Eccleston & Wolf

Professional Corporation • Attorneys At Law

Eccleston and Wolf is a regional law firm serving the District of Columbia, Northern Virginia and the State of Maryland. As part of its representation of lawyers in all aspects of their practice, the firm is on the defense panel of virtually every insurer of lawyers in the region. It is the policy of most insurers to allow their insureds to select counsel from those firms on the defense panel. Accordingly, if you prefer to utilize the services of Eccleston and Wolf, please request the firm, by name.

Eccleston and Wolf, Professional Corporation is pleased to announce:

Eric M. Rigatuso & Stephen M. Cornelius

have been elected Supervising Attorneys by the firm.

Oh No, A Letter From Bar Counsel

According to its Annual Report, the Attorney Grievance Commission sends out roughly 2,000 complaint letters each year. Approximately 75% of these initial inquiry letters are dismissed after receiving a well reasoned response. All too often however, matters that might have been promptly resolved with a good first letter go awry, and the attorney becomes deeply embroiled in the troubled waters of the attorney disciplinary process. The cause of this additional pain and anguish is often attributable to what Bar Counsel dubs a "BFL," or "bad first letter."

A typical BFL attacks the Complainant, the Court, Bar Counsel, or all three. The classic BFL usually fails to respond appropriately to the issues posed, and usually contains gratuitous and sometimes damning information which expands the scope of Bar Counsel's inquiry.

The recommended course for any lawyer unfortunate enough to receive a complaint from the Attorney Grievance Commission is to report the matter immediately to their professional malpractice carrier. While some policies provide no coverage for Bar complaints, the vast majority do cover disciplinary actions with no deductible obligation. The level of coverage afforded by different insurance companies can vary widely, and you should therefore consult with an insurance broker experienced and well versed in this field.

The most appropriate response to a disciplinary complaint is to set forth the relevant facts clearly and concisely and to explain why the conduct complained of is not disciplinary in nature. Good response letters deal effectively with every issue raised, but do not contain extraneous matters or inadvertently raise new issues. Certainly a good response should never insult the person filing the complaint, the Bar Counsel, or anyone else involved. The response should be objective and demonstrate a high degree of professionalism and propriety. Hastily written, sloppily edited letters do not enhance a lawyer's chances of having a complaint dismissed.

For those who do not have professional negligence insurance, and are not willing to consult an attorney experienced in the field, it is recommended that you first let the matter sit for a day and give it some thought. Pull the related file and carefully review it to make sure every statement made to Bar Counsel is factually accurate. Answer only what is being asked and volunteer nothing extraneous. Keep in mind the fact that Bar Counsel is fielding over 2,000 complaints a year, but will review carefully everything that you send. Accordingly, concise responses are appreciated. Secondly, let your response sit for a day and then carefully review it as objectively as possible. Feel free to share it with a colleague whom you respect and trust, confident that your communication will be privileged under either Rule 1.6 or 1.18.

Consulting an attorney experienced in the area is always the recommended approach. An attorney well versed in the field will understand and appreciate what Bar Counsel is looking for in the response, from the standpoint of both style and substance. Many attorneys inadvertently raise facts or issues that create concerns beyond the initial complaint. Stated simply, they put their foot in their mouth without even realizing that they are expanding the scope of the inquiry. Experienced counsel will insure that you do not inadvertently step into one of these pitfalls, and will educate you where appropriate as to how you should alter your current practice.

When and Why You Need Tail Insurance

One of the least understood or appreciated provisions in the typical lawyer professional liability insurance policy is the option to purchase an extended claims reporting period, commonly referred to as a "tail". Many lawyers have never read their errors and omissions policy and are completely unaware of the coverage afforded or the risks entailed in failing to understand the intricacies of their policy. The dangers of such ignorance are especially prevalent when attorneys switch insurance companies, move from one law firm to another, or retire from the active practice of law. Attorneys who would never dream of ignoring such a critical document when representing their clients blithely assume that having purchased a policy they are "covered." Many retiring attorneys believe that since they are no longer practicing, there is no need for continuing insurance coverage. The penalty for this cavalier attitude is often devastating. Having practiced law for decades while paying considerable premiums, it is the foolhardy attorney who neglects to purchase "tail" coverage during his retirement.

