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# From Legislature To Litigation: The Real Medical Malpractice Crisis

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by Patti G. Zimmerman, Esq.

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Despite a rare unanimity among plaintiff's counsel and defense attorneys alike that the legislatively created Health Claims Arbitration Office should be abolished, the system has "celebrated" its ten year anniversary and hardly an accolade was heard. Instead, amendment after amendment is being heaped upon the statute to create temporary plugs in the statutory wall that is purported to be preventing a veritable flood of medical malpractice litigation from reaching the circuit courts of our state. The wisdom of this "band aid" legislation is questionable, at best, and as is demonstrated herein, may be in direct contravention of the stated purpose of the creation of the Health Claims Arbitration Office - to reduce the cost of achieving resolution of medical malpractice claims (including the cost of defending the claims) with a corresponding reduction in insurance rates.<sup>1</sup> Section 3-2A-01 et seq. of the Courts & Judicial Proceedings Article ("Act") governs actions pending before the Health Claims Arbitration Office. Recent changes, however, have made the system, in addition to being seen as ineffective in many cases, also unworkable. It is these legislative ambiguities that have led, and will continue to lead parties to seek judicial intervention and interpretation - steps that further increase the cost of medical malpractice litigation.

The problem with the legislation first manifests itself in the definitional section, Section 3-2A-01. With the advent of

HMOs and related prepaid health plans, the statute provides no clear statement as to inclusion or exclusion of such organizations under the definition of "health care provider."<sup>2</sup> It has, therefore, been for the courts to resolve whether the statute requires that a physician or nurse affiliated with such an organization be subject, exclusively, to the jurisdiction of the Health Claims Arbitration Office, while the "employer" is not and may only be sued in the circuit court or federal district court in the appropriate venue. See *Group Health Ass'n v. Blumenthal*, 295 Md. 104, 453 A.2d 1198 (1983). Such an interpretation results in the splitting of a cause of action - a situation clearly contrary to the concept of judicial economy. Defense of what would ordinarily be a single claim, in two judicial jurisdictions is not, however, a new problem under the Health Claims Arbitration statute. Following its enactment, the problem most frequently arose and still arises today, when the initial injury to the claimant is in the nature of an auto tort or products liability claim and the treatment for the injury is alleged, foreseeably, to have been rendered negligently. The inability of an HCA panel to obtain jurisdiction over the manufacturer of a product or over the driver of an automobile makes it impossible to have such a claim resolved, initially, in a single trial. The future course of this problem and the cost ramifications may be frightening. With the increase in the development and

use of medical products it is foreseeable that more and more malpractice cases will involve an entity which, under the statute, is technically not a health care provider and therefore not subject to the jurisdiction of the Health Claims Arbitration Office.

Further, as Maryland authorizes practice by more and more para-professionals, the definitional section of the Act gets more and more outdated and, consequently, unworkable - almost to the point of requiring that the statute be construed contrary to the legislative intent of requiring all health care providers, of any sort, to initially, submit claims against them to arbitration. For example, are CRNAs, respiratory therapists, physician's assistants, psychologists, lab technicians (the list grows longer), health care providers under the statute? Do they render health care? Could they fail to render health care? Could they cause medical injury? Does not the statute, on its face, giving it's required plain meaning, exclude such individuals or is it contrary to the intent to require that an anesthesiologist who administers anesthesia submit his claim to arbitration while a CRNA, administering the very same anesthesia, must defend him or herself, initially, in the circuit court.

The legislative ambiguities are far from limited to the definitional section of the statute. The state's highest courts have been called upon on several occasions to construe Section 3-2A-02, entitled "Exclu-

siveness of Procedures." While it is generally understood that the Act is meant to relate to traditional malpractice cases only, by drafting the statute in such a fashion that it is said to apply to "[a]ll claims, suits and actions. . . by a person against a health care provider for medical injury. . .,"<sup>3</sup> the legislature was inviting submission to arbitration any claims against physicians that allegedly resulted in personal injury including claims which sounded in assault, battery, slander, etc. The applicability of the statute has now been judicially, as compared to legislatively, limited to claims arising from a violation of the health care providers' professional duty to exercise the appropriate care required for a health care provider in a professional setting. See *Cannon v. McKen*, 296 Md. 227, 459 A.2d 196 (1983); *Nichols v. Wilson*, 296 Md. 154, 460 A.2d 57 (1983).

