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Wright, Constable & Skeen, LLP Gives Back

Saturday, April 26th, Wright, Constable & Skeen, LLP attorneys traded in their brief cases for paint brushes and hand tools to pitch in and help Rebuilding Together Baltimore make needed repairs to Ethel Gaither's home in the Penn Lucy neighborhood of Baltimore City.



The team from Wright, Constable & Skeen, LLP
Back row (left to right): David Skeen, Howard Stevens, Louis Kozlakowski
Middle row: Robert Hesselbacher, Meighan Griffin Burton, Marie Nathan
Front row: Ann Hesselbacher, Ms. Ethel Gaither, Sarah Mendes

Ethel Gaither is a retired grandmother in Penn Lucy. She is raising three grandchildren that she assumed custody of due to their mother's inability to care for them. She takes great pride in her home but has limited means to make repairs.

The WCS team painted, hung doors, repaired cellars steps and performed other miscellaneous repairs. WCS was part of a larger effort to help Ethel Gaither maintain the home she is providing for her family. Since she struggles with arthritis, other volunteers made changes to the home so Gaither could live on the first floor. In addition to converting a family room into a bedroom, a powder room was converted into a full bath. Instead of having to go up and down steep steps into the basement, the washing machine was moved into the kitchen.

Rebuilding Together Baltimore is a nonprofit, nonsectarian volunteer organization dedicated to helping low-income homeowners through home renovation and repair. This year the target neighborhoods were Penn Lucy in Baltimore City and Turner Station in Baltimore County.

Baltimore City was selected as one of five winning cities whose volunteer projects will be televised later this year for HGTV's Change the World - Start at Home community revitalization and environmental awareness campaign. Ethel Gaither's home was selected as one of Rebuilding

Together's volunteer projects for HGTV's Change the World-Start at Home campaign.

The Change the World - Start at Home campaign is collaboration between HGTV and its partners, Rebuilding Together, National Trust for Historic Preservation and the Natural Resources Defense Council. Rebuilding Together completed three revitalization projects in the inner-city Baltimore neighborhood of Penn Lucy and Waverly.

HGTV film crews, along with Taniya Nayak of "Designed to Sell" were on hand Monday, April 28th to film portions of the revitalization projects. Portions of the projects will air in future HGTV promos and public service announcements. Taniya Nayak helped put in a new front door for Eithel Gaither. If you watch closely, you might see a quick glimpse of Louis Kozlakowski who served as the house captain in charge of all of the renovations to Gaither's home. Lou also serves as counsel to the Board for Rebuilding Together. More information about Rebuilding Together and HGTV's "Change the World - Start at Home" program may be viewed at www.rebuildingtogetherbaltimore.org

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When Your Insurance Company Won't Pay: A New Remedy for Insurers Behaving Badly

By Meighan Griffin Burton, Esq.



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The average consumer carries multiple types of insurance protection, including life, health, disability, auto, and homeowner's insurance. Because of the unfair bargaining power and ultimate control an insurer has over whether and how it pays claims made under its policies, many years ago Maryland enacted an Unfair Trade Practices Act (Title 27 of the Maryland Insurance Code), ("the Act") to protect consumers. Under the Act insurers operating in Maryland are prohibited from engaging in certain "unfair practices," which include, among others: (1) misrepresentation of facts or policy provisions relevant to the claim at issue; (2) refusal to pay a claim for an arbitrary or capricious reason; (3) settlement of a claim based on an application that is altered without notice to or consent of the insured; (4) failure to include with any claim paid to an insured a statement of coverage under which the payment is being made; (5) failure to settle a claim when liability is reasonably clear; and (6) failure to act in good faith in settling a first-party claim under a policy of property and casualty insurance. Maryland Insurance Code §27-303.