Many retiring attorneys' misconceptions regarding the need for continuing coverage following retirement are based upon their confusion over how insurance policies have changed over time. In its infancy, lawyers' errors and omissions policies were written on an "occurrence" as opposed to "claims made" basis. Under an "occurrence" policy an attorney received coverage for acts, errors or omissions which occurred during the period the policy was in effect. Thus, it was irrelevant when the claim or suit was advanced against the lawyer; there was coverage so long as the alleged act, error or omission "occurred" during the period in which the policy was in force and effect. As a result, there was no need for a retiring attorney to purchase insurance after retirement.

With the advent of the discovery rule for statute of limitations purposes, it became not only possible, but inevitable, that an error might lie fallow for many years, or even decades, before being "discovered" and advanced against the attorney. This created a nearly impossible situation for insurance companies because they were unable to calculate, to any reasonable degree, the proper premiums for the risk. Especially in the fields of estates and trusts, real estate, business transactions, and the representation of minors, claims might lie dormant, and, then, be asserted ten, fifteen or even twenty years after the occurrence. As a result, every carrier writing professional errors and omissions policies abandoned the "occurrence" form and adopted some variation of the "claims made" form. This basic change necessarily altered how attorneys retiring from practice evaluated their coverage needs.

A "claims made" policy provides coverage for claims made during the policy period regardless of whether the act, error or omission giving rise to the claim occurred during or prior to the policy period. Thus, the date of the occurrence became largely irrelevant, and insurance companies were able to accurately predict the risk being accepted and, thus, charge an appropriate premium. Moreover, once the policy year expired, the insurance company, knowing that no future claims chargeable to that policy would be forthcoming, could quickly analyze claims history and adjust premiums for purchase policies. The pure "claims made" policy, however, posed several problems. Since a claim is deemed "made" when a demand for damages is advanced against the Insured, it often results that the claim is not reported to the insurance company until after the policy period expires.

In states such as Maryland, insurance companies cannot deny coverage as the result of an Insured failing to promptly report a claim in the absence of actual prejudice. Thus, insurance companies cannot generally rely upon late notice conditions, alone, to deny coverage. The Annotated Code of Maryland, Insurance Article §19-110 provides in pertinent part that:

> An insurer may disclaim coverage on a liability insurance policy on the ground that the insured or a person claiming the benefits of the policy through the insured has breached the policy by failing to cooperate with the insurer or by not giving the insurer required notice only if the insurer establishes by a preponderance of the evidence that the lack of cooperation or notice has resulted in actual prejudice to the insurer.

Most insurance companies, therefore, altered the pure "claims made" form to require that the claim not only be made, but also, that the claim be reported to the insurance company within the policy period in order to trigger coverage. Thus, most policies in current use should more properly be called "claims made and reported" policies. It should be noted that distinguishing between a "claims made" and a "claims made reported" policy can be difficult, and Maryland courts generally have been reluctant to uphold the denial of coverage where the claim was made against the insured during the policy period, but not reported until after the policy expired.

Until 2011, Maryland case law was clear that §19-110 did not apply to claims made and reported policies. *See*, *St. Paul Fire & Marine Ins. v. House*, 315 Md. 328 (1989). However, in 2011, the Maryland Court of Appeals issued its decision in *Sherwood Brands, Inc. v. Great Am. Ins. Co.*, 418 Md. 300 (2011), in which the Court distinguished the prior case law and concluded that the policy's notice requirement was not a

