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Recent Developments

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ADMINISTRATIVE LAW — Any Attorney In Good Standing May Represent Others Before Federal Agencies. Agency Practice Act, 79 Stat. 1281, U.S. CODE CONG. & AD. NEWS 5859 (1965). In the past, requirements for admission to practice before federal agencies were set by each individual agency. The attorney seeking admission had to follow formal procedures which required him to prove to the satisfaction of the agency not only that he was licensed, but also that he was competent and of good character and reputation.[1] In 1957, on the recommendation of the Department of Justice, most agencies discontinued the formal requirements, and only a few still retained them at the time of this act.[2]

The purpose of the act is to do away with those formal enrollment procedures and admission requirements for licensed attorneys which were still required and to compel agencies to deal with such attorneys.[3] It provides that, "Any person who is a member in good standing of [a] bar . . . may represent others before any agency upon filing with the agency a written declaration that he is currently [so] qualified . . . and is authorized to represent the particular party in whose behalf he acts". The act does not curtail the power of agencies to discipline those attorneys appearing before them, however.

Practice before the Patent Office is exempt because of technical and scientific qualifications presumably needed in addition to legal competence. The act also eliminates formal enrollment requirements for duly qualified certified public accountants representing others before the Internal Revenue Service.[4]

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1. See generally the legislative history of the act, U.S. CODE CONG. & AD. NEWS 6114–24 (1965).

2. See, *e.g.*, 31 C.F.R. §§ 10.1–.8 (1965) (Internal Revenue Service); 49 C.F.R. §§ 1.7–.13 (1963) (Interstate Commerce Commission); 18 C.F.R. § 1.4 (1961) (Federal Power Commission); 37 C.F.R. §§ 1.341–.348 (1960) (Patent Office).

The Internal Revenue Service and the Patent Office were acting pursuant to statutory authorization, the former under 5 U.S.C. § 261 (1927) and the latter under 35 U.S.C. § 31 (1954).

3. See U.S. CODE CONG. & AD. NEWS at 6115 (1965).

4. Pursuant to the act, the Internal Revenue Service has issued interim enrollment procedures pending the issuance of amended regulations. See 34 U.S.L. WEEK 2288 (Nov. 9, 1965).

ATTORNEY'S FEES — Right To Review In Social Security Cases. *Chernock v. Celebrezze,* 241 F. Supp. 520 (E.D. Pa. 1965). Plaintiff attorney made an agreement with his client regarding the fee for representing him in proceedings before the Social Security Administration. After presenting and winning his client's case, plaintiff filed a petition with the hearing examiner seeking approval of the agreed $5,000 fee.[1] The hearing examiner reduced the fee to $300. Plaintiff then filed an action under the Social Security Act[2] seeking judicial review of the hearing examiner's decision. The district court, relying primarily on *Goodell v. Fleming,*[3] ruled that the determination of the attorney's fee is within the sole discretion of the Secretary (acting through the hearing examiner) and is not subject to judicial review.

Judicial review of administrative proceedings under the Social Security Act is expressly limited by section 405(g) of the act.[4] In the principal case, plaintiff asked the court to take jurisdiction under the language of § 405(g), which states in part that a party to a hearing before the Secretary may obtain a review of the findings by a civil action. It has been held, however, that an attorney is not a party to such a hearing, but is merely the legal representative of such a party, and thus, there is no record to be submitted to the court for review.[5]

Complementing the right to judicial review is the right to administrative review, which is also expressly reserved to "any party".[6] Although in both instances an attorney is not considered such a "party",[7] under the present practice[8] an attorney may have the decision of the hearing examiner on the question of fees reviewed by the Appeals Council.[9]

These provisions and holdings apply only to administrative proceedings under the Social Security Act. The hearing examiner has no right to determine the attorney's fee in a judicial proceeding such as an appeal of his client's claim to the district court.[10] Consequently,