Section 3-2A-03, while not the subject of many appellate opinions, is often described as a procedural nightmare. With best intention, that section mandates that a panel be comprised of a lawyer (presumably to offer advice on legal issues), a health care provider (presumably to offer advice on medical issues), and a lay person (to offer common sense?). Up until July 1, 1986 any member of the Bar could be selected as panel chairman - the person charged with making all legal rulings both pre-trial and during trial. Recognizing that potentially multi-million dollar law suits were being decided by individuals who had never seen the inside of a courtroom, this section was recently amended to require that the attorney be in the practice of law in Maryland for three years.<sup>4</sup> Where, however, is it written that a panel chairman must have tried a single case, made a single objection, practiced in the area of general negligence work or, be familiar with the statute and the case law construing the statute? Is this amendment in the legislation going to provide a solution to the problem of ill-prepared attorneys acting as panel chairmen and practicing outside of their specialties?

And what of the health care provider panelist? For years, although the legislation provided that the list from which counsel were to select the panelist must, if practicable, include at least one health care provider from each recognized specialty (presumably, although not written, each recognized specialty, *at issue*), because of the voluntary nature of the service on the panels, because of the low compensation, because of the great inconvenience, and because of the time consuming nature of the panel hearings, actively practicing physicians in the specialties involved who could actually provide some medical infor-

mation to the other panelists regarding the applicable standards of care when the treatment was rendered, are almost never participating. Recognizing this shortcoming, more amendments were made. Now every physician who is licensed in this state and who is a resident of this state is required to be available to serve. Does this mean that they shall serve? No. Does this mean that if they do agree to serve that they must appear? No. Does this guarantee or even increase the probabilities that a specialist that can offer insight into the litigation will participate? No.

One of the most significant legislative band aids was enacted in July of 1986 when Section 3-2A-04 was amended to require the filing of a Certificate of a Qualified Expert by the claimant within 90 days of the filing of suit, and by the health care provider within 120 days of the

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claimant's filing. While, on its face, this seems consistent with the statutory purpose and intent, issues of constitutionality (which challenges the legislation, as a whole, survived years ago)<sup>5</sup>, have arisen again. Specifically, constitutional scholars must question whether to require all health care providers, if they wish to contest liability, to forward and find an expert to support their care or to say that their care did not proximately cause harm, when the burden of proof is on the claimant, is appropriate.<sup>6</sup> And, lest we forget, what about the hospital or other health care providing institution who is merely alleged to be vicariously liable? Can they be required to go forward and find an expert supporting their alleged employee's care even though no employer-employee relationship, in fact, exists? Further, one must question the wisdom of establishing

the due date for the health care provider's certificate based on the date of the filing of the claimant's certificate and not upon service. This anomaly often results in a given defendant's certificate being due under the statute *before* service of process has been made.

And what about the certificates themselves? Where is the guidance as to their contents? Must a claimant, in suing multiple physicians, file a certificate that says each was negligent and that each proximately caused harm? May a health care provider sign his own certificate? What of the requirement that the attesting physician (who is frequently *not* testifying at the Health Claims Arbitration hearing) be available for discovery? What attorney, in the routine case, would depose a physician who is not going to appear? Is this consistent with efforts to reduce litigation costs, or are all of these issues going to be begging judicial clarification and intervention?

It goes without saying that Section 3-2A-06 entitled "judicial review" has been an area from which more appellate issues have arisen than other aspect of the litigation. See, generally, *Brothers v. Sinai Hospital*, 63 Md. App. 235, 492 A.2d 656 (1985); *Mitcherling v. Rosselli*, 61 Md. App. 113, 484 A.2d 1060 (1984), *aff'd*, 304 Md. 363, 499 A.2d 476 (1985); *Tranen v. Aziz*, 59 Md. App. 528, 476 A.2d 1170 (1984). Despite that fact, however, in the past two legislative sessions, little or no effort has been made to streamline the appellate process for cases subject to the Health Care Malpractice Claims Act despite the frequency with which these cases are appealed.

This commentary would be unfair if it did not recognize some of the merits of the Health Care Malpractice Claims Act and the efforts of those administering the Act and practicing under the Act. It would, likewise, be unfair not to comment on recent legislative changes which are beneficial and consistent with the stated purpose of the Act. For example, Section 3-2A-02(c), for the first time, has been amended to provide that, except as otherwise indicated, the Maryland Rules of Procedure shall apply to practice under the subtitle. This issue, in the past, had been left to the discretion of the panel chairperson. Additionally, an amendment to Section 3-2A-06 provides for the admissibility of depositions taken in connection with the arbitration proceeding and mandating the binding nature of previously filed Interrogatories, Requests for Admission of Fact and Requests for Production of Documents, will, hopefully, reduce the discovery expenses associated with a *de novo* appeal. Section 3-2A-07(a) providing for

the payment of costs of the proceeding and reasonable expenses, including attorneys' fees, by a party, an attorney, or both, if the arbitration panel finds that maintaining the proceeding or defending the proceeding is in bad faith or without substantial justification, may deter frivolous law suits and give the arbitration panel the same power that has been afforded our circuit courts in discouraging such litigation.