condition precedent to coverage, but a covenant such that a breach required that the carrier establish actual prejudice before coverage could be properly denied. While Maryland appellate courts have not rendered any decisions on this issue since *Sherwood Brands*, several cases from the U.S. District Court for the District of Maryland have spoken on the issue with varying results. In, *Minnesota Lawyers Mutual v. Baylor & Jackson*, 852 F. Supp. 2d 647 (2012), and *Financial Industry Regulatory Authority, Inc. v. AXIS Ins. Co.*, 951 F. Supp. 2d 826 (2013), the U.S. District Court concluded that §19-110's actual prejudice requirement was inapplicable to the subject policies. In *Baylor & Jackson*, the Court rejected the argument that §19-110 required the carrier to establish that it suffered actual prejudice as a result of the insured's untimely notice in order to deny coverage and held that the subject policy requirement of timely reporting was no mere "notice provision," but, rather, was incorporated into the definition of coverage and, therefore, became a condition precedent to coverage. A similar decision was rendered by the Honorable Paul W. Grimm in Financial *Industries Regulatory Authority, supra.*

On the other hand, in three other cases, the U.S. District Court concluded that §19-110 was applicable and required a showing of actual prejudice before coverage may be denied. *See, McDowell Building, LLC v. Zurich Am. Ins. Co.*, 2013 WL 5234250 (2013); *Navigators Specialty Ins. Co. v. Medical Benefits Admin. of MD, Inc.*, 2014 WL 768822 (2014); and *Katlin Specialty Ins. Co. v. Aron*, 38 F.Supp.3d 694 (2014). In each of these cases, the Court concluded that §19-110 applied, thereby requiring a showing of actual prejudice before coverage may be denied.

While the status of Maryland law, as it relates to the applicability of §19-110 to claims made and reported policies, remains somewhat unclear and very case specific depending on the language of each applicable insurance policy, the fact remains that an insured faces a significant risk of not having insurance coverage if a claim is not both made and reported during the applicable insurance term.

The switch from an occurrence to a "claims made and reported" form created a huge problem for lawyers retiring from the practice of law. With occurrence policies, there was, of course, no need to continue purchasing insurance following retirement because the retired attorney would not be committing "new" acts, errors or omissions. The retiree's prior occurrence polices would, therefore, apply to any claims made in the future, since they would, by definition, be based upon acts, errors or omissions which occurred during one of the earlier policy periods. However, under a "claims made and reported" policy, once the last policy period expired, any claims made, even though based upon acts, errors or omissions which occurred while the policy was in effect, would not be covered. Hence, the need arose for an extended reporting period to protect the attorney for claims made, after his last policy expired, for acts, errors or omissions which occurred during earlier policy periods.

These "tails" do not provide coverage for new acts, errors or omissions, but rather, simply allow the Insured to report claims based on prior acts, errors or omissions following the normal expiration of the policy term. The precise terms of the extended claims reporting options differ from policy to policy. The main point is that the "tail" option provisions differ widely, and it is important to be cognizant of the applicable provisions that may best suit an individual's needs. As a result, Eccleston and Wolf strongly recommends that retiring attorneys, or attorneys switching firms or policies, consult with an expert insurance broker with a practice concentrated in the realm of professional errors and omissions insurance.

For the solo practitioner who decides to retire, the choice seems fairly simple and straightforward. Simply put, the solo practitioner contemplating retirement should seek either an unlimited or long-term tail provision. While the cost may seem high at a time when your income may be limited, the risks entailed are too great to forego the protection afforded. For those individuals retiring from a stable law firm, which is likely to indefinitely carry on the business, the decision is more complex. Most errors and omissions policies contain a provision making a retired partner or employee an "additional insured." For example, one of the policies frequently issued in Maryland provides that the following are "additional insureds":

1. Any former partner, officer, director, stockholder or employee of the Named Insured Firm or Predecessor Firm named in the Declarations while acting solely in a professional capacity on behalf of such Named Insured Firm or Firms;

2. Any partner, officer, director, stockholder or employee of the Named Insured Firm or Predecessor Firm named in the Declarations who has retired from the practice of law, but only for those professional services rendered prior to the date of retirement from the Named Insured Firm or Firms.

