances will be determined by the court on a case-by-case basis. A landlord's general knowledge of prior unrelated incidents of criminal activity occurring in the area is not alone sufficient to impose a duty on the landlord. Id.

REVIEW OF MEASURES TAKEN BY THE INSURED TO REDUCE LIABILITY EXPOSURE

In view of the existent law and the vigorous duties which have been ascribed to the owners, managers and occupiers of commercial property, the following measures should be considered in order to reduce liability exposure. A review of the measures established and implemented by the insured should be undertaken in order to properly assess the risk exposure presented and as a matter of sound risk management.

- (1) All owners and operators should establish and implement a **reasonable standard of care** with respect to the premises. The standard of care should encompass all areas of potential liability and be predicated on a common sense establishment of duty associated with the care and maintenance of the premises. In recognition of the duty to use reasonable and ordinary care of the premises, each business entity or facility should establish and develop a reasonable standard of care suited to the nature of the premises in accordance with **an uniform standard of care** for the maintenance of premises, i.e. the creation of and adherence to an industry standard;
- (2) The owners and operators of malls, retail establishments and commercial enterprise, as an industry should set the standard of care applicable generally otherwise a court or jury will do so. Not only are Courts and juries ill-equipped to do so but the results are incongruous in that different yard sticks are used to measure liability on a case by case basis rather than a singular standard set by industry predicated upon a

reasonable standard of care; The applicable standard of care should be **established and implemented**.

- (3) Customer assistance efforts, as well as first aid matters should be bifurcated and kept separate and distinct from claims handling and reporting;
- (4) A proper reporting or claims handling procedure is to obtain the customer's complaints and version of the occurrence and to record and accurately report it as such;
- (5) Security should obtain all available information inclusive of a complete description of the customer and the customer's account of the incident, as well as all existing site conditions in order to document the condition of the premises at the time of the alleged occurrence;
- (6) Identify and locate all eyewitnesses to all or part of the occurrence and any part thereof. This information should include full names, addresses and all available information inclusive of witness statements if possible;
- (7) A determination of the condition of the premises on the date, time and place of the occurrence, as well as the names and addresses of all witnesses thereto should be obtained and recorded as part of the reporting or claims handling process. The condition of the premises at the date, time and place of the occurrence should be fully documented;
- (8) Preserve all available evidence at the scene of the occurrence and/or accident local: (a) photographs; (b) measurements; (c) preserve all physical evidence;
- (9) All security reports and/or incident reports should be labeled as such and identified as accident investigation and legal investigation. All documents and the security report should be labeled "**Confidential - Prepared in Anticipation of Litigation**" and submitted to legal; Such material also can be labeled "**protected by attorneys work product;**"
- (10) Establish a **litigation contact person** initially for communications with the insurance carrier and subsequently for litigation counsel. Such a person should be in charge of all of the security reports that were prepared in anticipation of litigation;
- (11) Adopt a procedure for **mall emergency closures** and/or partial or segmental mall closures dealing with all matters of mall safety and security such as fire, criminal activity, catastrophe and the like. **Emergency procedures** should be reflected in all lease agreements and otherwise deal with segmental closing of the mall in order to assure safety and/or matters of public necessity are authorized;
- (12) **Security Survey:** It is recommended that a security survey be undertaken with respect to all matters of mall safety and security. It is recommended that such a security survey be performed under the advice of counsel and that once a security and safety program has been implemented that a second security survey be performed as part of the regular maintenance and safety review policies for the facility. The security and safety survey should include all matters of primary risk inclusive of all existing

conditions, natural and artificial.

IV. DAMAGE ASSESSMENT

COMPENSATORY DAMAGES FOR BODILY INJURY

In an action for damages in a personal injury case, the following elements of damage may be awarded:

- (i) The *personal injuries* sustained and their extent and duration;
- (ii) The *effect* such injuries have on the overall physical and mental health and well-being of the plaintiff;
- (iii) The *physical pain and mental anguish* suffered in the past and which with reasonable probability may be expected to be experienced in the future;
- (iv) The *disfigurement* and *humiliation* or *embarrassment* associated with such disfigurement;
- (v) The *medical and other expenses* reasonably and necessarily incurred in the past and which with reasonable probability may be expected in the future; and
- (vi) The *loss of earnings* in the past and such earnings or *reduction in earning capacity* which with reasonable probability may be expected in the future.

In awarding damages, a jury in Maryland must itemize its verdict or award to show the amount intended for:

- (1) The medical expenses incurred in the past;
- (2) The medical expenses reasonably probable to be incurred in the future;
- (3) The loss of earnings and/or earning capacity incurred in the past;
- (4) The loss of earnings and/or earning capacity reasonably probable to be expected in the future;
- (5) The “**Noneconomic Damages**” sustained in the past and reasonably probable to be sustained in the future. All damages which you may find for pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, or other *nonpecuniary* injury are “*Noneconomic Damages*;”
- (6) Other damages.

MARYLAND CAP ON NON-ECONOMIC DAMAGES

<u>DATES</u>	<u>PERSONAL INJURY</u>	<u>WRONGFUL DEATH</u>
07/01/86 - 09/30/94	\$350,000.00	N/A
10/01/94 - 09/30/95	\$500,000.00	\$750,000.00
10/01/95 - 09/30/96	\$515,000.00	\$772,500.00
10/01/96 - 09/30/97	\$530,000.00	\$795,000.00

10/01/97 - 09/30/98	\$545,000.00	\$817,500.00
10/01/98 - 09/30/99	\$560,000.00	\$840,000.00
10/01/99 - 09/30/00	\$575,000.00	\$862,500.00
10/01/00 - 09/30/01	\$590,000.00	\$885,000.00
10/01/01 - 09/30/02	\$605,000.00	\$907,500.00
10/01/02 - 09/30/03	\$620,000.00	\$930,000.00
10/01/03 - 09/30/04	\$635,000.00	\$952,500.00
10/01/04 - 09/30/05	\$650,000.00	\$975,000.00

Note: Non-economic damages shall increase by \$15,000.00 on October 1 of each year beginning on October 1, 1995. The increased amount shall apply to causes of action arising between October 1 of that year and September 30 of the following year. This shall apply in a personal injury action to each direct victim of tortious conduct and all persons who claim injury by or through that victim. In a wrongful death case in which there are two or more claimants, an award for non-economic damages may not exceed 150% of the cap on personal injury recovery for non-economic damages.

SUSCEPTIBILITY TO INJURY

The effect that an injury might have upon a particular person depends upon the susceptibility to injury of the plaintiff. In other words, the fact that the injury would have been less serious if inflicted upon another person should not affect the amount of damages to which the plaintiff may be entitled.

PRESENT VALUE QUALIFICATION—PERSONAL INJURY

In deciding upon the damages to be awarded for any future economic loss, a jury must consider how long the plaintiff is likely to live notwithstanding the injury, and the present cash value, if any, of the loss.

Present cash value means that sum of money needed now, which, when added to what that sum may reasonably be expected to earn in the future by prudent investment, will equal the amount of the plaintiff's loss.

In other words, the total anticipated future loss must be reduced to an amount, which if prudently invested at a particular rate of interest over the applicable number of years, will return an amount equal to the total anticipated future loss.

PUNITIVE DAMAGES

In Maryland, D.C. and Virginia, a jury may, but is not required to, award an additional amount as punitive damages. In determining the amount of such an award, a jury is instructed to use its sound judgment and discretion to arrive at an amount which it believe will punish the defendant and deter the defendant and others from similar conduct. There should be a reasonable connection between the award and the defendant's ability to pay. The award should not be designed to bankrupt or financially destroy the defendant.

(i) Intentional torts except fraud (implied malice): Punitive damages may be awarded if defendant's conduct was outrageous, and in light of the risks and dangers which were known or should have been known, defendant's conduct indicated a disregard for the rights and safety of others, or showed a conscious indifference to the consequences.

(ii) Fraud Cases: Punitive damages may be awarded if the jury finds a breach of fiduciary duty, gross fraud, or other extraordinary or exceptional circumstances from which ill will or evil motive may be inferred. A finding of mere fraud alone is insufficient to award punitive damages.

