University of Baltimore Law Forum

Volume 15
Number 2 *Spring, 1985*

Article 9

1985

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by James Kevin Mac Alister

There are few truths that are as self-evident in the legal community today than the fact that legal fees are getting more expensive and the law is becoming more complicated. A consequence of these developments is that not only are lawyers charging more for their time, but they are having to spend more time on individual cases. This in turn, has produced a dilemma for most attorneys, namely: How do I get paid?

Payment can be derived from three potential sources. The first is the client. Understandably, few clients have the financial wherewithall to sustain a protracted legal battle. The second is the contingency fee. This source also has some important drawbacks. Of course, there is always the possibility of an unfavorable verdict. Moreover, if the case proves to be more protracted than originally anticipated, the actual value of time invested by the attorney can dwarf the agreed percentage of the recovery. The third alternative is to recover the fees without having to take a percentage of any recovery, from someone other than the client.

This third alternative is clearly the most attractive. However, it is also the most difficult to accomplish. By clinging unflinchingly to the so-called "American Rule," the courts have steadfastly held that attorney's fees are not recoverable in litigation.[1] They can never be taxed as costs,[2] and, unless provided for by contract,[3] they are seldom awarded as damages. In spite of this doctrinal ban on recovering fees as damages, a number of exceptions have been judicially fashioned in an effort to recognize some of the hardships imposed by the rule. These exceptions are found in various statutes,[4] rules of procedure,[5] and common law principles.[6]

Maryland Rule 1-341

One of the most widely recognized exceptions to the American Rule is embodied in new Maryland Rule 1-341. Under this rule, attorney's fees are regarded as a sanction to be used against parties who litigate for the wrong reasons. Although the new rule inherited much of its text from its predecessor, former Rule 604 b,[7] there are a number of important differences between the two rules that have the cumulative effect of expanding the availability of the sanction. These changes are reflected in the step by step procedure for invoking the rule.

Authority to Award Fees

The claim for fees must arise in the appropriate setting. Under both the new and old rules, the fees to be charged must be attributable to a case filed in court.[8] Thus, expenses related to pre-trial activities, such as negotiating a settlement before suit has been filed, are not recoverable.[9] Also, since both rules confine their applications to civil cases, attorney fees cannot be recovered in criminal cases.[10]

Where the new rule differs markedly from its predecessor is in the types of proceedings in which it can be invoked. Since Rule 1-341 is located in Title 1 of the rules, it "applies to procedure in all courts of this State, except the Orphans' Courts."[11] Accordingly, unlike Rule 604 b which applied only in the circuit courts,[12] the new rule expands the authority to award fees to the State's District and appellate courts.[13]

This does not mean, however, that one court sitting in review of a lower court will be inclined to award fees for sins committed in the lower court. In other words, to preserve the issue for appeal, the moving party should be required to request fees in the court where the culpable conduct occurred. If a party fails to enter such a request, a claim for fees that could have been recovered there should be deemed waived. Moreover, when one court sits in review of the decision of another, the lower court's findings of fact should only be reviewed under the existing clearly erroneous standard. As to these issues, Rule 1-341 would be no different from its predecessor.[14]

What could be different under Rule 1-341 is that the appellate courts could award fees for culpable conduct committed while the case was pending on appeal.[15] Thus, when a party against whom attorney's fees have been awarded at trial , appeals the award of fees and losses, the appellate court can add fees attributable to the appeal to the fees awarded below.[16] This is something that was not possible under Rule 604 because that rule did not grant appellate courts the authority to award fees.[17]

Culpable Conduct

To invoke Rule 1-341, the awarding court must make certain findings. First, it is required to find as a matter of fact "that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification."[18] This differs somewhat from that old rule which added "for purposes of delay" to the test of proscribed conduct.[19] In actuality, this works no change in the law. The rule's framers removed the reference to delay because they believed that unjustifiable dilatory tactics were better described as acts of bad faith.[20] This conclusion was reached because not all delaying tactics are indicative of bad faith.[21] A request for a continuance to prepare a surprise witness, for example, is a perfectly legitimate request for delay that can be made in good faith.[22]

Identifying other instances of bad faith or an absence of substantial justification are not always so simple. Bad faith is difficult to define. The simplest way to describe it is as the absence of good faith. In their commentary on the new Maryland Rules, Linda Richards and Paul Niemeyer offer what are probably the

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most helpful guidelines.[23] They regard bad faith as any use of the rules of procedure for reasons other than that were which they were intended. These intended uses, they contend, are spelled out in the opening section of the rules. There, the rule proclaims that "[t]hese rules shall be construed to secure simplicity in procedure, fairness in administration, and elimination of unjustifiable expense and delay."[24]

A lack of substantial justification can be an equally mysterious concept. The simplest way to describe this conduct is that it involves taking a position that "indisputably has no merit — when any reasonable attorney would agree that the [tactic or strategy] is totally and completely without merit."[25] This can occur for instance, when a party is caught raising a question that has been squarely answered in a previous case.[26] Although it is difficult to anticipate how the rule applies in other contexts, one guideline has emerged: an unsuccessful attempt to raise a novel issue of law will not invoke the rule.[27] In the words of the Court of Special Appeals of Maryland, "[a] litigant ought not be penalized for innovation or exploration beyond existing legal horizons unless such exploration is frivolous."[28]