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Most policies contain similar, but certainly not identical, provisions. Thus, so long as the firm stays in business and continues to purchase insurance from the same insurance company, without a break, the retiring attorney is covered without the need to purchase additional tail coverage. Unfortunately, the firm may dissolve after the attorney's retirement, or may drop its insurance or switch to a new company whose policy does not afford coverage. For example, even if the firm continues in business and maintains insurance coverage after the attorney's retirement, the firm might switch to a new insurance carrier and accept a very restrictive prior acts exclusion or other limiting language in order to save on premiums. This could leave the retiring attorney in a vulnerable position. Even worse, should the firm dissolve, or cease to buy coverage of any type, the retiree could be left wholly uncovered. Thus, in a subsequent lawsuit, even if the former law firm is named as one of the defendants, the retiree will potentially bear the brunt of any adverse judgment and the defense costs associated therewith, especially if the firm is judgment proof following dissolution. Similar issues may arise when the attorney either changes insurance companies or changes firms.

The most important aspect of any determination as to what coverage you need is a firm grasp of the options available. It is imperative that when planning for retirement, you obtain and carefully review your insurance policy in order to ascertain the options available. It is also highly recommended that you discuss the various policies available with your insurance professional. If the professional you normally use only offers one product, or will not provide you with information on competing policies, you should contact Eccleston and Wolf to ascertain the names of qualified brokers who concentrate in this type of insurance. Most brokers and agents write policies across a broad spectrum. The question is whether the person who sells you auto and home coverage is the person you want advising you on this crucial issue. At the very minimum, three years prior to contemplated retirement is not too soon to begin thinking and planning how you will protect the fruits of a lifetime of labor.

Social Media Evidence Requires Higher Authentication Standard in Maryland

Practitioners face a higher than usual standard when authenticating social media posts in Maryland courts. In *Griffin v. State*, the Court of Appeals emphasized the necessity of distinctive characteristics in order to overcome the possibility of manipulation and hacking. More recently, in *Sublet v. State*, the Court adopted the "reasonable juror" standard. *Sublet v. State*, 442 Md. 632 (2015). The reasonable juror standard requires only that evidence be "sufficient to support a finding that the matter in question is what its proponent claims." MD. RULE § 5-901 (2015). This is usually a low bar that requires only circumstantial evidence for authentication with documents and email. Despite adopting the "reasonable juror" standard in *Sublet v. State*, the Court of Appeals articulated a higher threshold requirement for Maryland practitioners when authenticating social media posts. In *Sublet v. State*,[1] the purported author's denial of making the post, combined with the fact that other individuals possessed her password, did not meet this higher standard. In *Harris* and *Monge-Martinez*, however, special software, proximity to the incident, and direct testimony regarding authorship, convinced the Court that a reasonable juror would have authenticated the posts.

In *Sublet*, the defense tried to introduce a Facebook printout suggesting someone else, not the defendant, instigated an assault. *Sublet*, 442 Md. at 700. The purported author denied making the entry, explaining that she gave her username and password to other individuals, and that people would commonly hack her page and post under her name. The Court was not convinced that a reasonable juror could have authenticated the printout because the alleged author denied making it, and the defense failed to establish other distinctive characteristics proving authorship.

The Court distinguished *Harris*, holding that sufficient distinctive characteristics existed for a reasonable jury to determine that Harris was the one who posted the tweets and messages. *Sublet*, 442 Md. at 674. A detective used special software to retrieve the social media posts to confirm that Harris authored the posts. Additionally, a number of other circumstantial facts existed that the Court found persuasive: (1) the direct messages were sent at a time when only a few people could have made the posts in question (2) a witness with personal knowledge testified that Harris authored the direct messages and (3) the tweets were authored during the same timeframe as the direct messages. *Id.*

Similarly, distinctive characteristics existed in *Monge-Martinez* sufficient to authenticate the messages. *Sublet*, 442 Md. at 675-76. Like *Harris*, the messages were received in close

[1] The Court of Appeals consolidated three separate cases into Sublet: Sublet v. State, Harris v. State, and Monge-Martinez v. State. Each will be addressed in turn.

proximity to the event when only a few people knew about the incident, and the victim personally testified to Monge-Martinez sending the messages. The messages were also sent by a Spanish speaker, which was Monge-Martinez's first language. The Court found that the distinctive characteristics and circumstantial evidence provided far more assurance against falsification than *Sublet*. See *id.* at 677-78.

