

# **Publications - Survey Of Tort And Insurance Law**

**Law Offices of  
Saunders & Schmieler, P.C.**

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**SURVEY OF TORT AND INSURANCE LAW:**

**OVERVIEW OF THE LAW RELATING TO INSURANCE DEFENSE**

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**\_\_\_\_INTRODUCTION**

This publication contains a Mid-Atlantic Regional Tort and Insurance Law survey which addresses the applicable law in those areas of particular interest to the liability insurance industry, for Maryland, the District of Columbia, Virginia, New Jersey, Delaware, Pennsylvania, and West Virginia.

The survey is prepared by the law firm of *Saunders & Schmieler, P.C.*, which has been principally engaged as defense counsel for the Insurance Industry for over Fifty (50) years. The firm is actively involved in providing general legal representation, trial and litigation services, inclusive of insurance defense cases and litigation, insurance coverage analysis and litigation, general tort and contract liability defense cases, personal injury defense litigation, products liability defense litigation, premises liability defense litigation, construction defense litigation, intellectual property and advertising injury defense litigation, environmental litigation, toxic chemical litigation, toxic fume and contamination claims, occupational illness claims, discrimination claims, corporate and commercial law, and class action defense litigation.

All firm counsel constitute a team of experienced insurance defense litigators who have worked in close association with Insurance adjusters and Insurance personnel on a day-to-day basis for many years in connection with the representation of the interests of a number of major carriers. The firm is one of only a select number of law firms to be listed in the Insurance Defense Section of the Bar Register of Preeminent Lawyers and is a recipient of *Martindale-Hubble's* esteemed "AV" Rating -- the "A" signifying the highest level of legal ability and the "V" denoting very high adherence to the legal profession's standards of conduct, ethics, reliability, and diligence. The firm is also listed in *AM Best's Directory of Recommended Insurance Attorneys and Adjusters*.

#### **SURVEY OF TORT AND INSURANCE LAW IN:**

#### **MARYLAND, THE DISTRICT OF COLUMBIA, VIRGINIA, NEW JERSEY, DELAWARE, PENNSYLVANIA, AND WEST VIRGINIA**

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## I. LIMITATION OF ACTIONS

### A. MARYLAND

According to § 5-101 of the Court's Judicial Proceedings Article of the Maryland Annotated Code, a **civil action** at law shall be filed within **three (3) years** from the date it accrues unless another provision of the Code provides a different period of time within which an action can be commenced.<sup>[1]</sup> Thus, unless a specific exception applies, all civil actions must be filed within three years. The most noticeable exceptions to the three year rule are: a **twelve (12) year** statute of limitations on a **promissory note** or other **instrument under seal**, bond, judgment, recognizance or contracts under seal.<sup>[2]</sup> The statute of limitation for **adverse possession** is **twenty (20) years**.<sup>[3]</sup> As for **assault, libel, and slander**, all actions shall be filed within **one (1) year** from the date it accrues.<sup>[4]</sup> An action for damages for injuries arising out of the failure to render professional services by a **health care provider** shall be filed within the earlier of **five (5) years** of the time the injury was committed or **three years** of the **date the injury was discovered**.<sup>[5]</sup> If the claimant was under the age of eleven (11) at the time the injury was committed, the time limitation prescribed shall commence when the claimant reaches the age of eleven (11) years.<sup>[6]</sup> Finally, according to the Commercial Law Article of the Maryland Annotated Code § 2-725 an action for breach of any contract for sale must be commenced within **four (4) years** after the cause of action has accrued.<sup>[7]</sup> Therefore, for the most part, unless the case involves one of the aforementioned exceptions, the statute limitations for **civil actions** is **three (3) years**.

### B. DISTRICT OF COLUMBIA

The District of Columbia has the following limitations on actions:

- A. **Negligence:** For personal injury or property damage the limitation is **three (3) years**;<sup>[8]</sup>
- B. **Intentional Torts:** For libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment the limitation period is **one (1) year**;<sup>[9]</sup>
- C. **Intentional Infliction of Emotional Distress:** Court looks at the acts underlying the alleged infliction to determine the applicable statute of limitations;<sup>[10]</sup>
- D. For the **recovery of lands**, or tenements: **15 years**;<sup>[11]</sup>
- E. For the recovery of **personal property** or damages for its unlawful detention: **three (3) years**;<sup>[12]</sup>
- F. For a **statutory penalty** of forfeiture: **one (1) year**;<sup>[13]</sup>
- G. On an **executor's** or **administrator's bond**: **five (5) years**; on any other bond or single bill, covenant, or other **instrument under seal**: **twelve (12) years**;<sup>[14]</sup>
- H. On a **simple contract**, express or implied: **three (3) years**;<sup>[15]</sup>
- I. For which a limitation is not otherwise specifically prescribed: **three (3) years**;<sup>[16]</sup>
- J. And for the recovery of **damages** for an injury to real property from **toxic substances** including **asbestos**: **five (5) years** from the date the **injury** is **discovered** or with reasonable diligence should have been discovered.<sup>[17]</sup>

- K. For claims under the **Uniform Commercial Code: Four (4) years.**

**C. VIRGINIA**

Virginia has the following limitations for actions:

A. **Five (5) years** for claims involving **property damage** (whether personal or real);[\[18\]](#) claims by parents for **medical expenses incurred by minors**;[\[19\]](#) claims for **breach of written contracts** which is not otherwise specified.[\[20\]](#)

B. **Four (4) years** for claims involving **breach of contract for sale of goods** under the Uniform Commercial Code.[\[21\]](#)

C. **Three (3) years** for claims involving **breach of oral or implied contracts**. Implied contracts include contracts for indemnification or contribution.[\[22\]](#)

D. **Two (2) years** for claims involving **personal injury** and **fraud**.[\[23\]](#)

**D. NEW JERSEY**

New Jersey has the following limitations for actions:

A. **1 year** - Libel, slander.[\[24\]](#)

B. **2 years** - Negligence/Personal injuries,[\[25\]](#) wrongful death,[\[26\]](#) discrimination

C. **6 years** -Trespass, tortious injury to real or personal property, conversion, tortious injury to the rights of another, non-U.C.C. contract claims.[\[27\]](#)

D. **10 years** - Damages for injury from unsafe condition of improvement to real property.[\[28\]](#)

E. **20 years** -Real estate or rents recovery.[\[29\]](#)

**E. DELAWARE**

Delaware has the following limitations for actions:

A. **1 year** - Notice to City of Wilmington of action against it.[\[30\]](#)

B. **2 years** -Wrongful death, personal injury, property damage;[\[31\]](#) medical malpractice.[\[32\]](#)

C. **3 years** -Trespass, Trespass to Chattels.[\[33\]](#)

D. **4 years** -Leases and U.C.C contracts.[\[34\]](#)

E. **6 years** -Promissory Notes.[\[35\]](#)

**F. PENNSYLVANIA**

Pennsylvania provides for the following limitations on actions:

A. **6 months** -Action against State for injury to person or property.[\[36\]](#)

B. **1 year** -Libel, slander, invasion of privacy, actions on bonds.[\[37\]](#)

C. **2 years** -Assault, battery, false arrest, malicious prosecution, abuse of process, personal injury/negligence, personal injury/property damage based in negligence or other tort, injury or death of a person caused by exposure to asbestos.[\[38\]](#)

D. **4 years** - Contracts/U.C.C.[39]

E. **5 years** -Revival of a judgment lien on real property; specific performance of a contract for sale of real property or for damages for noncompliance therewith.[40]

F. **6 years** -General statute of limitations (Any civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the application of a period of limitation by section 5531 (relating to no limitation)).[41]

G. **20 years** - execution against personal property after the entry of the judgment; writings under seal.[42]

H. **21 years** -Possession or payment of charges relating to real property.[43]

## G. WEST VIRGINIA

West Virginia Code §55-2 *et seq.* provides for the following limitation of actions and suits:

A. **2 years** - Wrongful death, personal injury, injury to real or personal property,[44] survival, medical malpractice.[45]

B. **4 years** - U.C.C./Contract.[46]

C. **10 years** - Recovery of lands;[47] Deficiencies, injuries or wrongful death resulting from any improvements to real property.[48]

## II. ACCRUAL

### A. MARYLAND

As to accrual, the question of when a cause of action accrues is a judicial one to be decided by the Court and not the trier of fact.[49] Generally limitations against a right or a cause of action begins to run from the **date of the wrong**. However, there are a number of causes of actions that it is not immediately apparent to the Plaintiff at the time the wrong was committed that damage has occurred. Under these types of situations, Maryland has held that the **discovery rule** is applicable.[50]

### B. DISTRICT OF COLUMBIA

In the District of Columbia the Statute of Limitations ordinarily begins to run from the time at **which all** of the **elements** of the **Plaintiff's cause of action** exist.[51] In D.C., actions on a **contract** begin to run from the time of **breach**.<sup>[52]</sup> The limitations period under the District of Columbia's three (3) year limitations period for negligence begins to run when the Plaintiff suffers **injury**.<sup>[53]</sup> In determining when a legal malpractice claim accrues, the District of Columbia follows the "**injury rule**" under which claims for legal malpractice accrue when the Plaintiff suffers actual injury and not when the act causing the injury occurs.<sup>[54]</sup>

### C. VIRGINIA

A cause of action in Virginia accrues at the time of the injury and not at the time of discovery, except for limited situations involving medical malpractice cases and claims involving fraud. The statute of limitations does not begin to run for a minor until the minor has reached the age of eighteen (18) with the exception of medical malpractice cases involving minors.<sup>[55]</sup>

### D. NEW JERSEY

New Jersey courts hold that a tort action accrues not when the tortious conduct occurs, but when the

consequential injury or damages occurs.<sup>[56]</sup> New Jersey also abides by the discovery rule, which tolls the statute of limitations until the plaintiff becomes aware of the injury or should have become aware of the injury.<sup>[57]</sup> The discovery rule does apply to medical malpractice cases.<sup>[58]</sup>

#### **E. DELAWARE**

The cause of action in a tort cases accrues at the time of injury.<sup>[59]</sup> The Delaware courts subscribe to the "inherently unknowable injury" theory, which tolls the statute of limitations until the injury manifests itself or becomes ascertainable.<sup>[60]</sup> The Delaware courts also adhere to the continuing negligence theory, which allows the action to accrue when the negligence ends.<sup>[61]</sup>

#### **F. PENNSYLVANIA**

The general rule in Pennsylvania is that the cause of action accrues at the time an act or omission occurs. The exception to this rule appears when the injury or damage is sustained after the act or omission, thus the action accrues when the damage and injury are sustained.<sup>[62]</sup> A medical malpractice case based on informed consent accrues at the time the medical procedure is performed, unless fraud or active concealment is pleaded and proved.<sup>[63]</sup> The subsequent continuance of the wrong cannot serve to toll the running of the statute of limitations on the earlier injury of which the plaintiff has knowledge.<sup>[64]</sup>

#### **G. WEST VIRGINIA**

West Virginia has adopted the discovery rule with respect to applicability of limitations periods and applicable limitations periods do not begin to run until plaintiff knows or by the exercise of due diligence should know that he has been injured, and the identity of the person or persons responsible.<sup>[65]</sup>

### **III. NON-SUITS**

#### **A. MARYLAND**

In Maryland there is no automatic dismissal or an automatic non-suit after the cause of action is at issue. According to Rule 2-506 of the Maryland Rules of Civil Procedure, a Plaintiff may dismiss an action without leave of court by filing a Notice of Dismissal at any time before the adverse party files an Answer or a Motion for Summary Judgment or by filing a Stipulation of Dismissal signed by all parties who have appeared in the action. Otherwise, the Plaintiff may dismiss an action only by Order of Court and upon such terms and conditions as the Court deems proper. Unless otherwise specified in the Notice of Dismissal, a dismissal is without prejudice. Usually, the first voluntary dismissal is without prejudice, and the second voluntary dismissal is with prejudice.

#### **B. DISTRICT OF COLUMBIA**

The is no automatic dismissal or a non-suit of an action once one has been filed in D.C. and the parties are at issue. Voluntary Dismissal in D.C. is set forth in D.C. Superior Court Rule 41.<sup>[66]</sup>

#### **C. VIRGINIA**

In Virginia, a plaintiff has an absolute right to take a nonsuit to an action once it has been filed. A plaintiff may take a non-suit before a motion to strike the evidence has been sustained or before the jury retires from the bar or before the action has been submitted to the court for decision.<sup>[67]</sup>

If a plaintiff suffers a voluntary nonsuit as prescribed in § 8.01-380, the statute of limitations with respect to such action shall be tolled by the commencement of the nonsuited action, and the plaintiff may recommence his action within six months from the date of the order entered by the court, or within the original period of limitation, or within the limitation period as provided by subdivision (B)(1) (pertaining to death of person entitled to bring a personal action), whichever period is longer.<sup>[68]</sup>

#### **D. NEW JERSEY**

New Jersey allows plaintiffs to dismiss actions. A plaintiff may dismiss an action without prejudice at any time before the plaintiff is served by a responsive pleading or by filing a stipulation of dismissal signed by all the parties appearing in the action.<sup>[69]</sup> Otherwise, a plaintiff cannot dismiss a case, without leave of Court.<sup>[70]</sup> If a plaintiff files a new suit based on the same cause of action and against the same defendant, the defendant can move for costs of the previous suit.<sup>[71]</sup>

#### **E. DELAWARE**

The plaintiff can dismiss an action without prejudice before any response by the adverse party or by filing a stipulation with all parties after a response is provided.<sup>[72]</sup> A defendant may move to dismiss a case under this rule if the plaintiff fails to prosecute or does not comply with these Rules.<sup>[73]</sup> The Court may on its own or on any other party's motion dismiss a case if it is found that a party has failed to diligently to prosecute the action.<sup>[74]</sup>

#### **F. PENNSYLVANIA**

In Pennsylvania, a discontinuance is the exclusive method of voluntary termination of an action by a plaintiff before the commencement of trial.<sup>[75]</sup> Formal application for a discontinuance to the Court is not required. After a discontinuance, a plaintiff may proceed on the same cause of action upon the payment of costs of the former action.<sup>[76]</sup> Voluntary non-suit is the exclusive method for the plaintiff to voluntarily terminate an action during trial.<sup>[77]</sup> A plaintiff may not obtain a voluntary non-suit without leave of court upon good cause shown and cannot do so after the close of all the evidence.<sup>[78]</sup>

#### **G. WEST VIRGINIA**

An action may be dismissed by the Plaintiff by filing a Notice of Dismissal prior to the filing of an Answer or Motion for Summary Judgment by the Defendant, whichever occurs first, or by filing a Stipulation of Dismissal signed by all parties.<sup>[79]</sup> A matter may be dismissed for failure of a plaintiff to prosecute upon motion of the Defendant; such a dismissal operates as an adjudication upon the merits.<sup>[80]</sup> Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of this or any other state an action based on or including the same claim.<sup>[81]</sup>

### **IV. RESPONSIVE PLEADINGS**

#### **A. MARYLAND**

According to Maryland Rule 2-321, a party shall file an answer to a complaint within **thirty (30) days** after being served. If the Defendant is served outside of the State or if the Defendant is a Corporation the time is extended to **sixty (60) days**. As for motions, a response shall be filed within **fifteen (15) days**.

#### **\_\_\_\_\_ B. DISTRICT OF COLUMBIA**

A responsive pleading to a Complaint in D.C. must be filed within **20 days** after the service and summons on the Defendant under D.C. Sup. Ct. Civ. R. 12 (a).

#### **\_\_\_\_\_ C. VIRGINIA**

Under Virginia Rule 3:5 a Defendant has 21 days after the filing of a motion for Judgment in which to file a responsive pleading. A Defendant's failure to file a response within this time period will result in the defendant being in default.

#### **D. NEW JERSEY**

In New Jersey, the defendant must answer a complaint and file any counterclaim within 35 days after service on the defendant. N.J. Rule 4:6-1. Failure to respond or deny allegations is considered an admission. See N.J. Rule 4:5-5.

#### **E. DELAWARE**

Time to file responses to pleadings in Delaware is governed by the Rules of each Court. Superior Court Civil Rules require a responsive pleading to be filed within twenty (20) days after service of process. See Rule 12. The same deadline applies to the Court of Chancery. See Court of Chancery Rule 12.

#### **F. PENNSYLVANIA**

A responsive pleading in Pennsylvania must be filed within twenty (20) days after service of the preceding pleading, and a defendant outside the U. S. has sixty days to respond. Pa. R. C. P. No. 1026, 42 Pa. C.S.A.

#### **G. WEST VIRGINIA**

The Federal Rules of Civil Procedure form the basis of the service of process rules in West Virginia with some modifications. An Answer is due within twenty (20) days from the date of service. If service is made on an agent, a responsive pleading must be filed within thirty (30) days. WV R. R.C.P. 12.

### **V. STATUTE OF REPOSE FOR IMPROVEMENTS TO REAL PROPERTY**

#### **A. MARYLAND**

According to § 5-108 of the Courts Judicial Proceedings Article of the Maryland Annotated Code, no cause of action for damages accrues and a person may not seek contribution or indemnity for damages occurred when wrongful death, personal injury, or injury to real or personal property resulting from the defective and unsafe condition of an improvement to real property occurs **more than twenty (20) years** after that the entire improvement first became available for its intended use. A cause of action for damages does not accrue and a person may not seek contribution or indemnity from any architect, professional engineer, contractor for damages incurred when wrongful death, personal injury or injury to real or personal property, resulting from the defective and unsafe condition of an improvement to real property, occurs more than 10 years after the date the entire improvement became available for its intended use. Upon accrual of a cause of action, an action shall be filed within (3) three years. This section does not apply if the defendant was in actual possession and control of the property as owner, tenant, or otherwise when the injury occurred. A cause of action for an injury described in this section accrues when the injury or damage occurs.

#### **B. DISTRICT OF COLUMBIA**

DC Code § 12-310 entitled "Actions arising out of Death or Injury caused by Defective or Unsafe Improvements to Real Property" states that action(s) involving recovery for damages for personal injury, injury to real or personal property, or wrongful death resulting from the defective or unsafe condition of an improvement to real property, and for contribution or indemnity which is brought as a result of such injury or death, shall be barred unless in the case where the injury is the basis of such action, such injury occurs within the **ten (10) year period** beginning on the date the improvement was substantially completed, or in the case where death is the basis of such action, either such death or the injury resulting in such death occurs within such ten (10) year period.

#### **C. VIRGINIA**

An action for recovery of injury to property or for bodily injury arising out of a defective or unsafe condition of an improvement to real property must be brought against the individuals designing or constructing the improvements to real property within **five (5) years** from the date of performance of such service. Va. Code Ann. §8.01-250.