(iii) Unintentional Torts (actual malice): Defendant's conduct was outrageous and performed with evil motive, intent to injure, ill will or fraud and without legal justification or excuse.

(iv) Products Liability: If the jury believes defendant actually knew of the defect and by marketing/selling/manufacturing the product acted in conscious disregard of a foreseeable harm caused by the product.

DAMAGES—SPOUSE OF DECEASED

In determining the damages which will reasonably and adequately compensate the spouse of the deceased as a result of the death, a jury considers both economic and non-economic losses.

The economic losses to be considered include the financial support as well as the replacement value of the services that the deceased furnished or probably could have been expected to furnish. The jury may consider the deceased's earnings and future earning capacity for the probable time both had been expected to live to determine the amount that the surviving spouse could reasonably have expected to receive.

The non-economic losses to be considered are the mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital care, attention, advice or counsel the surviving spouse has experienced or probably will experience in the future.

DAMAGES—PARENT OF DECEASED CHILD

In determining the damages which will reasonably and adequately compensate each parent as a result of the death of their child a jury considers both economic and non-economic losses.

The economic losses to be considered are any financial benefits a parent probably would have been expected to receive from the deceased until the child reached age 18.

The non-economic losses to be considered are the mental anguish, emotional pain and suffering, and the loss of society, companionship, comfort, protection, care, attention, advice, counsel or guidance, a parent has experienced or probably will experience in the future.

The non-economic losses are not limited to the period of time when the child would have been a minor.

DAMAGES—MINOR CHILD OF DECEASED PARENT

In determining the damages which will reasonably and adequately compensate each surviving child of a deceased parent as a result of the death of a parent the jury considers both economic and non-economic losses.

The economic losses to be considered include the financial support, as well as the replacement value of the services that the deceased furnished or probably would have been expected to furnish until the child reached age 18.

The non-economic losses to be considered are the mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, parental care, attention, advice, counsel, training, guidance or education which the child has experienced or probably will experience in the future.

The non-economic losses are not limited to the period of time when the surviving child is a minor.

DAMAGES—ACTION BY ESTATE

In determining the damages to be awarded to the estate of the deceased as a result of the death a jury considers both economic and non-economic losses.

The economic losses to be considered include the fair and reasonable medical expenses which were incurred by the deceased, and the loss of earnings from the time of injury to the time of death. Funeral expenses up to \$2,000 may also be recoverable.

The non-economic losses to be considered are any conscious pain, suffering or mental anguish that the deceased experienced as a result of the injury until death (and any punitive damages for which the defendant is found to be responsible).

PRESENT VALUE QUALIFICATION-WRONGFUL DEATH

a. Spouse

In deciding upon the amount of economic damages for the plaintiff [spouse of deceased], the following elements may be considered:

- (1) how long the plaintiff [spouse of deceased] would have been likely to have received financial benefits from the deceased;
- (2) how long the deceased was likely to have lived; and
- (3) how long the plaintiff [spouse of deceased] is likely to live.

The damages for such economic loss shall be for the period of their joint life expectancy.

b. Children

In deciding upon the amount of economic damage for the child[ren] of the deceased parent, the jury considers the financial benefits [the][each] child[ren] would have been likely to have received from the deceased. The damages for such economic loss shall be for the period of time until the child[ren] would reach the age of eighteen years.

In figuring the amount of the economic damages, the jury must not multiply the number of years by the financial benefits. Instead, the jury determines the present cash value of such future financial benefits.

“Present cash value” means that sum of money needed now, which, when prudently invested over the applicable number of years, will equal the amount of financial benefits lost because of the death of the deceased.

MORTALITY TABLE—LIFE EXPECTANCY

According to life expectancy tables, the life expectancy of a person of that person is relevant and may be considered.

The life expectancy figure(s) set forth in the life expectancy table is to assist the jury in determining the probable life expectancy of the plaintiff as it bears on future losses and damages. It is not conclusive proof of the life expectancy, and the jury is not bound by it. It is only an estimate based on average experience.

V. CLAIM EVALUATION

The evaluation of every claim includes a good faith analysis of three basic factors: (1) Liability exposure analysis ; (2) Damage(s) assessment & evaluation (3) Insurance Coverage/ Collectability of Damages.

RISK FACTORS PRESENTED BY THE CLAIM

The proper evaluation of a claim includes a consideration of all risk factors associated with the claim. The evaluation always includes an analysis of the following factors:

1. Liability exposure

- Is there a possibility of establishing non liability as a matter of law?
- Is a jury question presented on liability
- Is the case a case of liability

2. Damage Assessment / Evaluation

- Special damages which can be proven
- economic damages
- non economic damages
- punitive damages
- other damages
- the intangibles

1. The Plaintiff

2. The jurisdiction in which suit is filed

3. The Plaintiff's attorney

4. The demographic consideration

5. The jury pool composition

6. The Defendant

7. The evidence

8. The witnesses

9. The documentary evidence

10. Review and Analysis of the Case in its entirety

3. Coverage(s) afforded Under the insurance policy/collectability

After all investigation and discovery has been completed and the case has been reviewed in its entirety, it can be evaluated for settlement. This is the best time in which to evaluate the settlement. A thorough investigation of the facts and law is essential to the proper evaluation of a claim.

JURY VERDICT RANGE(S)

One of the factors which is always a part of every claim evaluation is the anticipated jury range which is presented based upon all of the relevant facts. A survey of the jury ranges in a wide variety of cases must be considered in properly evaluating every claim. Consideration must always be given to the demographic

profile of the prospective jury panel in order to determine the risk exposure presented in the particular situs of the trial. Jury verdict ranges differ considerably within a particular jurisdiction and are dependant upon a number of complex factors. Therefore an analysis of the jury ranges indigenous to a particular jury pool is an important factor in assessing the valuation of the case.

VI. CASE STUDIES AND ACTUAL CASE EXEMPLARS

In addition to an analysis of the applicable jury verdict ranges which may be present in a particular jurisdiction, another important assessment is an analysis of actual cases which have been defended in that jurisdiction. Such a study should include an analysis of the information developed during the defense of the particular case together with an analysis of the pertinent information in similar cases in the same jurisdiction. The information which should be analyzed includes all relevant factual information presented by the case, a detailed liability exposure assessment, a detailed damage assessment and evaluation together with any additional information, data and documentation which is relevant to the evaluation of the claim.

An exemplar of an actual case study in the form of a File/Case Status Report is attached as an exemplar.

MEMORANDUM

To: All Staff Members
From: Jeffrey R. Schmieler
Subject: TORT CASE: DEFENSE (Office Policy & Procedure)
Date: June 1, 2004

I. THE LAW:

1. Review the file to determine how the injury occurred, and if there appears to be a possibility of establishing non-liability of the Defendant as a matter of law.
2. If after a review of the authorities, a pre-trial motion does not seem advisable, turn to the facts as a defense and concentrate your efforts on a tireless and thorough investigation and preparation of all the available evidence.
3. Be sure that in reviewing the available authorities you note the mutual duties and obligations imposed on the Plaintiff and Defendant by the law of the jurisdiction where the injury occurred.

II. THE FACTS:

1. Review the investigation that has been completed prior to the receipt of the file and ascertain whether:
 - a. All witnesses have been contacted and statements obtained.
 - b. Police investigation reports have been obtained and investigating police officer interviewed.
 - c. Diagrams and/or photographs of the accident locale have been obtained.
 - d. All medical reports on the injury to the Plaintiff have been obtained.
 - e. A thorough check has been made to determine the past medical and legal (claims) history of the Plaintiff.
2. Specially drafted Interrogatories should be filed in order to obtain pertinent information.
3. An extensive Notice to Produce should be filed obtaining pertinent information and documents.