In an apparent recognition of the difficulties associated with evaluating the purpose and frivolity associated with litigation strategies, the state's appellate courts have accorded great deference to lower court findings. Only when a lower courts findings are clearly erroneous will it be reversed.[29]

Lastly, unlike its predecessor, Rule 1-341 does not require a court to award fees once it finds bad faith or a lack of substantial justification. Rather, by substituting the discretionary "may" for the mandatory "shall," the rulemakers have made it clear that the ultimate decision to award fees is committed to the discretion of the court called upon to award the fees. Presumably, these exercises of discretion will only be reviewable on appeal when there has been a clear abuse of discretion.[30]

Person Liable for Fees

Under former Rule 604 b, the court could only award fees against a party.[31] As a result, it was the client who had to bear the brunt of his attorney's questionable tactics. In an apparent recognition that attorneys are often as responsible for culpable tactics as are their clients, new Rule 1-341 permits an award of fees against either the client or the "attorney advising the conduct or both of them."[32] Since the rule does not manifest a preference, it should be incumbent upon the awarding court to explain why it has chosen to impose the sanction upon either the attorney or his client. Otherwise, there is no way that the reviewing court can examine the propriety of this exercise of discretion.[33]

One way to avoid this problem would be to hold that fees should presumptively be awarded against the client, unless the court affirmatively finds that the attorney was responsible for the improper conduct. This approach would be consistent with the notion that it is the client, and not the attorney, who has the ultimate control over the case. It overlooks, however, the realities of the attorney client relationship. While the client is responsible for the major decisions, it is the attorney who decides how these plans are to be translated into litigation strategies. Also, since the presumption approach would place the burden of shifting blame to the attorney on the client, a client who failed to comprehend the complexities of the tactics that resulted in fees being requested would be unable to defend the request without consulting separate counsel.

Procedures for Awarding Fees

Attorney's fees cannot be awarded in a vacuum. They represent a deprivation of property, and therefore, due process requires that the offending party be accorded notice and a hearing.[34] At this hearing, evidence must be introduced to show that Rule 1-341 can and should be invoked, the appropriate amount to assess and against whom the award should be made.[35] In the appellate courts, this may prove troubling because these courts have no current procedures for admitting evidence. When calculating the appropriate amount, however, the courts are not confined to the evidence in the record. Rather, the court is allowed to apply its own knowledge of the case and to fix its own price for the value of the legal services rendered.[36]

Also, the court can bypass a hearing altogether if the person against whom the sanction has been invoked fails to respond to the motion for fees or to request a hearing.[37] In such a case, the defaulting party waives his due process right and the court can proceed on its own, provided there is enough information before it to make the required findings. In a recent case, for example, fees were awarded against a client without a hearing when the moving party prayed an award of fees against only the client and the client failed to respond. Presumably, if fees had been requested from the attorney and the client, a hearing would have been required to decide which person should be assessed the fees.[38]

Collateral Litigation

Occasionally, an individual's breach of duty will cause another to become involved in litigation. For example, a seller who breaches a covenant to convey quiet enjoyment of a parcel of land can cause the buyer to become embroiled in litigation with one claiming superior title.[39] When this occurs, the courts have permitted attorney's fees to be recovered from the breaching party for the cost of litigating this claim.[40] Although this exception has received limited treatment by the courts, there are a number of elements to the exception that could easily confuse even the most diligent researcher.

First, there must be separate actions.[41] One action where the party seeking to recover fees was involved in litigation with someone other than the breaching party and a second action against the breaching party to recover the fees associated with litigating the first suit. The court of appeals has taken a very literal approach to this component of the collateral litigation exception.[42] In an older decision, the court held that the joinder of the breaching party in the first suit precluded an award of fees because there was no "separate action."[43] Thus the court appears to be equating the words "separate claim" with "separate suit." This unexplained penalty for joining all the parties in one action is puzzling. If nothing else, it flies in the face of the policies favoring the joinder of all claims in a single suit."[44] This is not to imply that fees associated with litigating issues against the wrongdoer should be recoverable. These issues would clearly be governed by the American Rule. What is desputed is the rationale behind denying fees attributable to litigating issues with parties other than the breaching party. A more recent decision of the court of special appeals suggests that the "separate action" limitation should be read as "other parties."[45] Thus, the court appears to have embraced the more sensible notion that the cost of litigating with "others" is recoverable, regardless of how many suits are involved.

Second, there must be a wrongful act of the defendant that "has involved the plaintiff in litigation with others, or placed him in such relation with others as make it necessary to incur expenses to protect his interest."[46] In many of the earlier decisions, it appeared as though this litigation producing act could only

be a breach of contract.[47] More recent cases, however, suggest that tortious conduct will also provide a basis for invoking the collateral litigation exception.[48] This does not represent a departure from the earlier cases because those decisions never expressly limited their operation to contract cases. Rather, the language used merely called for a "wrongful act."[49]

Third, the claimed attorney's fees must be "the natural and proximate consequence of the injury complained of."[50] Presumably, this means that fees cannot be recovered when the defendant can prove that the plaintiff would have been sued in the first case, regardless of the defendant's wrongful acts. Also, if it was the plaintiff who brought the first suit, he can only recover fees if he lost that proceeding.[51] A victory in the previous case, by necessity, indicates that the court found that no wrongdoing had taken place. Hence, there is no wrongful act upon which fees were expended.