#### **\_\_\_D. NEW JERSEY**

New Jersey's Statute of Repose is codified in N.J.S.A. 2A:14-1.1, which states as follows:

No action whether in contract, in tort, or otherwise to recovery damages for any deficiency in the design, planning, supervision or construction of an improvement to real property, or for any injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property, more than **10 years** after the performance or furnishing of such services and construction. This limitation shall not apply to any person in actual possession and control as owner, tenant, or otherwise, of the improvement constitutes the proximate cause of the injury or damage for which the action is brought.

The discovery rule is not applicable to this statute. See Stix v. Greenway Devel. Co., Inc., 185 N.J. Super. 86, 447 A.2d 577 (1982); Hudson County v. Terminal Const. Corp., 154 N.J. Super. 264, 381 A.2d 355 (1977).

#### **\_\_\_E. DELAWARE**

Statute of Repose is recognized in the State of Delaware. 10 Del. C.A. § 8127. The statute does not allow a cause of action based on contract, tort or otherwise for damages, contribution, or indemnification resulting from injuries person or property due to the construction of improvements to real property after the expiration of **six (6) years** from whichever of the following dates shall be earliest:

- a. The date of purported completion of all the work called for by the contract as provided by the contract if such date has been agreed to in the contract itself;
- b. The date when the statute of limitations commences to run in relation to the particular phase or segment of work performed pursuant to the contract in which the alleged deficiency occurred, where such date for such phase or segment of work has been specifically provided for in the contract itself;
- c. The date when the statute of limitations commences to run in relation to the contract itself where such date has been specifically provided for in the contract itself;
- d. The date when payment in full has been received by the person against whom the action is brought for the particular phase of such construction or for the particular phase of such designing, planning, supervision, and/or observation of such construction or manner of such construction, as the case may be, in which such alleged deficiency occurred;
- e. The date the person against whom the action is brought has received final payment in full, under the contract for the construction or for the designing, planning, supervision, and/or observation of construction, as the case may be, called for by contract;
- f. The date when the construction of such an improvement as called for by the contract has been substantially completed;
- g. The date when an improvement has been accepted, as provided in the contract, by the owner or

occupant thereof following the commencement of such construction;

h. For alleged personal injuries also, the date upon which it is claimed that such alleged injuries were sustained; or after the period of limitations provided in the contract, if the contract provides such a period and if such period expires prior to the expiration of **2 years** from whichever of the foregoing dates is earliest.

#### **F. PENNSYLVANIA**

42 Pa.C.S.A. § 5536 states:

a. General rule.--Except as provided in subsection (b), a civil action or proceeding brought against any person lawfully performing or furnishing the design, planning, supervision or observation of construction, or construction of any improvement to real property must be commenced within **12 years** after completion of construction of such improvement to recover damages for:

(1) Any deficiency in the design, planning, supervision or observation of construction or construction of the improvement;

(2) injury to property, real or personal, arising out of any such deficiency;

(3) injury to the person or for wrongful death arising out of any such deficiency;

(4) contribution or indemnity for damages sustained on account of any injury mentioned in paragraph (2) or (3).

b. Exceptions.--

(1) If any injury or wrongful death shall occur more than ten and within 12 years after completion of the improvement a civil action or proceeding within the scope of subsection (a) may be commenced within the time otherwise limited by this subchapter, but not later than 14 years after completion of construction of such improvement.

(2) The limitation prescribed by subsection (a) shall not be asserted by way of defense by any person in actual possession or control, as owner, tenant or otherwise, of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury or wrongful death for which it is proposed to commence an action or proceeding.

#### **G. WEST VIRGINIA**

The West Virginia Code provides that all actions for personal injury or property damage must be brought within **two (2) years** from the date of accrual. However there is an "architects and builders statute" which limits the time within which actions can be brought against architects, engineers, and others in the construction industry for construction of or improvements in real property to **ten (10) years** after the performance of such services or construction. W. Va. Code § 55-2-6a. Under the Statute of Repose a cause of action is foreclosed after ten (10) years after the improvement is made regardless of when the injury occurred. Gibson v. W. Va. Dept. of Highways, 406 S.E. 2d 440 (W. Va. 1991).

### **VI. STACKING OF UNINSURED MOTORIST BENEFITS**

#### **A. MARYLAND**

Under § 19-513 of the Maryland Code, no person may recover uninsured motorist coverage for more than one motor vehicle liability policy or insurer in either a duplicate or supplemental basis. The phrase "duplicative" as used in the statute means payment in full, twice or more for the same claim, while the

term "supplemental" is more inclusive and refers to attempts to fill the deficiencies in the uninsured motorist coverage for the primary policy by claiming under a second policy. Under either term, after a claim for policy limits has been paid under the primary policy, recovery under a secondary policy is prohibited.

#### **B. DISTRICT OF COLUMBIA**

Under DC Code § 35-2102 (27), "stacking" is defined as "a legal procedure wherein the limits of liability applicable to a single motor vehicle policy of insurance are added to the limits of liability of all motor vehicles which may be insured by one motor vehicle liability policy of insurance involved in one accident." Underinsured motor vehicle coverage under DC Code § 35-2106 (c-1) states that insurance that includes underinsured motor vehicle coverage may include terms and conditions that **preclude** stacking of underinsured motor vehicle coverage. Furthermore, DC Code §31-2407 states that "Any Motor Vehicle policy of insurance may include terms and conditions that preclude stacking of uninsured motor vehicle coverage." Thus, it appears that stacking in some instances is permitted in the District of Columbia unless the specific policy of insurance precludes such stacking.

In the District of Columbia, if more than one excess indemnity policy applied to give claim arising out of asbestos exposure, thermal insulation manufacturer could designate which policy's limits would apply in that case, but it could not "stack" policy limits.<sup>[82]</sup> In situations in which the District of Columbia No-Fault Motor Vehicle Insurance Act and the District of Columbia Workers' Compensation Act applies benefits payable under Workers' Compensation are primary over benefits payable under no fault. Thus, personal injury protection benefits must be paid by a self-insured employer only if benefits paid under Workers' Compensation do not accord an injured individual the full measure of recovery he would receive from PIP benefits.<sup>[83]</sup>

#### **\_\_\_C. VIRGINIA**

Under Virginia law, insureds may stack uninsured motorist coverages on separate policies. See Bryant v. State Farm Mut. Auto. Ins. Co., 205 Va. 897, 140 S.E.2d 817 (1965). Policy provisions that preclude an insured from claiming liability and uninsured motorist coverage under the same policy are void as against public policy. See Nationwide Mut. Ins. Co. v. Hill, 247 Va. 78, 439 S.E.2d 335 (1994).

As a general rule stacking is not permitted with multiple coverages on the same policy even though separate premiums are paid, so long as the policy contains clear and unambiguous language precluding the stacking. See Goodville Mut. Cas. Co. v. Borrer, 221 Va. 967, 275 S.E.2d 625 (1981).

#### **\_\_\_D. NEW JERSEY**

The New Jersey legislature has expressly stated that the stacking of uninsured motorist coverage policies is prohibited. NJ Legis. Ch. 89, § 89 states as follows:

Uninsured and underinsured motorist coverage provided for in this section shall not be increased by stacking the limits of coverage of multiple motor vehicles covered under the same policy of insurance nor shall these coverages be increased by stacking the limits of coverage of multiple policies available to the insured. If the insured had uninsured motorist coverage available under more than one policy, any recovery shall not exceed the higher of the applicable limits of the respective coverages and the recovery shall be prorated between the applicable coverages as the limits of each coverage bear to the total of the limits.

#### **\_\_\_E. DELAWARE**

In Delaware, an insurer is statutorily required to offer uninsured coverage to all insured, who have a right to reject that aspect of the policy. 18 Del. C. § 3902. Delaware law does not permit stacking of

uninsured vehicle coverage. "The affording of insurance under this action to more than one (1) person or to more than (1) vehicle shall not operate to increase the limits of the insurer's liability. 18 Del. C. § 3902(c). When 2 or more vehicles owned or leased by persons residing in the same household are insured by the same insurer or affiliated insurers, the limits of liability shall apply separately to each vehicle as stated in the declaration sheet, but shall not exceed the highest limit of liability applicable to any 1 vehicle. 18 Del. C. § 3902(c).

## F. PENNSYLVANIA

Pennsylvania allows for the stacking of uninsured coverage benefits. See 75 Pa. C.S.A. 1738. When multiple policies exist, the policy covering the vehicle occupied by the injured person is first exhausted. After the exhaustion of the first policy, the policies covering other motor vehicles but under which the injured person is insured are looked to for recovery. See 75 Pa. C.S.A. § 1733. Pennsylvania allows the insured to waive his right to stacking the limits of coverage and purchase coverage which states the limits for the vehicle. In exchange, the insured receives a reduced premium rate which reflects the different cost of coverage. 75 Pa. C.S.A. § 1738. The recovery of both underinsured and uninsured benefits for the same accident is barred. Erie Ins. Exchange v. Danielson, 621 A.2d 656, 423 Pa. Super. 524 (1993).

## G. WEST VIRGINIA

The West Virginia Uninsured Motorist Statute makes no mention of priority in primary coverage or stacking. The liability of two (2) insurers under two (2) policies should be evenly divided, and an insured simultaneously covered by two (2) uninsured motors policies may recover on both policies up to the limits of liability in each or the amount of judgment, whichever is less. W. Va. Code §§ 17 D-1, *et seq.*

## VII. SERVICE OF PROCESS

### A. MARYLAND

Service of process may be made by (1) delivering to the person to be served a copy of the summons, complaint, and all other papers filed with it; (2) if the person to be served is an individual, by leaving a copy of the summons, complaint, and all other papers filed with it at the individual's dwelling house or usual place of abode with a resident of suitable age and discretion; or (3) by mailing to the person to be served a copy of the summons, complaint, and all other papers filed with it by certified mail requesting: "Restricted Delivery--show to whom, date, address of delivery." Service by certified mail under is complete upon delivery. Service outside of Maryland may also be made in the manner prescribed by the court or prescribed by the foreign jurisdiction if reasonably calculated to give actual notice.

When proof is made by affidavit that a defendant has acted to evade service, the court may order that service be made by mailing a copy of the summons, complaint, and all other papers filed with it to the defendant at the defendant's last known residence and delivering a copy of each to a person of suitable age and discretion at the place of business of the defendant.

When proof is made by affidavit that good faith efforts to serve the defendant have not succeeded and service is inapplicable or impracticable, the court may order any other means of service that it deems appropriate in the circumstances and reasonably calculated to give actual notice. Maryland Rule 2-121.

Service is made upon an individual by serving the individual or an agent authorized by appointment or by law to receive service of process for the individual. Service is made upon an individual under disability by serving the individual and, in addition, by serving the parent, guardian, or other person having care or custody of the person or estate of the individual under disability.

Service is made upon a corporation, incorporated association, or joint stock company by serving its resident agent, president, secretary, or treasurer. If the corporation, incorporated association, or joint

stock company has no resident agent or if a good faith attempt to serve the resident agent, president, secretary, or treasurer has failed, service may be made by serving the manager, any director, vice president, assistant secretary, assistant treasurer, or other person expressly or impliedly authorized to receive service of process.

Service made upon a general partnership sued in its group name in an action pursuant to the Maryland Code, Courts Article, § 6-406 by serving any general partner.

Service is made upon a limited partnership by serving its resident agent. If the limited partnership has no resident agent or if a good faith attempt to serve the resident agent has failed, service may be made upon any general partner or other person expressly or impliedly authorized to receive service of process.

Service is made upon a limited liability partnership by serving its resident agent. If the limited liability partnership has no resident agent or if a good faith attempt to serve the resident agent has failed, service may be made upon any other person expressly or impliedly authorized to receive service of process.

Service is made upon a limited liability company by serving its resident agent. If the limited liability company has no resident agent or if a good faith attempt to serve the resident agent has failed, service may be made upon any member or other person expressly or impliedly authorized to receive service of process.

Service is made upon an unincorporated association sued in its group name pursuant to Maryland Code, Courts Article, § 6-406 by serving any officer or member of its governing board. If there are no officers or if the association has no governing board, service may be made upon any member of the association.

Service is made upon the State of Maryland by serving the Attorney General or an individual designated by the Attorney General in a writing filed with the Clerk of the Court of Appeals. In any action attacking the validity of an order of an officer or agency of this State not made a party, the officer or agency shall also be served.

Service is made on an officer or agency of the State of Maryland by serving (1) the resident agent designated by the officer or agency, or (2) the Attorney General or an individual designated by the Attorney General in a writing filed with the Clerk of the Court of Appeals. If service is made on the Attorney General or a designee of the Attorney General and the officer or agency is not ordinarily represented by the Attorney General, the Attorney General or designee promptly shall forward the process and papers to the appropriate officer or agency. Maryland Rule 2-124.

Service of process may be made by a sheriff or by a competent private person, 18 years of age or older, including an attorney of record, but not by a party to the action. All process requiring execution other than delivery, mailing, or publication shall be executed by the sheriff of the county where execution takes place, unless the court orders otherwise. When the sheriff is a party to or interested in an action so as to be disqualified from serving or executing process, the court, on application of any interested party, may appoint an elisor to serve or execute the process. The appointment shall be in writing, signed by a judge, and filed with the clerk issuing the process. The elisor has the same power as the sheriff to serve or execute the process for which the elisor was appointed and is entitled to the same fees. Maryland Rule 2-123.

An individual making service of process by delivery or mailing shall file proof of the service with the court promptly and in any event within the time during which the person served must respond to the process. The proof shall set out the name of the person served, the date, and the particular place and manner of service. If service is by certified mail, the proof shall include the original return receipt. If service is made by an individual other than a sheriff, the individual shall file proof under affidavit which shall also state that affiant is of the age of 18 or over.

An individual making service of process pursuant to Maryland Rule 2-122 shall file with the court proof of compliance with the Rule together with a copy of the publication or posted notice promptly and in any event within the time during which the person notified must respond. The certificate of the publisher constitutes proof of publication.

When process requires for its execution a method other than or in addition to delivery or mailing, or publication or posting pursuant to Maryland Rule 2-122, the return shall be filed in the manner prescribed by rule or law promptly after execution of the process.

An individual unable to make service of process in accordance with these rules shall file a return as soon thereafter as practicable and in no event later than ten days following the termination of the validity of the process. A return shall include a copy of the process if served and the original process if not served. In every instance the return shall be filed with the court issuing process. In addition, when a writ of attachment, a writ of execution, or any other writ against property is executed in another county, a return shall be filed with the court of that county.

Failure to make proof of service does not affect the validity of the service. Maryland Rule 2-126.

#### **\_\_\_B. DISTRICT OF COLUMBIA**

A summons shall be served together with a copy of the complaint and initial order. The plaintiff is responsible for service of a summons, complaint and initial order within the time allowed and shall furnish the person effecting service with the necessary copies of the summons, and complaint and initial order.

Service may be effected by any person who is not a party and who is at least 18 years of age. At the request of the plaintiff, however, the Court may direct that service be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the Court for that purpose. Such direction shall be made only (a) when service is to be effected on behalf of the United States or an officer or agency thereof, or (b) when the Court issues an order stating that service by a United States marshal or deputy United States marshal or a person specially appointed for that purpose is required in order that service be properly effected in that particular action.

As to any defendant described in subdivision (e), (f), (h), or (j) of Rule 4, service also may be effected by mailing a copy of the summons, complaint and initial order to the person to be served by registered or certified mail, return receipt requested.

As to any defendant described in subdivisions (e), (f) or (h) of Rule 4, service may be effected by mailing a copy of the summons, complaint and initial order by first-class mail, postage prepaid, to the person to be served, together with two copies of a Notice and Acknowledgment conforming substantially to Form 1-A and a return envelope, postage prepaid, addressed to the sender. Unless good cause is shown for not doing so, the Court shall order the payment by the party served of the costs incurred in securing an alternative method of service authorized by this Rule if the person served does not complete and return within 20 days after mailing, the Notice and Acknowledgment of receipt of the summons.

Unless otherwise provided by law, service upon an individual from whom an acknowledgment has not been obtain and filed. other than an infant or an incompetent person, may be effected in any part of the United States:

(1) pursuant to District of Columbia law, or the law of the state or territory in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of that state or territory; or

(2) by delivering a copy of the summons, complaint and initial order to the individual personally or by

leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons, complaint and initial order to an agent authorized by appointment or by law to receive service of process. Unless otherwise provided by applicable law, service upon an individual from whom an acknowledgment has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within the United States:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents; or

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

(B) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(C) unless prohibited by the law of the foreign country, by delivery to the individual personally of a copy of the summons, complaint and initial order; or any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or by other means not prohibited by international agreement as may be directed by the Court.

Service upon an infant or an incompetent person in the United States shall be effected in the manner prescribed by the law of the District of Columbia or the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state. Service upon an infant or an incompetent person in a place not within the United States shall be effected in the manner prescribed by paragraph (2)(A) or (2)(B) of subdivision (f) of Rule 4 or by such means as the Court may direct.

Unless otherwise provided by applicable law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which an acknowledgment of service has not been obtained and filed, shall be effected:

(1) within the United States in the manner prescribed for individuals by subdivision (e)(1) of Rule 4, or by delivering a copy of the summons, complaint and initial order to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or

(2) in a place not within the United States in any manner prescribed for individuals by subdivision (f) of Rule 4 except personal delivery as provided in paragraph (2)(C)(i) thereof.

Service upon the United States shall be effected (A) by delivering a copy of the summons, complaint and initial order to the United States Attorney for the District of Columbia or to an assistant United States Attorney or clerical employee designated by the United States Attorney in a writing filed with the Clerk of the Court, or by sending a copy of the summons, complaint and initial order by registered or certified mail addressed to the civil process clerk at the office of the United States Attorney and (B) by also sending a copy of the summons, complaint and initial order by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and (C) in any action attacking the validity of an order officer or agency of the United States not made a party, by also sending a copy of the summons, complaint and initial order by registered or certified mail to the officer or agency.

Service on an agency or corporation of the United States, or an officer or employee of the United States

sued only in an official capacity, is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by also sending a copy of the summons and complaint and initial order by registered or certified mail to the officer, employee, agency, or corporation.

Service on an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States--whether or not the officer or employees is sued also in an official capacity--is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by serving the officer or employee in the manner prescribed by Rule 4(e), (f), or (g).

Service shall be made upon the District of Columbia by delivering (pursuant to Rule 4(c)(2)) or mailing (pursuant to Rule 4(c)(3)) a copy of the summons, complaint and initial order to the Mayor of the District of Columbia (or designee) and the Corporation Counsel of the District of Columbia (or designee). The Mayor and the Corporation Counsel may each designate an employee for receipt of service of process by filing a written notice with the Clerk of the Court. In any action attacking the validity of an order of an officer or agency of the District of Columbia not made a party, a copy of the summons, complaint and initial order also shall be delivered or mailed to such officer or agency. Service upon an officer or agency of the District of Columbia shall be made by delivering (pursuant to paragraph (c)(2)) or mailing (pursuant to paragraph (c)(3)) a copy of the summons, complaint and initial order to the Mayor (or designee), the Corporation Counsel (or designee), and such officer or agency.