Finally, this commentary would not be complete without acknowledging the efforts of the 1987 General Assembly in enacting legislation which, while applicable to medical malpractice cases, are not part of the Health Care Malpractice Claims Act. For example, the "remittitur bill" which is applicable to medical malpractice cases only, allows, but does not require, the court to receive evidence of collateral source payments. Further, in the area of malpractice, a change in the statute of limitations with respect to the filing of claims by a minor, will shorten the number of years for which physicians treating minors are at risk. Specifically, in medical malpractice cases only, a claimant must file suit either within three years from the date of discovery or five years from the date of injury, whichever is shorter, once the claimant reaches 11 years of age. Section 5-109 of the Courts & Judicial Proceedings Article of the Annotated Code of Maryland remains applicable to medical malpractice cases and sets forth the statute of limitations for adults and remains applicable to minors when the cause of action is related to foreign objects left in the body or injury to the reproductive organs.

### Conclusion

It remains to be seen whether the attempted legislative resuscitation of the Act will breathe new life into the insurance industry or will result in a long and painful death due to increasingly expensive litigation.

### Notes

- <sup>1</sup> Although the Health Care Malpractice Claims Act has remained in full force and effect for more than a decade, Medical Mutual Liability Insurance Society of Maryland, the state's largest insurer of physicians, continues, each year, to request and receive authorization for significant premium increases.
- <sup>2</sup> It is one of the cardinal rules of statutory construction that provides that when the legislature has chosen to make express mention of one item in a definition, the exclusion of others is implied. In the case of the Health Care Malpractice Claims Act, the legislature listed as health care providers, a hospital, a physician, an osteopath, an optometrist, a chiropractor, a registered or licensed practical nurse, a dentist, a podiatrist, and a physical therapist.
- <sup>3</sup> There are other issues lurking within the confines of this section including, for example, where, jurisdictionally, one health care provider seeks indemnity or

contribution from another health care provider when the underlying litigation was traditional malpractice.

- <sup>4</sup> This requirement is qualified, however, by Section 3-2A-03(c) (3) (ii) which provides that if the attorney's name appeared on the list of persons willing to serve before January 1, 1986, then that person continues to be eligible to serve.
- <sup>5</sup> *Attorney General v. Johnson*, 282 Md. 274, appeal dismissed, 439 U.S. 805 (1978)
- <sup>6</sup> Section 3-2A-04 (b) (2) provides, *inter alia*, that if the defendant disputes liability and fails to file a certificate within 120 days from the date the claimant filed his certificate, all issues of liability will be adjudicated against the defendant.

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(continued from page 17)

### Notes:

- <sup>1</sup> Blum, *Couch Potatoes*, *The New Nightlife* New York vol. 20 n. 28 July 20, 1987 at 26
- <sup>2</sup> *Id.*
- <sup>3</sup> Sullivan, *Black and White in Living Color* Canadian Business vol. 60 February 1987 at 59
- <sup>4</sup> *The Color Guard*, Rosenfeld *The Washington Post*, May 13, 1987 at F1
- <sup>5</sup> Sullivan, *Black and White in Living Color* Canadian Business vol. 60 at 59-60
- <sup>6</sup> *Alfred Bell Co. v. Catalda Fine Arts* 191 F.2d 99 (1951)
- <sup>7</sup> Hearings on the Colorization of Black-and White Motion Pictures Before the Subcommittee on Technology and the Law of the Senate Judiciary Committee (Statement of Professor Paul Goldstein) 100th Cong. 1st Sess. (May 12, 1987)
- <sup>8</sup> *Burrows-Giles Lithographic Co. v. Sarony* 111 U.S. 53; 4 S. Ct. 279; 28 L. Ed. 349 (1884)
- <sup>9</sup> *Gross v. Seligman* 212 F. 930 (1914)
- <sup>10</sup> 37 C.F.R. §202.1(a)
- <sup>11</sup> 52 Fed. Reg. 23,443 (proposed June 22, 1987)
- <sup>12</sup> *Id.*
- <sup>13</sup> *Id.*
- <sup>14</sup> *Id.*
- <sup>15</sup> *Id.*
- <sup>16</sup> *AFI Squares Off Against Colorization*, *McCarthy Variety*, vol. 324 October 8, 1986 at 5
- <sup>17</sup> *Variety*, vol. 324 October 15, 1986 at 5
- <sup>18</sup> Hearings on the Colorization of Black and White Motion Pictures before the Subcommittee on Technology and the Law of the Senate Judiciary Committee (Written statement of Rob Ward, President of Hal Roach Studios) 100th Cong. 1st Sess. (May 12, 1987)
- <sup>19</sup> Hearings on Colorization before Senate Judiciary Committee (Statement of Roger L. Mayer, President, Turner Entertainment Co.) 100th Cong. 1st Sess. (May 12, 1987)
- <sup>20</sup> *Tinting Makes Film Buffs See Red*, *Gagliano The Wall Street Journal*, Jan. 12, 1987 at 25
- <sup>21</sup> *The Color Guard*, *Rosnfeld The Washington Post*, May 13, 1987 at F8
- <sup>22</sup> *Variety*, vol. 324 October 8, 1987 at 5
- <sup>23</sup> *Nimmer on Copyright*, Melville B. Nimmer West Publishing Company, § 1.03 [A]
- <sup>24</sup> *Krauthammer, Casablanca in Color? I'm Shocked, Shocked!* *Time* Jan. 12, 1987 at 82
- <sup>25</sup> *Id.*
- <sup>26</sup> Hearings on Colorization before Senate Judiciary Committee (Statement of Professor Paul Goldstein) 100th Cong. 1st Sess. (May 12, 1987)
- <sup>27</sup> H.R. 2400, 100th Congress, 1st Sess. 1987
- <sup>28</sup> 100 Cong. Rec. E1922
- <sup>29</sup> *Id.*
- <sup>30</sup> *Id.*