4. If any of the above-information has not been furnished, arrange to have it completed before taking Depositions.
5. Ordinarily, it is advisable at this point for defense counsel to visit the scene of the accident to familiarize himself with it, as well as to arrange for the preservation of any evidence which could be removed or destroyed before trial.
6. It may also be advisable at this point to interview the Defendant, or it's representative, if it be a corporation, and any other witnesses who are peculiarly available to the Defendant or whose testimony you consider vital to the defense.
7. After filing all necessary pleadings arrange to take the Depositions of the Plaintiff, inquiring thoroughly into his medical and claims background, his marital history, his employment history and the like, as well as into the facts of the occurrence itself and the injuries and complaints of pain and disability which he may have.
8. Consideration should then be given to taking the Deposition of other witnesses. Such depositions usually should be taken if you have reason to believe that a witness may die or leave the jurisdiction prior to trial, or that his testimony is vital to the defense.
9. Make a thorough investigation of the medical evidence which could be presented at the trial as follows:
 - a. Obtain all up to date medical reports on the Plaintiff's injuries;
 - b. If permanent injury is claimed, arrange to have the Plaintiff

examined by a doctor of your own selection;
 - c. If your doctor feels it helpful or essential, arrange to have all

Prior medical reports and x-rays made available to him in

considering his opinion on disability;
 - d. After reviewing your doctor's report and evaluation, have a

conference with him wherein he can educate you on all medical

aspects of the case.
10. After reviewing the various medical reports and the testimony of the Plaintiff in his Deposition, consider whether the Plaintiff's claims of disability are exaggerated or non-existent, and if so, consider the possibility of a specialized investigation, such as:
 - a. A check of the Plaintiff's neighborhood and working acquaintances to determine whether they are familiar with the nature of his complaints.
 - b. Possibly an undercover investigation of the Plaintiff and his actions including photographs or motion pictures of any unusual or strenuous actions in which he may engage.
 - c. Investigation through his employment to verify special claims, such as lost wages, or if the Plaintiff is self-employed, securing an appropriate authority to review his income tax records.
11. Consider the use of demonstrative evidence, such as the advantages or disadvantages of used commercial photographs, plats, charts or models.
12. Review the facts that your investigation has developed to determine if there is any area for the testimony of an expert witness. Examples of such testimony would be the speed and stopping distances of automobiles,

sufficiency of lighting at an accident scene, the slipperiness of floors, waxes and the like, and structural soundness, product design and quality.

CASE EVALUATION, SETTLEMENT AND TRIAL:

1. Prepare summaries of depositions, answers to interrogatories, medical statements, itemized listing of special damages and file trial summary.
2. File Request for Admissions of Fact and Genuineness of Documents if warranted by case.
3. After all investigation and discovery has been completed, review the case in its entirety and evaluate for possibility of settlement. This is the best time in which to evaluate settlement, since for the first time you have before you all of the evidence which will be available to the jury, and it can be viewed dispassionately without the rigors and pressures of pre-trial or trial. In line with settlement, it should be kept in mind that a thorough investigation of the facts and law is as essential to advantageous settlement as it is to a proper presentation of the case at trial.

CASE STUDY AND ACTUAL CASE EXEMPLAR

I. FILE/CASE STATUS REPORT

SAUNDERS & SCHMIELER, P.C.

FILE/CASE STATUS REPORT

June 21, 2002 (V-4)

This communication contains privileged information disclosed to or by Saunders & Schmieler, P.C. in providing legal advice to its client, Apex Foot Health Industries, Inc., and its insurer, Chubb Group of Insurance Companies, and contains material prepared in the course of litigation which reflects counsel's mental impressions, conclusions, opinions and legal theories. To maintain the protected nature of this material which, constitutes privileged attorney/client communication and attorney work product, please do not disseminate beyond the recipient without Saunders & Schmieler's approval in advance.

TO: CHUBB GROUP OF INSURANCE COMPANIES

ATTN: MS. VIVIAN E. HOLLAS

FROM: JEFFREY R. SCHMIELER, ESQUIRE

LUCAS WEBSTER, ESQUIRE

FILE INFO: Chubb File: 79449165

Our File: CH001-494

Insured: Apex Foot Health Industries, Inc.

Claimant: Louise Gulyas Peuser

TRIAL: October 28, 2002

COURT: Circuit Court for Wicomico County, Maryland

101 North Division
Salisbury, Maryland 21803-0198

CASE NO: 22-C-00-001099 OC

SCHEDULING ORDER:	Expert Witnesses Identified	07/30/02
	Notice - Use of computer evidence	07/30/02
	Discovery Completed by	09/13/02
	Depositions Completed by	09/13/02
	Settlement Conference	09/16/02 at 1:30 p.m.
	Motions filing deadline	09/28/02
	Pre-Trial Conference	10/11/02 at 8:45 a.m.
	Exhibit lists / Witness lists due	10/18/02
	Proposed Voir Dire due	10/18/02
	Proposed Jury Instructions	10/18/02
	Special Jury Verdict Sheets due	10/18/02
	Accurate estimate of trial time due	10/18/02

INTRODUCTION: This is a complex products liability personal injury action. The Plaintiff, who is a Type II (most severe) diabetic, has alleged that on February 10, 1999 she purchased two pair of specially-ordered orthopaedic shoes from Foot Fit, Inc., a store located in Pittsville, Maryland. The Plaintiff's feet had been measured to be 12.5 extra wide; however, one of the pair of shoes purchased are alleged to have been only 12.5 wide and not "extra" wide. These shoes were manufactured by our insured, Apex Foot Health Industries, Inc. (Apex). The Complaint states that the shoes, which were only 12.5 wide were in a box marked 12.5 extra wide. As a result of the improperly fitting shoes, the Plaintiff asserts that she developed a blister on her right foot that eventually became so unhealthy and damaged that surgery was required to amputate her right little (5th) toe. The Plaintiff further alleges that post surgical complications caused the need for additional surgery and hospitalization.

CASE: As a result of these allegations, the Plaintiff has filed a **Six-Count Complaint** against Apex who is the manufacturer of the two pairs of shoes

purchased, and Foot Fit, Inc., the owner and operator of the specialty store where the shoes were ordered and purchased. **Count I** is against our insured Apex for **negligence**, as the Plaintiff needed a 12.5 “extra” wide and Apex is alleged to have negligently placed a 12.5 wide shoe in a box marked 12.5 extra wide. **Count II** is against Apex under the theory of **strict liability** as Apex did manufacture the product and allegedly mislabeled the product prior to it reaching its customers. **Count III** is against both Defendants for **breach of implied warranty-fitness for ordinary purpose**. Under this theory of liability, the Plaintiff alleges that the shoes were not fit for the purpose for which they were purchased; specifically, that they were not 12.5 extra wide shoes capable of being worn by the Plaintiff. **Count IV** is against Foot Fit, Inc. for **breach of implied warranty - fitness for a particular purpose**. Under this theory the Plaintiff alleges that Foot Fit, Inc. did breach this warranty as they had been informed that the Plaintiff was a diabetic and needed the shoes to fit properly and failed to ensure that they placed the proper fitting shoe on her feet. **Count V** is **anegligence** count against Foot Fit, Inc. for failing to exercise due care when checking the actual size of the shoes sold to the Plaintiff and was negligent for improperly instructing the Plaintiff to continue to try to use the shoes even after they had caused a blister. **Count VI** is by Mr. Peuser for **loss of consortium** as the husband alleges that their marital relationship was damaged due to the injuries caused by the shoes. The Plaintiff seeks **\$1,250,000** in damages per count and the husband seeks **\$250,000** in damages as well.

LIABILITY EXPOSURE: This case is not considered to be a case of ultimate liability on the part of the Insured. It is considered more probable that not that the Plaintiff will be unable to establish liability against the insured predicated upon the causes of action set forth in the complaint, namely: (1) Negligence, (2) Strict Liability in Tort or (3) Breach of implied warranty - fitness for particular purpose. Assuming the Plaintiff survives a Summary Judgment Motion and / or a motion made at the conclusion of the Plaintiff’s case in chief, a jury issue will be presented on the defenses of contributory negligence and assumption of risk with respect to the negligence count; sophisticated user, product misuse , product alteration and/or assumption of the risk with respect to Strict Liability in Tort, and failure to reject non conforming goods, failure to inspect and related UCC defenses as to the Breach of Warranty count.

Cross-Claim Against Foot Fit, Inc.: Discovery to date has revealed that an employee at Foot Fit, Inc.

