Litigation Law Section Newsletter
(April 1999)

Unanswered Questions in Tennessee's Law of Informed Consent
By Robert Blake Menzel

The body of informed consent law in this country was developed under the auspices of protecting the patient's right to medical self-determination. Under Tennessee law, if a physician fails to obtain informed consent and performs a procedure or surgery that causes injury, the physician is liable for the consequences because the failure to obtain informed consent is a technical battery, not negligence.1 The same, presumably, will be true for the new cause of action known as "medical battery."2

The Tennessee Supreme Court has repeatedly opined that there is a difference between a battery analysis and a negligence analysis when discussing informed consent cases, but the court has yet to explain exactly what the difference is. The only unresolved questions in informed consent law which could form a basis for this distinction have to do with causation issues. That is, once the plaintiff introduces competent proof from which a jury could conclude that the physician either a) performed an unauthorized operation on the patient (medical battery); or b) deviated from the applicable standard of care with respect to discussing the risks and alternatives associated with the procedure (traditional informed consent case), does the plaintiff have to prove that the plaintiff would not have undergone the procedure in question if properly warned or advised about the nature of the procedure and alternative treatments? If so, then should the jury utilize an objective or subjective standard when attempting to ascertain what the plaintiff would have done had he received information he never actually received?

The real issue is arguably the focus of the causation inquiry. Put another way, the issue is whether in an informed consent or medical battery case the plaintiff has to prove that his injuries were proximately caused by the physician's failure to provide adequate warnings, or whether the causation inquiry is more properly tied to whether the damages were proximately caused by the procedure which was performed without informed consent? Can the causation inquiry be tied to an act of negligence when the cause of action has been deemed one for technical battery? These questions require resolution by the Tennessee Supreme Court. The Supreme Court must also resolve whether the required causation proof will differ between a medical battery case and the traditional informed consent case.

The resolution of the question of what causation proof should be required should logically turn on the nature of the informed consent claim. If a negligence analysis is utilized, then the damages in question must have been proximately caused by the negligent deviation from the recognized standard of care. However, if a battery analysis is utilized then the causation analysis should not focus on what damages

were caused by any deviation from the standard of care, but should instead focus on what damages were proximately caused by the battery (the procedure or treatment which was performed without the patient's informed consent). Without this distinction there is no practical difference between the use of a negligence analysis versus a battery analysis in the State of Tennessee.3

States have traditionally opted to treat informed consent claims as either negligence cases or technical battery cases, and Tennessee has opted for the latter. Tennessee had the opportunity to opt for a negligence based theory of informed consent, but, time after time, Tennessee courts have confirmed that a negligence analysis is not appropriate in cases based upon a lack of informed consent.4

Regardless of whether a state has opted for a negligence or battery analysis, the vast majority of states to consider the "causation proof" question have come down on the side of requiring a plaintiff to prove that had he received the required warnings or information he would not have undergone the procedure or treatment in question. This makes perfect sense for "negligence based states," but, unfortunately, few of the "technical battery states" have actually taken the time to logically analyze whether the same standards should apply to them. While the states differ with respect to whether an objective or subjective standard is utilized by the trier of fact, most still require the trier of fact to engage in the mental gymnastics of attempting to determine whether the plaintiff (or a reasonable person in the plaintiff's position) would have undergone the treatment in question if he had received the warnings or information he never, in fact, received. So far, only Pennsylvania has done away with this approach, opting instead for an analysis which seeks to ascertain only whether the damages claimed were proximately caused by the treatment or procedure performed without informed consent.5 No other technical battery state that this author has found to date has actually walked through an analysis which considers tying the causation inquiry to the act of battery rather than to the alleged omission or deviation from the standard of care, nor has this author found any court that articulates a reason not to utilize such an analysis for a battery claim.

Tennessee's first opinion on this subject was recently rendered by the Court of Appeals for the Middle District of Tennessee in the case of Ashe v. Radiation Oncology Associates, Case No. 01-A-01-9710-CV00563 (slip opinion July 31, 1998). The plaintiff in that case obtained a favorable ruling reversing the trial court's entry of a directed verdict on the plaintiff's informed consent claims. However, the plaintiff filed an Application for Permission to Appeal to the Supreme Court because of the language used by the Court of Appeals to describe the plaintiff's burden of proof at trial on the issue of causation. The plaintiff's Application for Permission to Appeal was granted by the Tennessee Supreme Court on February 16, 1999. The Appellate Court in Ashe held, for the first time in Tennessee, that the plaintiff must prove that a reasonable man in the plaintiff's position would not have agreed to undergo the procedure or treatment in question if properly informed about the risks and alternative treatments associated with the procedure or treatment.