The decisions in *Sublet* have major implications for admitting evidence at trial. Using photographs, birthdays, phone numbers, or other common identifying information is not enough to meet the standard. Knowledge that other individuals have access to social media accounts, without additional evidence demonstrating authorship, would seem to ensure that the standard will not be met. The more circumstantial evidence that exists, the more comfortable the Court appears to be with authentication of social media evidence. Meeting one of the three methods established in *Griffin v. State* would probably be enough for authentication: (1) ask the purported creator if they created the profile or made the post, (2) examine the computer's history to see if it was used to generate the post, and/or (3) obtain information directly from the social networking site linking the posts to the person. *Griffin v. State*, 419 Md. 343, 363, 364 (2011). While the standard in *Griffin* was higher than what the Court now requires after *Sublet*, using one of these three methods would be the safest approach for authenticating social media posts.

It should be noted, however, that these methods are non-exclusive. A limited pool of people who could have made the post or testimony from other witnesses concerning authorship, would probably satisfy the standard, as the court determined in *Harris* and *Monge-Martinez*. *Sublet*, 442 Md. at 674, 677. Additionally, posts providing distinctive characteristics about an individual or situation not commonly known, such as speaking in a different language or other written communications relating to the social media posts, also appear to meet this standard.

Sublet has discovery implications as well; the choice to depose a purported author on whether they made the post or to subpoena records from a site could be critical to authentication at trial. If the purported author denies making the post and admits to providing others with their social media passwords, subpoenaing records from the site or the author's computer may be the only way to confirm that they made the post. Deposing an individual who overheard the purported author discussing the post or witnessed the author making the post could also be critical to authentication. As demonstrated in *Sublet*, merely printing a social media post or pointing out non-unique characteristics at trial will not be sufficient. Practitioners must use a great deal of foresight when authenticating social media posts. Because the "reasonable juror" standard is unclear, erring on the side of offering more makes courts less wary of falsification and manipulation.

Cautionary Notes with Unbundling Legal Services

Unbundled legal service is a method of legal service delivery that allows attorneys to (1) break down legal tasks of their clients and (2) provide limited representation only pertaining to a clearly defined portion of the client's legal needs. Upon the completion of an attorney's limited representation, the remainder of the client's legal responsibilities is subsumed by the client, and the client must handle his or her own remaining legal tasks.

The practice of unbundling legal services stems from the recognition that securing legal services ought not to be an all-or-nothing proposition. By unbundling legal services, clients with specific needs, who may not be financially situated to afford full representation, benefit from receiving assistance on only portions of their cases. Moreover, unbundling legal services increases court accessibility, promotes effective resolution of matters, and aids courts in efficiently handling cases.

Maryland Rules of Professional Conduct 1.2(c) provides that "[a] lawyer may limit the scope of the representation in accordance with applicable Maryland Rules if (1) the limitation is reasonable under the circumstances, (2) the client gives informed consent, and (3) the scope and limitations of any representation, beyond an initial consultation or brief advice provided without a fee, are clearly set forth in a writing, including any duty on the part of the lawyer under Rule 1-324 to forward notices to the client." Maryland Rules of Professional Conduct 1.2(c). In providing unbundled legal services, the rule only requires that "the scope and limitations of [the] limited representation by an attorney be set forth in [] writing." *Id.*

As stated above, Rule 1.2(c) provides that "[a] lawyer may limit the scope of the representation if the limitation is reasonable [emphasis added] under the circumstances and the client gives informed consent." *Id.* Attorneys are professionally responsible in determining whether limited representations are reasonable on a case-by-case basis. Assisting a party with

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forms or providing brief consultations may constitute as *reasonable* in relation to a simple uncontested divorce but may not be reasonable for a matter involving complicated marital property and tax issues. To safeguard against this pitfall, attorneys should define the representation specifically in writing and obtain the client's informed consent.[1]