The last provision, designating a failure to act in good faith in settling a "first party" claim as an unfair practice, is a new addition to the Act, which amendment became effective on October 1, 2007. The amendment did not alter the right of an insured to sue its liability insurer in tort for a "third party bad faith claim." *Allstate Ins. Co. v. Campbell*, 334 Md. 381, 396, 639 A.2d 652, 659 (Md. 1994). In the context of automobile insurance, a third party bad faith claim would arise in the following scenario:

- (1) You are involved in an accident,
- (2) The other party involved suffers injury or property damage,
- (3) You are at fault,
- (4) The injured party files a claim against you,
- (5) Your insurer wrongfully refuses to

- settle the claim against you, and
- (6) The ultimate lawsuit results in a judgment in excess of your policy limits, subjecting you to personal liability for the amount of the judgment above the policy limits.

Before October 1, 2007, an insured could not bring a "first party" claim in tort against its own insurer for the insurer's wrongful failure to pay or settle the insured's own claim. An insured could only proceed against his or her insurer for breach of the insurance contract. See, e.g., *Snyder v. Chester County Mutual Ins. Co.*, 264 F. Supp.2d 332, 340 (D. Md. 2003), citing *Mesmer v. M.A.I.F.*, 353 Md. 241, 258-59, 725 A.2d 1053 (1999); *Jones v. Hyatt Ins. Agency, Inc.*, 356 Md. 639, 741 A.2d 1099 (Md. 1999); *Yuen v. American Republic*, 786 F. Supp. 531, 533 (D. Md. 1992). A first party bad faith claim would arise in the following scenario:

- (1) You are involved in an accident,
- (2) You suffer injury or property damage,
- (3) You file a claim under your own policy, and
- (4) Your insurer refuses to pay your claim.

To remedy this shortcoming, the State Legislature created a statutory cause of action for first party bad faith claims

brought under a property and casualty insurance policy issued, sold, or delivered in the State, effective October 1, 2007. Maryland Code Courts & Judicial Proceedings §3-1701. If the trier of fact in an action under §3-1701 finds that the insurer failed to act in good faith, the insured may be awarded damages up to the insured's policy limits, and attorneys' fees, which are limited to one-third of the insured's actual damages. "Good faith" is defined as an informed judgment based on honesty and diligence supported by evidence that the insurer knew or should have known at the time the insurer makes its decision on a claim. Maryland Insurance Code §27-1001(a).

First party claims under §3-1701 must first be brought before the Maryland Insurance Administration, in accordance with the procedure outlined in Maryland Code Insurance § 27-1001, unless both the insured and the insurer waive the administrative proceeding, in which case the claim can be brought directly in the applicable State court. The administrative requirements also do not apply to claims under \$5,000—claims of this amount fall within the small claims jurisdiction of the district courts and can be brought there initially—or to claims brought under commercial insurance policies with liability limits exceeding \$1 million—this type of claim can be brought directly in Circuit Court.

The new law gives Maryland policyholders added protections against the bad-faith refusal of insurers to pay claims. [WCS](#)

Getting Divorced: Avoid A Court Finding That You Have Dissipated Marital Assets

By Mollie G. Caplis, Esq.

If you are in the process of getting a divorce, you may want to consider an important legal concept during your separation period. It is called “dissipation.”

As a general rule, property disposed of before a divorce trial cannot be marital property. In describing the concept of dissipation, Maryland courts have stated that, “[d]issipation may be found where one spouse uses marital property for his or her own benefit for a purpose unrelated to the marriage at a time when the marriage is undergoing an irreconcilable breakdown.” *Sharp v. Sharp*, 58 Md. App. 386, 401, cert. denied, 300 Md. 795 (1984).

The Marital Property Act enables Maryland courts to make a monetary award to one party so that the property disposition between the parties will be equitable. Maryland law requires the application of a three-step process when calculating a monetary award. First, the court must characterize all property owned by the parties and classify it as marital, non-marital, or partly marital and partly non-marital. Second, the court must then value the marital property. Third, the court may transfer ownership of an interest in property, grant a monetary award, or both, as an adjustment of the equities and rights of the parties concerning marital property. This process must be completed before a monetary award may be granted.