“stretched” the shoes manufactured by our insured Defendant and had knowledge that the shoes did not properly fit the Plaintiff and failed to reject the non conforming goods . Additionally, Foot Fit, Inc. is a sophisticated user and failed to properly inspect the label in the product which , according to the Plaintiff, properly labeled the shoes as 12 ½ Wide. A Cross-Claim has been filed against the Co-Defendant, Foot Fit, Inc. This was based upon our discovery to date which reveals that Foot Fit, Inc. failed to exercise due care in checking the actual size of the shoes sold to the Plaintiff and for negligently instructing the Plaintiff to continue wearing the shoes when she notified Foot Fit, Inc. that the shoes felt too small. It is noted the Foot Fit, Inc. maintains that the shoes actually sold to the Plaintiff were 12 ½ Extra Wide and not 12 ½ Wide as maintained by the Plaintiff. **The employee at Foot Fit, Inc. who sold the Plaintiff the shoes, Lisa Morris , has testified that she checked the shoe and it was a 12.5 extra wide and that she “stretched the shoe” for 15-20 minutes, thereby modifying and changing the shape of the shoe.** In the event that the evidence of Foot Fit, Inc. is believed, there is no remaining theory of liability against Apex on the Cross Claim. *Finally, please note that Foot Fit, Inc. has filed a Cross-Claim against our insured as well.*

RECOMMENDATIONS TO CHUBB FOR FURTHER INVESTIGATIVE WORK: No further investigative work is recommended to be performed.

PROPOSALS FOR DISCOVERY AND INSPECTION:

1. Interrogatories: Interrogatories with respect to the specific issues at hand have been propounded on the Plaintiff. Those answers have been received and reviewed.

2. Requests for Production of Documents: An extensive set of Requests for Production of Documents specific to the issues have been propounded on the Plaintiff. The documents have been received and reviewed.

3. Deposition of Louise Peuser: The deposition of Plaintiff has been taken and the corresponding deposition reports have been previously forwarded.

4. Deposition of John Peuser: The deposition of the Mr. Peuser will be taken in the immediate future. **5.**

Deposition of Medical Providers: Medical Records depositions have been forwarded to all relevant and

germane healthcare providers. Medical records have been received and summarized. (See attached Medical Summary).

6. Deposition: Dr. John Hedger treated the Plaintiff for her alleged personal injury due to the improperly fitting shoes. His deposition has been taken and his report has been previously forwarded. It is also attached hereto.

7. Deposition: Dr. Chris Stroud has provided post-medical surgical treatment to the Plaintiff. He is not going to testify against the Defendants with respect to causation and permanency of the Plaintiff's injuries. He testified that the shoes "might" be a cause of the original blister. His deposition report has been previously forwarded. His report is also attached hereto.

8. Deposition: The deposition of Dr. Wayne Campbell was taken on June 4, 2002. Dr. Campbell is an infectious disease physician who was called in for a consult on October 8, 1999 when the Plaintiff was first transferred to Union Memorial Hospital. He eventually noted that the Plaintiff was suffering from a methicillin resistant staph aureus (MRSA) infection. The doctor was called in by Dr. Stroud for an infectious disease consult. Dr. Campbell prescribed several antibiotics and "loosely" followed Mrs. Peuser, progress for about six (6) months. Dr. Campbell confirmed that infections, and particularly foot infections were a common event with diabetic patients, particularly those with diabetic neuropathies in their lower extremities. He further stated that diabetics are particularly susceptible to bacteria staphylococcus aureus, it was a common bacteria. He went to on to state that 18% of the human population carry Staph on their skin all the time. Another 10-20% will carry it intermittently. Certain groups have a higher risk for it, diabetics are in that category, especially diabetics who use insulin. He stated that the likelihood was that an insulin dependent diabetic would have Staph as a normal skin flora. He also stated that Staph was invasive, and that, if given the opportunity, such as through a rupture or fissure in the skin, would penetrate and infect the tissue. Dr. Campbell was then asked if he had an opinion, held to a reasonable degree of medical probability or certainty, as to the source of Ms. Peuser's methicillin resistant staph aureus (MRSA) infection for which he saw her on October 11, 1999. His response was that he was **not** able to formulate such an opinion.

Significance of Dr. Campbell's testimony: Dr. Campbell's opinion that he could not correlate the

Plaintiff's infection of her right foot in June 1999 to the infection he treated her for in the left foot in October of 1999. **Dr. Campbell will not offer an opinion as to the cause of Ms. Peuser's left foot infection, and specifically the cause of her MRSA infection.**

9. I.M.E.: An independent medical evaluation of the Plaintiff should be conducted by Dr. Paul Taylor, our podiatrist. Considering the Plaintiff's prior and current medical issues with respect to her feet, and her allegations that the shoes were the cause of her medical issues, his expertise is considered germane to the defense of this matter. This I.M.E. is currently being scheduled.

10. Infectious Disease Consultant: The Plaintiff has alleged that she was infected by a "methicillin resistant staph aureus" (MRSA) while undergoing surgery with Dr. Hedger (allegedly as a result of a burst blister caused by the insured's product), and as a result has suffered and continues to suffer additional complications from the original blister. Accordingly, this office recommends retaining Dr. Lynette Posorske, an expert in infectious disease, to review all of the relevant and germane medical information and serve as an expert medical witness in this matter. While the Plaintiff has not yet causally connected the staff infection to the medical treatment that she received following the alleged occurrence, it is anticipated that the Plaintiff can pay a medical expert who may testify to the causation. This recommendation can be deferred until Plaintiff presents some evidence of medical causation.

11. Forensic examination of the subject shoes, together with shoes manufactured identical to subject shoes in both 12.5 wide and 12.5 extra wide. Considering that the Plaintiff alleges that the difference in width between a 12.5 wide and 12.5 extra wide is the cause of her alleged injury, it is recommended that a product liability expert be retained to first measure the actual physical difference in size between the shoes and then inspect the shoes in question to see if they have been stretched, or otherwise altered. Finally, the expert will be used to testify regarding a) the actual affect with respect to the difference between the two sizes, and b) what affect the removing of the inserts from within shoe would have on the overall make up of the product.

MEDICAL RECORDS DEPOSITIONS: medical records depositions have been received and reviewed from the following healthcare providers:

Peninsula Regional Medical Center

100 East Carroll Street
Salisbury, MD 21801-5493

The Union Memorial Hospital

201 East University Parkway
Baltimore, MD 21218

**Greater Chesapeake Orthopaedic
Associates, LLC**

3333 North Calvert Street, Suite 400
Baltimore, MD 21218

American HomePatient, Inc.

207 Milford Street
Salisbury, MD 21804-6932

John H. Hedger, M.D.

111 Davis Street
Ocean City, MD 21804

C. Christopher Stroud, M.D.

3333 North Calvert Street, Suite 400
Baltimore, MD 21218

Wayne Campbell, M.D.

Department of Medicine - Suite 405
201 East University Parkway
Baltimore, MD 21218

Peninsula Orthopedic Associates, P.A.

111 Davis Street

Ocean City, MD 21804

CVS Pharmacy

Pointer Ridge
1334 Crain Highway
Bowie, MD 20716

Bowie Health Center

15001 Health Center Drive

Bowie, MD 20716

Comprehensive Medical Evaluations

Johnston Professional Building

3333 North Calvert Street

Baltimore, MD 21218

Medstar Health

7379 Washington Boulevard

Elkridge, MD 21075

Atlantic General Hospital

9733 Healthway Drive

Berlin, MD 21911

Peter S. Abbott, M.D.

10445 Ocean City Boulevard

Berlin, MD 21811

Candee Van Iderstine, P.T.

Laurel Regional Hospital

Outpatient Therapy Center at Bowie

15003 Health Center Drive

Bowie, MD 20716

James F. McMurray, Jr., M.D.