Service upon a state, municipal corporation, or other governmental organization subject to suit shall be effected by delivering a copy of the summons, complaint and initial order to its chief executive officer or by serving the summons, complaint and initial order in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

Service of a summons, complaint and initial order or filing an acknowledgment of service is effective to establish jurisdiction over the person of a defendant who could be subjected to the jurisdiction of this Court, or who is a party joined under Rule 14 or Rule 19 and is served at a place not more than 100 miles from the place of hearing or trial, or when authorized by a statute of the United States or the District of Columbia.

If the exercise of jurisdiction is consistent with the Constitution and applicable law, serving a summons or filing an acknowledgment of service is also effective, with respect to claims arising under such law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

If service is not acknowledged, the person effecting service shall make proof of service to the Court. If service is made by a person other than a United States marshal or deputy United States marshal, the person shall make affidavit thereof.

If service is made by registered or certified mail under paragraph (c)(3) of Rule 4, the return shall be accompanied by the signed receipt attached to an affidavit which shall specifically state the caption and number of the case; the name and address of the person who posted the registered or certified letter; the fact that such letter contained a summons, a copy of the complaint and the initial order setting the case for an Initial Scheduling Conference; and, if the return receipt does not purport to be signed by the party named in the summons, then specific facts from which the Court can determine that the person who signed the receipt meets the appropriate qualifications for receipt of process set out in subdivisions (e) through (j) of Rule 4.

Proof of service in a place not within the United States shall, if effected under Rule(1)(f), be made pursuant to the applicable treaty or convention, and shall, if effected under Rule 4(2) or Rule 4(3) thereof, include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the

Court. Failure to make proof of service does not affect the validity of the service. The Court may allow proof of service to be amended.

Within 60 days of the filing of the complaint, the plaintiff must file either an acknowledgment of service or proof of service of the summons, the complaint and any order directed by the Court to the parties at the time of filing. The acknowledgment or proof shall be filed as to each defendant who has not responded to the complaint. Prior to the expiration of the foregoing time period, a motion may be made to extend the time for service. The motion must set forth in detail the efforts which have been made, and will be made in the future, to obtain service. The Court shall extend the period for such time as may be warranted by circumstances set forth in the motion. Failure to comply with the requirements of Rule 4 shall result in the dismissal without prejudice of the complaint. The Clerk shall enter the dismissal and shall serve notice thereof on all the parties entitled thereto. D.C. Super. Ct. Civ. R. 4.

Process other than a summons as provided in Rule 4 or a subpoena as provided in Rule 45 may be served by a United States marshal, a deputy United States marshal, or unless otherwise provided by statute, by a person who is not a party and not less than 18 years of age, who shall make proof of service as provided in Rule 4(1). The process may be served anywhere within the District of Columbia, and, when authorized by applicable statute, beyond the territorial limits of the District of Columbia.

Orders in civil contempt proceedings shall be served in the District of Columbia or elsewhere within the United States if not more than 100 miles from the District of Columbia. D.C. Super. Ct. Civ. R. 4.1.

Service under Rule 5(a) is made by delivering a copy to the person served by (i) handing it to the person, (ii) leaving it at the person's office with a clerk or other person in charge, or if no one is in charge leaving it in a conspicuous place in the office; or (iii) if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing, there. Service by mail is complete on mailing. If the person served has no known address, leaving a copy with the Clerk of the Court. Delivering a copy by any other means, including electronic means, as permitted or required by administrative order or consented to in writing by the person served. Service by electronic means is complete on transmission; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

All papers after the complaint required to be served upon a party, other than those referred to in Civil Rule 12-I(e), shall be filed with the Court either before service or within 5 days after service; however, the clerk shall not accept for filing depositions, transcripts, interrogatories, requests for documents, requests for admission, and responses thereto except as set forth in the last sentence of this paragraph. The party serving such a discovery paper or noticing a deposition must, however, file with the Court a CERTIFICATE REGARDING DISCOVERY which shall indicate the title of the discovery paper served and the date on which it was served. The requesting party must retain the original discovery paper, and must also retain personally, or make arrangements for the reporter to retain, in their original and unaltered form, any deposition transcripts which have been made at the party's request. Such discovery papers and deposition transcripts must be retained until the case is concluded in this Court, the time for noting an appeal or petitioning for a writ of certiorari has expired, and any such appeal or petition has been decided. Discovery papers and deposition transcripts may be filed, without leave of court, if they are appended to a motion or opposition to which they are relevant and may otherwise be filed if so ordered by

the Court sua sponte or pursuant to motion.

The filing of papers with the Court as required by these Rules shall be made by filing them with the Clerk of the Court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the Office of the Clerk. On the date of the filing of any motion or any papers related to a motion (e.g., an opposition to a motion, memorandum of points and authorities, exhibits related thereto or proposed order), the party filing such motion, papers or pretrial statements and other papers described in SCR Civil 16(d) and (e) shall deliver a chambers copy thereof to a depository designated by the Clerk of the Court for receipt of such papers by the assigned judge. Along with the chambers copy of the motion, the moving party must provide the assigned judge with (1) an original proposed order and (2) an addressed envelope or a mailing label for each counsel or unrepresented party to the case. With the chambers copy of any opposition to a motion, the party filing the opposition must provide the assigned judge with an original proposed order. If the original document has been mailed, the chambers copy may be mailed to chambers. No other papers shall be delivered to the judge's chambers unless the assigned judge so orders. D.C. Super. Ct. Civ. R. 5.

### C. VIRGINIA

In any action at law or in equity or any other civil proceeding in any court, process, for which no particular mode of service is prescribed, may be served upon natural persons by delivering a copy thereof in writing to the party in person; or by substituted service in the following manner:

(a) If the party to be served is not found at his usual place of abode, by delivering a copy of such process and giving information of its purport to any person found there, who is a member of his family, other than a temporary sojourner or guest, and who is of the age of sixteen years or older; or

(b) If such service cannot be effected, then by posting a copy of such process at the front door or at such other door as appears to be the main entrance of such place of abode, provided that not less than ten days before judgment by default may be entered, the party causing service or his attorney or agent mails to the party served a copy of such process and thereafter files in the office of the clerk of the court a certificate of such mailing. In any civil action brought in a general district court, the mailing of the application for a warrant in debt or affidavit for summons in unlawful detainer or other civil pleading or a copy of such pleading, whether yet issued by the court or not, which contains the date, time and place of the return, prior to or after filing such pleading in the general district court, shall satisfy the mailing requirements of this section. In any civil action brought in a circuit court, the mailing of a copy of the pleadings with a notice that the proceedings are pending in the court indicated and that upon the expiration of ten days after the giving of the notice and the expiration of the statutory period within which to respond, without further notice, the entry of a judgment by default as prayed for in the pleadings may be requested, shall satisfy the mailing requirements of this section and any notice requirement of the Rules of Court. The person executing such service shall note the manner and the date of such service on the original and the copy of the process so delivered or posted and shall effect the return of process as provided in §§ 8.01-294 and 8.01-325.

If service cannot be effected in the manners prescribed above, then by order of publication in appropriate cases under the provisions of §§ 8.01-316 through 8.01-320. Va. Code Ann. § 8.01-296.

Except as prescribed in § 8.01-300 as to municipal and quasi-governmental corporations, process may be served on a corporation created by the laws of this State by personal service on any officer, director, or registered agent of such corporation; or by substituted service on stock corporations in accordance with § 13.1-637 and on nonstock corporations in accordance with § 13.1-836. Va. Code Ann. § 8.01-299.

Notwithstanding the provisions of § 8.01-299 for service of process on other domestic corporations, process shall be served on municipal and county governments and quasi-governmental bodies or agencies

in the following manner:

- (1) If the case be against a city or a town, on its city or town attorney in those cities or towns which have created such a position, otherwise on its mayor, manager or trustee of such town or city; and
- (2) If the case be against a county, on its county attorney in those counties which have created such a position, otherwise on its attorney for the Commonwealth; and
- (3) If the case be against any political subdivision, or any other public governmental entity created by the laws of the Commonwealth and subject to suit as an entity separate from the Commonwealth, then on the director, commissioner, chief administrative officer, attorney, or any member of the governing body of such entity; and
- (4) If the case be against a supervisor, county officer, employee or agent of the county board, arising out of official actions of such supervisor, officer, employee or agent, then, in addition to the person named defendant in the case, on each supervisor and the county attorney, if the county has a county attorney, and if there be no county attorney, on the clerk of the county board.

Va. Code Ann. § 8.01-300.

Service of process on a foreign corporation may be effected in the following manner:

- by (1) personal service on any officer, director or on the registered agent of a foreign corporation which is authorized to do business in the Commonwealth, and by personal service on any agent of a foreign corporation transacting business in the Commonwealth without such authorization, wherever any such officer, director, or agents be found within the Commonwealth;
- (2) substituted service on a foreign corporation in accordance with §§ 13.1-766 and 13.1-928, if such corporation is authorized to transact business or affairs within the Commonwealth;
- (3) substituted service on a foreign corporation in accordance with § 8.01-329 where jurisdiction is authorized under § 8.01-328.1, regardless of whether such foreign corporation is authorized to transact business within the Commonwealth; or
- (4) by order of publication in accordance with §§ 8.01-316 and 8.01-317 where jurisdiction in rem or quasi in rem is authorized, regardless of whether the foreign corporation so served is authorized to transact business within the Commonwealth. Va. Code Ann. § 8.01-301.

In addition to the manner of service on natural persons prescribed in § 8.01-296, a summons for a witness or for a juror may be served (1) at his or her usual place of business or employment during business hours, by delivering a copy thereof and giving information of its purport to the person found there in charge of such business or place of employment; or (2) in the case of a juror, by mailing a summons to the person being served, at least seven days prior to the day he is summoned to appear. Va. Code Ann. § 8.01-298.

When any corporation is operated by a trustee or by a receiver appointed by any court, in any action against such corporation, process may be served on its trustee or receiver; and if there be more than one such trustee or receiver, then service may be on any one of them. In the event that no service of process may be had on any such trustee or receiver, then process may be served by any other mode of service upon corporations authorized by this chapter. Va. Code Ann. § 8.01-303.

Process against a copartner or partnership may be served upon a general partner, and it shall be deemed service upon the partnership and upon each partner individually named in the action, provided the person served is not a plaintiff in the suit and provided the matter in suit is a partnership matter.

Provided further that process may be served upon a limited partner in any proceeding to enforce a limited partner's liability to the partnership. Va. Code Ann. § 8.01-304.

Process against an unincorporated (i) association, (ii) order, or (iii) common carrier, may be served on any officer, trustee, director, staff member or other agent. Va. Code Ann. § 8.01-305.

If an unincorporated (i) association, (ii) order, or (iii) common carrier has its principal office outside Virginia and transacts business or affairs in the Commonwealth, process may be served on any officer, trustee, director, staff member, or agent of such association, order, or carrier in the city or county in which he may be found or on the clerk of the State Corporation Commission, who shall be deemed by virtue of such transaction of business or affairs in the Commonwealth to have been appointed statutory agent of such association, order, or carrier upon whom may be made service of process in accordance with § 12.1-19.1. Service, when duly made, shall constitute sufficient foundation for a personal judgment against such association, order or carrier. If service may not be had as aforesaid, then on affidavit of that fact an order of publication may be awarded as provided by §§ 8.01-316 and 8.01-317. Va. Code Ann. § 8.01-306.

#### D. NEW JERSEY

In all civil actions, unless otherwise provided by rule or court order, orders, judgments, pleadings subsequent to the original complaint, written motions (not made *ex parte*), briefs, appendices, petitions and other papers except a judgment signed by the clerk shall be served upon all attorneys of record in the action and upon parties appearing *pro se*; but no service need be made on parties who have failed to appear except that pleadings asserting new or additional claims for relief against such parties in default shall be served upon them in the manner provided for service of original process. The party obtaining an order or judgment shall serve it as herein prescribed within 7 days after the date it was signed unless the court otherwise orders therein. N.J. Rule 1:5-1.

Service upon an attorney of papers referred to in R. 1:5-1 shall be made by mailing a copy to the attorney at his or her office by ordinary mail, by handing it to the attorney, or by leaving it at the office with a person in the attorney's employ, or, if the office is closed or the attorney has no office, in the same manner as service is made upon a party. Service upon a party of such papers shall be made as provided in R. 4:4-4 or by registered or certified mail, return receipt requested, to the party's last known address; or if the party refuses to claim or to accept delivery, by ordinary mail to the last known address; or if no address is known, by ordinary mail to the clerk of the court. Mail may be addressed to a post office box in lieu of a street address only if the sender cannot by diligent effort determine the addressee's street address or if the post office does not make street-address delivery to the addressee. The specific facts underlying the diligent effort shall be recited in the proof of service required by R. 1:5-3. Where mailed service is made upon a party, the modes of service may be made simultaneously. N.J. Rule 1:5-2.

Proof of service of every paper referred to in R. 1:5-1 may be made (1) by an acknowledgment of service, signed by the attorney for a party or signed and acknowledged by the party, or (2) by an affidavit of the person making service, or (3) by a certification of service appended to the paper to be filed and signed by the attorney for the party making service. If service has been made by mail the affidavit or certification shall state that the mailing was to the last known address of the person served. A proof of service made by affidavit or certification shall state the name and address of each attorney served, identifying the party that attorney represents, and the name and address of any *pro se* party. The proof shall be filed with the court promptly and in any event before action is to be taken on the matter by the court. Where service has been made by registered or certified mail, filing of the return receipt card with the court shall not be required. Failure to make proof of service does not affect the validity of the service, and the court at any time may allow the proof to be amended or supplied unless an injustice would result. N.J. Rule 1:5-3.

Where under any rule, provision is made for service by certified or registered mail, service may also be

made by ordinary mail simultaneously or thereafter. If the addressee fails or refuses to claim or to accept delivery of certified or registered mail, the ordinary mailing shall be deemed to constitute service.

Except for motions that are governed by R. 1:6-3(c), service by mail of any paper referred to in R. 1:5-1, when authorized by rule or court order, shall be complete upon mailing of the ordinary mail. If no ordinary mailing is made, service shall be deemed complete upon the date of acceptance of the certified or registered mail.

Service by a commercial courier of a paper referred to in R. 1:5-1, except for motions, which are governed by R. 1:6-3, shall be complete upon the courier's receipt of the paper from the sender, provided the courier's regular business is delivery service, and provided further that it guarantees delivery to the addressee by the end of the next business day following the courier's receipt from the sender. N.J. Rule 1:5-4.

In any civil action in which there are unusually large numbers of defendants, the court, upon motion or on its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleadings and service thereof upon the plaintiff, or an adverse party in a cross-claim, constitutes due notice of it to the parties. In any such action the court may designate certain parties as representatives for receipt of service for all defendants similarly situated and may order that service of pleadings, motions and other papers filed in the action may be served upon such representatives with the same effect as if all such defendants had been served. A copy of every such order shall be served upon the parties in interest in such manner and form as the court directs. N.J. Rule 1:5-5.

#### **\_\_\_E. DELAWARE**

Service of process shall be made by the sheriff to whom the writ is directed, by a deputy sheriff, or by some person specially appointed by the Court for that purpose, except that a subpoena may be served as provided in Rule 45.

The process, complaint and affidavits, if any, shall be served together. The Clerk of the Court shall furnish the person making service with such copies as are necessary.

Service shall be made upon an individual other than an infant or an incompetent person by delivering a copy of the summons, complaint and affidavit, if any, to that individual personally or by leaving copies thereof at that individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or, by delivering copies thereof to an agent authorized by appointment or by law to receive service of process.

Service shall be made upon an infant under the age of 18 years, if such infant has a guardian in this State, by service upon such guardian in the same manner as upon an individual, if the guardian is an individual, or in the same manner as upon a corporation, if the guardian is a corporation; and if there is no such guardian, by service in the same manner as upon an individual upon an adult person with whom such infant resides or has his or her place of abode.

Service shall be made upon an incompetent person, if such person has a trustee or guardian in this State, by service upon such trustee or guardian, in the same manner as upon an individual, if the trustee or guardian is an individual; or in the same manner as upon a corporation, if such trustee or guardian is a corporation; and if there is no such trustee or guardian, by service in the same manner as upon an individual, upon an adult person with whom such incompetent person resides or has his or her place of abode.

Service shall be made upon an infant or incompetent person, not a resident of the State, in the same

manner as upon a competent adult person who is not an inhabitant of or found within the State.

Service shall be made upon a domestic or foreign corporation or upon a partnership or unincorporated association which is subject to suit under common name by delivering copies of the summons, complaint and affidavit, if any, to an officer, a managing or general agent or, to any other agent authorized by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Service shall be made upon a municipal corporation or other governmental organization subject to suit by delivering a copy of the summons, complaint and affidavit, if any, to the chief executive officer thereof or by serving copies thereof in the manner prescribed by law for the service of summons upon such defendant.

Service shall be made upon a defendant of any class referred to in subsection (I) and (III) of this rule, it is also sufficient if the summons, complaint and affidavit, if any, are served in the manner prescribed by any statute.

Whenever a statute, rule of Court or an order of Court provides for service of summons or of a notice or of an order in lieu of summons upon a party not an inhabitant of or found within the State, service shall be made under the circumstances and in the manner prescribed by the statute, rule or order.

Service of attachment or garnishee process shall be made in the same manner, as provided in Rule 4(f), on those persons, firms or corporations subject to such service in this State. If garnishees are summoned upon a writ of mesne attachment, the person serving the writ shall leave with them a copy of the writ, the complaint and affidavit. If execution of the writ requires seizure of personal property, the sheriff shall levy thereon and make the return in the same manner as heretofore.

The writ of capias shall be served as provided by statute. The person serving the writ shall deliver to the defendant a copy of the writ, complaint and affidavit.

Service of original process other than summons, attachment or capias. Service of original process other than summons, attachment, or capias shall be made as provided by statute or order of court.

Original process, whether an original, alias or pluries writ, shall be returnable 20 days after the issuance of the writ. The person serving the process shall make return thereof to the Court promptly after service and in any event, on the return day thereof. Process which cannot be served before the return day thereof shall be returned on the return day and such return shall set forth the reasons why service could not be had. If service is made by a person other than by an officer or his deputy, his return shall be verified. Failure to make a return or proof of service shall not affect the validity of service.