Significantly, the Court of Appeals admitted that its decision was based primarily upon foreign authority because of an absence of Tennessee authority on point.6

According to the Application for Permission to Appeal, plaintiff's position on appeal in Ashe will be that the causation inquiry in an informed consent case (whether "medical battery" or "traditional informed consent") should focus on whether the alleged damages were proximately caused by the procedure or treatment in question, and not on whether the damages were caused by the alleged failure to warn. To do otherwise, plaintiff argues, deprives the patient of the right to make an objectively "unreasonable" choice and results in an analysis which is inconsistent with Tennessee's purported adoption of a technical battery analysis in informed consent cases.

The defendant in Ashe previously argued that Tennessee law should recognize two distinct categories of informed consent law, one in which there was no consent at all to the procedure or treatment in question, and one in which the consent that was given was allegedly defective because the physician failed to discuss certain risks or alternatives to the procedure. The defendant agreed that the battery focused causation inquiry urged by Ms. Ashe should be utilized in those cases where there was never any consent of any kind to the procedure or treatment in question, but argued for a causation inquiry which focused on the results of the physician's failure to discuss certain risks or alternatives in those cases where some consent was given, but the consent was allegedly defective.

Shortly after the Ashe court rendered its first opinion, the Supreme Court's opinion in Blanchard v. Kellum was released. Blanchard made new law by adopting the same argument made by the defendant/Appellee in Ashe to the extent that it called for a recognition of two categories of informed consent claims, but Blanchard did not directly address the causation issues discussed herein. The Ashe court agreed with the appellee that the plaintiff's battery centered causation argument might be appropriate in a "medical battery" case. However, the court noted that Ashe was not a medical battery case and ultimately adopted a causation inquiry focused on whether a reasonable person in the plaintiff's position would have undergone the procedure or treatment in question if properly warned.7 No explanation was offered by the court for why the causation analysis would be any different in a medical battery case given that the Supreme Court has characterized all informed consent claims as technical battery claims. Blanchard established that the difference between medical battery claims and traditional informed consent claims will be the elimination of the requirement of expert testimony on the standard of care in medical battery cases. No other distinctions from traditional informed consent claims were made.

While the defendant/appellee in Ashe argued that the adoption of a battery focused causation inquiry would force physicians to create laundry lists of all possible complications in order to avoid liability for failure to obtain informed consent, plaintiff/appellant argued that the position ultimately adopted by the court would

deprive a patient of the right to make an objectively "unreasonable" medical choice. The Court of Appeals failed to address Ms. Ashe's argument that the adoption of an objective standard for evaluating what the patient would have done would result in a vitiation of the rights the cause of action was originally designed to protect, but the topic merits additional discussion by the Supreme Court.

Tennessee courts have long recognized that the competent patient has the right to make medical decisions for himself even when the decision may not seem rational to outsiders.8 If Tennessee truly desires to protect the patient's right to make an informed and potentially "unreasonable" choice about the treatment he or she is to receive, it is critically important to realize that the patient has only one opportunity to decide whether to undergo a particular procedure, and that opportunity obviously comes before the treatment is rendered. Once the physician performs a treatment or procedure without the patient's informed consent, the patient has been deprived of the opportunity to make any informed choice about her medical care, whether reasonable or unreasonable. If the patient is required to prove that a reasonable person in her shoes would not have undergone the procedure in question if properly warned about the known risks and alternatives, then she has been deprived of the right to make a seemingly unreasonable choice, and the tortfeasor may benefit from the patient's inability to prove to 12 people she has never met before that the outcome would have been different had she been properly warned.

