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Recent Developments: Mitchell v. Maryland Casualty Co.: For the Purposes of Asbestos-Related Diseases under a General Liability Insurance Policy, "Bodily Injury" Occurs When the Victim Is Initially Exposed to the Hazardous Condition

Kenneth J. Goldsmith

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of the forgery. *Id.* The court held that the evidence of both the forged signature on the agreement and Optic's awareness of the forgery on March 13, 1990, may have carried the requisite weight for the trial court to find that Optic continued the suit in bad faith. The court remanded the case with the view that the fees and expenses from the misappropriation claim may be severable from those associated with the breach of contract claim, depending on what the trial court finds on remand. *Id.* at 590.

The decision of the court of special appeals in *Optic Graphics* offers the Maryland legal community some insight as to the direction lower courts may take in deciding disputes under the Maryland Uniform Trade Secret Act. While courts must regard the Restatement of Torts as a guide in defining terms within the Act, they shall look specifically to the Act for settling such disputes. Furthermore, the Maryland legal community can expect courts to look to general provisions under Maryland Rules of Procedure and Maryland case law when sanctioning parties who bring bad faith trade secret misappropriation claims under the Maryland Uniform Trade Secret Act. As for the ambitious employees who decide to branch off on their own from the powerful, more established employer, the court of special appeals has interpreted the Act to fully protect those daring souls and their former employers who act in good faith.

- Michael E. Muldowney

Mitchell v. Maryland Casualty Co.:
FOR THE PURPOSES OF ASBESTOS-RELATED DISEASES UNDER A GENERAL LIABILITY INSURANCE POLICY, "BODILY INJURY" OCCURS WHEN THE VICTIM IS INITIALLY EXPOSED TO THE HAZARDOUS CONDITION.

In *Mitchell v. Maryland Casualty Co.*, 595 A.2d 469 (Md. 1991), the Court of Appeals of Maryland held

that, for the purposes of insurance claims involving asbestos, "bodily injury" occurs when asbestos fibers are inhaled and retained in the lungs, even if no diagnosable disease has manifested itself. If the period of coverage has expired under a general liability insurance policy for an installer of asbestos products, claims for diseases which are caused by exposure to asbestos fibers during the policy coverage will be defended by the indemnifier as if the resulting disease had manifested itself during the period of coverage.

Until 1976, Lloyd E. Mitchell was involved in the sale, distribution and installation of products which contained asbestos. During the period of 1965 to at least January 1, 1977, Mitchell was covered by a general liability insurance policy from Maryland Casualty Company. The policy required that Maryland Casualty defend and indemnify Mitchell from all claims resulting from asbestos-related bodily injuries which occurred during the insurance policy period. The policy defined "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury . . . neither expected nor intended from the standpoint of the insured." The policy additionally defined "bodily injury" as "bodily injury, sickness, or disease sustained by any person which occurs during the policy period."

After his insurance coverage had lapsed, Mitchell was sued by several individuals who had been exposed to asbestos in his products. He sought to have Maryland Casualty defend against the claims, arguing that, because the people were injured from products installed during the period of coverage, he should be defended and indemnified from those claims. In support of this contention, Mitchell introduced the affidavit of Dr. John Craighead, a physician and pathologist. It stated that asbestos fibers injure the lungs upon inhalation, and the resulting injury leads to a variety of lung diseases.

The exposure, in his opinion, is the direct cause of the diseases and, therefore, *inhalation* constitutes the point of "bodily injury." *Mitchell*, 595 A.2d at 471.

Maryland Casualty disagreed with Mitchell. It believed that because Mitchell's policy coverage had lapsed, all asbestos-related disease claims against Mitchell were no longer covered by Maryland Casualty. It felt that unless the disease has manifested itself during the policy coverage, there was no obligation to defend or indemnify. In support, Maryland Casualty introduced the affidavit of Dr. Paul Epstein, a clinician, which stated that exposure to asbestos does not always result in disease and that several events must occur in conjunction with asbestos exposure before it can progress to bodily injury. Therefore, in his opinion, *diagnosis* of the disease would be the proper point at which to measure "bodily injury." *Id.*

Both parties filed for declaratory judgment in the Circuit Court for Harford County. After the complaints were filed, each party also moved for summary judgment claiming that no material facts were in dispute. The trial court ruled in favor of Maryland Casualty's motion, finding that the point of "bodily injury," for the purposes of insurance coverage, should be measured by the point of manifestation of the asbestos-related disease. Mitchell appealed, and the Court of Appeals of Maryland granted certiorari before consideration by the court of special appeals.

The appellate court considered two issues. The first issue was whether, under a comprehensive general liability insurance policy, coverage is triggered at the point of initial exposure or when an asbestos-related disease first manifests itself to a clinically detectable degree. Second, the court considered whether the circuit court erred in adopting the "manifestation" theory in finding for Maryland Casualty when, pathologically, damage to the body from asbestos could occur upon expo-

sure. *Id.* at 472.