Enshrouded in this causation issue is the question of good faith. Specifically, it must appear as though the plaintiff's involvement in the first case was necessary and in good faith.[52] This issue becomes especially important when the plaintiff is alleging that he was forced to bring the first case to protect a *bona fide* interest. In such cases, it must appear that there was some threat or interest that warranted resorting to the courts for protection.[53]

Additionally, the plaintiff's reason for bringing suit is central to deciding whether he instituted the first action with the proper objective in mind. In one case, for example, an ex-wife was unsuccessful in her attempt to recover the expenses associated with obtaining a divorce from her former husband. She has sued her husband's former mistress, alleging that the need for a divorce had been brought on because the mistress "had sexual relations with, debauched and carnally irreparable damages to her marriage which culminated in divorce."[54] Concluding that the collateral litigation exception applies only when a party has litigated to "preserve" an interest, fees could not be recovered because divorce served only to "destroy."[55]

Lastly, before fees can be awarded in the second suit, the plaintiff must show that he called upon the defendant to assume the task of litigating the first suit.[56] The reason behind imposing this requirement is that a party should not be called upon to pay the cost of litigating a case unless he had the opportunity to direct the litigation.[57] Apparently, when the defendant had actual notice of the previous suit and failed to offer counsel, it is unnecessary to show that the plaintiff called upon him to litigate. Similarly, if the defendant was joined or participated in the trial of the first case, notice is unnecessary because the purpose behind the rule has been satisfied.

Indemnification

When an indemnity relationship exists, and the party entitled to indemnification has litigated a matter for which the indemnitor will ultimately be responsible, attorney's fees are a proper element of damages in a subsequent suit between the indemnitee and the indemnitor.[58] At first blush, this may appear to be strikingly similar to the collateral litigation exception. The important distinction, however, is that there need be no wrongful act committed by the defendant. Rather, the exception is premised upon the notion that the indemnitee, although technically a proper party in the first suit, actually litigated the matter on behalf of the indemnitor; principles of fairness dictate that the indemnitee should be allowed to recover the fees it expended in an effort to reduce or avoid being held liable for a judgment that the indemnitor would ultimately have had to pay.[59]

By definition, before this exception can be invoked, there must be an indemnity relationship. This can arise in two ways. First, unless an "indemnity contract provides otherwise, an indemnitee is entitled to recover, as part of the damages, reasonable attorney's fees."[60] Second, under the common law, a principal joint tortfeasor whose tortious conduct causes another joint tortfeasor to be held liable is responsible for indemnifying the other.[61]

Closely related to the second method of creating an indemnity relationship is the concept of *in pari delicto*. Under this rule "as between *actual tortfeasors* the law will not enforce contribution or indemnity."[62] The justification for recognizing this defense is that "[i]n respect to offenses that involve any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt."[63] Thus, complaints of conduct must be more than *malum prohibitum* or constructive fault;[64] it must raise to the level of an actual knowing participation in the wrongdoings.[65] Anything less than this will result in the indemnitor having to pay the fees associated with the first action, in addition to any damage award made in that suit.

Two other important limitations apply to limit the scope of the rule. First, the exception only applies to fees expended litigating on behalf of another.[66] Thus, fees associated with creating or enforcing the indemnity relationship are probably not recoverable. What this means is that the expense of gaining judicial recognition of the indemnity relationship is not recoverable. In this regard, the indemnity exception parallels the collateral litigation exception in that it contemplates two litigations: one to create the duty to pay fees and another to enforce it.[67]

Second, the indemnitee must show that he litigated the previous case solely on behalf of another.[68] In the words of the Maryland Court of Appeals, the indemnity exception only applies when he has defended "solely and exclusively the act of another, and is compelled to defend no misfeasance of his own."[69] At first glance, this appears to be an element of the joint tortfeasor indemnity rule. By definition, if the indemnitee is defending himself, and not the interests of the indemnitor, the exception should not apply. This conclusion, however, does not take into account those situations where an indemnitee relationship exists, even though the indemnitee has nevertheless committed a tort.[70] A better way to explain the "misfeasance of his own" concept would be to regard it as a mere application of the rule of *in pari delicto*.

Once it is determined that an enforceable indemnity relationship exists, it must appear that a demand to defend was served upon the indemnitee.[71] Of course, an indemnitor who had actual notice or actually participated in the prior suit cannot defend a claim for fees based on a lack of notice.[72]

Additionally, it is questionable if an indemnitee could recover fees if the indemnitor was joined in the first suit because those fees were related in part to creating the indemnitee relationship.[73] The most appropriate way to resolve this dilemma would be to borrow from the previous collateral litigation discussion[74] and hold that only the fees associated with litigating with the other party should be chargeable to the indemnitor. In other words, the indemnitee would only be precluded from recovering expenses associated with joining and litigating with the indemnitor.