6318 Democracy Boulevard

Bethesda, MD 20817

INJURIES: The Plaintiff alleges that as a result of wearing the improperly fitting shoes, she developed a blister that continued to worsen. Eventually, surgical intervention was necessary to remove the right little toe (5th toe). The Plaintiff further alleges that she suffered post surgical complications which required

additional hospitalization and surgical procedures. Those post surgical complications are allegedly the result of the Plaintiff contracting a staph infection while hospitalized for continuing problems with the right little toe (5th toe). She alleges that as a result of the staph infection, the bones in her left foot began to deteriorate making it very difficult for the Plaintiff to stand and walk for more than 20 minutes at a time. Please note that the Plaintiff is a Type II diabetic [suffers from *diabetic neuropathy*] and has had significant problems with her feet for years prior to this matter. In fact, she has previously had other toes amputated due to her medical condition and the related complications. In addition, she has testified that the shoes were “too tight” at the store when she first tried them on thus, there is also a jury question present with respect to whether the Plaintiff was contributorily negligent and/or assumed the risks of her injuries. An itemized list of damages as provided by the Plaintiff is shown below:

Peninsula Orthopedic Associates	\$ 6,211.64
Delmarva Radiology	1,278.00
Peninsula Regional Hospital Center	30,419.70
American HomePatient	1,052.18
Atlantic General Hospital	268.00
Dr. Snitzer	1,696.00
Greater Chesapeake Orthopedic Associates	22,169.00
Union Memorial Hospital	70,242.83
American Radiology	1,028.00
Associated Anesthesiology Practice	1,650.00
Dr. Tustin	478.00
Peninsula Surgical Group	187.00
Professional (?)	3,735.72
Home Health Corporation	7,750.12
Internal Medicine Associates	75.00
LifeStar Ambulance	605.00
Blue Heron Medical Group	178.00
Helix Care Medical Group	250.00
Chesapeake Periopera (?)	3,808.00
Pulmonary & Critical Care Associates of Baltimore	368.00
EHP Behavioral (?)	300.00

Apria Health Care, Inc.	836.07
Dr. Nesbitt, III	416.00
VNA Home Infusion Specialists	20,754.26
Washington Hospital Center	611.00
Comprehensive Medical	200.00
Parkway Pain Service	544.00
Prince George's Hospital	240.54
Peninsula Pathology	<u>200.00</u>
Sub-total (medicals)	\$ 177,552.06
Foot Fit (Shoes)	108.00
Van Dyke & Bacon (Shoes)	<u>1,400.00</u>
TOTAL	\$ 179,060.06
Lost Wages	\$ 60,000.00
TOTAL	\$ 239,060.06

** The Plaintiff has listed lost wages at \$60,000.00. However, she has not provided any records to support said claim. Her salary as of the date of loss was \$17,000. Furthermore she is alleging future lost wages as she is completely disabled.*

DAMAGE ASSESSMENT/ EVALUATION: The Plaintiff has alleged that the insured was negligent simply because the shoes in the box marked 12.5 extra wide were only 12.5 wide. As a result, she alleges she lost her right little toe (5th toe). Furthermore, she alleges that she suffered a staph infection during subsequent surgical procedures for complications with the right little toe (5th toe) area of her foot. As a result of the infection, she was forced to have a bone graph performed to her left foot as the bones were allegedly deteriorating. These injuries have allegedly resulted in additional medical problems with her feet and she allegedly may have to have her entire left foot amputated. As indicated above, the alleged damages are quite significant as the Plaintiff alleges that as a result of the loss of her toe, she can no longer work and properly care for her new child. Furthermore, she alleges that she has suffered severe emotional distress throughout the course of this ordeal, has been and continues to be, a prisoner in her own home as she cannot leave and is suffering as she may lose her entire left foot. Therefore, this case is

considered to be a potentially high exposure case at this stage. Although discovery is on going, an adverse verdict in this matter could range between \$600,000.00 to \$800,000. 00. However, that this case is not considered to be a case of ultimate liability against the insured, Apex. It is considered more probable than not that a jury verdict for the defendant will occur. Additionally, the medical literature and testimony of the physicians to date has not established any medical causation with respect to the Plaintiff's allegations of injury and medical damages. It is recommended that a comprehensive Motion for Summary Judgment supported by affidavit and legal memorandum be filed at the conclusion of discovery. Aside from liability and medical causation issues, this matter can also be defended with respect to the assertions contained in our Cross-Claim filed against Co-Defendant Foot Fit, Inc. It is noted that the Co-Defendant's employee not only had knowledge of the fact that the shoes did not fit properly, butalso modified the product i.e. "stretched" the shoes. In addition, the shoes were actually marked as a 12.5 wide and therefore not mislabeled at all according to the Plaintiff. It is alleged that the box they came in were improperly marked as a 12.5 extra wide. Foot Fit, Inc. maintains that not only was the box labeled as 12.5 extra wide, but that the shoes were too. If Foot Fit Inc.'s evidence is believed there is no liability on the part of Apex. In the event that it is not believed then Foot Fit, Inc. should have inspected the product and rejected the non conforming goods. This defense is strongly supported by the fact that the Plaintiff allegedly complained to the Co-Defendant's employee that the shoes were too tight as she tried them on.

ESTIMATED COST OF DEFENSE: The cost of defense in this matter is estimated at \$35,000 to trial and \$8,000 for trial. Expert witness fees are estimated at \$12,000. DEFENSE STRATEGY: The defense strategy is to continue a vigorous defense on the issues of both liability and medical causation and to focus any liability on the co-defendant Foot Fit, Inc. Additionally, the strategy is to posture the case through further discovery for a successful Motion for Summary Judgment.

<u>AUTHORITY:</u>	<u>None</u>	<u>(5/29/02)</u>
<u>DEMAND: (in Complaint)</u>	<u>\$1,500,000</u>	<u>(5/15/01)</u>
<u>OFFER:</u>	<u>None</u>	<u>(5/29/02)</u>

SETTLEMENT NEGOTIATIONS: No settlement negotiations have taken place to date. None are recommended.

ADR POTENTIAL: In accordance with the local rules of the Circuit Court for Wicomico County, this case has been scheduled for a Settlement Conference on September 16, 2002.

ADDITIONAL RELEVANT COMMENTS/PROPOSALS: Discovery is in its final stages. The Plaintiff's deposition has now been completed. The depositions of the two Foot Fit, Inc. employees have been taken. The deposition of our insured Defendant has been taken. In addition, the depositions of three of the Plaintiff's treating physicians have been completed. A comprehensive request for admissions of fact and genuineness of documents is being drafted, all remaining discovery is being scheduled and a comprehensive motion for summary judgment will be filed in order to attempt to extricate the insured from this litigation.

[1]. Baltimore Gas and Elec. Co. v. Flippo, 348 Md. 680, 705 A.2d 1144 (1998).

[2]. Powell v. District of Columbia, 634 A.2d 403, 406 (D.C. 1993).

[3]. Personal Injury Law in Virginia, Charles E. Friend, (1998).

[4]. Chesapeake & Potomac Tel. Co. v. Dowdy, 235 Va. 55, 365 S.E.2d 751 (1988).

[5]. Pittsburgh Nat'l Bank v. Perr, 431 Pa. Super. 580, 584, 637 A.2d 334, 336 (1994).

[6]. Philadelphia v. Chicken's Place, 388 Pa. Super. 198, 202, 565 A.2d 182, 184 (1989).

[7]. Payne v. Soft Sheen Products, Inc., 486 A.2d 712 (D.C. 1985).

[8]. Ferebee v. Chevron Chemical Co., 237 U.S. App.D.C. 164, 736 F. 2d 1529 (1984).

[9]. Id.

[10]. Berman v. Watergate West, Inc., 391 A.2d 1351 (D.C. 1978) .

[11]. Cotton v. McGuire Funeral Services, Inc., 262 A.2d 807 (D.C. 1970).

[12]. Martello v. Hawley, 112 U.S. App.D.C. 129, 300 F. 2d 721 (1962) .