In an action in which the plaintiff serves process pursuant to 10 Del.C. § 3104, § 3112 or § 3113, the defendant's return receipt and the affidavit of the plaintiff or the plaintiff's attorney of the defendant's nonresidence and the sending of a copy of the complaint with the notice required by the statute shall be filed as an amendment to the complaint within 10 days of the receiving by the plaintiff or the plaintiff's attorney of the defendant's return receipt; provided, however, that the amendment shall not be served upon the parties in accordance with the provisions of Rule 5(a).

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. Del. Rule 4.

## F. PENNSYLVANIA

Original process shall be served within the Commonwealth within thirty days after the issuance of the writ or the filing of the complaint. If service within the Commonwealth is not made within the time prescribed by subdivision (a) of this rule or outside the Commonwealth within the time prescribed by Rule 404, the prothonotary upon praecipe and upon presentation of the original process, shall continue its validity by reissuing the writ or reinstating the complaint, by writing thereon "reissued" in the case of a writ or "reinstated" in the case of a complaint. A writ may be reissued or a complaint reinstated at any time and any number of times. A new party defendant may be named in a reissued writ or a reinstated complaint. A substituted writ may be issued or a substituted complaint filed upon praecipe stating that the former writ or complaint has been lost or destroyed. A reissued, reinstated or substituted writ or complaint shall be served within the applicable time prescribed by subdivision (a) of this rule or by Rule 404 after reissuance, reinstatement or substitution. If an action is commenced by writ of summons and a complaint is thereafter filed, the plaintiff instead of reissuing the writ may treat the complaint as alternative original process and as the equivalent for all purposes of a reissued writ, reissued as of the date of the filing of the complaint. Thereafter the writ may be reissued, or the complaint may be reinstated as the equivalent of a reissuance of the writ, and the plaintiff may use either the reissued writ or the reinstated complaint as alternative original process. The copy of the original process to be served upon the defendant shall be attested by the prothonotary or certified by the plaintiff to be a true copy. Pa. Rule 404.

Original process shall be served outside the Commonwealth within ninety days of the issuance of the writ or the filing of the complaint or the reissuance or the reinstatement thereof by a competent adult in the manner provided by Rule 402(a); by mail in the manner provided by Rule 403; in the manner provided by the law of the jurisdiction in which the service is made for service in an action in any of its courts of general jurisdiction; in the manner provided by treaty; or as directed by the foreign authority in response to a letter rogatory or request. Pa. Rule 404.

Service of original process upon the Commonwealth or an officer of the Commonwealth, or a department, board, commission or instrumentality of the Commonwealth, or a member thereof, shall be made at the office of the defendant and the office of the attorney general by handing a copy to the person in charge thereof. Service of original process upon a political subdivision shall be made by handing a copy to (1) an agent duly authorized by the political subdivision to receive service of process, or (2) the person in charge at the office of the defendant, or (3) the mayor, or the president, chairman, secretary or clerk of the tax levying body thereof, and in counties where there is no tax levying body, the chairman or clerk of the board of county commissioners. Pa. Rule 422.

#### G. WEST VIRGINIA

The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint. The court may allow a summons to be amended.

Upon the filing of the complaint, the clerk shall forthwith issue a summons to be served as directed by the plaintiff. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served.

A summons shall be served together with a copy of the complaint. The plaintiff is responsible for directing the clerk in the manner of service of the summons and complaint within the time allowed under subdivision (k). Service may be effected by any person who is not a party and who is at least 18 years of age.

At the request of the plaintiff and upon payment of the applicable fees and costs of service, the clerk shall

deliver the summons and complaint to the sheriff for service as directed by the plaintiff; or make service by either certified mail or by first class mail as directed by plaintiff; or forward a copy of the summons and complaint to the Secretary of State, as statutory attorney-in-fact, for service as specified by any applicable statute.

Service upon an individual other than an infant, incompetent person, or convict may be made by delivering a copy of the summons and complaint to the individual personally; or delivering a copy of the summons and complaint at the individual's dwelling place or usual place of abode to a member of the individual's family who is above the age of sixteen (16) years and by advising such person of the purport of the summons and complaint; or delivering a copy of the summons and complaint to an agent or attorney-in-fact authorized by appointment or statute to receive or accept service of the summons and complaint in the individual's behalf; or the clerk sending a copy of the summons and complaint to the individual to be served by certified mail, return receipt requested, and delivery restricted to the addressee; or the clerk sending a copy of the summons and complaint by first class mail, postage prepaid, to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form 14 and a return envelope, postage prepaid, addressed to the clerk.

The plaintiff shall furnish the person making service with such copies of the complaint or order as are necessary and shall advance the costs of service. For service by certified mail, the plaintiff shall pay to the clerk a fee of ten dollars for each complaint to be served. For service by first class mail, the plaintiff shall pay to the clerk a fee of five dollars for each complaint to be served.

Service pursuant to subdivision (d)(1)(D) shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing acceptance by the defendant or a return envelope showing refusal of the registered or certified mail by the defendant. If delivery of the summons and complaint pursuant to subdivision (d)(1)(D) is refused, the clerk, promptly upon receipt of the notice of such refusal, shall mail to the defendant, by first class mail, postage prepaid, a copy of the summons and complaint and a notice that despite such refusal, the case will proceed and that judgment by default will be rendered against the defendant unless the defendant appears to defend the suit. Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the return receipt was signed by or delivery was refused by an unauthorized person. The notice and acknowledgment of receipt of the summons and complaint pursuant to subdivision (d)(1)(E) shall be executed in the manner prescribed on Form 14. Unless good cause is shown for failure to complete and return the notice and acknowledgment of receipt of summons and complaint pursuant to subdivision (d)(1)(E) within twenty (20) days after mailing, the court may order the payment of costs of personal service by the person served. Service pursuant to subdivision (d)(1)(E) shall not be the basis for entry of default or a judgment by default unless the record contains a notice and acknowledgment of receipt of the summons and complaint. If no acknowledgment of service pursuant to subdivision (d)(1)(E) is received by the clerk within twenty (20) days after the date of mailing, service of such summons and complaint shall be made under subdivisions (d)(1)(A), (B), (C), or (D).

Upon an infant or incompetent younger than 14 years of age, by delivering a copy of the summons and complaint to the infant's or incompetent's guardian or conservator resident in the State; or, if there be no such guardian or conservator, then to either the infant's or incompetent's father or mother if they be found. If there is no such guardian or conservator and if the father or mother cannot be found, service of the summons and complaint shall be made upon a guardian ad litem appointed under Rule 17(c). But if any of the persons upon whom service is directed to be made by this paragraph is a plaintiff, then service shall be upon the person who stands first in the order named in this paragraph who is not a plaintiff.

Upon an infant or incompetent 14 years of age or older, by making service as provided in paragraph (2) above, and in addition by making service upon the infant or incompetent as provided in paragraph (1) above.

Upon a person confined in the penitentiary of this or any other state, or of the United States, by delivering a copy of the summons and complaint to that person's committee, guardian, or like fiduciary resident in the State; or, if there be no such committee, guardian, or like fiduciary, or if the committee, guardian, or like fiduciary is a plaintiff, service of process shall be made upon a guardian ad litem appointed under Rule 17(c).

Upon a domestic private corporation, (A) by delivering or mailing in accordance with paragraph (1) above a copy of the summons and complaint to an officer, director, or trustee thereof; or, if no such officer, director, or trustee be found, by delivering a copy thereof to any agent of the corporation including, in the case of a railroad company, a depot or station agent in the actual employment of the company; but excluding, in the case of an insurance company, a local or soliciting agent; or (B) by delivering or mailing in accordance with paragraph (1) above a copy thereof to any agent or attorney in fact authorized by appointment or by statute to receive or accept service in its behalf.

Upon a city, town, or village, by delivering or mailing in accordance with paragraph (1) above a copy of the summons and complaint to its mayor, city manager, recorder, clerk, treasurer, or any member of its council or board of commissioners; (B) Upon a county commission of any county or other tribunal created to transact county business, by delivering or mailing in accordance with paragraph (1) above a copy of the summons and complaint to any commissioner or the clerk thereof or, if they be absent, to the prosecuting attorney of the county; (C) Upon a board of education, by delivering or mailing in accordance with paragraph (1) above a copy of the summons and complaint to the president or any member thereof or, if they be absent, to the prosecuting attorney of the county; (D) Upon any other domestic public corporation, (i) by delivering or mailing in accordance with paragraph (1) above a copy of the summons and complaint to any officer, director, or governor thereof, or (ii) by delivering or mailing in accordance with paragraph (1) above a copy thereof to an agent or attorney in fact authorized by appointment or by statute to receive or accept service in its behalf.

Upon a foreign corporation, including a business trust, which has qualified to do business in the State, by delivering or mailing in accordance with paragraph (1) above a copy of the summons and complaint as provided in Rule 4(d)(5).

Upon a foreign corporation, including a business trust, which has not qualified to do business in the State, (A) by delivering or mailing in accordance with paragraph (1) above a copy of the summons and complaint to any officer, director, trustee, or agent of such corporation; or (B) by delivering or mailing in accordance with paragraph (1) above copies thereof to any agent or attorney in fact authorized by appointment or by statute to receive or accept service in its behalf.

Upon an unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and complaint to any officer, director, or governor thereof, or by delivering or mailing in accordance with paragraph (1) above a copy of the summons and complaint to any agent or attorney in fact authorized by appointment or by statute to receive or accept service in its behalf; or, if no such officer, director, governor, or appointed or statutory agent or attorney in fact be found, then by delivering or mailing in accordance with paragraph (1) above a copy of the summons and complaint to any member of such association and publishing notice of the pendency of such action once a week for two successive weeks in a newspaper of general circulation in the county wherein such action is pending. Proof of publication of such notice is made by filing the publisher's certificate of publication with the court.

If the plaintiff files with the court an affidavit: (A) That the defendant is a foreign corporation or business trust for which no officer, director, trustee, agent, or appointed or statutory agent or attorney in fact is found in the State upon whom service may be had; or (B) That the defendant is a nonresident of the State for whom no agent, or appointed or statutory agent or attorney in fact is found in the State upon whom service may be had; or (C) That the plaintiff has used due diligence to ascertain the residence or

whereabouts of the defendant, without effect; or (D) That process, delivered to the sheriff of the county in which the defendant resides or is, has twice been delivered to such officer and has been returned without being executed; or (E) That there are or may be persons, other than those named in the complaint as plaintiff and defendant, interested in the subject matter of the action, whose names are unknown to the plaintiff and who are made defendants by the general description of unknown defendants; then the clerk shall enter an order of publication against such named and unknown defendants. Every order of publication shall state the title of the action; the object thereof; the name and address of the plaintiff's attorney, if any; that a copy of the complaint may be obtained from the clerk; and that each named and unknown defendant must appear and defend on or before a date set forth in the order, which shall be not fewer than 30 days after the first publication thereof; otherwise, that judgment by default will be rendered against the defendants at any time thereafter. Every such order of publication shall be published once a week for two successive weeks (or for such period as may be prescribed by statute, whichever period is longer) in a newspaper of general circulation in the county wherein such action is pending. Proof of service by publication is made by filing the publisher's certificate of publication with the court.

When plaintiff knows the residence of a defendant upon whom service has been unsuccessfully attempted as described in Rule 4(e)(1)(D), or when plaintiff knows the residence of a nonresident defendant or the principal office of a nonresident defendant foreign corporation or business trust for which no officer, director, trustee, agent, or appointed or statutory agent or attorney in fact is found in the State upon whom service may be had, plaintiff shall obtain constructive service of the summons and complaint upon such defendant by the method set forth in Rule 4(d)(1)(D). The summons in such instance shall notify the defendant that the defendant must appear and defend within thirty days of the date of mailing pursuant to Rule 4(d)(1)(D); otherwise, that judgment by default will be rendered against the defendant at any time thereafter. However, service pursuant to Rule 4(d)(1)(D) shall not be the basis for the entry of a judgment by default unless the record contains a return receipt showing acceptance by the defendant or a return envelope showing refusal of the certified mail by the defendant. If delivery of the summons and complaint sent by certified mail is refused, the clerk, promptly upon notice of such refusal, shall mail to the defendant, first class mail, postage prepaid, a copy of the summons and complaint and a notice that despite such refusal the case will proceed and that judgment by default will be rendered against defendant unless defendant appears to defend the suit. If plaintiff is unable to obtain service of the summons and complaint upon such defendant by use of the method set forth in Rule 4(d)(1)(D), then, upon affidavit to such effect filed with the court, the clerk shall issue an order of publication, and the procedures described in subdivision (e)(1) shall be followed to effectuate constructive service.

Personal service of a copy of the summons and complaint may be made outside of this State on any defendant. If any such defendant be then a resident of this State and if the plaintiff shall during the pendency of the action file with the court an affidavit setting forth facts showing that the defendant is such a resident, such service shall have the same effect as personal service within this State and within the county of the defendant's residence; otherwise, such service shall have the same effect as constructive service. In either case, the summons shall notify the defendant that the defendant must appear and defend within 30 days after service, otherwise judgment by default will be rendered against the defendant at any time thereafter.

The plaintiff may, at any time before judgment, have a copy of the summons and complaint served on a defendant in the manner provided by subdivisions (d) or (f) of this rule, although constructive service under subdivision (e) of this rule has been made. After such service under subdivision (d) of this rule, the action shall proceed as in other cases of personal or substituted service within the State; and after such service under subdivision (f) of this rule, the action shall proceed as in other cases of personal or constructive service.

Summonses, complaints, proofs of service and returns endorsed thereon, all orders and notices served or published, all proofs of service and certificates of publication, and all other papers filed relating to such

process, orders, and notices, are a part of the record of an action for all purposes.

The person serving the process or order or publishing a notice or order shall make proof of service of publication to the court promptly and in any event within the time during which the person served must respond to the process, notice, or order. If service is made by a person other than the sheriff or clerk, that person shall make proof thereof by affidavit. Failure to make proof of service or publication within the time required does not affect the validity of the service of the process, notice, or order.

At any time in its discretion and upon such terms as it deems just, the court may allow any process, notice, or order, or proof of service or publication thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process, notice, or order issued or was entered.

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. W. Va. Rule 4.

The summons and complaint in civil actions shall be served upon the defendant in the same manner as is provided by Rule 4 of the Rules of Civil Procedure for Trial Courts of Record. W. Va. Rule 3.

## **VIII. 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 tortfeasors 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 tortfeasors 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).

#### **X. 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 Fiberglas 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 tortfeasors. 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 tortfeasor 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 (4<sup>th</sup> 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

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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 tortfeasor 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).

## **X. 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.

However, 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.

At times 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** versus 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.<sup>[84]</sup> In some situations, a Plaintiff's failure to read a warning may be a manufacturer's defense in a products liability action.<sup>[85]</sup> 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.<sup>[86]</sup> An injured party has a cause of action against all parties who participated in placing the defective product into the stream of commerce.<sup>[87]</sup> The Plaintiff need not be a purchaser of the product, but can be an intended user of the consumer.<sup>[88]</sup>

#### **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 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 contained adequate warnings or instructions, or c. was designed in a defective manner.

### Defenses

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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 manufacture 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 in an inherent characteristic of the product that consumes the product with the ordinary knowledge 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

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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 premarket 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).

**XI. 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. Quaker 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.

## XII. JOINT & SEVERAL LIABILITY

### A. MARYLAND

Maryland has codified its rules regarding joint tortfeasors in its Courts & Judicial Proceedings Volume, Title 3, Subtitle 14. According to the **Uniform Contribution Among Tortfeasors Act (UCATA)**, a release by an injured person of one tortfeasor does not release additional tortfeasors unless they are released by the injured party. However, any amount paid by a single tortfeasor 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 tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides; but **reduces the claim** against the other tortfeasors 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 tortfeasor does not relieve him from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other tortfeasor 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 tortfeasor, of the injured person's damages are recoverable against all other tortfeasors.

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 tortfeasor for a pro rata release, then the amount of consideration, if greater than the released tortfeasors' pro rata share, will reduce the judgment entered against the remaining tortfeasor 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 tortfeasor 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 tortfeasor 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 tortfeasor 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 tortfeasor 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 tortfeasor.

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

Plaintiff enters in a joint tortfeasor 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 tortfeasor, \$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 represents 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 tortfeasor had no right of contribution from the nonsettling tortfeasor even though he paid in excess of the judgment subsequently obtained against the non-settling tortfeasor.

However, one should not conclude from the mere existence of two or more tortfeasors that they are necessarily deemed to be "joint tortfeasors", a judicially crafted term of art. Generally, two or more tortfeasors are considered joint tortfeasors 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 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 tortfeasor 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 tortfeasors have been held not to have caused the same harm and the latter tortfeasor not necessarily subject to the terms of a general release.

## **B. DISTRICT OF COLUMBIA**

D.C. has not adopted the Uniform Tortfeasor Act. In cases where the Plaintiff has settled the claim prior to trial with 1 or 2 or more joint tortfeasors, 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 tortfeasors) reduction may be ordered.<sup>[89]</sup> 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.

Although strictly not a joint tortfeasor rule, D.C. Rule 68 entitled "**Offer of Judgment**" states that any time, more than 10 days before trial begins, a party defending against a claim may serve upon the complaining party an offer of judgment. If the offer of judgment is not accepted, during the subsequent trial, if the judgment against the defending party is lower than the amount offered to the complaining party, the complaining party is then responsible for the costs incurred by the defending party subsequent to the date of the offer. The purpose of this rule is to promote settlement and avoid continuing litigation costs.

## **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 tortfeasor to enter into a release with the Plaintiff without releasing any other tortfeasor. Under Virginia Code Section 8.01-35.1., a Plaintiff may settle with one joint tortfeasor, without releasing any other joint tortfeasor.

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 tortfeasors from liability for the injury, property damage

or wrongful death unless its terms so provide; but any amount recovered against the other tortfeasors 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 tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

B. A tortfeasor who enters into a release or covenant not to sue with a claimant is not entitled to recover by way of contribution from another tortfeasor 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 tortfeasor 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 tortfeasors 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 tortfeasor is actually liable for the injury, or what share the tortfeasors 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 tortfeasors' 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 tortfeasors is relevant. Blackshear v. Clark, 391 A.2d 747 (Del. Supr. 978). Joint tortfeasors do have the right to recover amongst themselves under the theories of contribution and indemnification.

#### **F. PENNSYLVANIA**

Pennsylvania law holds joint tortfeasors 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 tortfeasors 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 tortfeasor 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.