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1. See 20 C.F.R. 404.976 (1965), describing the procedure for approval of attorney's fees.
2. 49 Stat. 624 (1935), as amended, 42 U.S.C. § 405(g) (1964).
3. 179 F. Supp. 806 (W.D. N.Y. 1959). This was an action to review the amount of the fee awarded to an attorney by the hearing examiner. The attorney charged a fee of $1,000.00, and the hearing examiner allowed him only $100.00. The court held that the attorney did not have the right to bring the action.
4. Cunningham v. U.S., 199 F. Supp. 541 (D. Mo. 1958). In an action to review the decision of the Secretary denying a claim under the Social Security Act, the Court held that to acquire judicial review the proceedings must be in accord with § 405(g) of the act.
5. Goodell v. Fleming, 179 F. Supp. 806, 807-08 (W.D. N.Y. 1959). "The plaintiff does not come within the language of this section [405(g)]. He was at no time a party to any proceeding, but rather merely an attorney for a party presenting a claim under the act."
6. 20 C.F.R. 404.945 (1965).
7. 20 C.F.R. 404.919 (1965).
8. This information was given to the *Review* by a member of the legal staff of the Social Security Administration. This practice has developed as a convenience to the legal community and should not be mistaken as a legal right.
9. See generally, 20 C.F.R. 404, Sub-part J (1965). The Appeals Council is an administrative board within the structure of the Social Security Administration.
10. Shepard v. Fleming, 189 F. Supp. 571 (D.W. Va. 1960).

an attorney who takes his client's case to the district court on appeal could make an agreement in regard to his fee which would not be subject to the hearing examiner's approval. Such an agreement could conceivably be made contingent on the amount allowed by the hearing examiner, and so the total fee could still be within the attorney's control.[11]

INSURANCE — Omnibus Clause In Automobile Liability Policy Held To Cover Second Permittee Of Named Insured. *Ohio Casualty Ins. Co. v. Pennsylvania National Mut. Casualty Ins. Co.*, 238 F. Supp. 706 (D. Md. 1965). The plaintiff sought a declaratory judgment that a policy of insurance issued by the defendant was applicable to an accident involving the automobile of the named insured. The parties stipulated that, if applicable, the defendant would be liable as primary insurer. The policy in question contained a standard omnibus clause.[1] The first permittee of the named insured had continuing general permission without express limitation to use the car and, on the occasion when the accident occurred, had obtained specific permission to use it. The accident occurred while the vehicle was being driven by the second permittee, furthering a purpose of his own and unaccompanied by the first permittee. The District Court, finding no Maryland case on point, relied on three decisions of the Fourth Circuit Court of Appeals. It held that the first permittee had implied authority to authorize the second permittee to drive the car, and that the coverage under the omnibus clause extended to the second permittee.[2]

Several states by statute require an automobile insurance policy to contain an omnibus clause.[3] The typical omnibus clause extends coverage to one having "permission" of the named insured, provided the "actual use" of the car is within the scope of the permission.[4] "Actual use" refers to the purpose for which the vehicle was being used at the

11. See Robinson v. Celebrezze, 248 F. Supp. 149 (W.D. S.C. 1965).

1. "The following are insureds . . . : any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission. . . ." 238 F. Supp. 706, at 707.

2. In Utica Mut. Ins. Co. v. Rollason, 246 F.2d 105 (4th Cir. 1957), the first permittee was not riding in the car, and the second permittee was not furthering a purpose common to himself and the first permittee. The court held that the question of the first permittee's authority to delegate permission was properly a jury question. In Chatfield v. Farm Bureau Mut. Automobile Ins. Co., 208 F.2d 250 (4th Cir. 1953), the second permittee, also alone in the automobile, was furthering a purpose common to himself and the first permittee. A directed verdict for the plaintiff was reversed and a new trial ordered. In Harrison v. Carroll, 139 F.2d 427 (4th Cir. 1943), the second permittee was furthering a common purpose. The court held that coverage extended to the second permittee.

3. See 7 APPLEMAN, INSURANCE § 4353 (1962). Such legislation is usually designed to broaden the coverage of automobile liability policies. See, *e.g.*, Wildman v. Government Employees' Ins. Co., 48 Cal. 2d 31, 307 P.2d 359 (1957) and Fidelity & Casualty Co. of New York v. Harlow, 191 Va. 64, 59 S.E.2d 872 (1950).