Courts across this country have struggled with the difficulty of trying to answer the hypothetical question of what the patient would have done had she been given warnings or alternatives which she was not given. Such an analysis attempts to determine what damages were caused by the physician's failure to provide appropriate warnings and is admittedly required by the use of a negligence causation analysis. However, the use of a battery analysis should eliminate the need to answer this hypothetical question at all. A battery analysis should seek to ascertain what damages were caused by the unauthorized touching, rather than the failure to properly warn. Using a battery analysis, if the patient suffers an injury which was a known risk or complication of the surgery or treatment and which the physician failed to disclose as required by the recognized standard of care in the community, the physician would be held liable for the damages caused by the treatment which was performed without informed consent. This is the position taken by the State of Pennsylvania, and it is the only approach which both protects the patient's right to self-determination and is consistent with a battery analysis.9

Tennessee courts have repeatedly held that informed consent/technical battery claims are different from negligence claims, and that informed consent claims should not be categorized as "negligent failure to warn" claims.10 If this is so, the question then becomes "how are informed consent claims different, as a practical matter, from negligence claims?" The logical answer would seem to be that negligence cases focus the causation inquiry on the damages caused by the deviation from the recognized standard of care. To answer that question in a negligence based

informed consent case, it would be necessary to determine what would have occurred if appropriate warnings had been given. However, in a battery case the causation inquiry should seek to ascertain what damages were caused by the battery or unauthorized treatment. Without this distinction, there is no practical difference between the proof required in a medical malpractice "negligence" claim and a technical or medical "battery" informed consent claim. Each would require expert proof on the applicable standard of care, proof of a deviation, proof of damages, and proof that the damages were proximately caused by the deviation from the standard of care.

The Tennessee Supreme Court's acceptance of the Ashe appeal would seem to signal an intention to clarify the causation analysis to be applied in both traditional informed consent cases and medical battery cases in the future. Absent a clear opinion on this topic, which specifically addresses the proof required in each kind of informed consent case, further confusion and inconsistent trial court opinions are sure to result in the wake of Ashe and Blanchard.

The Tennessee Supreme Court will likely follow one of two possible paths. First the court could confirm that both "medical battery cases" and "informed consent cases" are considered "technical batteries" because they arise out of the absence of informed consent, which renders any prior alleged consent (whether express or implied) void ab initio. This would require the court to distinguish the technical battery causation analysis from the negligence causation analysis traditionally utilized in Tennessee medical malpractice cases, but it would continue to build upon the foundation laid in Cardwell v. Bechtol. The most logical distinction would be that the causation question in all technical battery cases should be answered by asking what damages, if any, were caused by the unauthorized touching. The only drawback of this approach is that it would require the physician to warn of all potential risks or alternatives that the physician might reasonably expect a patient to consider relevant to the decision-making process and to document this discussion in the medical record.11

Alternatively, the court could reverse earlier opinions to the extent they assert that informed consent cases in Tennessee are all considered technical batteries. The court could then expand on Blanchard by declaring that all "medical battery" cases will be analyzed by asking what damages, if any, were caused by the unauthorized touching. This analysis would be consistent with theories of battery, as discussed above, and with the designation of these types of cases as medical battery cases. The court could then hold that "informed consent" cases will henceforth be considered "negligent failure to warn" cases.12 The causation analysis in an "informed consent" or "negligent failure to warn" case would properly require the jury to determine what damages, if any, were caused by the physician's failure to provide adequate warnings or information. In order to recover, the plaintiff would have to prove that a reasonable patient with the plaintiff's beliefs and physical history would have refused to undergo the procedure or treatment in question if properly warned of the risks and alternatives to the procedure if the plaintiff is to be awarded damages for

injuries caused by the operation or treatment in question. The problems with this approach are: 1) the court would have to overrule numerous pronouncements that informed consent cases are considered "technical battery cases" in Tennessee; 2) the jury is required to hypothesize about what the patient would have done had the patient been given information she was never given; and 3) the patient is retroactively denied the right to make an "unreasonable" choice about her medical care if the jury concludes that a "reasonable" person in the patient's shoes would have undergone the procedure or treatment in question even if provided with appropriate warnings.