Duty to Defend

Many insurance policies not only

promise to hold the insured harmless against liabilities covered by the policy, but they often reserve the right to control the course of any litigation aimed at fixing such liability.[75] This right to control any potential lawsuits in turn gives rise to a duty to defend. Borrowing in part from the collateral litigation exception,[76] the courts have resolved that fees can be recovered from an insurer who unjustifiably breaches this duty to defend.[77] The award of fees includes the cost of defending the suit for which a defense was denied and fees associated with bringing a declaratory judgment action to establish that the insurer has breached its duty.[78] Thus, while the rule contemplates two suits, fees are recoverable for both. This represents an important departure from the exceptions discussed thus far.[79]

Before any of this can take place, however, there must be a duty to defend. Ordinarily, it is contained in a policy term which expressly and unequivocally commits the insurer to supplying a defense, regardless of how frivolous the claim for which a defense is sought may be.[80] By including such a clear statement of duty, the courts reason, the insurer has upgraded ordinary liability coverage to include litigation insurance.[81] In other cases, the duty springs from a clause in the policy whereby insurer agrees to pay counsel fees for counsel approved by the insurer.[82]

To invoke this duty, it must appear that the claim for which a defense is sought falls within the wrongs insured against in the policy.[83] This involves a two-step inquiry. First, the terms of the policy itself must be determined.[84] Specifically, the covered and excluded occurrences ascertained. Also, since anyone covered by the policy may assert a duty to defend,[85] the persons entitled to coverage must be identified. Ordinarily, this is done without reference to the pending suit, unless the construction of the policy term will be decided in the tort suit. Second, it must appear that the allegations in the pending suit "potentially" bring it within the coverage extended in the policy.[86] This means that a defense must be supplied when the allegations in the plaintiff's complaint fall within the policy, regardless of what the insurer believes that the proof at trial will show.[87]

Not all breaches of the duty to defend will result in fees being awarded. Instead, it must appear that the refusal to defend was unjustified. In *MAIF v. Sparks*,[88] for example, the court of special appeals held that an insurer was able to avoid paying fees because its refusal to defend, although in contravention of the policy term, was justified by the insured's misconduct in reporting the claim.[89] Since the *MAIF* court offered its insight on the question, nothing more has been written about the "justification" defense. Presumably, it is still good law.

Lastly, there is a current dispute as to how fees should be awarded when some of the allegations in the pending suit are covered under the policy and others are not. Specifically, can the insured recover only those fees associated with defending the covered claims? In *Continental Casualty Company v. Bd. of Education of Charles County*,[90] the court of appeals answered part of the question. Without deciding the duty to allocate in cases involving unequivocal duties to defend, Maryland's highest court determind that there would be a duty to allocate, when the duty to defend is implied from the terms of the policy.[91] In such cases, fees could only be recovered if they are "reasonably related to a covered count" in the pending suit.[92] It is the insured who bears the burden of proving that the time spent on a given term is related to a covered count.[93] This is not to imply, however, that time spent working on the case as a whole is not recoverable. Rather, the opposite is true; "[s]o long as an item of service is related to a covered count, it may be apportioned wholly to the covered claim."[94]

As previously mentioned, the court's holding was expressly limited to implied duties to defend.[95] In dictum, though, the court implied that there would be no duty to apportion in cases involving the conventional unequivocal duty to defend the entire suit.[96] This flatly contradicts the dictum contained in the footnote of a decision of the state's intermediate appellate court.[97] What will become of these conflicting dicta remains to be seen.

Conclusion

As the foregoing reveals, the road to recovering attorney's fees in litigation is a treacherous one. This is due in part to the Maryland Judiciary's steadfast enforcement of the American Rule. It is also due to a large number of ambiquities built into the law. The growing cost and importance of attorney's fees, it is hoped, will bring about a reappraisal of the American Rule. As the cost of vindicating one's rights soars, there will be fewer and fewer clients who will be able to have access to justice. While some maintain that a policy which favors liberal availability of attorney's fees will have a chilling effect,[98] it cannot be doubted that unaffordable legal representation has a similar effect. Also, with the use of contingency fees by plaintiffs' counsel, the injured party ultimately must forfeit a substantial percentage of his hard fought damages to his attorney.[99] Can it be said that it would be wrong to compel the one who injured him, and thereby compelled him to litigate, to pay at least a portion of the fees? The answer in Maryland is that it would be wrong.

Notes

[1] *Empire Realty v. Fleisher*, 269 Md. 278, 286, 305 A.2d 144, 148 (1973); *Jones v. Calvin B. Taylor Banking Co.*, 253 Md. 130, 144, 253 A.2d 742, 748 (1969); *Freedman v. Seidler*, 233 Md. 39, 47, 194 A.2d 778, 783 (1963); *Harry's Thrifty Tavern, Inc. v. Pitarra*, 224 Md. 56, 63, 166 A.2d 908, 912 (1922); *Rice v. Baltimore Apartments, Co.*, 141 Md. 507, 516-17, 119 A. 364, 367 (1922); *McGaw v. Acker, Merrall & Condit. Co.*, 111 Md. 153, 160, 73 A. 731, 734 (1909); *Hamilton v. Trundle*, 100 Md. 276, 278, 59 A. 719, 720 (1905); *Wood v. Maryland*, 66 Md. 61, 69, 5 A. 476, 478-79 (1886); *Skeens v. Paterno*, 60 Md. App. 48, 67,*cert. denied*, 304 Md. 639, 480 A.2d 820, 830 (1984); *Dixon v. Process Corp.*, 46 Md. App. 198, 210, 416 A.2d 1295, 1302-3 (1980), *See generally Restatement (Second) of Torts* §914 comment (1979) (explaining; the American rule).