## XIII. 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.<sup>[90]</sup> Children under the age of five (5) are as a matter of law, incapable of contributory negligence.<sup>[91]</sup> 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)**.<sup>[92]</sup> 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.<sup>[93]</sup>

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.<sup>[94]</sup> 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.<sup>[95]</sup> 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.<sup>[96]</sup>

### C. VIRGINIA

The age majority in Virginia is **eighteen (18)**.<sup>[97]</sup> 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.<sup>[98]</sup> A minor over the age of fourteen (14), the minor can be responsible for negligence.<sup>[99]</sup> 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."<sup>[100]</sup>

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.<sup>[101]</sup> Minors are liable for intentional torts (acts of violence).<sup>[102]</sup> Minors in New Jersey are held to the standard of care applicable to reasonable persons of like age, intelligence and experience under like circumstances.<sup>[103]</sup> Certain activities performed by minors are so hazardous that the courts will hold them to adult standards (driving car or boat).<sup>[104]</sup>

#### **E. DELAWARE**

In Delaware the age of majority is eighteen (18).<sup>[105]</sup> 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.<sup>[106]</sup> 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.<sup>[107]</sup>

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."<sup>[108]</sup> 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.<sup>[109]</sup>

#### **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.<sup>[110]</sup> There is a conclusive presumption that children under seven cannot be contributorily negligent.<sup>[111]</sup> 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.<sup>[112]</sup> 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.<sup>[113]</sup>

#### **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.<sup>[114]</sup> 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.<sup>[115]</sup>

### **XIV. DRAM SHOP**

#### **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,<sup>[116]</sup> 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,<sup>[117]</sup> 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..."[\[118\]](#)

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.[\[119\]](#)

#### **B. DISTRICT OF COLUMBIA**

The District of Columbia does not have a Dram Shop Act per se.[\[120\]](#) However, the District of Columbia does prohibit the sale of alcoholic beverages to minors or already intoxicated persons.[\[121\]](#) 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.[\[122\]](#) 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.[\[123\]](#)

#### **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.[\[124\]](#) In Virginia, there is no liability on the seller of intoxicating liquor for negligence resulting in personal injuries sustained by a third party.[\[125\]](#) 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.[\[126\]](#)

#### **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."[\[127\]](#) 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.[\[128\]](#)

#### **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.[\[129\]](#) The Delaware Court reversed itself holding that an action

based on "Dram Shop" principles should be legislatively created and not created by the judiciary.<sup>[130]</sup> There is a Delaware statute which creates a duty for alcohol licensees and their employees to stop serving patrons who are visibly intoxicated.<sup>[131]</sup> The Court expressly stated in DiOssi that this section does not create a cause of action by a third party against a tavern owner.<sup>[132]</sup>

#### 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.<sup>[133]</sup> Under any condition, the licensee can be held liable to third parties when they sell alcohol to minors.<sup>[134]</sup> A social host may also be liable for furnishing minors with alcohol.<sup>[135]</sup> 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.<sup>[136]</sup>

#### 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.<sup>[137]</sup> 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.<sup>[138]</sup>

### **XV. INDEMNIFICATION**

#### **A. MARYLAND**

It is first important to note that the Uniform Contribution Among Tortfeasors 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.<sup>[139]</sup> 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 tortfeasor. According to Hanscome v. Perry,<sup>[140]</sup> 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.<sup>[141]</sup> 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.<sup>[142]</sup> 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.<sup>[143]</sup> 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.<sup>[144]</sup> 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.<sup>[145]</sup> 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.[\[146\]](#)

#### **\_\_\_\_\_D. NEW JERSEY**

In New Jersey, common law indemnification shifts cost of liability from one who is constructively or vicariously liable to tortfeasor who is primarily liable.[\[147\]](#) The party seeking indemnification must be free from fault.[\[148\]](#)

#### **\_\_\_\_\_E. DELAWARE**

Delaware recognizes a cause of action for equitable indemnification.[\[149\]](#) In order for a party to recover under equitable indemnity that party's negligence must be passive and seek indemnification from the active party.[\[150\]](#)

#### **\_\_\_\_\_F. PENNSYLVANIA**

Indemnity is an equitable remedy founded in the common-law that shifts loss from one defendant to another.[\[151\]](#) In Pennsylvania, an indemnification relationship may be formed in three 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.[\[152\]](#)

#### **\_\_\_\_\_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.[\[153\]](#)

Implied indemnity prevents the party who is primarily liable from being unjustly enriched and allows the party that is without fault restitution.[\[154\]](#) A party can be indemnified only if that party is without fault.[\[155\]](#)

### **XVI. CONTRIBUTION**

#### **\_\_\_\_\_A. MARYLAND**

Under Maryland statutory law, the right of contribution exists among joint tortfeasors. The issue of contribution depends on joint tortfeasors' liability to third parties.[\[156\]](#) 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.[\[157\]](#) 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."[\[158\]](#)

According to § 3-1402 of the Maryland Uniform Contribution Among Tortfeasors 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.[\[159\]](#)

According to § 3-1405 of the Maryland Uniform Contribution Among Tortfeasors 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.[\[160\]](#)

## **B. DISTRICT OF COLUMBIA**

Both contribution and indemnification are available under D.C. law.[\[161\]](#) However, neither contribution nor indemnity can be awarded to a party who is not a joint tortfeasor.[\[162\]](#) In other words, the District of Columbia permits a party to enforce contribution against one who shares common liability to the original Plaintiff.[\[163\]](#) Under the principal of contribution a tortfeasor against whom a judgment is rendered is entitled to recover proportional shares of a judgment from the other joint tortfeasor(s) whose negligence contributed to the injury and who were also liable to the Plaintiff.[\[164\]](#) 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.[\[165\]](#)

## **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.[\[166\]](#)

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.[\[167\]](#)

#### **\_\_\_\_\_D. NEW JERSEY**

By statute in New Jersey, a joint tort-feasor can seek contribution against another joint tort-feasor.[\[168\]](#) 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 Tortfeasors Contribution Law: "Where injury or damage is suffered by any person as a result of the wrongful act, neglect or default of joint tortfeasors, 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 tortfeasors, either in one action or in separate actions, and any one of the joint tortfeasors pays such judgment in whole or in part, he shall be entitled to recover contribution from the other joint tortfeasor or joint tortfeasors 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."[\[169\]](#)

#### **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 tortfeasors.
- (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 Tortfeasors 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.[\[170\]](#)

## **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 contractu." Comparative contribution between joint tortfeasors 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.

## **XVII. WORKER'S COMPENSATION**

### **A. MARYLAND**

The Maryland Worker's Compensation Act in giving an employee the right to compensation for injuries sustained during the course of his employment, regardless of fault and irrespective of negligence of the

employer, bars suit predicated on common law negligence against the employer. Ward v. Aetna Casualty Insurance Company, 260 Md. 651, 273 A. 2d 125 (1971). The exclusivity statute, found at Md. Code. Ann., Labor and Employment, § 9-509, states that recovery under the Worker's Compensation Act is the exclusive right of recovery from the employer and is in place of any cause of action against the employer. Under Md. Code. Ann., Labor and Employment, § 9-901, when a person other than an employer is liable for the injury or death of a covered employee for which compensation is payable under this title, the covered employee may file a worker's compensation claim under the Act or bring an action for damages against the person liable for the injury. If damages are recovered, the employer or insurer and the subsequent injury fund are the first reimbursed for any benefit paid under the worker's compensation act and the balance is paid to the worker or his dependents. Md. Code. Ann., Labor and Employment, § 9-902. If the award in a suit against a third-party is less than the amount recoverable from the employer under the Act, the employee may re-open a worker's compensation claim for the difference. Md. Code. Ann., Labor and Employment, § 9-903.

A co-employee is regarded as a "person other than the employer" and therefore may be sued in tort. However, under Md. Code Ann. Labor & Empl § 9-508(a), a "statutory employer" is not a third party and is immune from tort liability.

## B. DISTRICT OF COLUMBIA

A. **Exclusiveness:** Employer liability under the Act is exclusive and is in place of all other forms of liability. In other words, compensation to which an employee is entitled under the Worker's Compensation Act is the employee's exclusive remedy against the employer referable to the claimants' injury or death.<sup>[171]</sup> If the employer fails to secure payment of the compensation due; however, the employee may claim compensation under the Act and secure payment from the Special Fund,<sup>[172]</sup> or maintain a civil action at law for damages.<sup>[173]</sup> If the employee chooses the latter, the employer may not plead the defenses of negligence of a fellow employee, assumption the risk, or contributory negligence.<sup>[174]</sup>

B. **Third Party Liability:** When an employee is injured as a result of the negligence of a 3rd party, the employee may claim compensation from his or her employer, file a civil suit against the 3rd party responsible, or do both. If an employee intends to file suit against the 3rd party, he must do so within six (6) months of the date he receives an award of workers' compensation.<sup>[175]</sup> An award is defined as including only a formal order or decision, not a recommendation. An employee of a subcontractor may bring a third party action against a negligent general contractor where all compensation benefits have been received from the subcontractor.<sup>[176]</sup> An employee of a subcontractor may not bring a 3rd party action if the general contractor provides compensation coverage for all subcontractors.

C. **Statutory Employer:** In Meiggs v. The Associated Builders, Inc., 545 A.2d 631, 634 (D.C. App.)(1988), the D.C. Court of Appeals held that a general contractor is only deemed the constructive employer of a sub-contractor's employee when the general contractor actually secures a defaulting contractor's compensation payments to an injured employee. In Meiggs, the subcontractor did secure payments to its employee. The Court ruled that since the general contractor did not secure payment of compensation to Meiggs under its contingent Sec. 32-1503 duty, double liability was not possible, and no reason existed for engaging in the legal fiction for constructively deeming the general contractor, Meiggs' employer.

## C. VIRGINIA

Virginia's Workers' Compensation Act is located at Va. Code Ann. §65.2-100 *et seq.* Under the Workers' Compensation Act, an employer-employee relationship

exists only if control over the employee exists which includes the power to control not

only the result accomplished but also the means and methods by which the result is to be accomplished. Richmond Newsps. v. Gill, 224 Va. 92, 294 S.E.2d 840 (1982). Employment that is not permanent or periodically regular, but occasional or by chance and is not in the usual course of employer's trade or business is casual employment and the Act does not apply. Va. Code Ann. §65.2-101; Board of Supervisors v. Boaz, 176 Va. 126, 10 S.E.2d 498 (1940). The Act is the exclusive remedy for an employee against his employer. Va. Code Ann. § 65.2-307. Brown v. Reed, 209 Va. 562, 165 S.E.2d 394 (1969). An independent contractor, may rely upon exclusive nature of Workers' Compensation Act to defeat claim by employee of another contractor on same project. Evans v. Hook, 239 Va. 127, 387 S.E.2d 777 (1990).

Psychological injuries that are consequence of other compensable in-jury

are compensable. Bassett Burkeville Veneer v. Slaughter, 21 Va. App. 575, 466

S.E.2d 127 (1996) (major depression related to cartilage tear in chest covered by Act).

Purely psychological injury must be causally related to physical injury or causally re-lated to obvious sudden shock or fright arising in the course of employment to be compensable. Chesterfield County v. Dunn, 9 Va. App. 475, 389 S.E.2d 180 (1990) (post traumatic stress disorder in firefighter related to treating accident victims not covered by Act). An independent contractor performing services for a "statutory

employer" cannot be "other party" liable in a common law action, and contractor's employees are therefore barred from suing their employer to the same extent that they are

barred from suing the owner who is their statutory employer; likewise, the employee of the owner cannot sue independent contractor for injuries caused by contractor's negligence, if it is performing the normal work of owner. Va. Code Ann. §65.2-302; Farish v. Courion Indus., Inc., 754 F.2d 1111 (4<sup>th</sup> Cir. 1985). The language of Va. Code Ann. §§65.2-309 and 310 when considered together permits an employer to assert its statutory lien against any recovery obtained in an action brought against a third party liable for the employee's injury or death. Liberty Mut. Ins. Co. v. Fisher, 263 Va. 78, 557 S.E.2d 209 (2002).

#### D. NEW JERSEY

New Jersey has a worker's compensation statute found at N.J.S.A. 34:15-1 et seq. The New Jersey statute provides that when there is an employment relationship and the employee is injured while performing his employment, his exclusive remedy for damages is through worker's compensation. N.J.S.A. 34:15-8. The position of exclusivity has been reaffirmed many times by the New Jersey courts. See Fregara v. Jet Aviation Business Jets, 764 F. Supp. 940 (D.N.J. 1991); Jones v. New Jersey Mfrs. Cas. Ins. Co., 71 N.J. Super. 512, 177 A.2d 336 aff'd 77 N.J. Super. 147, 185 A.2d 678 aff'd 39 N.J. 555, 189 A.2d 711; Hall v. Hercules Powder Co., 20 N.J. Misc. 168, 26 A. 2d 164 (1942). A general contractor shall be liable to subcontractors and their employees who are injured due to defective conditions of ways, works, machines or in plants which was not discovered by the employer due to his negligence. N.J.S.A. 34:15-3.N.J. Stat. Ann.

Section 34:15-10 holds that children under eighteen years of age can file a negligence action against employer and co-worker. N.J. Stat. Ann. §34:15-10 also identifies two categories of workers who can file a tort claim, those under 18 without proper employment certificates or children employed in violation of child labor laws. Workers' Compensation is the exclusive remedy as to employer and employee, and a civil action is barred, except if the employee proves an intentional wrong. The determination of an independent contractor is based on two tests: the right to control and nature of work. Lesniewski v. W.B. Furze, 308 N.J. Super. 270 (App. Div. 1998); Re/Max of NJ v. Wausau, 162 N.J. 282 (2000). A claim

must arise out of and be in course of employment, which means that a risk of a particular accident is reasonably incidental to the employment. Coleman v. Cycle Transformer, 105 N.J. 285 (1986).

Mental stress claims are compensable if work conditions were objectively stressful,

peculiar to work place and a justified medical opinion states it was the cause of disability. Goyden v. Judiciary of Superior Court, 256 N.J. Super. 438 (App. Div. 1991), *aff'd*, 128 N.J. 54 (1992). An employer is reimbursed for benefits where the employee recovers against a third party for the same injuries and such a lien is applicable to a settlement or a judgment. N.J. Stat. Ann. §34:15-40.

## E. DELAWARE

Delaware Workers' Compensation statute is set forth at 19 Del. Code §2301 *et seq.* In the State of Delaware, Workmen's Compensation serves two (2) primary purposes: Providing a scheme for assured compensation to employees for work related injuries without regard to fault and to relieve employers and employees of the burden of civil litigation. Champlain Cable Corp. v. Employers Mut. Liab. Ins. Co., 479 A.2d 835 (Del. Supr. 1984); New Castle Court v. Goodman, 461 A. 2d 1012 (Del. Supr 1983). The latter purpose is expounded further by 19 Del. Code § 2304, titled "Compensation as exclusive remedy." § 2304 expressly states that the only form of recovery by an employee injured while in the course of employment is worker's compensation, "regardless of the question of negligence and to the exclusion of all other rights and remedies." Third parties are not bound by this Act. Ianire v. University of Del., 255 A.2d 687 (Del. Super 1969). If an injury following the primary compensable injury is caused by claimant's own negligence, then the claim of causation is broken and the subsequent injury not compensable. Amoco Chem. Corp. v. Hill, Del. Super., 318 A.2d 614 (1974).

A showing of unusual exertion is not a prerequisite of compensability even where the injury was at least partly due to the aggravation of a preexisting physical weakness which related back to time prior to employment. Duvall v. Connell Roofing, Del.Supr., 564 A.2d 1132 (1989). Psychological disorders resulting from industrial accidents are compensable provided there is sufficient causal connection between the accident and the disorder. Light v. MAD, Del. Super., C.A. No. 84A -FE-8, Gebelein, J. (Aug. 7, 1985). Total disability may be found in spite of sporadic earnings, if the claimant's physical condition disqualifies him from regular employment commensurate with his qualifications and training. Bigelow v. Sears, Del. Supr., 260 A.2d 906 (1969). The exclusive remedy of employee is compensation. 19 Del. Code §2304. No employee actions based on any degree of negligence, whether slight or gross, including intentional tort may be brought under common law. Kofron v. Amoco Chemical Corp., Del. Supr., 441 A.2d 226 (1982). Defamation is not a personal injury within the exclusivity provisions of §2304, and neither are libel, malicious prosecution, false imprisonment, and false arrest. Battista v. Chrysler Corp., Del. Super., 454 A.2d 286 (1982).

## F. PENNSYLVANIA

On June 24, 1996, Governor Tom Ridge signed into law extensive amendments of the Pennsylvania Workers' Compensation Act, also known as Act 57. 77 P.S.1 *et seq.*

§306 (A.2) (1)- (8) provides that nearly all claimants will be limited to receiving temporary total disability benefits for a period of one hundred-four (104) weeks. The Insurer must request a medical examination within sixty (60) days upon the expiration of the one hundred four (104) weeks to determine the degree of impairment due to claimant's compensable injury. The examination must be by a Board Certified Pennsylvania licensed physician, chosen by agreement of the parties or as designated by the Department. A claimants "earning power" shall be determined by the work the claimant is capable of performing and shall be based upon expert opinion evidence which includes job listings with agencies of the Department, private job placement agencies and advertisements in the usual employment area. Partial disability shall consider the employee's productive skill, education, age and work experience, and

whether or not the claimant can engage in any other kind of substantial, gainful employment which exists in the usual employment area in which the employee lives within the

Commonwealth. Sections 316 and 449 now provide for an extensive settlement procedure permitting a complete compromise and release of all claims, including medical associated with the work injury. Claimants will have to acknowledge, in writing, their complete understanding of the agreed resolution. Mental disability caused by claimant's subjective reaction to normal working conditions is not compensable. Work related stress must be caused by actual objective working conditions. Martin v. WCAB, 523 Pa. 509, 568 A.2d 159 (1990). An employer, even though negligent, is entitled to assert right to subrogation out of any third party recovery. Heckendorn v. Consolidated Rail Corp., 502 Pa. 101, 465 A.2d 609 (1983). There is no intentional tort exception to the employer's immunity under the Workers' Compensation Act. Poyser v. Newman, 514 Pa. 32, 522 A.2d 548 (1987). A claimant may seek damages against the employer on a cause of action for fraudulent misrepresentation when the employer's conduct is alleged to aggravate the work injury. Martin v. Lancaster Battery Co., 530 Pa. 11, 606 A.2d 444 (1992). Where an employee is intentionally injured by a co-worker for personal reasons, the employee can forego the workers' compensation system and sue his co-worker and his employer for injuries. Hammerstein v. Linsay, 440 Pa. Super. 350, 655 A.2d 597 (1995). Third-party defendants may not successfully join employer for contribution or indemnity unless the parties had entered into written contract calling for such obligation on the part of employer. Tsarnas v. Jones & Laughlin Steel Corp., 488 Pa. 513, 412 A.2d 1094 (1980).