It will likely be close to a year before the court resolves these difficult issues. The Ashe case could have a profound effect on both the viability and value of informed consent cases in Tennessee, or it could simply confirm the results reached by the Court of Appeals and clarify the analysis to be used in medical battery cases. In either case, the court has an opportunity to provide some much needed clarification in this area of the law, and many currently pending cases will undoubtedly be stayed for some time pending the outcome on appeal. n

Endnotes

1. Tenn. Code Ann. §29-26-118; Cardwell v. Bechtol, 724 S.W.2d 739 (Tenn. 1987); Ray v. Scheibert, 484 S.W.2d 63 (Tenn. Ct. App. 1972); Roddy v. Volunteer Medical Clinic, 926 S.W.2d 572, 576 (Tenn. Ct. App. 1996).
2. Blanchard v. Kellum, Case No. 01-A-01-9710-CV00563 (filed July 31, 1998), created a new cause of action known as a "medical battery" for that sub-category of informed consent cases in which the plaintiff claims there was no consent at all to the procedure which was performed.
3. In other states, the difference lies in whether expert testimony is required to establish the applicable standard of care on the warnings question. Traditionally "battery" states do not require expert proof. Instead, the jury is asked to determine whether the warning or alternative that was omitted would have been considered material to the decision making process by a reasonable person in the plaintiff's position. "Negligence" states require expert proof on the standard of care. Tennessee has made itself a hybrid state by proclaiming that it treats informed consent claims as technical batteries while simultaneously promulgating a statute which requires expert proof on the standard of care. Thus, with the exception of the open question of what causation proof is required, in Tennessee the elements of proof required in a medical negligence case are identical to those required in an "informed consent" case.
4. Seminal cases on the theory of informed consent are Cardwell v. Bechtol, 724 S.W.2d 739 (Tenn. 1987); Ray v. Scheibert, 484 S.W.2d 63 (Tenn. Ct. App. 1972); and Longmire v. Hoey, 512 S.W.2d 307 (Tenn. Ct. App. 1974).
5. See Gouse v. Cassel, 615 A.2d 331 (Pa. 1992).
6. The Ashe court relied upon the case of Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972). The Appellate Court noted as further support for reliance upon Canterbury that the earlier Tennessee cases of Longmire v. Hoey and Shadrick v. Coker had both relied upon Canterbury. However, neither case relied upon

Canterbury's language dealing with causation, and the Longmire case was decided prior to the Tennessee Supreme Court's decision in Cardwell v. Bechtol, 724 S.W.2d 739 (Tenn. 1987), which firmly established Tennessee's treatment of informed consent cases as technical battery cases.

7. The Appellate Court withdrew its original opinion in Ashe (1998 WL 381719, filed July 10, 1998) and issued a second opinion (1998 WL 430632, filed July 31, 1998) which directly addressed the Supreme Court's recent decision in Blanchard v. Kellum.

8. See State Dept. of Human Services v. Northern, 563 S.W.2d 197 (Tenn. Ct. App. 1978).

9. See Gouse v. Cassel, 615 A.2d 331 (Pa. 1992).

10. See Cardwell v. Bechtol, 724 S.W.2d 739, 750 (Tenn. 1987).

11. It is true that the legal analysis seeks to ascertain whether the applicable standard of care required a discussion of the risks or alternatives in question, not whether the omitted warnings or alternatives were material to the patient's decision making process. However, as a practical matter, even if a plaintiff's attorney succeeds in finding an expert willing to testify that the omitted discussion was required by the applicable standard of care, a jury is not likely to find against a physician unless they believe that the omitted discussion would have been material to the patient when making a decision about whether to undergo treatment or not. Thus, a physician should always warn the patient about all reasonable alternatives to the planned procedure, about those risks which are most frequently associated with the procedure or treatment, about those risks which are known to be potentially the most disastrous to the patient even if the risk is small, and about those risks which the physician believes this particular patient is particularly susceptible to or likely to experience because of the patient's physical history or condition. There is not now, nor is there likely to be in the future, any discussion of risks and alternatives which is guaranteed to immunize the physician from a possible lawsuit for failure to obtain informed consent. The goal should be to fully inform the patient, and thereby, minimize the risk of a future lawsuit if a complication arises.

12. If the court fails to retract the characterization of informed consent cases as "technical battery cases" and still endorses the analysis utilized by the Court of Appeals in Ashe, the difference between a negligence case and an informed consent case will be a difference in name only.

Myint v. Allstate Insurance Company,
Changing the Face of Insurance "Bad Faith" Litigation?
By W. Bryan Smith

Many states have created a cause of action allowing insured individuals to recover damages for an insurance company's "bad faith" refusal to settle a lawsuit filed by a third party against the insured, or an insurer's "bad faith" refusal to honor a claim filed by the insured. These causes of action are, generally, said to arise out of the implied covenant of good faith and fair dealing imposed on parties to a contract.1 This article, however, focuses primarily on the Tennessee Supreme Court's recent decision in Myint v. Allstate Ins. Co., 970 S.W.2d 920 (Tenn. 1998), and its implication on first party insurance2 "bad faith" litigation.