[2] *Webster v. People's Loan Etc. Bank*, 160 Md. 57, 62, 152 A. 817, 821 (1931); *Hamilton*, 100 Md. 276 at 278-79, 59 A. at 720; *Singer v. Fidelity & Deposit Co.*, 96 Md. 221, 224, 54 A. 63, 64 (1903).

[3] *Addressograph-Multigraph Corp. v. Zink*, 273 Md. 277, 288-89, 329 A. 28,35 (1974); *Webster*, 160 Md. at 61, 152 A. at 817; *Hollander v. Central Metal & Supply Co.*, 109 Md. 131, 154-55, 71 A. 442, 443 (1908). (must be a "clear agreement" that attorney's fees shall be awarded).

[4] See Appendix.

[5] Md. Rules 1-341, 2-433(c) and 2-434.

[6] *See infra* notes 39 to 57 and accompanying text.

[7] By order of the court of appeals, "the rules changes adopted...shall govern the courts of this State and all parties and their attorneys in all actions and proceedings; and shall take effect and apply to all action commenced on and after July 1, 1984 and insofar as practicable to all action then pending."

[8] *Bastian v. Laffin*, 54 Md. App. 703, 719, 460 A.2d 623, 632 (1983); *Brown v. Hardesty*, 40 Md. App. 688, 696, 395 A.2d 154, 158 (1978).

[9] *Brown*, 40 Md. App. at 696, 395 A.2d at 158.

[10] *But see P. Niemeyer & L. Richards, A Commentary on the Maryland Rules*, 40 (1984) (ignoring the introductory words of the rule, the authors contend that 1-341 authorizes awards of fees in criminal cases).

[11] Md. Rule 1-101.

[12] Md. Rule 1a (repealed 7/1/84).

[13] *Niemeyer & Richards, supra note* 10, at 40.

[14] *Hess v. Chalmers*, 33 Md. App. 541, 545, 365 A.2d. 294, 296 (1976) (applying the Md. Rule 1086 clearly erroneous standard); *Beane v. Prince George's County*, 20 Md. App. 383, 402, 315 A.2d 777, 778 (1974)

(applying Md. Rule 1085).

[15] *Blanton v. Equitable Bank, Nat'l. Assn.*, 61 Md. App. 158, 160-61, 485 A.2d 694, 698 (1985), (recognizing that 1-341 overturns the former rule that the state's appellate courts have no authority to award attorney's fees); *Singer v. Steven Kokes, Inc.*, 39 Md. App. 180, 187, 384 A.2d 463, 468 (1978); *Beane*, 20 Md. App. at 402, 315 A.2d at 788.

[16] *Erie Insurance Exchange v. Lane*, 246 Md. 55, 64-65, 227 A.2d at 231, 237 (1967) (decided under the old rules that the appellate courts cannot add an award of fees to a trial court of fees for a frivolous appeal from the trial court's ruling).

[17] *See supra* note 15.

[18] Md. Rule 1-341.

[19] Md. Rule 604b (repealed 7/1/84).

[20] *Niemeyer & Richards, supra* note 10, at 40.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] Md. Rule 1-201(a).

[25] *Dent v. Simmons*, 61 Md. App. 122, 128, n.3, 485 A.2d 270, 273 (1985) (quoting *in re Marriage of Flaherty*, 31 Cal. 3d 637, 648, 183 Cal. Rptr. 508, 513, 646 P.2d. 179, 187, (1982)).

[26] *Attorney Grievance Comm. of Md. v. A.S. Abell Co.*, 294 Md. 680, 689, 452 A.2d 656 660 (1982) (baseless venue objection); *Waters v. Smith*, 277 Md. 189, 197, 352 A.2d 793, 796 (1976) (mislead trial court into granting a mistrial); *Blanton*, 61 Md. App. at 163, 485 A.2d at 698 (attempted appeal from a non-appellate interlocutory order); *Hess*, 33 Md. App. at 545, 365 A.2d at 296 (effort to re-adjudicate a claim that was barred by res judicata).

[27] *Dent*, 61 Md. App. 128, 485 A.2d at 273.

[28] *Id.*

[29] *See supra* note 23.

[30] *Colonial Carpets v. Carpet Fair*, 36 Md. App. 583, 591, 374 A.2d 419, 425 (1977); *Hess*, 33 Md. App. at 545, 365 A.2d at 296.

[31] *Bastian v. Faffin*, 54 Md. App. at 719, 460 A.2d at 632 (1983).

[32] Md. Rule 1-341.

[33] *Miranda v. Southern Pac. Transp. Co.*, 710 F2d 516, 523 (9th cir. 1983).

[34] *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980). *See Miranda*, 710 F.2d at 522.

[35] *Blanton*, 61 Md. App. at 166, 485 A.2d at 698.

[36] *Id.* at 167 485 A.2d at 699 (citing Sharp v. Sharp, 58 Md. App. 386, 406, 473 A.2d 499 (1984)).