#### **G. WEST VIRGINIA**

Worker's Compensation is the exclusive remedy for work related injuries, and the provisions of the act may not be waived. W. Va. Code §23-2-7. The act takes from an employee his common law right to sue his employer. Belcher v. Richardson, 317 F. Supp 1294. There is a two year statute of limitations on filing claims, and a five (5) year time limit for reopening dormant cases. W. Va. Code 23-2 et seq. West Virginia Code §23-4-10 (e) allows the dependent of a deceased employee to receive a lump sum equal to 104 weeks of benefits if the following three conditions have been met: (1)

the dependent was receiving permanent total disability workers' compensation benefits at his death; (2) death was from cause other than disability injury; and (3) the decedent died leaving dependent as defined in W. Va. Code §23-4-10 (d). Vandergriff v. State Workers' Comp. Comm'r, 183 W. Va. 148, 394 S.E.2d 747 (1990). In order for claim to be held compensable under the Workers' Compensation Act, three elements must coexist: (1) personal injury; (2) received in course of employment; and (3)

resulting from that employment. Jordan v. State Workers' Comp. Comm'r, 156 W. Va.

159, 191 S.E.2d 497 (1972). An employee defendant is on a business trip, so as to receive immunity under the Workers' Compensation laws from suit by a co-employee, only if the employment created the necessity for trip and if, upon cancellation for business reason, the trip would not have gone forward. Jenrett v. Smith, 173 W. Va. 325, 315 S.E.2d 583 (1983). Where permanent partial disability combines with factors, such as age, education and intelligence, to render a claimant unemployable, he or she is entitled to a permanent total disability award; however, second injury life award may not be based solely on the fact that claimant's advanced age precludes employment. Hunter v. State Workers' Comp. Comm'r and Nat'l Coal Mining, 182 W. Va. 133, 386 S.E.2d 500 (1989). Under W. Va. Code §23-4-2, as amended effective May 7, 1983, an employer is subject to common law tort action for damages for wrongful death where employer acts with deliberate intention. The statute sets forth two separate and distinct methods of proving deliberate intention: (1) the plaintiff demonstrates that the employer acted with consciously, subjectively and deliberately formed intention to produce specific result of injury or death to the employee or (2) plaintiff offers evidence to prove five specific requirements provided in §23-4-2 (c) (2) (ii). Mayles v. Shoney's, Inc., 185 W. Va. 88, 405 S.E.2d 15 (1990). In the event an

employer defaults on any payment required by Workers' Compensation Act, then payment, interest and penalty thereon shall be a lien enforceable against all property of employer, subject to certain exceptions. W. Va. Code §23-2-5a (1995).

## **XVIII. INSURANCE CONTRACT INTERPRETATION**

### **\_\_\_A. MARYLAND**

Maryland does not follow the rule that an insurance policy is to be construed most strongly against the insurer. Bausch & Lomb, Inc. v. Utica Mut. Ins. Co., 330 Md. 758, 625 A.2d 1021 (1993).

In Cole v. State Farm Mutual Insurance Company, 359 Md. 298, 753 A.2d 533 (2000). The Court of Appeals explained:

Our primary task in interpreting an insurance policy, as with any contract, is to apply the terms of the contract itself. We look first to the contract language employed by the parties to determine the scope and limitations of the insurance coverage. When interpreting the words of a contract, we seek to give the words their customary, ordinary and accepted meaning. In addition, we examine the character of the conduct, its purpose and the facts and circumstances of the parties at the time of execution . . . . If the meaning of the terms of the insurance policy are plain and unambiguous, we will determine the meaning of the terms of the contract as a matter of law.

Id. 359 Md. at 305-06, 753 A.2d at 537. (Internal quotations and citations omitted).

In Maryland, it is well settled that the construction of a written contract is ordinarily considered to be an issue of law for resolution by the trial judge. University Nat'l Bank v. Wolfe, 279 Md. 512, 369 A.2d 570 (1977); Allen Engineering Corp. v. Lattimore, 235 Md. 182, 201 A.2d 13(1964). Only when there is a *bona fide* ambiguity in the contract's language or legitimate doubt as to its application under the circumstances is the contract submitted to the trier of the fact for interpretation. See Board of Trustees v. Sherman, 280 Md. 373, 373 A.2d 626 (1977); 4 Williston on Contracts § 616 (1961). Ambiguity arises if, to a reasonably prudent person, the language used is susceptible of more than one meaning and not when one of the parties disagrees as to the meaning of the subject language. Board of Educ. of Charles County v. Plymouth Rubber Co., 82 Md. App. 9, 26- 27, 569 A.2d 1288 (1990); Truck Ins. Exch. v. Marks Rentals, Inc., 288 Md. 428, 418 A.2d 1187 (1980). In determining the meaning of a term used in an insurance policy, or in any contract, when the term is not itself defined by the document, a Maryland court is to give the term in question its "customary, ordinary and accepted meaning." Moreover, under Maryland law, all of the provisions of an insurance policy must be read in context and in conjunction with one another. See Pacific Indem. Co. v. Interstate Fire & Cas. Co., 302 Md. 383, 388, 488 A.2d 486, 488 (1985).

### **\_\_\_B. DISTRICT OF COLUMBIA**

In D.C. when interpreting an insurance policy, the Court must first determine whether the language is plain and unambiguous and therefore controlling as a matter of law, or whether words are ambiguous and in need of interpretation through rules of construction, and objective evidence of the parties intent. Keene Corp. v. Ins Co. of North America, 597 F. Supp 946, vacated 631 F. Supp. 34 (D.C. 1984).

In construing ambiguous language of insurance contract, a court must consider objective evidence of insured's intent; the most important evidence is the interpretation that parties themselves give a contract, as manifested by their conduct subsequent to formation. Reasonableness of different interpretations of an insurance policy is determined by intent of insured, rather than the insurer. Id.

Under District of Columbia law, terms of insurance policy, so long as they are clear and unambiguous, constitute an express contract between parties and must be enforced, unless they violate a statute or public policy. Chiriboga v. International Bank for Reconstruction and Development, 616 F. Supp. 963 (D.D.C. 1985).

Clear and unambiguous language should be construed according to its everyday meaning. Ambiguous policy language should be construed in favor of insured wherever reasonable. Continental Cas. Co. v. Cole, 809 F.2d 891, 258 U.S. App. D.C. 50 (1987).

### **C. VIRGINIA**

In Virginia, when construing an insurance policy, the court will read it as a single document, and while liberally construing it in favor of the insured, the court will not write a new contract of insurance. Quesenberry v. Nichols, 208 Va. 667, 159 S.E.2d 636 (1968).

### **D. NEW JERSEY**

New Jersey's appellate courts have ruled that clear basic terms and particular provisions of an insurance contract may not be disregarded at will and a new contract judicially made for the parties. Linden Motor Freight v. Travelers, 40 N.J. 511, 193 A.2d 217 (1963). Fundamental principle of insurance law is to fulfill objectively reasonable expectations of parties to insurance contract, however, even unambiguous insurance contracts may be interpreted contrary to plain meaning so long as to fulfill the reasonable expectations of the parties. Werner v. First State, 112 N.J. 30, 548 A.2d 188 (1988); MacBean v. St. Paul, 169 N.J. Super. 502, 405 A.2d 405 (App. Div. 1978); Doto v. Russo, 140 N.J. 544, 659 A.2d 1371 (1995). Insurance contract not ambiguous simply because it is complex. Transamerica Ins. v. Keown, 451 F. Supp. 397 (D.N.J. 1978). When policy is clear and unambiguous, the court must enforce contract as written, not try to make a better contract for the insured. Vantage v. American Env. Tech., 251 N.J. Super. 516, 598 A.2d 948 (1991); State v. Signo Trading Int'l, 130 N.J. 51, 63, 612 A.2d 932 (1992); Erdo v. Torcon, 275 N.J. Super. 117, 645 A.2d 806 (App. Div. 1994). Ambiguity in insurance policy is resolved against insurer when insured is unsophisticated party, Sparks v. St. Paul, 100 N.J. 325, 495 A.2d 406 (1985); Werner v. First State, 112 N.J. 30, 548 A.2d 188 (1988), but not where clear that parties negotiated and jointly drafted. First Nat'l Bank v. Motor Club, 310 N.J. Super. 11, 708 A.2d 69 (1997); and interpretation should be sensible and conform with expressed intent of parties. Insurers seeking to limit scope of liability and exclude specific risks and hazards must use precise, express language. Fidelity & Cas. v. Carll & Ramagosa, 243 F. Supp. 481 (D.N.J. 1965), appeal dismissed, 365 F.2d 303 (3rd Cir. 1966). If controlling language of policy will support two meanings, one favorable to insurer, other to insured, interpretation favoring coverage should be applied. Butler v. Bonner & Barnwell, 56 N.J. 567, 267 A.2d 527 (1970); Watson v. Agway, 291 N.J. Super. 417, 677 A.2d 788 (App. Div. 1996), cert. denied, 146 N.J. 500, 683 A.2d 202; Sears Roebuck v. Allstate, 340 N.J. Super 223, 774 A.2d 526 (App. Div. 2001).

### **E. DELAWARE**

In Delaware, ambiguous terms in an insurance policy -- which are considered to be contracts of adhesion -- are construed against the insurer. However, Delaware's courts have ruled that plain language is not made ambiguous by relationships of adhesion, and will be enforced without distortion, if otherwise proper. Furthermore, that mere disagreement on the construction of language will not create ambiguity. City Investing v. Continental Cas., 624 A.2d 1191 (Del. Supr. 1993).

### **F. PENNSYLVANIA**

Under Pennsylvania law, a policy provision will be ambiguous -- and construed most favorably for the insured -- only if reasonably intelligent persons, when considering in context the entire policy, would

honestly disagree as to the provision's meaning. Musisko v. Equitable Life Assurance Society, 344 Pa. Super. 101, 496 A.2d 28 (1985); Adelman v. State Farm Mut. Auto. Ins., 255 Pa. Super. 116, 386 A.2d 535 (1978). Furthermore, a Pennsylvania court should read the policy to avoid ambiguities if possible and should not convolute the plain meaning of the writing merely to find any ambiguity. Lower Paxton Twp. v. United States Fidelity, 383 Pa. Super. 558, 557 A.2d

393 (1989). Where language of policy is clear and unambiguous, it must be given plain and ordinary meaning in the terms used. Guardian Life v. Zerance, 505 Pa. 345, 479 A.2d 949 (1984); Luko v. Lloyd's, 393 Pa. Super. 165, 573 A.2d 1139 (1990), appeal denied, 526 Pa. 636, 584 A.2d 319 (1990); Pfeiffer v. Grocer's Mut Ins., 251 Pa. Super. 1, 379 A.2d 118 (1977). Court should read policy provisions to avoid ambiguities, if possible, and not torture the language to create them. St. Paul Fire and Marine Ins. v. U.S. Fire Ins., 655 F.2d 521 (3rd Cir. 1981). If unambiguous, the court may interpret the policy as a matter of law. Patterson v. Reliance Ins., 332 Pa. Super. 592, 481 A.2d 947 (1984). Reasonable expectations of the parties must be considered in analyzing an insurance policy which is ambiguous as applied to the factual situation presented. J.H. France Refractories Co. v. Allstate Ins. Co., 396 Pa. Super. 185, 578 A.2d 468, appeal granted, 527 Pa. 634, 592 A.2d 1302 (1991).

### G. WEST VIRGINIA

West Virginia court are also mindful that "Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended." Tackett v. American Motorists Ins. Co., 584 S.E.2d 158, 164-65 (2003 ("Language in an insurance policy should be given its plain, ordinary meaning.")).

However, if the language in an insurance policy is ambiguous, then the doctrine of reasonable expectations applies, which is defined as:

With respect to insurance contracts, the doctrine of reasonable expectations is that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.

National Mutual Ins. Co. v. McMahon & Sons, Inc., 356 S.E.2d 488, 494 (W. Va. 1987). See also Silk, 192 W.Va. at 526 n.4, 453 S.E.2d at 360 n.4 (The doctrine of reasonable expectations only applies in West Virginia when the policy language is ambiguous); State Bancorp, Inc. v. United States Fidelity and Guaranty Ins. Co., 483 S.E.2d 228, 233 (W. Va. 1997) (holding that insurer did not have duty to defend insured in action for breach of contract, outrage, civil conspiracy because insured did not allege "occurrence" as defined in the policy); Bruceton Bank v. United States Fid. & Guar. Ins. Co., 486 S.E.2d 19 (W. Va. 1997).

Lastly, "[w]here the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated." McMahon & Sons, Inc., 356 S.E.2d at 496.

The West Virginia Supreme Court of Appeals has adopted the doctrine of reasonable expectations. Under the doctrine as adopted in West Virginia, "[a]n insurance contract should be given a construction which a reasonable person standing in the shoes of the insured would expect the language to mean." Soliva v. Shand, Morahan & Co., 345 S.E.2d 33, 35-36 (W. Va. 1986); see Perkins v. Doe, 350 S.E.2d 711 (W. Va. 1986); Hensley v. Erie Insurance Co., 283 S.E.2d 227 (W. Va. 1981); Thompson v. State Automobile Mutual Insurance Co., 11 S.E.2d 849, 850 (W. Va. 1940). Under the rule as articulated by the McMahon Court, the doctrine of reasonable expectations is, in the context of the interpretation of insurance contracts, that "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of

the policy provisions would have negated those expectations." McMahon & Sons, 356 S.E.2d at 495, quoting Keeton, Insurance Law Rights at Variance with Policy Provisions, 83 Harv.L.Rev. 961 (1970). Of particular significance is footnote 6 of the McMahon opinion:

"The doctrine is also recognized by other authorities. "[C]ourts in construing and applying a standardized contract seek to effectuate the reasonable expectations of the average member of the public who accepts it." Restatement (Second) of Contracts § 237 comment e. "[T]he construction adopted is that which a reasonable person in the position of the insured would have understood the language used to mean." 2 *Couch on Insurance 2d* § 15.16, p. 174 (1984).

In applying the doctrine of reasonable expectations to standardized insurance contracts, we must reject that portion of the reasoning in Soliva v. Shand, Morahan & Co., 345 S.E.2d 33 (W. Va. 1986)] which is based on the general rule that a party to a contract has a duty to read the instrument. While this rule may equitably be enforced with regard to a contract negotiated at arm's length between parties of reasonably equivalent bargaining power and signed by each, it would be unfair to apply the general rule in the case of the modern insurance contract. These policies are contracts of adhesion, offered on a take-it-or-leave-it basis, often sight unseen until the premium is paid and accepted, full of complicated, almost mystical, language. "It is generally recognized the insured will not read the detailed, cross-referenced, standardized, mass-produced insurance form, nor understand it if he does." . . . The majority rule is that the insured is not presumed to know the contents of an adhesion-type insurance policy delivered to him, . . . and we hereby adopt the majority view.

Id. at 495 n.6.

In West Virginia, the doctrine of reasonable expectations is limited to those instances in which the policy language is ambiguous. Id. at 496 n.7 ("The requirement of ambiguity is based on the fact that the doctrine of reasonable expectations is essentially a rule of construction, and unambiguous contracts do not require construction by the courts.") See, e.g., Syl. Pt. 1, Columbia Gas Transmission Corp. v. E.I. duPont de Nemours and Co., 217 S.E.2d 919 (W. Va. 1975); Syl. Pt. 1, Christopher v. United States Life Insurance Co., 116 S.E.2d 864 (W. Va. 1960). Soliva, 345 S.E.2d at 36; contra Estrin, 612 S.W.2d 413; Corgatelli v. Globe Life & Accident Insurance Co., 533 P.2d 737 (Idaho 1975). The Court noted that "[w]here ambiguous policy provisions would largely nullify the purpose of indemnifying the insured, the application of those provisions will be severely restricted." McMahon & Sons, 356 S.E.2d at 496. The Court further expressed that an exclusion in a general business liability policy should not be so construed as to "strip the insured of protection against risks incurred in the normal operation of his business," especially when the insurer was aware of the nature of the insured's normal operations when the policy was sold. Id. (citations omitted).

In further articulating the rationale underpinning the reasonable expectation rule of construction, the McMahon Court explained:

Where an insured has a reasonable expectation of coverage under a policy, he should not be subject to technical encumbrances or to hidden pitfalls. An insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear, placing them in such a fashion as to make obvious their relationship to other policy terms, and must bring such provisions to the attention of the insured. Of course, the insurer may avoid liability by proving that the insured read and understood the language in question, or that the insured indicated his understanding through words or conduct.

Id. (citations omitted).

## **XIX. WRONGFUL DEATH**

## \_\_\_\_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 if:

The non-economic damages cap of § 11-108 of the Court's and Judicial Proceedings article of the code

applies to wrongful death cases.[\[177\]](#)

<u>Cause of Action Arising On or After:</u>	<u>Non-Economic Cap on Damages</u>
July 1, 1986	\$350,000
October 1, 1994	\$500,000
October 1, 1995	\$515,000
October 1, 1996	\$530,000
October 1, 1997	\$545,000
October 1, 1998	\$560,000
October 1, 1999	\$575,000
October 1, 2000	\$590,000
October 1, 2001	\$605,000
October 1, 2002	\$620,000
October 1, 2003	\$635,000
October 1, 2004	\$650,000
October 1, 2005	\$665,000

In an action instituted by the personal representative against a tortfeasor 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.[\[178\]](#)

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#### **B. DISTRICT OF COLUMBIA**

A wrongful death action shall be brought by the personal representative of the Decedent.[\[179\]](#) A wrongful death action shall be brought within one (1) year after the death of the injured person.[\[180\]](#)

Damages under the Wrongful Death Act go solely to the benefit of the spouse and next of kin.[\[181\]](#) 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.<sup>[182]</sup> The second element compensates for the value of services lost to the family as a result of the decedent's death.<sup>[183]</sup> The reasonable expenses of the last illness and burial are also included in the damage calculation.<sup>[184]</sup>

A survival action is brought by the legal representative of the decedent.<sup>[185]</sup> 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.<sup>[186]</sup> The Plaintiff may also recover for conscious pain and suffering suffered by the decedent prior to death.<sup>[187]</sup>

### **C. VIRGINIA**

Virginia allows a personal representative to bring an action for a claim for wrongful death.<sup>[188]</sup> 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.<sup>[189]</sup> 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.<sup>[190]</sup> 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.<sup>[191]</sup> And such recovery cannot include mental anguish, pain or suffering of the deceased.<sup>[192]</sup>

### **\_\_\_D. NEW JERSEY**

New Jersey has a statutory cause of action for wrongful death.<sup>[193]</sup> 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.<sup>[194]</sup> Any action brought under the New Jersey Act must be commenced within 2 years after the death of the decedent.<sup>[195]</sup> The New Jersey wrongful death statute is remedial in nature rather than penal, therefore punitive damages are not, awarded.<sup>[196]</sup>

### **\_\_\_E. DELAWARE**

Delaware has codified its wrongful death action.<sup>[197]</sup> The beneficiaries of such an action shall be a spouse, parent and children.<sup>[198]</sup> 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.<sup>[199]</sup> The statute of limitations for a wrongful death action is two (2) years.<sup>[200]</sup> 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.<sup>[201]</sup>

### **\_\_\_F. PENNSYLVANIA**

In Pennsylvania a wrongful death action must be commenced within one (1) year after death.<sup>[202]</sup> A

wrongful death action may only be brought by the personal representative of the decedent until six months after the death of the decedent.[\[203\]](#) 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.[\[204\]](#) 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.[\[205\]](#) 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.[\[206\]](#)

## **\_\_\_ G. WEST VIRGINIA**

In West Virginia a personal representative can bring a wrongful death action on behalf of the deceased.[\[207\]](#) There is a two year statute of limitations on wrongful death actions.[\[208\]](#) 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.[\[209\]](#) A jury or court can consider mental anguish, and solace, loss of services and income, costs of final illness, reasonable funeral expenses suffered "dependents."[\[210\]](#), *i.e.*, surviving spouse, children, stepchildren, brothers, sisters, parents and any persons who were financially dependent on the deceased.