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act." *Id.* After both parties successfully had the motion dismissed, Allstate appealed. Writing for the majority in the Court of Special Appeals of Maryland, Chief Judge Gilbert found the vexing issue presented by this case to be: "whether an insurer may... after disposition of the tort matter, relitigate the same issues and obtain a declaratory judgment... that overrides the jury's verdict on the tort action." *Id.* The court found that even though Allstate was not a party to the tort action, it is nevertheless bound by the jury's verdict.

The court cited *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 347 A.2d 854 (1975) as being similar with respect to the conflict between an insurer and an insured. The conflict in *Brohawn* arose out of a complaint that alleged separate and alternative theories of negligence and assault and battery. The insurer insisted because of the conflicting legal theories averred against its insured, the extent of policy coverage (due to an exclusionary clause similar to the case here) should be resolved prior to trial in a declaratory action. Although the *Brohawn* court noted, as did the court here, that the above contention is not without merit, it held that a declaratory action is inappropriate where the questions of fact to be resolved in the declaratory action are also to be litigated in the pending action. *Id.*

The court, in its application of *Brohawn*, found that while an insurer's right to preliminary adjudication on an insured's right to coverage under an insurance policy is limited, it is not a compelling enough reason to allow an insurer to adjudicate issues that will be subsequently litigated at trial. *Allstate*, 71 Md. App. at 1069, 523 A2d. at 1069.

The court further pointed out that *Brohawn* as applied did not strip away all of Allstate's defenses. To begin, the court refused to read *Brohawn* as a bar to an insurance carrier's ability to be a party to the action. Nothing in the cited authority forbids the carrier, after supplying independent counsel to its insured or paying the cost of the insured's choice of counsel, from intervening as a party and from being represented at a tort trial.

Thus, to limit the more severe implications of this holding, the court placed the locus of the blame on Allstate for its failure to intervene, not on Allstate being denied its right to representation.

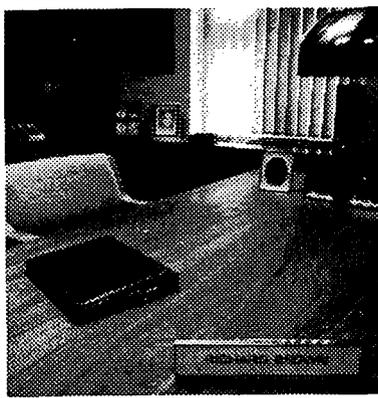
The court in *Atwood* clearly indicates that a more affirmative role should be played by the insurance carrier in tort litigation in which a plaintiff pleads alternative legal theories of which one will be excluded by the scope of the policy at trial. Implicitly the court held firm in its unwil-

lingness to compromise a jury verdict on an issue of liability, despite the fact that extrinsic evidence may reveal that the jury's finding may well fall into an insurance carrier's exclusionary provision.

—Michael T. Wyatt



**Richard Brown  
thought he  
was too young  
to have a  
heart attack.  
He wasn't.**



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