Maryland Rules of Procedure 2-131(b)(2) and 3-131(b)(2) provide model retainers for attorneys to use as reference in drafting their client retainer agreements. The model retainers enumerate different scopes of representation for the attorney to indicate in relation to their limited representation and provide a sample provision conveying the client's informed consent to the limited nature of representation:

> I understand that except for the legal services specified above, I am fully responsible for handling my case, including complying with court Rules and deadlines. I understand further that during the course of the limited representation, the court may discontinue sending court notices to me and may send all court notices only to my limited representation attorney. If the court discontinues sending notice to me, I understand that although my limited representation attorney is responsible for forwarding to me court notices pertaining to eh matters outside the scope of the limited representation, I remain responsible for keeping informed about my case. Rule 2-132(b)(2). Rule 3-131(b)(2).

One should bear in mind, however, that this model retainer is not comprehensive and may not be applicable for every unbundled case. The enumerated scopes of representations within the model retainer only encompass a general category of representation without specificity:

> … check all that apply: [1] arguing the following motion; [2] attending a pretrial conference; [3] attending a settlement conference; [4] attending the following court-ordered mediation for purpose of advising the client during the proceeding; [5] acting as my attorney for the following hearing or trial; [6] with leave of court, acting as my attorney with regard to the following specific issue or a specific portion of a trial or hearing. Rule 2-132(b)(2). Rule 3-131(b)(2).

Due to this lack of specificity, the model retainer may create disputes as to the extent of the limited representation. For example, the model retainer provides an option for limited representation in attending a settlement conference. The model retainer, however, does not specify whether the representation merely extends to the attendance of a single conference or to the ultimate resolution of the settlement dispute. Consequently, a Pro Se litigant with a lay person's understanding of the law may interpret this provision to require the attorney in assisting the client in reaching an ultimate settlement agreement while the attorney may have a different interpretation. Therefore, though the model retainers provide a starting point in drafting a retainer, it is imperative for attorneys to note that adjustments of retainers are necessary to provide a comprehensive and specific language in relation to the scope of limited representation.

In providing unbundled legal services, one should also use caution in adhering to the articulated scope of representation provided by the retainer. When providing limited scope representation, attorneys may be tempted to work beyond the initially agreed upon representation. Nonetheless, attorneys should use caution not to extend their work beyond what was initially agreed upon. Exceeding the articulated scope of representation may violate the prior agreement and create a different legal duty. If an attorney finds himself or herself providing legal representation beyond the initial agreement, the attorney should discuss the issue with the client and revise the retainer accordingly. In other words, the engagement needs to be memorialized in writing.

Attorneys should bear in mind that limited representation does not equate to limited workload. When providing limited scope representation, an attorney should review the client's case in its entirety. Whether representation is made in full or with limitations, factual information from different issues may interrelate and warrant different legal remedies. Thus, a comprehensive review of factual evidence in its entirety is crucial in providing limited scope representation, as relevant information-that does not blatantly appear relevant-may be overlooked.

A common practice of limited representation involves ghostwriting. Ghostwriting refers to the practice of licensed attorneys drafting pleading, briefs, or other documents on behalf of a pro se litigant. Though there have been disagreements within the legal profession of the ethicality of this practice, Maryland has found such practices to be legally sound.

[1] The Maryland Rules of Professional Conduct defines informed consent as an "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks and reasonably available alternatives to the proposed course of conduct." Maryland Rules of Professional Conduct 1.0(f).

Bear in mind the ghost writer (i.e. attorney) is subject to Rule 1-311, the pleading must be filed in good faith, for legitimate purposes-otherwise the lawyer may be reasonable whether his or her name is on the paper, or not.

Secondly, ghost writing is prohibited in the Federal Courts in Maryland, pursuant to Local Rule.

The practice of unbundled legal services is still relatively new in the legal profession. The area is evolving and the reader is urged to keep current on all developments.