4. See, *e.g.*, Gulla v. Reynolds, 151 Ohio St. 147, 85 N.E.2d 116 (1949); Home Indemnity Co. v. Bowers, 194 Tenn. 560, 253 S.W.2d 750, 36 A.L.R.2d 668 (1952). See generally 7 AM. JUR. 2d *Automobile Insurance* § 109 (1963).

time of the accident, not to the identity of the operator.[5] If the initial permission is silent as to authority to delegate, as in the principal case, the second permittee is generally held to have no permission within the meaning of the omnibus clause where he has been delegated actual use by the first permittee,[6] although there is some authority to the contrary.[7] Moreover, permission given by the named insured generally does not extend to a second permittee allowed to operate the car by the first permittee.[8] However, courts frequently find implied permission when the first permittee participates in the actual use, *i.e.*, when he is riding in the car at the time of the accident,[9] or when the second permittee is furthering a purpose common to himself and the first permittee.[10]

Maryland by statute requires an automobile insurance policy to contain an omnibus clause.[11] Maryland agrees that permission to delegate operation can be implied, and Maryland courts have thus far extended coverage to a second permittee where the first permittee was riding in the car at the time of the accident.[12] The District Court thus made an informed prediction of what Maryland law will be when dealing with the situation in the principal case.[13]

LABOR LAW — New Remedy For Runaway Shop. *Garwin Corp.*, 153 N.L.R.B. No. 59, 59 L.R.R.M. 1405 (1965). A New York City employer closed his plant, discharged his employees, and transferred operations to an "alter-ego" he had set up in Miami, Florida, to avoid dealing with the employee's union. The NLRB found that the Miami operation was a runaway plant and that the employer had violated §§ 8(a)(1), (3) and (5), of the National Labor Relations Act.[1] The Board ordered the employer to give back pay to the dis-

5. Indemnity Ins. Co. of North America v. Metropolitan Casualty Ins. Co. of New York, 53 N.J. Super. 90, 146 A.2d 692 (1958).

6. See Allstate Ins. Co. v. Hodsdon, 92 N.H. 233, 29 A.2d 782 (1942); Cronan v. Travelers Indemnity Co., 126 N.J.L. 56, 18 A.2d 13 (1941).

7. See Boyer v. Massachusetts Bonding & Ins. Co., 277 Mass. 359, 178 N.E. 523 (1931).

8. See, *e.g.*, Baesler v. Globe Indemnity Co., 33 N.J. 148, 162 A.2d 854 (1960); Indemnity Ins. Co. v. Jordan, 158 Va. 834, 164 S.E. 539 (1932); Annot., 160 A.L.R. 1195; 7 APPLEMAN, *op. cit. supra* note 3, § 4361.

9. See Standard Accident Ins. Co. v. New Amsterdam Casualty Co., 249 F.2d 847 (7th Cir. 1957) (concurring opinion); Loffler v. Boston Ins. Co., 120 A.2d 691 (D.C. Mun. Ct. App. 1956). *But see* Aetna Casualty & Surety Co. v. DeMaison, 213 F.2d 826 (3d Cir. 1954) and Hays v. Country Mut. Ins. Co., 38 Ill. App. 2d 1, 186 N.E.2d 153 (1962), *rev'd*, 28 Ill. 2d 601, 192 N.E.2d 855 (1963).

10. See Chatfield v. Farm Bureau Mut. Automobile Ins. Co., 208 F.2d 250 (4th Cir. 1953); Harrison v. Carroll, 139 F.2d 427 (4th Cir. 1943); Boyer v. Massachusetts Bonding & Ins. Co., 277 Mass. 359, 178 N.E. 523 (1931). The cases often query whether the actual use is within the scope of the named insured's permission, without regard to the identity of the user. Since the initial permission here was a general and continuous one, that question is not involved.

11. MD. CODE ANN. art. 66½, § 131(a)(3) (1957).

12. Melvin v. American Automobile Ins. Co., 232 Md. 476, 194 A.2d 269 (1963); Hardware Mut. Casualty Co. v. Mitnick, 180 Md. 604, 26 A.2d 393 (1942). *But see* Selected Risks Ins. Co. v. Miller, 227 Md. 174, 175 A.2d 584 (1961).