Dissipation is determined by a preponderance of the evidence. The burden of persuading the court that funds have been dissipated is on the party making the allegation. After that party establishes a prima facie case that monies have been dissipated (i.e., expended for the principal purpose of reducing the funds available for equitable distribution) the burden shifts to the party who spent the money to produce evidence sufficient to show that the expenditures were appropriate. At that point, a trial court must determine whether joint funds were spent for other



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than family purposes with the intention of reducing the amount of money available to the court for equitable distribution. If the evidence presented in support of a finding of dissipation is sufficient, the party responsible cannot prove that the funds were spent appropriately, the spending party bears the loss. On the other hand, if the evidence presented in support of a finding of dissipation is insufficient, or if the spending party presents sufficient evidence that the funds were spent appropriately, the trial court may reasonably conclude that the previously relinquished asset should not be included in the marital property.

In *Beck v. Beck*, 112 Md. App. 197 (1996), the wife alleged that her husband dissipated marital assets totaling approximately \$127,000. Although the husband admitted to using an unknown amount of the cash to finance gambling trips, some of the money was used to pay a private investigator fee, tuition for the parties' child, and daily living expenses. In addressing the issue of dissipation, the trial court considered whether the husband “use[d] marital property for his own benefit for a purpose unrelated to the marriage at a time [when] the marriage [was] undergoing an irreconcilable breakdown.”

Based on the evidence at trial, the court in *Beck* recognized that the parties maintained high standards of living. In fact, the wife spent over \$90,000 during the same period for her living expenses. The court was unable to determine what amounts, if any, were not used for the husband's actual reasonable living expenses. Accordingly, the court held that the husband met his burden to establish that marital assets had not been dissipated.

On appeal, the Court of Special Appeals considered whether the husband satisfied his burden to produce evidence sufficient to show that his expenditures were appropriate. The appellate court acknowledged that although some of the funds had been used for gambling, the husband had spent substantial portions of the funds toward tuition, living expenses, and other appropriate uses. The appellate court further acknowledged that the trial court had considered the parties' high standards of living and the amounts that both parties spent for living expenses. In the absence of a clearly erroneous decision by the trial court, the Court of Special Appeals affirmed the lower courts findings regarding dissipation.

More recently, the Court of Special Appeals addressed the need for trial courts to engage in an in-depth analysis of funds in order to make a finding of dissipation. In *McCleary v. McCleary*, 150 Md. App. 448 (2002), the wife alleged that her husband dissipated marital assets. The trial court found that the wife had established a prima facie case of dissipation. The court then shifted the burden to the husband to account for those assets at trial. The court adopted the wife's argument that \$36,000 per month would have constituted reasonable living expenses and held that the husband dissipated the amount spent in excess of that sum. On appeal, the Court of Special Appeals held that the trial court's finding of dissipation was

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Transfer of Interests in Entities Owning Real Property Triggers Transfer and Recordation Taxes in Maryland

By Mary Alice Smolarek



Mary Alice Smolarek is a partner with Wright, Constable & Skeen, LLP. Ms. Smolarek's law practice concentrates in estate planning, estate administration and trust administration. If you have any questions concerning this article you may contact Ms. Smolarek by telephone: (410) 659-1318 or by e-mail: masmolarek@wcsllaw.com.

Until now, owners of Maryland real estate have been able to avoid transfer and recordation taxes on the sale of real estate by selling the entity owning the real estate. Effective July 1st, this loophole will be closed. From this date sales of a “controlling interest” in a “real property entity” will trigger the same taxes as if the real property had been conveyed by deed. The tax is not triggered unless there is a sale of a “controlling interest” which is defined as the sale of more than 80% of the total value of all classes of stock of a corporation, the beneficial interest of a trust, or of the total interest in capital and profits of any other entity (such as a limited liability company or a partnership) but only to the extent that the applicable corporation, trust, limited liability company or partnership is determined to be a “real property entity.”

Under the amended law, unless otherwise exempt, the entity is required to pay the tax to the Maryland State Department of Assessments and Taxation within 30 days of the transfer of a controlling interest.