In Myint, the Tennessee Supreme Court noted that insurance companies are subject to liability under the Tennessee Consumer Protection Act. This decision surprised many members of the insurance defense bar since previous case law held the Tennessee Consumer Protection Act did not apply to the acts and practices of the insurance industry.3 However, the implications of the Myint decision are best understood in the context of the historical development of insurance "bad faith" litigation.

A. The Historical Development of Insurance Bad Faith Litigation
Insurance bad faith litigation historically developed in the context of third party insurance claims.4 Courts recognized the contractual relationship between an insurance company and its insured imposed a quasi-fiduciary relationship on the insurer.5 Since insurance contracts typically conferred control of litigation to the insurer, courts held that insurance companies owed their insureds a duty to attempt settlement of third party claims within an insured's policy limits in cases where the insured potentially faced a judgment in excess of her or his liability policy limits.6 If an insurance company breached the quasi-fiduciary relationship imposed by the courts, it potentially faced liability to the insured.

Without establishing a sound theoretical basis for imposing liability in first party insurance claims,7 courts carried the concept of extra-contractual liability for an insurer's "bad faith" into the arena of contractual disputes between an insurer and its insureds.8 Courts held that in certain circumstances an insurer's failure to pay an insured's claim amounted to "bad faith."9 In these situations, the insurer faced potential damages in addition to those imposed for breaching the insurance contract.10 The damages imposed were similar in theory to consequential damages available in ordinary contractual disputes.11

While some states have created common law torts imposing liability for an insurance company's "bad faith,"12 other states have created statutory penalties.13 In Tennessee, the legislature has enacted Tenn. Code Ann. §56-7-105, which reads:

Additional liability upon insurers and bonding companies for bad-faith failure to pay promptly. – (a) The insurance companies of this state, and foreign insurance companies and other persons or corporations doing an insurance or fidelity bonding business in this state, in all cases when a loss occurs and they refuse to pay the loss within sixty (60) days after a demand has been made by the holder of the policy or fidelity bond on which the loss occurred, shall be liable to pay the holder of the policy or fidelity bond, in addition to the loss and interest thereon, a sum not exceeding twenty-five percent (25%) on the liability for the loss; provided, that it is made to appear to the court or jury trying the case that the refusal to pay the loss was not in good faith, and that such failure to pay inflicted additional expense, loss, or injury upon the holder of the policy or fidelity bond; and provided further, that such additional liability, within the limit prescribed, shall, in the discretion of the court or jury trying the case, be measured by the additional expense, loss, and injury thus entailed.... [emphasis added]

This statute is typically referred to as the bad faith statute.

Before the Tennessee Supreme Court's decision in Myint, Tennessee courts held that the statutory bad faith penalty was the exclusive remedy for a first party insurer's "bad faith" refusal to honor an insured's claim.14 These decisions were based upon the language of the statute, which limits the liability for an insurer's "bad faith" refusal to honor a claim "in all cases … in addition to the loss and interest thereon, [to] a sum not exceeding twenty-five percent (25%) on the liability for the loss … "15 Courts reasoned that since this statute provided the exclusive remedy for an insurer's bad faith refusal to pay a claim, the Tennessee Consumer Protection Act did not apply to the acts and practices of the insurance industry.16

Recently, the Supreme Court of Tennessee held the Tennessee Consumer Protection Act did apply to the acts and practices of the insurance industry in appropriate situations. Specifically, the court noted in the Myint decision that "the Insurance Trade Practices Act, the bad faith statute, and the Consumer Protection Act [are] complementary legislation that [accomplish] different purposes, and [concluded], accordingly, that the acts and practices of insurance companies are generally subject to the application of all three."17

B. Myint v. Allstate Insurance Company18

The dispute between the plaintiffs, Win and Patti Myint, and Allstate Insurance Company began in September of 1991 when the Myints filed an insurance claim for water damage to a piece of rental property they owned. After receiving the Myints' claim, Allstate sent an adjuster to inspect the property. The adjuster determined that the water damage had been caused by "slowly leaking water," which was specifically excluded from coverage under the terms of the policy. Since the damage was not covered under the policy, the claim was denied.19