13. For further reference see 15 ALA. L. REV. 610 (1963).

1. 49 Stat. 449 (1935), as amended, 29 U.S.C. 158(a)(1), (3), (5) (1965).

charged New York employees and to offer them reinstatement at the New York plant, if reopened, or to offer equivalent jobs plus moving expenses at the new Miami plant. In addition, without requiring the union to re-establish its majority status, the NLRB ordered the employer to bargain with the New York plant's union wherever the employer ultimately decided to locate.

The usual order for a runaway shop of this type[2] has required the employer to bargain with the union if he returns to his original location. Otherwise, he must bargain with the union at the new plant only after the union can show that the number of reinstated employees from the original plant plus the number of new employees signing union cards are a majority of the appropriate unit.[3] A remedy of this type can be quite effective in the situation where a plant moves only a few miles. It is ineffectual, however, where the new plant is several hundred miles away, since few old employees would wish to relocate, and the union is then faced with organizing a completely new shop.[4] The bargaining order in the principal case seeks to prevent the employer from achieving his "primary illegal objective, *i.e.*, to escape bargaining."[5] The result of the order allows a union to represent employees who have never had a representation election, even if the majority may not wish such representation.[6] The Board feels that its statutory objectives balance the effect of the order on the new employees. Since the new employees hold their jobs by virtue of: (1) the employer's unfair labor practices; "(2) the Board's unwillingness to order the plant to return to its original location; and (3) the failure of the discriminatees to displace them by applying for reinstatement," their interests must give way to those of the NLRB in fashioning a meaningful remedy for the unfair labor practices.[7]

PHYSICIANS AND SURGEONS — Bylaws Of County Medical Society Excluding Osteopaths Held Valid. *Kurk v. Medical Soc'y of the County of Queens, Inc.*, 264 N.Y.S.2d 859 (Sup. Ct. App. Div. 1965). The defendant medical society, pursuant to its

2. This is the traditional runaway shop situation where the employer seeks to avoid bargaining with the union by closing his plant completely and opening a new plant elsewhere with new employees to handle the same business. This differs from the mere transfer of operations to an existing facility.

3. NLRB v. Mackneish (cited as Industrial Fabricating, Inc.), 272 F.2d 184 (6th Cir.), *enforcing* 119 N.L.R.B. 167, 173, 41 L.R.R.M. 1038 (1959); NLRB v. Sidele Fashions, Inc. (cited as Sidele Fashions, Inc.), 305 F.2d 825 (3d Cir. 1962), *enforcing* 133 N.L.R.B. 547, 555–56, 48 L.R.R.M. 1679 (1961).

4. *Labor Law Problems in Plant Relocation*, 77 HARV. L. REV. 1100, 1110 (1964); see, *e.g.*, NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961).

5. 59 L.R.R.M. 1405, 1409.

6. The NLRB has previously required employers to bargain with unions in instances where the union does not represent a majority of the employees in the bargaining unit, but this has generally been limited to instances where the union has lost such a majority due to unfair labor practices on the part of the employer. See, *e.g.*, Frank Brothers v. NLRB, 321 U.S. 702, 704 (1944); NLRB v. Lewis, 246 F.2d 886, *888* (9th Cir. 1957); Delight Bakery, Inc., 145 N.L.R.B. 893, 908–09, 55 L.R.R.M. 1076 (1964).

7. 59 L.R.R.M. 1405, 1409.

written constitution and bylaws, denied petitioner, a licensed osteopath, membership in the society on the ground that he did not qualify, not having completed a four year course in a college of medicine. Petitioner then brought this mandamus proceeding to compel the society to admit him to membership, alleging that he could not obtain hospital privileges where he desired until admitted to membership in the society. The Supreme Court, Queens County, directed the society to admit the petitioner on the ground that the bylaws in question were unreasonable and contrary to public policy in that they set arbitrary educational standards for admission into the society.[1] The Supreme Court, Appellate Division, reversed, holding that the prerequisite to membership of four years of study in a medical college was non-arbitrary and in accordance with the New York law distinguishing osteopaths and medical doctors. The court felt that the members of the society, all graduates of medical colleges, had every right to maintain it as a medical society unless the society was a party to a monopoly and the economic necessities of the petitioner required his admission into the society. The court held, absent allegations of a monopoly and proof of economic necessity,[2] that the medical society could rightly exclude petitioner from membership.