[13]. Board of Trustees of Baltimore County Community Colleges v. RTKL Associates Inc., 80 Md. App. 45, 559 A.2d 805 (1989)

- [14]. 75 Md. App. 605, 542 A.2d 541 (1988).
- [15]. Myco, Inc. v. Super Concrete Co., Inc., 565 A.2d 293 (D.C. 1929).
- [16]. Id.
- [17]. Moses-Ecco v. Roscoe-Ajak, 320 F.2d 685, 115 U.S. App. D.C. 366 (1936).
- [18]. Gemco-Ware v. Rongene, 234 Va. 54, 360 S.E.2d 342 (1987) - The right to recover for Contribution and Indemnification arises from the payment or discharge of the common obligation.
- [19]. Carr v. Home Insurance Co., 250 Va. 427, 463 S.E.2d 457 (1955).
- [20]. Glover v. Johns-Manville Corp., 662 F. 2d 225 (4th Cir. 1979) - A party may only prevail on its indemnity claim if its negligence was in some sense passive or secondary in bringing about the injury suffered by the original claimant, under Virginia law, active negligence prevents a party's seeking indemnity altogether.
- [21]. Harley Davidson Motor Co. v. Advance Die Casting, Inc., 150 N.J. 489, 696 A.2d 666 (1997).
- [22]. Kimball Int'l, Inc. v. Northfield Metal Products, 334 N.J. Super. 596, 615 n.8, 760 A.2d 794, 804 n.8 (2000).
- [23]. New Zealand Kiwifruit Marketing Board v. City of Wilmington, 825 F. Supp. 1180, 1191 (D. Del. 1993).
- [24]. Ianime v. University of Delaware, 255 A.2d 687 (Del. Super. 1969), aff'd 269 A.2d 52 (Del. 1970).
- [25]. Willet v. Pennsylvania Medical Catastrophe Loss Fund, 549 Pa. 613, 622, 702 A.2d 850, 854 (1997).
- [26]. Daily Express, Inc. v. Northern Neck Transfer Corp., 490 F. Supp. 1304 (M.D. Pa. 1980).
- [27]. Harvest Capital v. West Virginia Department of Energy, 211 W. Va. 34, 37, 560 S.E.2d 509, 512 (2002).
- [28]. Id.
- [29]. Sydenstricker v. Unipunch Products, Inc., 169 W. Va. 440, 447, 288 S.E.2d 511, 516 (1982).
- [30]. State of Md. for Use of Gliedman v. Capital Airlines, Inc., 267 F. Supp. 298, 305 (D.Md. 1967).
- [31]. Hollingsworth & Vose Co. v. M.P. Conner, 136 Md. App. 91, 138-39 (2000).
- [32]. Id.
- [33]. Md. Code, Cts & Jud Pro § 3-1402.
- [34]. Md. Code, Cts & Jud Pro § 3-1405.
- [35]. Grogan v. Gen Maintenance Service Co., 763 F.2d 444, 246 U.S. App. D.C. 154 (C.A. D.C. 1985).
- [36]. Rose v. Hakim, 335 F. Supp 1221, 1233 (D.C. 1971).
- [37]. Emmert v. U.S., 300 F. Supp 45 (D.C. 1969).
- [38]. Dawson v. Contractors Transport Corp., 467 F. 2d 727, 729, 151 U.S. App. D.C. 401, 403 (C.A. D.C. 1972).
- [39]. District of Columbia v. Washington Hospital Center, 722 A.2d 332 (D.C. 1998).

- [40]. Va. Code Ann. § 8.01-34.
- [41]. Va. Code Ann. § 8.01-35.1.
- [42]. N.J.S.A. 2A:53A-2.
- [43]. N.J.S.A. 2A:53A-3.
- [44]. 42 Pa. C.S.A. § 7102.
- [45]. Latin for “let the master answer.”
- [46]. Oaks v. Conners, 339 Md. 24, 30, 660 A.2d. 423 (1995); Globe Indemnity Co. v. Victill Corp., 208 Md. 573, 584, 119 A. 2d. 423 (1956).
- [47]. Sawyer v. Humphries, 322 Md. 247, 255, 587 A.2d 467 (1991).
- [48]. Id.
- [49]. Id.
- [50]. Cox v. Prince George’s County, 296 Md. 162, 460 A.2d 1038 (1983).
- [51]. King v. Kidd, 640 A.2d 656, 666 (D.C. 1993).
- [52]. Control is defined as the employer’s right to direct the person in more essential aspects of the job, the term control does not mean the right to direct every single action.
- Factors to consider are:
- (a) the employer’s rights to give orders
 - (b) the employer’s right to control the performance of the employee’s work
 - (c) the employer’s right to control the method that the employee performed the work.
- Beegle v. Restaurant Mgt., Inc., 679 A.2d 480, 485 (D.C. 1996)
- [53]. Pratt v Maryland Farms Condominium Phase 1, Inc, 42 Md. App. 632, 402 A.2d 105 (1979); State for the use of Taylor v. Barlly, 216 Md. 94, 102 140 A.2d 173, 177 (1958).
- [54]. Miller v. Graff, 196 Md. 609, 78 A.2d 220 (1951).
- [55]. D.C. Code §46-101 (2001).
- [56]. U.S. v. Benson, 185 F.2d 995, 88 U.S. App.D.C. 45 (C.A. D.C. 1951).
- [57]. Cleveland Park Club v. Perry, 165 A.2d 485 (D.C. MunApp. 1960).
- [58]. Id.
- [59]. Id.
- [60]. Va. Code Ann. § 1-13.42.

- [61]. Virginia Electric and Power Co. v. Dungee, 258 Va. 235, 247, 520 S.E.2d 164, 171 (1999).
- [62]. Carson v. LeBlanc, 245 Va. 135, 140, 427 S.E.2d 189, 192 (1993).
- [63]. Dungee, 258 Va. at 247, 520 S.E.2d at 171.
- [64]. N.J. Stat. Ann. 9:17B-4.
- [65]. Guzy v. Gandel, 95 N.J. Super 34, 229 A.2d 809 (1967).
- [66]. Goss v. Allen, 134 N.J. Super 99, 338 A.2d 820, reversed, 170 N.J. 442, 360 A.2d 388 (1975).
- [67]. Id.
- [68]. Del. Code Ann. tit. 1., § 701.
- [69]. Del. Code Ann. tit. 10., § 3922.
- [70]. Del. Code Ann. tit. 21, § 6106.
- [71]. Moffitt v. Carroll, 640 A.2d 169, 174 (Del. 1999).
- [72]. Id.
- [73]. Kuhns v. Brugger, 390 Pa. 331, 135 A.2d 395 (1957).
- [74]. Dynes v. Bromley, 208 Pa. 633, 57 A. 1123 (1904).
- [75]. Kelly v. Pittsburgh Birmingham Traction Co., 204 Pa. 623, 54 A. 482 (1903).
- [76]. Berman by Berman v. Phil. Bd. of Ed., 310 Pa. Super 153, 456 A.2d 545 (1983).
- [77]. Pino v. Szuch, 185 W. Va. 476, 478, 408 S.E.2d 55, 57 (1991).
- [78]. Id. at 479, 408 S.E.2d at 58.
- [79]. 197 Md. 249, 254, 78 A.2d 754 (1951).
- [80]. 292 Md. 174, 438 A.2d 494 (1981),
- [81]. Id. at 184, 438 A.2d 499.
- [82]. Apper v. East Gate Associates, 28 Md.App. 581, 347 A.2d 389 (1975).
- [83]. Today, a vast majority of states recognize a cause of action against vendors of alcoholic beverages for the torts of their intoxicated patrons. This liability is based upon Dram Shop Acts, negligence based on the violation of Alcoholic Beverage Control Acts, Common Law Negligence, and willful and wanton misconduct. The District of Columbia does recognize a cause of action in negligence based on a violation of D.C. Code § 25-781 for sale of alcohol to intoxicated persons. Marrusa v. District of Columbia, 484 F.2d 828, 834-35 (D.C. Cir. 1973).
- [84]. D.C. Code §25-781.
- [85]. Id.