A “real property entity” is any entity that beneficially owns real property if the Maryland real property is at least 80% of the value of the entity’s assets and if the aggregate value of the Maryland real property is equal to or exceeds \$1,000,000. In determining the value of

the real property no reduction is allowed for any mortgage, deed of trust, lien or other encumbrance.

There are several exemptions to the new transfer and recordation taxes. (1) The taxes are not imposed if the transfer would have been exempt had the real property been conveyed directly by deed between the parties. (2) Also, there is no tax if the transferee and the transferor are owned by the same persons and in the same proportions. (3) The tax does not apply if the transfer of the controlling interest is completed in stages over a period

of more than 12 months. Even if the transfer occurs in less than 12 months, no tax will be required if the transfer is not conducted pursuant to an intentional plan or contract to do so. (4) Also, there is a somewhat limited exemption for transfers of controlling interests between certain commonly controlled entities.

If no exemption applies, then the entity is liable for the transfer and recordation tax, not the transferor or the transferee. The tax liability, 1.16% to 3.0% depending upon the county, is calculated as a percentage of the “consideration payable” for the transfer of the controlling interest. In calculating the “consideration payable,” the entity must add to the amount of the actual consideration paid all debts against the real property owed by the entity, including all mortgages, deeds of trust, or other liens. Only the value of the Maryland real property is included in the calculation, any other assets of the entity may be subtracted from the purchase price for the purpose of calculating the tax.

Because there is an exemption for gifts between family members, transfers of interests in family limited partnerships and family owned limited liability companies that own real estate should remain exempt under the new laws. [WCS](#)

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clearly erroneous because the court made its determination of dissipation without examining the specific expenditures that exceeded \$36,000 per month to ascertain whether they had been made for family purposes.

In light of these cases, it is important to consider the concept of dissipation if you are in the process of getting a divorce. If your spouse establishes a prima facie case

that you used marital property for your own benefit for a purpose unrelated to the marriage at a time when the marriage was undergoing an irreconcilable breakdown, the burden will then be on you to produce evidence sufficient to persuade a court that your expenditures were appropriate. You may need to produce an accounting of your expenditures during the separation period to show that the funds spent were for reasonable living expenses. If you

fail to produce sufficient evidence to the court, you may become responsible for the loss of the dissipated marital funds to your spouse in the form of a monetary award. [WCS](#)

Wright, Constable & Skeen, LLP is Proud to Announce

At the Annual Meeting of the Bar Association of Baltimore City (BABC), Young Lawyers' Division Council, and Baltimore Bar Foundation, Inc. held on June 4, 2008, the following Wright, Constable & Skeen attorneys were elected to new positions:



Mary Alice Smolarek, Esq., Partner
President-Elect, Bar Association of
Baltimore City
Chair, Long Range Planning Committee

Ms. Smolarek served as Secretary (2005-2006), Treasurer (2006-2007) and President (2007-2008) of the Baltimore Bar Foundation. Ms. Smolarek has also served as Secretary (2005-2006), Treasurer (2006-2007) and Vice-President (2007-2008) of the BABC, and is a past chair of the Legal Services to the Elderly Committee and of the Membership Committee of the BABC. Ms. Smolarek is also a Life Fellow of the Baltimore Bar Foundation and a Life Fellow of the Maryland State Bar Foundation.



Meighan G. Burton, Esq., Associate
Chair-Elect, Young Lawyers' Division
Council, Bar Association of Baltimore
City

Ms. Burton previously served as
Co-Chair, Public Service Committee



Mollie G. Caplis, Esq., Associate
Member Board of Governors of the
Maryland State Bar Association, and
Co-Chair of the Membership
Committee of the Young Lawyers'
Division, Bar Association of Baltimore
City

Ms. Caplis previously served as Chair (2007-2008), Young Lawyers' Division Council, Secretary (2006-2007) and Chair of the Continuing Legal Education Committee of the Young Lawyers' Division as well as an Elected Member of the Executive Council of the BABC.



Robert W. Hesselbacher, Jr., Esq., Partner
Chair, Fee Arbitration Committee
Bar Association of Baltimore City



2006 CENTENNIAL YEAR

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A Continuation of Excellence*