## **XX. SUMMARY JUDGMENTS**

### **\_\_\_ A. MARYLAND**

The Maryland Rules provide that "[a]ny party may make a motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law.[\[211\]](#) The motion shall be supported by affidavit if it is (1) filed before the day on which the adverse party's initial pleading or motion is filed or (2) based on facts not contained in the record.[\[212\]](#) Summary judgment is generally not appropriate for issues concerning knowledge, motive, or intent because "the facts concerning . . . knowledge and conduct, and the circumstances in which they existed, as well as any determinations of how they relate to the legal standard . . . are best left for resolution by the trier of fact at trial."[\[213\]](#) When a court reviews an order for summary judgment, it "construe[s] the facts properly before the court as well as reasonable inferences that may be drawn from them in the light most favorable to the non-moving party."[\[214\]](#)

### **\_\_\_ B. DISTRICT OF COLUMBIA**

Subject to the Motions deadline set forth in Rule 12-I (n), a Motion for Summary Judgment may be filed by a party seeking to recover on a claim at any time after twenty (20) days have expired from the commencement of the action or after service of a motion for Summary Judgment by an adverse party.[\[215\]](#) A defending party may move for Summary Judgment at any time prior to the Motions deadlines.[\[216\]](#) It is well settled that Summary Judgment is proper where the moving party establishes that no genuine issue as to any material fact exists and that he is entitled to judgment as a matter of law.[\[217\]](#)

### **\_\_\_ C. VIRGINIA**

Any party may make a motion for summary judgment.[\[218\]](#) Summary judgment is entered only on questions of law - if there are any material questions of fact in dispute, then summary judgment should not be granted and the lawsuit should proceed to trial.[\[219\]](#) The burden of establishing the non-existence

of a genuine issue of fact is on the party moving for summary judgment, and the court must view the facts and inferences in a light most favorable to the nonmoving party.[\[220\]](#) The statutes and rules of court are explicit in forbidding summary judgment to be based on discovery depositions upon oral examination unless all parties agree that they may be so used.[\[221\]](#) Summary judgment cannot be based on affidavits in Virginia practice.[\[222\]](#) Summary judgment normally results in a final disposition of the case, but Rule 3:18 also allows the judge to enter an interlocutory summary judgment as to undisputed facts of the case.[\[223\]](#)

#### **\_\_\_\_\_ D. NEW JERSEY**

A party may file a Motion for Summary Judgment at any time after 20 days from original service or after served with a Motion for Summary Judgment by an adverse party.[\[224\]](#) Summary Judgment can be based on pleadings, depositions, answers to interrogatories, admissions on file and affidavits.[\[225\]](#) Summary Judgments are granted if the Court finds that there is no material fact challenged and that the moving party is entitled to judgment as a matter of law.[\[226\]](#) The court may award attorneys' fees at the end of trial to the prevailing party if the court finds that the summary judgment motion was denied due to a factual contention raised in bad faith by the opposing party.[\[227\]](#)

#### **\_\_\_\_\_ E. DELAWARE**

Delaware permits Motions for Summary Judgment in both the Court of Chancery and Superior Court.[\[228\]](#) Although the rules use some different language, they both adhere to the same fundamental principles. A party may move for summary judgment twenty (20) days from the commencement of the action or after service of a motion for summary judgment by the adverse party.[\[229\]](#) A motion for summary judgment can be supported with pleadings, depositions, answers to interrogatories, admissions on file, and affidavits.[\[230\]](#) "The facts must be viewed in the manner most favorable to the nonmoving party with all factual inferences taken against the moving party and in favor of the nonmoving party and the moving party has the burden of demonstrating that there is no material question of fact."[\[231\]](#) A party opposing a motion for summary judgment may not merely deny the factual allegations but must support the denial with items mentioned above.[\[232\]](#)

#### **\_\_\_\_\_ F. PENNSYLVANIA**

A motion for summary judgment is governed by Pa. Stat. R. Civ. P. Rule 1035.2. The motion may be filed after pleadings have been closed but before such time that may cause a delay to the trial.[\[233\]](#) A motion for summary judgment can be supported by pleadings, depositions, answers to interrogatories, admissions and supporting affidavits.[\[234\]](#) The Court will grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.[\[235\]](#) When considering the motion for summary judgment, a Court examines the record in the light most favorable to the non-moving party.[\[236\]](#)

#### **\_\_\_\_\_ G. WEST VIRGINIA**

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may file a motion for summary judgment after 30 days from the commencement of the action.[\[237\]](#) A party against whom such claim is asserted may move at any time for a summary judgment.[\[238\]](#) Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[\[239\]](#) When a motion for summary judgment is made and supported, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response must set forth specific facts showing that there is a genuine issue for trial.[\[240\]](#) A court may order a party that employed bad faith affidavits to pay the other party reasonable expenses including attorney's fees.[\[241\]](#)

## **XXI. BAD FAITH**

### **\_\_\_\_\_A. MARYLAND**

In Maryland, an insurer can be sued by its insured in tort for the wrongful failure to settle a claim.<sup>[242]</sup> 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.<sup>[243]</sup> 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.<sup>[244]</sup> The insurer's exclusive control over the litigation creates an actual or potential conflict of interest between insurer and insured.<sup>[245]</sup> 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.<sup>[246]</sup> 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.<sup>[247]</sup> 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.<sup>[248]</sup> "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."<sup>[249]</sup>

### **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.<sup>[250]</sup> 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.<sup>[251]</sup>

### **\_\_\_\_\_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.<sup>[252]</sup> This requires that the loss be covered.<sup>[253]</sup> 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.<sup>[254]</sup> 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.<sup>[255]</sup>

### **\_\_\_\_\_D. NEW JERSEY**

New Jersey recognizes bad faith causes of actions based on both contract and tort theories.<sup>[256]</sup> Under New Jersey law, the insurer's obligation with respect to settlement is to exercise good faith in dealing with offers of settlement.<sup>[257]</sup> 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.<sup>[258]</sup> This duty is increased when the insurer reserves full control, under the policy, to handle the claim.<sup>[259]</sup>

### **\_\_\_\_\_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."[\[260\]](#) 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.[\[261\]](#) 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.[\[262\]](#)

#### **\_\_\_\_\_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.[\[263\]](#) 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.[\[264\]](#) 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.[\[265\]](#) 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.[\[266\]](#)

#### **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.[\[267\]](#) 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.[\[268\]](#)

### **XXII. LANDLORD LIABILITY FOR CRIMINAL ACTS OF THIRD PARTIES**

#### **\_\_\_\_\_A. MARYLAND**

The leading case regarding a landlord's 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.*

### **XXIII. AN INSURER'S DUTY TO DEFEND**

Most liability policies provide that the insurer has the obligation and right to defend its insured against a claim for which coverage could be invoked under the policy. If the policy does not contain a duty to defend provision, then the insurer does not have such a duty. If the policy provides that the insurer has the right -- but not the obligation -- to defend, there is no duty to defend. Generally, for policies containing a duty to defend provision, the analysis of whether a defense is in fact owed is triggered once the insurer is placed on notice of a claim that may potentially be covered under the policy at issue.

#### **A. MARYLAND**

In Maryland, the insurer's duty to defend is determined by the allegations brought against the insured and any extrinsic facts known to the insurer which may raise the potentiality of coverage under the policy. *See Aetna v. Cochran*, 337 Md. 98, 651 A.2d 859 (1995). If the allegations of the complaint state any cause of action potentially within the coverage afforded by the insurance policy, or if any extrinsic facts made known to the insurer could potentially bring the claim within the coverage afforded by the insurance contract, the insurer must defend the claim. *See id.*

#### **B. DISTRICT OF COLUMBIA**

D.C. is a "four corners" jurisdiction. That is, the duty to defend is generally determined by "the terms of the insurance policy and the allegations in the complaint against the insured." *Stevens v. United General Title Ins. Co.*, 801 A.2d 61, 67 (D.C. 2002) citing *Wester Exterminating Co. v. Hartford Accident & Indem. Co.*, 479 A.2d 872, 874 (D.C. 1984); *S. Freedman & Sons, Inc. v. Hartford Fire Ins. Co.*, 396 A.2d 195, 197 (D.C. 1978) (duty to defend depends only upon the facts as alleged to be and insurer's "obligations should be measured by comparing the policy it issued with the complaint filed"). Any doubt as to whether there is a duty to defend must be resolved in favor of the insured. *Stevens*, at 67 referencing *Washington v. State Farm Fire & Cas. Co.*, 629 A.2d 24, 26 (D.C. 1993).

Furthermore, in D.C., it should be noted that the duty to disclaim coverage or to reserve rights is a part of the duty to defend, and if the insurer has a duty to defend the insured, the insurer will be estopped from

denying coverage in a later proceeding if the insurer has conducted the defend of the insured with knowledge of any defense to liability. Potomac Residence Club v. Pooya, 666 A.2d 1193 (D.C. 1995).

### C. VIRGINIA

In Virginia, when pleadings allege facts, some of which would, if proven, fall with the risk covered by the policy, the insurer is obligated to defend its insured. Where allegations leave it in doubt whether the case alleged is covered by the policy, the insurer's failure to defend is at its own risk. Parker v. Hartford Fire Ins. Co., 222 Va. 33, 278 S.E.2d 803 (1981); see also United States Fire Ins. v. Aspen Bldg. Corp., 235 Va. 263, 367 S.E.2d 478 (1988); Reisen v. Aetna Life & Cas. Co., 225 Va. 327, 302, S.E.2d 529 (1983).

### D. NEW JERSEY

In New Jersey, where allegations of complaint potentially fall within terms of liability insurance policy, insurer has a duty to defend its insured. Voorhees v. Preferred Mut., 128 N.J. 165, 607 A.2d 1255 (1992); SL Industries, Inc. v. American Motorists, 128 N.J.

188, 607 A.2d 1266 (1992). However, where facts known to insurer at time claim is tendered establish that claim is not covered under policy, insurer has no duty to defend notwithstanding allegations in underlying complaint. Hartford Acc. & Indem. v. Aetna, 98 N.J. 18, 483 A.2d 402 (1984); Burd v. Sussex Mut., 56 N.J. 383, 267 A.2d 7 (1970). Duty to defend is co-extensive with duty to indemnify. If no duty to indemnify, no duty to defend. The Trustees of Princeton Univ. v. Aetna, 293 N.J. Super. 296, 680 A.2d 783 (App. Div. 1996); Aetna v. Ply Gem Industries, 343 N.J. Super. 430, 778 A.2d 1132 (App. Div. 2001). If facts that govern whether or not there is coverage will not be resolved in underlying liability case, insurer may decline to defend and defense obligation reverts to a duty to reimburse for defense expenses if coverage later established. The Trustees of Princeton Univ. v. Aetna, *supra*. Where initial facts indicate there is no coverage for underlying claim, but later discovery reveals that claim may be one covered by policy, duty to defend arises at that time and insurance company is liable only for portion of defense costs arising after being informed of facts triggering duty to defend. SL Industries, *supra*.

### E. DELAWARE

In Delaware, the allegations of the complaint determine whether an action against the insured states a claim covered by the policy. Continental Casualty Co. v. Alexis I. duPont Sch. Dist., 317 A.2d 101, 103 (Del. 1974). When coverage cannot be determined from pleadings in underlying action, duty to defend depends on actual facts. National Union Fire Ins. Co. v. Rhone-Poulenc Basic Chems. Co., 616 A.2d 1192 (De. 1992).

### F. PENNSYLVANIA

In Pennsylvania, the determination of a duty to defend is based solely on the allegations of the complaint against the insured. Gene's v. Nationwide, 519 Pa. 306, 548 A.2d 246 (1988); Cadwallader v. New Amsterdam Cas. Co., 396 Pa. 582, 152 A.2d 484 (1959); Pacific Indem. v. Linn, 766 F.2d 754 (3rd Cir. 1985). Obligation to defend is present whenever complaint of injured party may potentially come within coverage. Id.; Gedeon v. State Farm, 410 Pa. 55, 188 A.2d 320 (1963); Dennis v. New Amsterdam Cas., 216 Pa. Super. 320, 264 A.2d 436 (1970). Duty to defend continues until claim can be confined to recovery that policy does not cover. Germantown Ins. Co. v. Martin, 407 Pa. Super. 326 595 A.2d 1172 (1991).

### G. WEST VIRGINIA

Generally, West Virginia courts look solely to the allegations in the complaint and the policy itself to determine an insurer's duty to defend.<sup>[269]</sup> However, though West Virginia courts generally do not look

outside the "four corners" of the allegations contained in the complaint and the policy in dispute -- the insurer may in fact have an obligation to do so.

The Supreme Court of Appeals of West Virginia has expanded on the liberality of the principle delineated above. It has held that, "[w]hen a complaint is filed against an insured, an insurer must look beyond the bare allegations contained in the third party's pleadings and conduct a reasonable inquiry into the facts in order to ascertain whether the claims asserted may come within the scope of the coverage that the insurer is obligated to provide."[\[270\]](#) Accordingly:

[I]f the insurer is aware or reasonably ought to be aware of facts that conflict with the allegations set forth in the complaint filed against its insured, or if, in light of what the insurer knows or reasonably should know, the allegations are incomplete, or if the allegations are ambiguous on their face or in light of what the insurer knows or reasonably should know, the insurer has a further obligation to investigate whether its insured is potentially liable before denying that it has any duty to defend.[\[271\]](#)

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[\[1\]](#)Md. Stat. Ann., CJP § 5-101.

[\[2\]](#)Md. Stat. Ann., CJP § 5-102.

[\[3\]](#)Md. Stat. Ann., CJP § 5-103.

[\[4\]](#)Md. Stat. Ann., CJP § 5-105.

[\[5\]](#)Md. Stat. Ann., CJP § 5-109.

[\[6\]](#)Id.

[\[7\]](#)Md. Stat. Ann., Comm. Law § 2-725.

[\[8\]](#)D.C. Code §12-301.

[\[9\]](#)D.C. Code § 12-301 (4).

[\[10\]](#)Burda v. National Association Postal Sup., 592 F. Supp. 273 (D.C. 1984).

[\[11\]](#)D.C. Code §12-301(1).

[\[12\]](#)D.C. Code §12-301(2).

[\[13\]](#)D.C. Code §12-301(5).

[\[14\]](#)D.C. Code §12-301(6).

[\[15\]](#)D.C. Code §12-301(7).

[\[16\]](#)D.C. Code §12-301 (8).

[\[17\]](#)D.C. Code §12-301 (10).

[\[18\]](#)Va. Code Ann. § 8.01-243(b).

[\[19\]](#)Id.

[20] Va. Code Ann. § 8.01-246(2).

[21] Va. Code Ann. § 8.2-725.

[22] Va. Code Ann. § 8.01-246(4).

[23] Va. Code Ann. § 8.01-243(a).

[24] N.J.S.A. 2A:14-3.

[25] N.J.S.A. 2A:14-2.

[26] N.J.S.A. 2A:31-3.

[27] N.J.S.A. 2A:14-1.

[28] N.J.S.A. 2A:14-1.1.

[29] N.J.S.A. 2A:14-7.

[30] 10 Del.C. § 8124.

[31] 10 Del.C. § 8107.

[32] 18 Del.C. § 6856.

[33] 10 Del.C. § 8106.

[34] 6 Del.C. § 2-725.

[35] 10 Del.C. § 8109.

[36] 42 Pa.C.S.A. § 5522.

[37] 42 Pa.C.S.A. § 5523.

[38] 42 Pa.C.S.A. § 5524.

[39] 13 Pa.C.S.A. § 2725; 42 Pa.C.S.A. § 5525.

[40] 42 Pa.C.S.A. § 5526.

[41] 42 Pa.C.S.A. § 5527.

[42] 42 Pa.C.S.A. § 5529.

[43] 42 Pa.C.S.A. § 5530.

[44] W. Va. Code, § 55-2-12.

[45] W. Va. Code, § 55-7B-4.

[46] W. Va. Code, § 46-2-725.

[47] W. Va. Code, § 55-2-1.

[48] W. Va. Code, § 55-2-6a.

[49] Harig v. Johns-Manville Products Corp., 284 Md. 70, 394 A.2d 299 (1978).

[50]The Court stated in Poffenberger v. Risser, 290 Md. 631, 431 A.2d 677 (1981), that the cause of action accrues when the claimant in fact knew or reasonably should have known of the wrong. Actual knowledge, either expressed or implied is sufficient to start the running of the limitations. However, constructive knowledge is not. As for contracts, according to §2-725 of the Commercial Law Article of the Maryland Annotated Code, a cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.

[51]National R. R. Passenger Corp. v. Notter, 677 F. Supp. 1 (D.D.C. 1987).

[52]D.C. Code §12-301(7) - includes claims for Breach of Warranty as well.

[53]D.C. Code §12-301(8); Pouty v. National R.R., 572 F. Supp. 200 (D.D.C. 1983) .

[54]D.C. Code §12-301. Byers v. Burleson, 713 F.2d 856 (D.C. Cir. 1983).

[55]Va. Code Ann. § 8.01-229.

[56]Burd v. N.J. Tel. Co., 149 N.J. Super. 20, 372 A.2d 1355, *aff'd* 76 N.J. 284, 386 A.2d 1310 (1978).

[57]Ayers v. Jackson Tp., 189 N.J. Super. 561, 461 A.2d 184 (1983).

[58]Morgan v. Napolitano, 71 N.J. 133, 363 A.2d 346 (1976).

[59]Howmet Corp. v. City of Wilmington, 285 A.2d 423 (Del. Super. Ct. 1971).