However, Allstate's investigation also uncovered the property's overall poor condition. On October 18, 1991, Allstate notified the Myints that their insurance

would be cancelled as of December 2, 1991, citing the condition of the property as the reason for the termination.20

On October 23, 1991, a small fire broke out on the Myints' property. This fire only caused minor smoke damage to the property. Three days later, a second fire erupted on the plaintiffs' property. This time the fire caused more extensive, structural damage.21

On January 10, 1992, the Myints filed "Sworn Statements in Proof of Loss" with Allstate seeking payment for the fire damage to their property. Allstate denied the Myints' claim "citing two policy violations: (1) the Myints intentionally set fire to the property for the purpose of collecting the insurance proceeds; and (2) the fire damage was the result of an increase in hazard created by the Myints' failure to maintain the property."22

The Myints subsequently filed suit against Allstate alleging breach of contract, violation of the bad faith statute, and violation of the Tennessee Consumer Protection Act. Their claim for violation of the Consumer Protection Act was dismissed before trial.23

Allstate was found liable for breaching the terms of its contract with the Myints. However, the jury found Allstate had not acted in violation of the bad faith statute. The case was appealed, and the Myints contested, in part, the trial court's dismissal of their claim under the Tennessee Consumer Protection Act. The Court of Appeals affirmed the trial court's dismissal of the Consumer Protection action. The bad faith statute, the Court of Appeals reasoned, provided the exclusive remedy for an insurer's "bad faith" refusal to pay a claim. The Myints appealed the decision to the Tennessee Supreme Court.24

On appeal, Allstate, and several other insurance companies who filed amicus briefs, argued the Tennessee Consumer Protection Act did not apply to the insurance industry because insurance companies were already subject to comprehensive regulations addressing unfair and deceptive trade practices. In addition, Allstate and the other insurance companies argued Tenn. Code Ann. §56-7-105 provided the exclusive remedy for an insurer's "bad faith" refusal to pay a claim. The Myints and the Attorney General argued that the objectives of insurance regulations and the Tennessee Consumer Protection Act were "distinct, each with different standards of liability, and each with different remedies."25

Ultimately, the Supreme Court determined that the acts and practices of an insurance company may, indeed, be subject to the Consumer Protection Act. However, the Court found no evidence that Allstate violated the Act and, therefore, affirmed the trial court's dismissal of the plaintiffs' Consumer Protection action.26

C. Implications of the Myint Decision

In Myint, the Tennessee Supreme Court held that "the legislature has enacted a trilogy of statutes which, on their faces, apply to unfair and deceptive insurance trade acts and practices. We consider the Insurance Trade Practices Act, the bad faith statute, and the Consumer Protection Act as complementary legislation that accomplishes different purposes, and we conclude, accordingly, that the acts and practices of insurance companies are generally subject to the application of all three."27 The Supreme Court's decision was based upon its interpretation of the statutes and regulations involved, but, interestingly, failed to discuss, in any detail, the language of the bad faith statute. In addition, the Court's decision failed to discuss previous case law interpreting the bad faith statute as the exclusive remedy for an insurer's bad faith refusal to pay a claim.28

Interpreting the language of the statute, courts previously held the bad faith statute precluded an insured from receiving consequential, punitive, and/or other extra-contractual damages based upon an insurer's breach of contract.29 The Myint decision tells us that an insured can maintain an action under the Tennessee Consumer Protection Act if there are sufficient facts to establish the insurer engaged in "[u]nfair or deceptive acts or practices affecting the conduct of any trade or commerce."30 However, the Myint decision raises many unanswered questions. For example, what facts will be sufficient to maintain a cause of action against an insurer under the Tennessee Consumer Protection Act? Can an insured recover damages under the Tennessee Consumer Protection Act and the bad faith statute?

Insurers have a right to investigate claims, and in some circumstances owe their insureds a duty to investigate claims.31 Assuming an insurer's claim investigation and evaluation procedures are sufficient to avoid liability under the bad faith statute, those same procedures should shield the insurer from liability under the Consumer Protection Act.

In addition, the threat of claims under the Consumer Protection Act should be diminished by the Act itself. The Consumer Protection Act allows the defendant in a private Consumer Protection action to recover damages, including reasonable attorney's fees and costs, if "the action is frivolous, without legal or factual merit, or brought for the purpose of harassment."32 If an insurer successfully moves for summary judgment on an insured's Consumer Protection action, the granting of summary judgment necessarily entails a finding that the Consumer Protection action lacks legal or factual merit.33 Therefore, an insurer may be entitled to recover damages, including reasonable attorney's fees and costs, from the insured.