[37] *Id.*

[38] *Id.*

[39] *Jarrett v. Scofield*, 200 Md. 641, 92 A.2d 370 (1952).

[40] *Empire Realty Co. v. Fleisher*, 269 Md. 278, 286, 305 A.2d 144, 149 (1973); *Fowler v. Benton*, 245 Md. 540, 550, 226 A.2d 556, 563 (1967); *Freeman v. Seidler*, 233 Md. 39, 47, 194 A.2d 778, 783 (1963); *Harry's Tavern, Inc. v. Pitarra*, 224 Md. 56, 63, 166 A.2d 908, 912 (1961); *McGaw v. Acker, Merrall & Co.*, 111 Md. 153, 160, 73 at 731, 734 (1909); *Archway Motors v. Herman*, 41 Md. App. 40, 45, 394 A.2d 1228, 1231 (1978); *Kromm v. Kromm*, 31 Md. App. 635, 639, 358 A.2d 247, 250 (1976).

[41] *Empire Realty*, 269 Md. at 286, 305 A.2d at 149; *Freeman*, 233 Md. at 47, 194 A.2d at 783.

[42] *Freeman*, 233 Md. at 47, 194 A.2d at 783.

[43] *Id.*

[44] *See generally, Allen Whatten, Inc. v. John C. Grimberg Co.*, 229 Md. 585 (1962) (explaining liberal joinder policy). This policy is embodied in the rules governing the joinder of parties and claims. *See, e.g.* Md. Rules 2-211, 2-212, 2-214, 2-231, 2-303(c), 2-305.

[45] *Archway Motors*, 41 Md. App. at 45, 394 A.2d at 1231.

[46] *Fowler*, 245 Md. at 540, 226 A.2d at 556; *Harry's Tavern*, 224 Md. at 63, 166 A.2d at 912.

[47] *Freeman*, 233 Md. 39, 194 A.2d 778 (landlord & tenant); *Harry's Tavern* 224 Md. 56, 166 A.2d 908 (corporate officer); *Jarret*, 200 Md. 641, 92 A.2d 370 (breach of covenant of quiet enjoyment); *McGaw*, 111 Md. 153, 73A 731 (landlord & tenant). *See generally, C. McCormick, Handbook on the Law of Damages* §68 (1935) (explaining the contract related theory behind the rule); Annot. 4 A.L.R. 3d 270, (1965).

[48] *Fowler*, 245 Md. 540, 226 A.2d 556 (fraud); *Dixon*, 46 Md. App. 198, 416 A.2d 1295 (injurious falsehood/slander of title); *Kromm*, 31 Md. App. 635, 358 A.2d 247 (criminal conversation). *See generally, McCormick, supra* note 47, §67 (explaining the tort related theory behind the rule); *Restatement (second) of Torts* § 914(b) (1979); Annot. 45 A.L.R. 2d 1183 (1956).

[49] *McGaw*, 111 Md. at 160, 73 A. at 734.

[50] *Fowler*, 245 Md. at 550, 226 A.2d at 563.

[51] *Jarret*, 200 Md. at 646, 92 A.2d at 372.

[52] *Fowler*, 245 Md. at 550, 226 A.2d at 563.

[53] *McGaw*, 111 Md. at 160, 73 A. at 734.

[54] *Kromm*, 31 Md. App. at 636, 358 A.2d at 248-49.

[55] *Id.* at 639, 358 A.2d at 250.

[56] *Jarret*, 200 Md. at 646, 92 A.2d at 372; *Crisfield v. Starr*, 36 Md. 129, 151, 11 AR 480 (1872).

[57] *Crisfield*, 36 Md. at 151, 11 AR 480.

[58] *Jones v. Calvin B. Taylor Banking Co.*, 253 Md. 430, 441-42, 253 A.2d 742, 748-49 (1969); *C.&O. C. Co. v. County Comm.'rs.*, 57 Md. 201, 221, 6-27, 40 AR 430, 435 (1881). This common law principle remains unaffected by the Maryland Uniform Contribution Among Tort-Feasers Act. Md. Code Ann. alt. 50, §21 (1979 red. vol.)

[59] *C.&O. C. Co.* 57 Md. at 226, 40 AR at 438.

[60] *Jones*, 253 Md. at 441, 253 A.2d at 748 (quoting 41 Am. Jur. 2d, Indemnity, §36 (1968)).

[61] *Penn Thresherman v. Travelers*, 233 Md. 205, 215, 196 A.2d 76, 81(1963); *Park Circle Motor Co., v. Willis*, 201 Md. 104, 113, 94 A.2d 443, 446 (1952); *Balt. & Ohio R. Co. v. Howard Co.*, 111 Md. 176, 184, 73 A. 656, 658 (1909), 113 Md. 404, 77 A. 930 (1910); *Garden Village Realty v. Russo*, 34 Md. App. 25, 40-41, 366 A.2d 101, 110-11 (1976); *See also, Carroll v. Bowling;* 151 Md. 59, 67, 133 A. 851, 854 (1926) (applying the rule in a non-tortious situation); *Orient Overseas Line v. Globemaster*, 33 Md. App. 372, 393-94; A.2d 325, 341-42 (1976) (applying Maritime law).