- [86]. Cartwright v. Hyatt Corp., 460 F. Supp 80, 81-82 (D.C. 1978).
- [87]. Va. Code Ann. § 4.1-304.
- [88]. Williamson v. Old Brogue, Inc., 232 Va. 350, 350 S.E.2d 621 (1986).
- [89]. Webb v. Blackies House of Beef, Inc., 811 F.2d 840 (4th Cir. 1987).
- [90]. N.J. Stat. Ann. 2A:22A-4 (West 2000).
- [91]. N.J.S.A. 2A:22A-6.
- [92]. Taylor v. Ruiz, 394 A.2d 765 (Del. Super. 1978).
- [93]. DiOssi v. Maroney, 548 A.2d 1361 (Del. Super. Ct. 1988).
- [94]. Del. Code Ann. tit. 4, § 706.
- [95]. See also Oakes v. Megaw, 565 A.2d 914 (Del. Supr. 1989), which extends the bar to this type of action even if a tavern owner sold alcohol to minors.
- [96]. Pa. Stat. Ann. tit. 47, § 4-497 (West 1997).
- [97]. Mathews v. Korieczu, 515 Pa. 106, 527 A.2d 508 (1987).
- [98]. Congini by Congini v. Protorsville Value Co., 504 Pa. 157, 470 A.2d 515 (1983).
- [99]. Jefferies v. Conn., 371 Pa. Super 12, 537 A.2d 355 (1988).
- [100]. W. Va. Code §60-7-12; W. Va. Code § 55-7-9; Bailey v. Black, 183 W. Va. 74, 394 S.E. 2d. 58 (1990).
- [101]. W.Va. Code § 60-8-20(a).
- [102]. Weimer v. Hetrick, 309 Md. 536, 553, 525A.2d 643 (1987); Dunham v. Elder, 18 Md. App. 360, 363, 306 A.2d 568 (1973).
- [103]. MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-02(c).
- [104]. Shilkret v. Annapolis Emergency Hospital Association, 276 Md. 187, 349 A.2d 245 (1975).
- [105]. Karl v. Davis, 100 Md. App. 42, 639 A.2d 214, 218-19 (1994) (citing Crockett v. Crothers, 264 Md. 222, 224-25, 285 A.2d 612 (1972)).
- [106]. MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-02(a), (b).
- [107]. Yonce v. Smithkline Beecham Lab., 111 Md. App. 124, 680 A.2d 569 (1996).
- [108]. Marcus v. Bathon, 72 Md. App. 475, 531 a.2d 690 (1987).
- [109]. Wegad v. Howard Street Jewelers, Inc., 326 Md. 409, 605 A.2d 123 (1992) (**accountants**); Free State Bank & Trust Co. v. Ellis, 45 Md. App. 159, 411 A.2d 1090 (1980) (**banks**); Mattingly v. Hopkins, 254 Md. 88, 253 A.2d 904 (1969) (**engineers**).
- [110]. Ray v. American Nat. Red Cross, 696 A.2d 399 (D.C. 1997).
- [111]. Professional is defined as: a doctor, lawyer, architect, dentist, surveyor, health care provider, etc.

- [112]. 15 U.S.C. § 1127 (Construction and definitions; intent of chapter).
- [113]. These remedies are set forth in 15 U.S.C. § 1125(a), which deal with false designation of origin of product and false advertising.
- [114]. 15 U.S.C. § 1116, 18 U.S.C. § 2320.
- [115]. 15 U.S.C. § 1125 (a).
- [116]. 35 U.S.C.A. § 1 et seq.
- [117]. 35 U.S.C.A. § 102.
- [118]. 35 U.S.C.A. § 103.
- [119]. 35 U.S.C.A. § 154.
- [120]. See Carbice Corp. v. American Patents Development Corp., 283 U.S. 27 (1930).
- [121]. See Thompson-Houston Elec. Co. v. Ohio Brass Co., 80 Fed. 712, 721 (6th Cir. 1897).
- [122]. 35 U.S.C.A. § 281.
- [123]. See U.S. CONST., Art. I § 8, cl. 3.
- [124]. See 17 U.S.C.A. § 301 et seq.
- [125]. See id. §§ 502-511 and §§ 1498-2319.
- [126]. See id.
- [127]. MD. CODE ANN., COM. LAW ART., § 11-1201 et seq.
- [128]. Id. at 110 (quoting Restatement of Torts § 757 cmt. b (1939)).
- [129]. Optic Graphics, Inc. v. Agee, 87 Md. App. 770, 782, 591 A.2d 578, cert. den., 324 Md. 658, 598 A.2d 465 (1991) (quoting Restatement of Torts § 757 cmt. b (1939)).
- [130]. See id. at 784.
- [131]. Id.
- [132]. Id. at 783; see also Bond v. Polycycle, Inc., 127 Md. App. 365, 732 A.2d 970 (1999) (quoting Space Aero and Optic Graphics, both supra); Trandes Corp. v. Guy F. Atkinson Co., 996 F.2d 655 (D.Md. 1993) (same).
- [133]. MD. CODE ANN., Com. Law art., § 11-201(c) (Maryland Uniform Trade Secrets Act).
- [134]. Gai Audio of New York, Inc. v. CBS, Inc., 27 Md. App. 172, 340 A.2d 736 (1975).
- [135]. 248 U.S. 215 (1918).
- [136]. Gai, 27 Md. App. at 190, 340 A.2d at 747 (citation omitted).
- [137]. Id.

- [138]. *Id.*, 27 Md. App. at 192, 340 A.2d at 748 (quoting *INS*, 248 U.S. at 215).
- [139]. 127 Md. App. 385; 752 A.2d 980 (1999).
- [140]. 182 Md. 229 (1943).
- [141]. 208 Md. 38 (1955).
- [142]. *Electronics Store*, 127 Md. at 406-407, 752 A.2d at 941 quoting *Baltimore Bedding*, 182 Md. at 236.
- [143]. *Id.*, quoting *Baltimore Bedding*, 182 Md. at 237.
- [144]. *Id.* 127 Md. at 406-407, 752 A.2d at 991-92 quoting *Edmonson Village Theatre*, 208 Md. at 43.
- [145]. *Electronics Store*, 127 Md. at 406-407, 752 A.2d at 941 (itself quoting *J.I. Case Plow Workers v. J. I. Case Threshing Mach. Co.*, 155 N.W. 128, 134 (1915)). Following the *Gai* Court's ruling, the United States Supreme Court held in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964), and in *Compco Corp. v. Day Brite Lighting, Inc.*, 376 U.S. 234 (1964), that where the "misappropriation" consists solely of copying nonpatentable designs or characteristics of a competitor's product, no relief can be granted under state unfair competition laws. The Supreme Court's rationale being that to enjoin such copying would conflict with the purpose of the patent laws – which is to provide a legally protected monopoly only where the design or characteristic meets certain requirements of novelty, etc.
- [146]. 451 A.2d 879, 881 n.3 (1982).
- [147]. *Id.* quoting W. Prosser, *HANDBOOK OF THE LAW OF TORTS* 956-57 (4th ed. 1971).
- [148]. 1958 – *Rosso & Mastracco v. Giant Food*, 200 Va. 159, 104 S.E.2d 776.
- [149]. See *Deems v. Western Maryland Ry.*, 247 Md. 95, 100, 231 A.2d 514 (1967).
- [150]. MD. CODE ANN., CTS & JUD. PROC. § 3-904(d).
- [151]. *Oaks v. Connors*, 339 Md. 24, 660 A.2d 423 (1995).
- [152]. *Shetterly v. Raymark Industries, Inc.*, 117 F.3d 776 (4th Cir. 1997).
- [153]. *Labram v. Havel*, 43 F.3d 918 (4th Cir. 1995).
- [154]. *Oaks v. Connors*, 339 Md. 24, 660 A.2d 423 (1995).
- [155]. *Monias v. Endal*, 330 Md. 274, 632 A.2d 656 (1993).
- [156]. *Id.*
- [157]. *Id.*
- [158]. *District of Columbia v. Howell*, 607 A.2d 501 (1992).
- [159]. VA CODE ANN. Section 55-36.
- [160]. *Potomac Electric Power Company v. Smith*, 79 Md.App. 591, 558 A.2d 768 (1989).
- [161]. Md. Est. & Trusts § 7-401(y)(2).

