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MID-ATLANTIC PROPERTY & CASUALTY REPORTER

REAL ESTATE INSPECTIONS AND MISREPRESENTATIONS: MUST THE REAL ESTATE AGENT BEWARE ?

One factor fairly unique to the housing bubble, which by many economists' estimates existed between 2004 and 2006, was the pace at which residential properties were being sold. It was not unusual, for example, for a buyer to receive offers before formally listing a property. Listed properties were often the subject of multiple offers, with each prospective purchaser vying to make the most attractive offer in order to lock in a sale. During this time, many buyers' offers did not include inspection contingencies, the rationale being that a seller would more likely accept a non-contingent offer than a contingent one.

With the collapse of the real estate market several years ago, the number of fraud and misrepresentation claims filed by buyers against real estate agents and brokers, as well as sellers, has been rising. This trend will likely continue as more homeowners face foreclosure. Buyers desperate to hold on to their homes will look to any possible source of recovery, including selling agents and brokers. One way to do this is to argue that the agent committed fraud or otherwise misrepresented the condition of the subject property.

To read the remainder of this article, follow this [link](#).

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Funk & Bolton's Coverage & Defense Practice Group provides advice and counsel to insurers in coverage and extra-contractual matters, product development and claim compliance, and defends claims and litigation matters.

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MARYLAND'S CAP ON NON-ECONOMIC DAMAGES HELD CONSTITUTIONAL (AGAIN)

Maryland's cap on non-economic damages has survived yet another constitutional challenge by the plaintiffs' bar. .

The plaintiffs in *DRD Pool Service v. Freed* had argued that the cap, which limits jury awards based on non-quantifiable damages such as pain and suffering, was unconstitutional because it violated the equal protection clauses of both the Maryland Declaration of Rights and the United States Constitution. They argued that because less seriously injured plaintiffs could keep their entire jury award (because the award fell below the cap limit), while awards to more seriously injured plaintiffs were limited, the law treated similarly situated persons differently without any rational basis. The plaintiffs also argued that the cap was not constitutional as applied because it has not achieved its stated purpose, keeping insurance premiums reasonable, in the years since it was passed by the General Assembly.

Jennifer S. Lubinski, on behalf of Maryland Defense Counsel, Inc., authored an amicus brief in favor of the cap. You may review it [here](#). Only one member of Maryland's highest court dissented. The Honorable Joseph F. Murphy, Jr. argued that the statute should be reviewed under a heightened scrutiny standard, a standard generally reserved for statutes which classify people on suspect bases, such as gender or illegitimacy. As a trial judge, Judge Murphy had previously found the statute unconstitutional. His decision was overturned on appeal, however, some twenty years ago, in one of the first cases to address the constitutionality of the cap.

DUTY TO DEFEND EXISTS BASED ON COVERED DAMAGES EVEN WHEN THOSE DAMAGES CANNOT BE RECOVERED AS A MATTER OF LAW

The United States District Court for the District of Maryland recently decided to that an insurer must defend an insured because of the possibility that covered damages would be alleged in an underlying case, even where those damages would not be recoverable as a matter of law.

In *Ricketts v. Great Northern Ins. Co.*, No. CCB-09-3140, 2010 WL 3038048 (D. Md. Aug. 2, 2010), the Court considered a case in which the insureds had been sued for slander of title to real estate. The insureds tendered defense of the litigation to their homeowner's insurance carrier. Although the insurer initially raised other defenses to coverage, it eventually argued that it was not obligated to defend because the slander of title claim was not a suit seeking damages for "personal injury" or "property damage" as those terms were defined in the policy.

The plaintiffs in the underlying case were seeking damages based upon emotional distress. The policy did provide coverage for "emotional distress." However, under Maryland law, a claimant cannot be awarded damages for emotional distress based solely upon a property damage claim. See *Rite Aid Corp. v. Lake Shore Investors*, 298 Md. 611, 471 A.2d 735 (1984). Accordingly, the insurer argued, because the policy would provide coverage only based on damages which could not be awarded, it had no duty to defend.

According to the Court, "[e]ven if damages for emotional distress are not legally cognizable under a slander of title claim, the insurance policy explicitly provides that claims need not be meritorious to trigger coverage." The Court entered summary judgment in favor of the insureds and ordered the insurer to pay the costs of defending the slander of title litigation.