[62] *Balto. & Ohio R. Co.*, 113 Md. at 414, 77 A. at 933.

[63] *Balto. & Ohio R. Co.*, 111 Md. at 185, 73 A. at 659.

[64] *C. & O. C. Co.*, 57 Md. at 220, 40 AR at 434. For example of passive a constrictive negligence, see *Penn. Threshermen*, 233 Md. at 215 A.2d at 81 (respondent superior); *Park Circle Motor Co.*, 201 Md. at 113-14, 94 A.2d at 446 (one who has been dispossessed of property by unrightful owner can recover indemnity from vendor who lacked title); *Carroll*, 151 Md. at 67, 133 A. at 854 (executors who mistakenly transferred all title to the intended holder of a lifestyle can recover indemnity from life tenant in an action by holder of reversion); *Garden Village Realty*, 34 Md. App. at 40-41, 366 A.2d at 110-11 (owner who breached a non-delegable duty could recover indemnity from a subcontractor in an action brought by a third party who was injured as a result of the subcontractors error).

[65] *Balto. & Ohio R. Co.*, 113 Md. at 416-17, 77 A. at 934-35.

[66] *C. & O. Canal Co. v. County Commissioners*, 57 Md. at 227, 40 AR at 439.

[67] *See supra* text accompanying notes 41 to 45.

[68] *C. &O. C. Co.*, 57 Md. at 226-27, 40 AR at 438-39.

[69] *Id.* (quoting Westfield v. Mayo, 122 Mass. 100, 109 (1877)).

[70] *See, e.g.* Penn Thresherman's, 233 Md. at 215, 196 A.2d at 81 (respondeat superior); *Garden Village Realty*, 34 Md. App. at 40-41, 366 A.2d at 110-11 (owner breached non-delegable duty to construct according to the building code).

[71] *Keitz v. National Paving Co.*, 214 Md. 479, 499, 136 A.2d 229, 232 (1957).

[72] *Id.* at 497-505, 136 A.2d at 231-235.

[73] *See supra* note 43.

[74] *See supra* text accompanying note 44.

[75] *Compare Continental Casualty Company v. Bd. of Educ. of Charles County*, 302 Md. 516, 530, 489 A.2d 536, 543 (1985) (right to control litigation coupled with responsibility to pay the insured's legal fees) *with Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 400, 347 A.2d 842, 846 (1975) (unequivocal duty to defend).

[76] *Continental Casualty Company*, 302 Md. at 537-38, 489 A.2d at 546-47; *Bankers & Ship Ins. v. Electro Ent.*, 287 Md. 641, 649, 415 A.2d 278, 283 (1980); *Cohen v. A.M. Home Insurance Co.*, 255 Md. 334, 357-63, 258 A.2d 225, 236-39 (1969). *But see Anderson v. Md. Casualty Co.*, 123 Md. 67, 69-70, 90 A. 780, 781-82 (1914)(characterizing the fees as part of the expectation interest for a breach of the contractual duty to defend).

[77] *See generally, Continental Casualty Company*, 302 Md. at 538, 489 A.2d at 547; *G. Couch. Couch Cyclopedia of Insurance Law* §51:61 (R. Anderson 2d ed. M. Rhodes Rev. Vol. 1982).

[78] *Continental Casualty Co*, 302 Md. at 538, 489 A.2d at 547 (string citing Maryland authorities on point); *American Home Insurance v. Osbourn*, 47 Md. App. 73, 84, 422 A.2d 8, 14-15 (1980).

[79] *See supra*, notes 41 to 45, 73-74.

[80] *Brohawn*, 276 Md. at 400, 347 A.2d at 846; *Ohio Casualty Insurance Company, v. Lee*, 62 Md. App. 176, 186, 488 A.2d 988, 993 (1985).

[81] *Brohawn*, 276 Md. at 400, 347 A.2d at 846; *Anderson*, 123 Md. at 69-70, 90 A. at 781-82.

[82] *Continental Casualty Co*, 302 Md. at 530-31, 489 A.2d at 543.

[83] *St. Paul Fire & Mar. Ins. v. Pryseski*, 292 Md. 187, 193-94, 438 A.2d 282, 285-286 (1981); *Brohawn*, 276 Md. at 409, 347 A.2d at 851.

[84] *St. Paul Fire & Mar. Ins.*, 292 Md. at 194-95, 438 A.2d at 286-87.

[85] *Bankers & Ship Ins. Co.*, 287 Md. at 649, 651, 415 A.2d at 283, 284; *Ohio Casualty Insurance Company*, 62 Md. App. at 187-190, 488 A.2d at 993-95. *See also Gov't. Employees Ins. v. Taylor*, 270 Md. 11, 22, 310 A.2d 49, 55 (1973)(subrogee can recover fees under duty to defend).

[86] *Ohio Casualty Ins. Co., 62 Md. App. at 186, 488 A.2d at 993 (quoting Brohawn*, 276 Md. at 408, 347 A.2d at 850).