Chief Judge Murphy wrote the opinion for the court of appeals. In deciding the first issue, the court first gathered a working background in the plain meaning of the term “bodily injury” as written in the policy description. It acknowledged that without a finding of “bodily injury,” coverage would not be triggered. The court found that “[w]hile the definition of bodily injury includes sickness and disease . . . the definition also specifically includes injury to the body” *Mitchell*, 595 A.2d at 475-76 (quoting *Insurance Co. of N. Am. v. Forty-Eight Insulations*, 451 F.Supp. 1230, 1242 (E.D. Mich. 1978), *aff’d*, 633 F.2d 1212 (6th Cir. 1980) (emphasis in original)). The court also found authority that most jurisdictions have defined “bodily injury” to include any “localized abnormal condition.” *Mitchell*, 595 A.2d at 476. The court also looked to Black’s Law Dictionary 159 (5th ed. 1979), which stated that “bodily injury . . . [g]enerally refers only to injury to the body, or to . . . diseases contracted by the injured as a result of injury.” *Id.* These findings illustrated that because a distinction existed between the occurrence of “bodily injury” and the resulting manifestation of sickness or disease, the terminology “sickness or disease” did not determine *when* an injury took place, but only that some injury *did exist*. *Id.* The question of “when” was an issue for medical experts.

Consequently, the court of appeals next looked to the affidavits of the medical experts, Craighead and Epstein. *Id.* The court noted that they were in general agreement as to their findings, except as to the initial incidence of “bodily injury.” *Id.* The court took an interest in the particular field of each expert, just as the Supreme Court of Illinois did in *Zurich Ins. Co. v. Raymark Indus.*, 514 N.E.2d 150 (Ill. 1987).

The court recognized that the issue presented in *Zurich* was identical

to the one presented before the court in *Mitchell*. *Mitchell*, 595 A.2d at 476. Nine physicians testified extensively, and there was disagreement between the pathologists and the clinicians as to when an injury occurred in asbestos cases. The clinicians conceded that damage might occur upon inhalation, but they also noted that the lung is capable of repairing itself so that not every inhalation precipitates disease. *Id.* at 477 (citing *Zurich*, 514 N.E.2d at 156). Without symptoms, they argued, it would be impossible to determine with accuracy exactly when a disease began. Therefore, it should follow that a disease would have to be diagnosed by its symptoms before it could constitute a “bodily injury.” *Id.* This argument, however, did not sway the Illinois court which concluded that once asbestos fibers are inhaled, bodily injury occurs, and nothing within the insurance policy requires diagnosis nor does it require identification of that injury within the policy period. Simply stated, only the *injury* must take place within the policy coverage, not the subsequently-manifested disease. *Id.*

Extending this analysis, the Maryland Court of Appeals noted that mere exposure to asbestos without injury does not trigger coverage. *Id.* at 478. However, upon the diagnosis of a disease, the courts will look back to the time of initial exposure to determine when the bodily injury occurred. *Id.*

In this writer’s opinion, an interesting situation would have arisen if a person had been diagnosed under the insured’s valid policy. When looking retroactively to the point of bodily injury, however, the initial inhalation of asbestos predated the policy coverage. It is unclear whether coverage would be allowed even if the insured product clearly aggravated an otherwise pre-existing asbestos-related mild lung condition. Technically, no injury actually “occurred” as defined by the Maryland Casualty policy. Also, if the process to develop lung disease

from asbestos is not immediate, it would appear to be very difficult, if not impossible, to decipher which inhalation precipitated the disease, i.e., was it the asbestos in his own home, a neighbors home, at work, etc. It would seem that unless *actual initial* causation could be shown, coverage would not be triggered.

The significance of *Mitchell v. Maryland Casualty Co.* rests with its possible application to other disease related cases where exposure to a condition is relevant, such as AIDS or Hepatitis B in hospitals and other facilities dealing with blood. For now, Maryland’s stance on asbestos-related insurance coverage is to be determined from the moment of initial exposure, so long as a disease manifests itself as a result. This is a policy which protects both consumers and installers from unknown dangers which we may not yet have the technology to detect. It places the burden temporarily upon insurance companies who can best afford the risk of using new materials and devices, and in turn, through their own influence, can pressure the manufacturers to work harder to safeguard the public.

- Kenneth Goldsmith

Cohen v. Cowles Media Co.:
FIRST AMENDMENT DOES NOT PROHIBIT AN INFORMANT FROM RECOVERING DAMAGES UNDER STATE’S PROMISSORY ESTOPPEL LAW FOR NEWSPAPER’S BREACH OF PROMISE OF CONFIDENTIALITY.

In *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991), the United States Supreme Court held that the First Amendment does not prohibit an informant from recovering damages under a state’s generally applicable promissory estoppel law for a newspaper’s breach of a promise of confidentiality given in exchange for information. The Court based its decision on the theory that laws of