Statute of Limitations: Inquiry Notice

In *Windesheim v. Larocca*, 443 Md. 312 (2015), the Court of Appeals discussed Maryland's statute of limitations in detail, and reaffirmed its holding in *Bank of New York v. Sheff*, 382 Md. 235 (2004). In *Windesheim*, Borrowers filed a putative class action lawsuit against PNC Mortgage and PNC's Loan Officer, Suzanne Windesheim, as well as realtors and other parties involved in the loan transactions, for an alleged mortgage fraud scheme. The Borrowers simultaneously applied for two loans in order to "bridge" the financing in purchasing new homes. The Borrowers obtained (1) home equity lines of credit ("HELOC") on their existing homes, and (2) primary mortgages on new homes. Through the HELOCs, the Borrowers extracted equity from their current homes, allowing them to make offers on new homes that were not contingent on the sale of their current homes.

The Borrowers believed that they were obtaining loans through Prosperity Mortgage Company and its loan officer Michelle Mathews; however, Mathews sent the Borrowers' financial information to PNC Mortgage and Ms. Windesheim, who prepared the HELOC applications. The Borrowers alleged that the HELOC applications falsely represented that the lines of credit would be secured by the Borrowers' primary residences (the HELOCs were secured by the existing homes, which the Borrowers intended to sell, and underwriting standards would not have allowed the lenders to approve HELOCs on homes intended for sale). Similarly, underwriting standards would not have allowed approval of the primary residential mortgages on the new homes given the new debt created by the HELOCs. The Borrowers alleged that, to get around this issue, Mathews falsely represented on the primary residential mortgage applications that the Borrowers received rental income and fabricated leases between the Borrowers and fictitious tenants.

It was undisputed that the Borrowers signed the HELOC and primary mortgage applications; however, the Borrowers argued that they did not have time to read and understand all of the numerous documents provided to them at closing. Notwithstanding this contention, the Court of Appeals applied the "signature doctrine," holding that where there is no dispute that the Borrowers signed the applications, "they are presumed to have read and understood those documents as a matter of law." *Id.* at 963-964.

The *Windesheim* Court then determined that the loan applications, which the Borrowers are charged with understanding, placed the Borrowers on inquiry notice of their mortgage fraud claims. The Court cited *Bank of New York v. Sheff*, 382 Md. 235 (2004), where the Court held that plaintiffs who received a closing binder that contained all of the closing documents, including financing statements filed with the Maryland SDAT and Prince George's County, but which did not contain a financing statement sent to the District of Columbia, that the plaintiffs were on notice that the bond transaction was not proceeding as expected because the financing statement was not filed. Similarly, the Court of Appeals found that the Borrowers in *Windesheim* had notice of their mortgage fraud claims because the HELOC applications expressly stated that Windesheim was processing them (as opposed to Mathews and National City), and because the primary mortgage applications expressly identified "gross rental income," where the Borrowers claimed that they were received based upon the falsely represented rental income. The Court found that the loan applications provided the Borrowers with "knowledge of facts about which they claim they were deceived and that suggested that their loan transactions were not proceeding as they expected…" *Windesheim* at 967.

The Court held that the Borrowers were on inquiry notice when they closed on their HELOCs and primary residential mortgages in 2006 and 2007, and their lawsuit, filed in December 2011, was not timely. As there was no evidence that the Borrowers were encouraged not to read the loan applications, and no evidence of a fiduciary relationship between the Borrowers and the lenders, the Court found that the lawsuit was barred, as a matter of law.

Locations

Baltimore-Washington Law Center
4th Floor
7240 Parkway Drive
Hanover, Maryland 21076
(410) 752-7474
Fax: (410) 752-0611

Washington, D.C.
Suite 260
1629 K Street, N.W.
Washington, D.C. 20006
(202) 857-1696
Fax: (202) 857-0762

Northern Virginia
Suite 107
10400 Eaton Place
Fairfax, Virginia 22030
(703) 218-5330
Fax: (703) 218-5350

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WWW.ECCLESTONWOLF.COM

ECCLESTON & WOLF, PC
Baltimore-Washington Law Center
4th Floor
7240 Parkway Drive
Hanover, Maryland 21076