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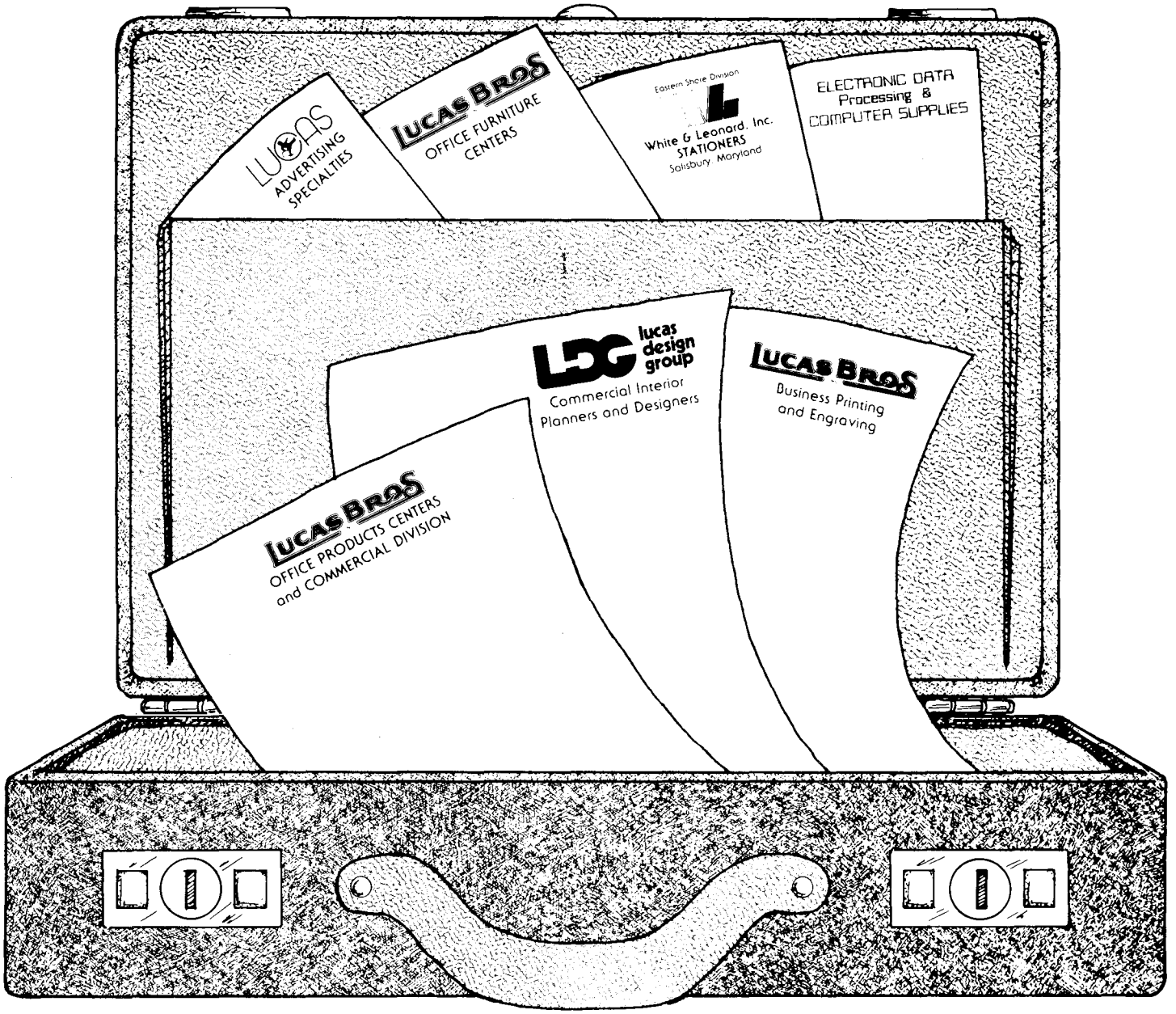

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[87] *St Paul Fire & Mar. Ins.*, 292 Md. at 193, 438 A.2d 285; *Brohawn*, 276 Md. at 409, 347 A.2d at 851; *U.S.F. & G. v. Nat. Pa. Co.*, 228 Md. 40, 54-55, 178 A.2d 872, 878-79 (1962).

[88] *Maryland Auto Ins. Fund v. Sparks*, 42 Md. App. 382, 400 A.2d 26 (1979).

[89] *Id.* at 395-96, 400 A.2d at 33.

[90] *Continental Casualty Co.*, 302 Md. 516, 489 A.2d 536 (1985).

[91] *Id.* at 531, 489 A.2d at 543.

[92] *Id.* at 531-33, 489 A.2d at 543-45.

[93] *Id.* at 536, 489 A.2d at 546.

[94] *Id.* at 534, 489 A.2d at 545.

[95] *See supra* note 8.

[96] *Id.* at 531, 489 A.2d at 543.

[97] *Lowenthal v. Security Ins. Co.*, 50 Md. App. 112, 123 n.5, 436 A.2d 493, 499 n.5 (1981).

[98] *McCormick, supra* note 47 §71, at 256 (listing the above and other reasons offered to support the American Rule); 411 *Sachs, Poe's Pleading and Practice* §840, at 766 (6 ed. 1949).

[99] *McCormick, supra* note 47, at 257-59. *See also* Falcon, *Awards of Attorney's Fees in Civil Rights and Constitutional Litigation*, 33 *Md. L. Rev.* 379 (1973) (examining flaws in the reasons supporting the American Rule).