It remains to be seen what effect, if any, the Myint decision will have on insurance bad faith litigation in Tennessee. However, it is interesting to note that despite the instruction it offered on the Tennessee Consumer Protection Act, the Supreme Court affirmed the dismissal of the Myints' Consumer Protection action. In addition, based upon the Supreme Court's failure to address the language of the bad faith statute, or other cases interpreting this statute, it appears the Myint decision will have only limited application – i.e. an insured may, in an appropriate situation, maintain a

Consumer Protection action against an insurance company. In most situations, however, an insured's remedies will be limited to recovery of damages for the insurer's breach of contract, plus interest and a bad faith penalty, if appropriate. n

Endnotes

1. Dennis J. Wall, Litigation and Prevention of Insurance Bad Faith, §2.02 (Clark Boardman Callaghan, 2nd ed. 1994).
2. "First-party insurance is obtained by the insured for its own monetary protection. It is insurance involving only the insured and its insurer. When a covered risk occurs, the insured makes the claim. The insured's liability to third parties is never involved." Id. at §9.01.
3. See Chandler v. Prudential Ins. Co., 715. S.W.2d 615, 619 (Tenn. App. 1986).
4. "Third-party insurance is liability insurance. It always involves a claim of loss and three distinct parties: and injured claimant, and insured, and the insured's insurance company. In contrast to first-party insurance, which applies to the insured's own claimed losses, third-party insurance is intended to protect the insured from the expense of defending and paying the claim of a third party within the policy's limits." Wall, supra note 1, at §3.01.
5. Id.
6. Id.
7. "Unless rights are given up to one person to act on behalf of another, there is no fiduciary relation. If there is no fiduciary relation, there can be no fiduciary bad faith. Under a first-party policy of insurance, the insured never gives up any rights when nothing more than her or his entitlement to payment is concerned. In that circumstance, the insured is no more than a creditor and the first-party insurer is its debtor. The insured's cause of action at common law is thus for breach of contract in a case like this, nothing more."
Id. at §9.03.
8. Id.
9. Id.
10. Id.
11. Id. at §§2.01-2.09.
12. E.g., Walter v. Simmons, 169 Ariz. 229, 818 P.2d 214, 223 (Ct. App. 1991).
13. See, Tenn. Code Ann. §56-7-105. See also, Chandler v. Prudential Ins. Co., 715 S.W.2d 615, 619 (Tenn. App. 1986) (rejecting an insured's claim based on an alleged tort of bad faith, and concluding Tenn. Code Ann. §56-7-105 provided the exclusive remedy for the insurer's bad faith refusal to pay the insured's claim).
14. Chandler, 715 S.W.2d 615; Rice v. Van Wagoner Companies, 738 F.Supp. 252, 252-56 (M.D. Tenn. 1990).
15. Tenn. Code Ann. §56-7-105(a) (Supp. 1997). See Chandler, 715 S.W.2d at 620-21 (citing Debolt v. Mutual of Omaha, 56 Ill. App.3d 111, 13 Ill. Dec. 656, 660, 371 N.E.2d 373, 377 (1978); Rice, 738 F.Supp. 252-56.
16. Chandler, 715 S.W.2d at 623-25.
17. Myint v. Allstate Ins. Co., 970 S.W.2d 920 (Tenn. 1998).
18. 970 S.W.2d 920 (Tenn. 1998).
19. Id. at 922-23.

20. Id. at 923.
21. Id.
22. Id.
23. Id.
24. Id. at 924.
25. Id.
26. Id. at 924-26.
27. Id. at 926.
28. See Chandler v. Prudential Ins. Co., 715 S.W.2d 615; Rice v. Van Wagoner Companies, 738 F.Supp. 252, 252-56 (M.D. Tenn. 1990).
29. See Chandler, 715 S.W.2d 615; Rice, 738 F.Supp. at 252-56.
30. Tenn. Code Ann. §47-18-109.
31. Wall, supra note 1, at §9.06.
32. Tenn. Code Ann. §47-18-109(e)(2).
33. Tenn. R. Civ. P. 56.04.