[60]Issacson, Stopler & Co. v. Artisan's Sav. Bank, 330 A.2d 130 (Del. Super. Ct. 1974).

[61]Begar v. Dixon, 547 A.2d 620 (Del. Super. Ct. 1988).

[62]Schwab v. Cornell, 306 Pa. 536, 160 A. 449 (1932).

[63]Levenson v. Souser, Pa. Super. 132, 557 A.2d 1081 (1989).

[64]Daniels v. Beryllium, 211 F. Supp. 452, 455-56 (E.D. Pa. 1962); Mitchell v. Hendricks, 431 F. Supp. 1295, 1300 (1977).

[65]Slack v. Kanawah Co., 423 S.E. 2d 547 (1992).

[66]D.C. Superior Court Rule 41(a) states an action may be dismissed by the Plaintiff without Order of Court (1) by filing notice of dismissal at any time before service by the adverse party of an answer or of a Motion for Summary Judgment, whichever first occurs, or (2) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a Plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim. Rule 41(b) goes on to state that dismissal may be obtained by Order of Court. If, however, a counterclaim has been plead by the Defendant prior to the service upon the Defendant of the Plaintiff's Motion to Dismiss, the action shall not be dismissed against the Defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the Order, a dismissal under this paragraph is without prejudice.

[67]Va. Code Ann. § 8.01-380.

[68]Va. Code Ann. § 8.01-229(E)(3).

[69]N.J. Rule 4:37-1.

[70] Id.

[71] N.J. Rule 4:37-4.

[72] Delaware Superior Court Rules of Civil Procedure, Rule 41.

[73] Id.

[74] Id.

[75] Pa. R.C.P. No. 229(a).

[76] Pa. R.C.P. No. 231(a).

[77] Pa. R.C.P. No. 230(a).

[78] Pa. R.C.P. No. 230(b).

[79] WV R.C.P. 41(a)(1).

[80] WV R.C.P. 41(b).

[81] WV R.C.P. 41(a)(1).

[82] Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co., 597 F. Supp. 1515 (D.C. 1985).

[83] D.C. Code §35-2101, 35-2113, 35-2110 (b,f), 36-301 to 36-344. McCrae v. Marques, 688 F. Supp. 653 (D.C. 1987).

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

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

[86] Id.

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

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

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

[90] 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).

[91] Miller v. Graff, 196 Md. 609, 78 A.2d 220 (1951).

[92] D.C. Code §46-101 (2001).

[93] U.S. v. Benson, 185 F.2d 995, 88 U.S. App. D.C. 45 (C.A. D.C. 1951).

[94] Cleveland Park Club v. Perry, 165 A.2d 485 (D.C. MunApp. 1960).

[95] Id.

[96] Id.

[97] Va. Code Ann. § 1-13.42.

[98] Virginia Electric and Power Co. v. Dungee, 258 Va. 235, 247, 520 S.E.2d 164, 171 (1999).

[99]Carson v. LeBlanc, 245 Va. 135, 140, 427 S.E.2d 189, 192 (1993).

[100]Dungee, 258 Va. at 247, 520 S.E.2d at 171.

[101]N.J. Stat. Ann. 9:17B-4.

[102]Guzy v. Gandel, 95 N.J. Super 34, 229 A.2d 809 (1967).

[103]Goss v. Allen, 134 N.J. Super 99, 338 A.2d 820, reversed, 170 N.J. 442, 360 A.2d 388 (1975).

[104]Id.

[105]Del. Code Ann. tit. 1., § 701.

[106]Del. Code Ann. tit. 10., § 3922.

[107]Del. Code Ann. tit. 21, § 6106.

[108]Moffitt v. Carroll, 640 A.2d 169, 174 (Del. 1999).

[109]Id.

[110]Kuhns v. Brugger, 390 Pa. 331, 135 A.2d 395 (1957).

[111]Dynes v. Bromley, 208 Pa. 633, 57 A. 1123 (1904).

[112]Kelly v. Pittsburgh Birmingham Traction Co., 204 Pa. 623, 54 A. 482 (1903).

[113]Berman by Berman v. Phil. Bd. of Ed., 310 Pa. Super 153, 456 A.2d 545 (1983).

[114]Pino v. Szuch, 185 W. Va. 476, 478, 408 S.E.2d 55, 57 (1991).

[115]Id. at 479, 408 S.E.2d at 58.

[116]197 Md. 249, 254, 78 A.2d 754 (1951).

[117]292 Md. 174, 438 A.2d 494 (1981),

[118]Id. at 184, 438 A.2d 499.

[119]Apper v. East Gate Associates, 28 Md. App. 581, 347 A.2d 389 (1975).

[120]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).

[121]D.C. Code §25-781.

[122]Id.

[123]Cartwright v. Hyatt Corp., 460 F. Supp 80, 81-82 (D.C. 1978).

[124]Va. Code Ann. § 4.1-304.

[125]Williamson v. Old Brogue, Inc., 232 Va. 350, 350 S.E.2d 621 (1986).

[126] Webb v. Blackies House of Beef, Inc., 811 F.2d 840 (4th Cir. 1987).

[127] N.J. Stat. Ann. 2A:22A-4 (West 2000).

[128] N.J.S.A. 2A:22A-6.

[129] Taylor v. Ruiz, 394 A.2d 765 (Del. Super. 1978).

[130] DiOssi v. Maroney, 548 A.2d 1361 (Del. Super. Ct. 1988).

[131] Del. Code Ann. tit. 4, § 706.

[132] 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.

[133] Pa. Stat. Ann. tit. 47, § 4-497 (West 1997).

[134] Mathews v. Korieczu, 515 Pa. 106, 527 A.2d 508 (1987).

[135] Congini by Congini v. Protersville Value Co., 504 Pa. 157, 470 A.2d 515 (1983).

[136] Jefferies v. Conn., 371 Pa. Super 12, 537 A.2d 355 (1988).

[137] 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).

[138] W.Va. Code § 60-8-20(a).

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

[140] 75 Md. App. 605, 542 A.2d 541 (1988).

[141] Myco, Inc. v. Super Concrete Co., Inc., 565 A.2d 293 (D.C. 1929).

[142] Id.

[143] Moses-Ecco v. Roscoe-Ajak, 320 F.2d 685, 115 U.S. App. D.C. 366 (1936).

[144] 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.

[145] Carr v. Home Insurance Co., 250 Va. 427, 463 S.E.2d 457 (1955).

[146] 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.

[147] Harley Davidson Motor Co. v. Advance Die Casting, Inc., 150 N.J. 489, 696 A.2d 666 (1997).

[148] Kimball Int'l, Inc. v. Northfield Metal Products, 334 N.J. Super. 596, 615 n.8, 760 A.2d 794, 804 n.8 (2000).

[149] New Zealand Kiwifruit Marketing Board v. City of Wilmington, 825 F. Supp. 1180, 1191 (D. Del. 1993).

[150] Ianime v. University of Delaware, 255 A.2d 687 (Del. Super. 1969), aff'd 269 A.2d 52 (Del. 1970).

[151]Willet v. Pennsylvania Medical Catastrophe Loss Fund, 549 Pa. 613, 622, 702 A.2d 850, 854 (1997).

[152]Daily Express, Inc. v. Northern Neck Transfer Corp., 490 F. Supp. 1304 (M.D. Pa. 1980).

[153]Harvest Capital v. West Virginia Department of Energy, 211 W. Va. 34, 37, 560 S.E.2d 509, 512 (2002).

[154]Id.

[155]Sydenstricker v. Unipunch Products, Inc., 169 W. Va. 440, 447, 288 S.E.2d 511, 516 (1982).

[156]State of Md. for Use of Gliedman v. Capital Airlines, Inc., 267 F. Supp. 298, 305 (D.Md. 1967).

[157]Hollingsworth & Vose Co. v. M.P. Conner, 136 Md. App. 91, 138-39 (2000).

[158]Id.

[159]Md. Code, Cts & Jud Pro § 3-1402.

[160]Md. Code, Cts & Jud Pro § 3-1405.

[161]Grogan v. Gen Maintenance Service Co., 763 F.2d 444, 246 U.S. App. D.C. 154 (C.A. D.C. 1985).

[162]Rose v. Hakim, 335 F. Supp 1221, 1233 (D.C. 1971).

[163]Emmert v. U.S., 300 F. Supp 45 (D.C. 1969).

[164]Dawson v. Contractors Transport Corp., 467 F. 2d 727, 729, 151 U.S. App. D.C. 401, 403 (C.A. D.C. 1972).

[165]District of Columbia v. Washington Hospital Center, 722 A.2d 332 (D.C. 1998).

[166]Va. Code Ann. § 8.01-34.

[167]Va. Code Ann. § 8.01-35.1.

[168]N.J.S.A. 2A:53A-2.

[169]N.J.S.A. 2A:53A-3.

[170]42 Pa. C.S.A. § 7102.

[171]D.C. Code § 32-1504.

[172]D.C. Code § 32-1519, 32-1540.

[173]Id.

[174]Id.

[175]D.C. Code § 32-1535.

[176]DiNicola v. George Hyman Construction Co., 407 A.2d 670 (D.C. 1979).

[177]Potomac Electric Power Company v. Smith, 79 Md. App. 591, 558 A.2d 768 (1989).

[178]Md. Est. & Trusts § 7-401(y)(2).

[179]D.C. Code § 16-2702.

[180]Id.

[181]D.C. Code §16-2701.

[182]Doe v. Binker, 492 A.2d 857, 863 (D.C. 1985).

[183]Id.

[184]D.C. Code §16-2701.

[185]D.C. Code §12-101.

[186]Hughes v. Pender, 391 A. 2d 259, 261 (D.C. 1978).

[187]Doe v. Binker, 492 A. 2d 857, 860 (D.C. 1985).

[188]Va. Code Ann. § 8.01-50.

[189]Va. Code Ann. § 8.01-53.

[190]Va. Code Ann. § 8.01-52.

[191]Va. Code Ann. § 8.01-56.

[192]Seymour v. Richardson, 75 S.E.2d 77, 79 (Va. 1953).

[193]N.J. Stat. Ann. 2A:31-1 *et seq.*

[194]N.J. Stat. Ann. 2A:31-4.

[195]N.J. Stat. Ann. 2A:31-3.

[196]Kern v. Kogan, A.2d 186, 191 (N.J. Super. Ct. Law Div. 1967).

[197]See Del. Code Ann. tit. 10, § 3721 *et seq.*

[198]Del. Code Ann. tit. 10, § 3724(a).

[199]Del. Code Ann. tit. 10, § 3724(b).

[200]Del. Code Ann. tit. 10, § 8107.

[201]Del. Code Ann. tit. 10, § 3724(d)(1)-(5).

[202]42 Pa. Cons. Stat. § 5524.

[203]Pa. R. Civ. P. Rule 2202(a).

[204]Pa. R. Civ. P. Rule 2202(b). See also 42 Pa. Cons. Stat. § 8301.

[205]42 Pa. Con. Stat. § 8301(b).

[206]42 Pa. Con. Stat. § 8301(c).

[207]W. Va. Code § 55-7-6(a).

[208]W. Va. Code § 55-7-6(d).

[209]W. Va. Code § 55-7-6(b).

[210]W. Va. Code § 55-7-6(c).

[211]Md. Ct. Order 03-02, Md. R. Civ. P. Rule 2-501(a).

[212]Id.

[213]Hemmings v. Pelham Wood Limited Liability Limited Partnership, 826 A.2d 443, 451 (Md. 2003) citing Federal Sav. & Loan Ins. Corp. v. Williams, 599 F. Supp. 1184, 1213 (D. Md. 1984).

[214]Hemmings, 826 A.2d at 450 citing Todd v. MTA, 816 A.2d 930, 933 (Md. 2003).

[215]Super. Ct. R. 56 (a).

[216]Id., Rule 56 (b).

[217]Nader v. Detoledano, 408 A. 2d 31, 42 (D.C. 1979); Kurth v. Dobricky, 487 A.2d 220 (D.C. 1985).

[218]Va. Sup. Ct. Rule 3:18.

[219]See W. Hamilton Bryson, Bryson on Virginia Civil Procedure, p. 268 (3d ed. 1997) citing Emerson v. Decker Realty Corp., 348 S.E.2d 239 (Va. 1986); Elliot & Assoc. v. Spotsylvania T.V., Inc., 12 Va. Cir. 81 (1987).

[220]See W. Hamilton Bryson, Bryson on Virginia Civil Procedure, p. 268 citing Realstar Realtors, L.L.C. v. Glenn, 56 Va. Cir. 179 (2001); Lindsay v. Yi, 45 Va. Cir. 467 (1998).

[221]Va. Sup. Ct. Rule 3:18. See also W. Hamilton Bryson, Bryson on Virginia Civil Procedure, p. 268-69 citing Johnson v. Norfolk Portsmouth Belt Line R.R., 53 Va. Cir. 151 (2000).

[222]See W. Hamilton Bryson, Bryson on Virginia Civil Procedure, p. 269 citing Gochenour v. Beasley, 47 Va. Cir. 218, 230 (1998).

[223]See W. Hamilton Bryson, Bryson on Virginia Civil Procedure, p. 268 citing Campbell v. Lanier, 12 Va. Cir. 85 (1987).

[224]N.J. Super. Ct. Rule 4:46-1.

[225]N.J. Super. Ct. Rule 4:46-2(c).

[226]N.J. Super. Ct. Rule 4:46-2(c).

[227]N.J. Super. Ct. Rule 4:46-6.

[228]See De. Ch. Ct. Rule 56(a); De. Super. Ct. Rule 56(a).

[229]Id.

[230]See De. Ch. Ct. Rule 56(c); De. Super. Ct. Rule 56(c).

[231]Tarzer v. International Ser. Indus. Inc., 402 A.2d 382, 385 (1979).

[232]Id.

[233]Pa. Stat. R. Civ. P. Rule 1035.2.

[234]Pa. Stat. R. Civ. P. Rule 1035.2; Pa. Stat. R. Civ. P. Rule 1035.2.

[235]Id. See also Rossi v. Penn St. Univ., 489 A.2d 828, 831 (Pa. Super. Ct. 1985).

[236][Richard Mall Corp. v. Kasco Const.](#), 486 A.2d 978, 981 (Pa. Super. Ct. 1984).

[237]W.V. R. Civ. P. Rule 56(a).

[238]W.V. R. Civ. P. Rule 56(b).

[239]W.V. R. Civ. P. Rule 56(c).

[240]W.V. R. Civ. P. Rule 56(e).

[241]W.V. R. Civ. P. Rule 56(g).

[242][Kremen v. Maryland Automobile Ins. Fund](#), 770 A.2d 170, 176 (Md. 2001).

[243][State Farm Mut. Auto. Ins. Co. v. White](#), 236 A.2d 269, 273 (Md. 1967).

[244][Id.](#) at 271.

[245][Id.](#)

[246][Id.](#) at 273-74.

[247][Kremen](#), 770 A.2d at 177 [citing](#) [Medical Mut. Liab. Ins. Soc'y of Maryland v. Evans](#), 622 A.2d 103, 114 (Md. 1993).

[248][Johnson v. Federal Kemper Ins. Co.](#), 536 A.2d 1211, 1212 [cert. denied](#), 313 Md. 8, 542 A.2d 844 (Md. App. 1988).

[249][Dann v. State Farm Mut. Automobile Ins. Co.](#), 632, A.2d 241, 245 (Md. App. 1994).

[250][Transportation Revenue Management v. First NH Investment Services Corp.](#), 886 F. Supp. 884, 892 (D.C. D.C. 1995).

[251][Bailey v. Greenberg](#), 516 A. 2d 934 (D.C. App. 1986).

[252][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).

[253][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).

[254][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).

[255][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).

[256][Picket v. Lloyd's](#), 621 A.2d 445, 451 (N.J. 1993).

[257][Id.](#) at 450.

[258][Kaudern v. Allstate Ins. Co.](#), 277 F. Supp. 83, 87 (D. N.J.1967).

[259][Royal Farms Resort, Inc. v. Investors Ins. Co. of America](#), 323 A.2d 495, 504 (N.J. 1974).

[260][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).

[261][Stilwell](#), 145 A.2d at 397.

[262][Corrado Bros. v. Twin City Fire Ins. Co.](#), 562 A.2d 1188, 1191 (Del. Super. 1989).

[263][Walasavage v. Marinelli](#), 483 A.2d 509, 517 (Pa. Super. 1984).

[264][U.S. Fire Ins. Co. v. Royal Ins. Co.](#), 759 F.2d 306, 308-09 (3d Cir. 1985) (applying Pennsylvania law).

[265][Puritan Ins. Co. v. Canadian Universal Ins. Co.](#), 775 F.2d 76, 80-81 (3d Cir. 1985) (applying Pennsylvania law).

[266][Id.](#)

[267][Daniels v. Hardemann Mut. Ins. Co.](#), 422 F.2d 87, 89 (W. Va. 1970).

[268][Shamblin v. Nationwide](#), 396 S.E.2d 766, 772-73 (W. Va. 1990).

[269][State Bancorp, Inc. v. United States Fidelity and Guaranty Ins. Co.](#), 483 S.E.2d 228, 233 (W. Va. 1997); [Butts v. Royal Vendors, Inc.](#), 504 S.E.2d 911 (W. Va. 1998) (comparing allegations in complaint with liability policy to determine insurer had a duty to defend defamation claim but not breach of fiduciary duty claim); [Silk v. Flat Top Construction, Inc.](#), 453 S.E.2d 356 (W. Va. 1994) (finding that insurer did not have a duty to defend suit because contract exclusion was unambiguous); [Tackett v. American Motorists Ins. Co.](#), 584 S.E.2d 158 (W. Va. 2003) (finding that allegations in a sexual misconduct lawsuit did not give rise to coverage afforded by the bodily injury portion of employer's CGL policy, but that the allegations did fall within the policy's personal injury coverage and therefore insurer had a duty to defend the employee).

[270][Farmers & Mechanics Mut. Fire Ins. Co. of West Virginia v. Hutzler](#), 447 S.E.2d 22, 25 (W. Va. 1994) (holding that the insurer had a duty to research the law pertaining to the distribution of alcoholic beverages before relying on an exception in its policy to deny coverage to its insureds - if insurer had done so it would have found that the insureds who owned and leased the premises, could not have violated a statute that was meant to apply only to sellers of alcohol).

[271]16 [Williston on Contracts](#) § 49:103, n.15 (4th ed. 2003) citing [Hutzler](#), [supra](#). But see [State Bancorp, Inc.](#), 483 S.E.2d at 239 n. 12 (finding that the reasonable inquiry required by [Hutzler](#) would not have effected the court's holding on whether the insurers had a duty to defend as the parties had not pointed to the existence of any facts that could have been discovered by the insurers);

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