- [162]. D.C. Code § 16-2702.
- [163]. *Id.*
- [164]. D.C. Code §16-2701.
- [165]. *Doe v. Binker*, 492 A.2d 857, 863 (D.C. 1985).
- [166]. *Id.*
- [167]. D.C. Code §16-2701.
- [168]. D.C. Code §12-101.
- [169]. *Hughes v. Pender*, 391 A. 2d 259, 261 (D.C. 1978).
- [170]. *Doe v. Binker*, 492 A. 2d 857, 860 (D.C. 1985).
- [171]. Va. Code Ann. § 8.01-50.
- [172]. Va. Code Ann. § 8.01-53.
- [173]. Va. Code Ann. § 8.01-52.
- [174]. Va. Code Ann. § 8.01-56.
- [175]. *Seymour v. Richardson*, 75 S.E.2d 77, 79 (Va. 1953).
- [176]. N.J. Stat. Ann. 2A:31-1 *et seq.*
- [177]. N.J. Stat. Ann. 2A:31-4.
- [178]. N.J. Stat. Ann. 2A:31-3.
- [179]. *Kern v. Kogan*, A.2d 186, 191 (N.J. Super. Ct. Law Div. 1967).
- [180]. *See* Del. Code Ann. tit. 10, § 3721 *et seq.*
- [181]. Del. Code Ann. tit. 10, § 3724(a).
- [182]. Del. Code Ann. tit. 10, § 3724(b).
- [183]. Del. Code Ann. tit. 10, § 8107.
- [184]. Del. Code Ann. tit. 10, § 3724(d)(1)-(5).
- [185]. 42 Pa. Cons. Stat. § 5524.
- [186]. Pa. R. Civ. P. Rule 2202(a).
- [187]. Pa. R. Civ. P. Rule 2202(b). *See also* 42 Pa. Cons. Stat. § 8301.
- [188]. 42 Pa. Con. Stat. § 8301(b).

- [189]. 42 Pa. Con. Stat. § 8301(c).
- [190]. W. Va. Code § 55-7-6(a).
- [191]. W. Va. Code § 55-7-6(d).
- [192]. W. Va. Code § 55-7-6(b).
- [193]. W. Va. Code § 55-7-6(c).
- [194]. See Aravanis v. Eisenberg, 237 Md. 242 (1965). When the issue is whether conduct by act or omission is negligence per se, it is an issue generally for the judge to decide as a matter of law, and not an issue for the jury or fact-finder to decide.
- [195]. See MD. CODE ANN., TRANSP. II §§ 21-501-21-511. When an issue is negligence per se, it means that there is negligence on its face, that negligence is established as a matter of law and does not become a question of fact for a jury.
- [196]. See Azar v. Adams, 117 Md. App. 426 (1997), cert. den. 348 Md. 332 (1998).
- [197]. See Schweitzer v. Brewer, 280 Md. 430 (1977).
- [198]. See MD. CODE ANN., TRANSP. II §§ 21-401 - 405.
- [199]. See Mallard v. Earl, 106 Md. App. 449 (1995); Dean v. Redmiles, 280 Md. 137 (1977).
- [200]. McNeil Pharmaceutical v. Hawkins, 686 A.2d 567 (D.C. 1996); Jhou v. Jennier Mall Restaurant, Inc., 534 A.2d 1268 (D.C. 1987).
- [201]. See D.C. Code Ann. § 36-228(a)(1981).
- [202]. D.C. Code Ann. § 36-222(1)(1981).
- [203]. **Traudt v. Potomac Elec. Power Co.**, 692 A.2d 1326 (D.C. 1997).
- [204]. Id.
- [205]. Id.
- [206]. Id. at 1331.
- [207]. 395 A.2d 63 (D.C. 1978)
- [208]. The Plaintiff's have included a claim of failure to provide a safe workplace, which will be addressed in the following paragraphs along with the claim of violating provision 36-228(a) of the District's Code.
- [209]. Personal Injury Law in Virginia, Charles E. Friend, (1998).
- [210]. Moore v. Virginia Transit Co., 188 Va. 493, 50 S.E.2d 268 (1948).
- [211]. Kremen v. Maryland Automobile Ins. Fund, 770 A.2d 170, 176 (Md. 2001).
- [212]. State Farm Mut. Auto. Ins. Co. v. White, 236 A.2d 269, 273 (Md. 1967).
- [213]. Id. at 271.

- [214]. Id.
- [215]. Id. at 273-74.
- [216]. Kremen, 770 A.2d at 177 citing Medical Mut. Liab. Ins. Soc'y of Maryland v. Evans, 622 A.2d 103, 114 (Md. 1993).
- [217]. Johnson v. Federal Kemper Ins. Co., 536 A.2d 1211, 1212 cert. denied, 313 Md. 8, 542 A.2d 844 (Md. App. 1988).
- [218]. Dann v. State Farm Mut. Automobile Ins. Co., 632, A.2d 241, 245 (Md. App. 1994).
- [219]. Transportation Revenue Management v. First NH Investment Services Corp., 886 F. Supp. 884, 892 (D.C. D.C. 1995).
- [220]. Bailey v. Greenberg, 516 A. 2d 934 (D.C. App. 1986).
- [221]. Insurance Law in Virginia 52 (Howard C. McElroy & John M. Claytor eds., 2003) citing Ramsey v. Home Ins. Co., 125 S.E.2d 201, 204 (1962).
- [222]. Insurance Law in Virginia 52 (Howard C. McElroy & John M. Claytor eds., 2003) citing Sentinel Assoc. v. American Mfrs. Mut. Ins. Co., 804 F. Supp. 815 (E.D. Va. 1992).
- [223]. Insurance Law in Virginia 55 (Howard C. McElroy & John M. Claytor eds., 2003) citing A&E Supply Co. v. Nationwide Mut. Fire Ins. Co., 798 F.2d 669, 676 (4th Cir. 1986).
- [224]. Insurance Law in Virginia 61 (Howard C. McElroy & John M. Claytor eds., 2003) citing Aetna Cas. & Sur. Co. v. Price, 146 S.E.2d 220, 227-28 (Va. 1966).
- [225]. Picket v. Lloyd's, 621 A.2d 445, 451 (N.J. 1993).
- [226]. Id. at 450.
- [227]. Kaudern v. Allstate Ins. Co., 277 F. Supp. 83, 87 (D. N.J.1967).
- [228]. Royal Farms Resort, Inc. v. Investors Ins. Co. of America, 323 A.2d 495, 504 (N.J. 1974).
- [229]. McNally v. Nationwide Ins. Co., 815 F.2d 254, 258 (3d. Cir. 1987) (applying Delaware law) citing Stilwell v. Parsons, 145 A.2d 397 (Del. 1958).
- [230]. Stilwell, 145 A.2d at 397.
- [231]. Corrado Bros. v. Twin City Fire Ins. Co., 562 A.2d 1188, 1191 (Del. Super. 1989).
- [232]. Walasavage v. Marinelli, 483 A.2d 509, 517 (Pa. Super. 1984).
- [233]. U.S. Fire Ins. Co. v. Royal Ins. Co., 759 F.2d 306, 308-09 (3d Cir. 1985) (applying Pennsylvania law).
- [234]. Puritan Ins. Co. v. Canadian Universal Ins. Co. , 775 F.2d 76, 80-81 (3d. Cir. 1985) (applying Pennsylvania law).
- [235]. Id.
- [236]. Daniels v. Hardemann Mut. Ins. Co., 422 F.2d 87, 89 (W. Va. 1970).
- [237]. Shamblin v. Nationwide, 396 S.E.2d. 766, 772-73 (W. Va. 1990).
- [238]. The comments to §314A of the Restatement clarify the rule: Comment (d) states that the duty to give aid to one who is ill or

injured extends to cases where the illness or injury is due to natural causes, to pure accident, to the acts of third persons, or to the negligence of the Plaintiff himself.

[239]. The use of the word “factor” refers to a special relationship, contract, custom, industry practice, regulation, etc.

[240]. Restatement of Torts 2d, §291, comment g.

[241]. The Restatement of Torts 2d § 344 provides that a possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent or intentional harmful acts of third persons or animals and by the failure of the possession to exercise reasonable care to discover that such acts are being done or are likely to be done, or give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it. In comment f to §344, it is observed that since the possessor is not an insurer of the visitor's safety, ordinarily he is under no duty to exercise any care until he knows or has reason to know that the acts of the third persons are occurring, or are about to occur. However, the Comment points out, the possessor may know or have reason to know from past experience that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. Comment goes on to state that if the place or character of the business, or past experience is such that the possessor should reasonable anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it and to provide a reasonably sufficient number of employees to afford a reasonable protection.

[242]. James (Jay) Stanley Bias, Jr., is the brother of Len Bias, who was the Maryland basketball player who died of a drug overdose in 1985.