Private voluntary[3] associations ordinarily have unlimited discretion in the management of their internal affairs,[4] and their constitution and bylaws are binding unless unreasonable, contrary to public policy or in contravention of the law of the land.[5] Membership is thus left to the control of the association, and courts are reluctant to interfere.[6] Although courts have occasionally protected members from unjustified expulsion,[7] they have almost unanimously held that medical societies and other voluntary associations have complete discretion to grant or

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1. Kurk v. Medical Soc'y of the County of Queens, Inc., 46 Misc. 2d 790, 260 N.Y.S.2d 520 (Sup. Ct. 1965).

2. The petitioner did not deny that there were other hospitals in the county which did not require graduation from a medical school as a prerequisite to qualification for privileges, nor did he deny that there were other osteopathic hospitals nearby.

3. "Voluntary" as applied to medical societies means that membership is not required by law as a condition for the practice of medicine. "Involuntary" means that membership is required as a condition for practice. See Annot., 89 A.L.R.2d 964, 971 (1963) and Note, 59 MICH. L. REV. 785 (1961).

4. See generally Chafee, *The Internal Affairs of Associations Not for Profit,* 43 HARV. L. REV. 993 (1930).

5. See, *e.g.,* Liggett v. Koivunen, 227 Minn. 114, 34 N.W.2d 345 (1948); Franklin v. Dick, 262 App. Div. 299, 28 N.Y.S.2d 426, *aff'd,* 287 N.Y. 656, 39 N.E.2d 282 (1941); International Union, S.O.E. v. Owens, 119 Ohio St. 94, 162 N.E. 386 (1928).

6. See, *e.g.,* North Dakota, by Langer v. North Central Ass'n, 23 F. Supp. 694 (E.D. Ill.), *aff'd,* 99 F.2d 697 (7th Cir. 1938); Tatkin v. Superior Court of Los Angeles County, 160 Cal. App. 2d 745, 326 P.2d 201 (1958); Hamilton County Hospital v. Andrews, 227 Ind. 217, 84 N.E.2d 469, *cert. den.,* 338 U.S. 831 (1949); Trautwein v. Harbourt, 40 N.J. Super. 247, 123 A.2d 30 (1956). See also Note, 15 RUTGERS L. REV. 327 (1961).

7. Bernstein v. Alameda-Contra Costa Medical Ass'n, 139 Cal. App. 2d 241, 293 P.2d 862 (1956); Smith v. Kern County Medical Ass'n, 19 Cal. 2d 263, 120 P.2d 874 (1942); State *ex rel.* Waring v. Georgia Medical Soc'y, 38 Ga. 608, 95 Am. Dec. 408 (1869). See 37 NOTRE DAME LAW. 453 (1962).

deny membership in the first instance.[8] Relief was granted to one excluded from membership, however, where the applicant met all the written requirements of the society and his exclusion affected his right to practice his profession and resulted in economic hardship.[9] In the case of involuntary associations, mandamus, compelling admission, will be granted when the applicant has the necessary qualifications.[10]

The Maryland Court of Appeals has held that a voluntary association, such as a medical society,[11] ordinarily has complete control over its internal affairs and has the power to grant or refuse membership.[12] It has recognized, however, that courts may protect members from unjustified expulsion in a "proper case, particularly where the ouster is arbitrary and not in compliance with the constitution and by-laws of the organization."[13] The court has not yet ruled upon the situation where an applicant is excluded from membership in a medical society for failure to satisfy standards set by the society's by-laws, as in the principal case.[14]

PROCEDURE-APPEALS — Motion For Appeal Filed Before Entry Of Judgment Absolute Is Premature And Must Fail. *Merlands Club, Inc. v. Messall,* 238 Md. 359, 208 A.2d 687 (1965). Appellant here was the defendant in a suit of ejectment. The trial court found for the plaintiff and rendered a judgment nisi. Three days later defendant filed a motion for appeal. Judgment absolute was entered the day following filing of the motion. Appellant made no further motions and at the end of thirty days, appellee moved for dismissal of the appeal. The Maryland Court of Appeals held that the order for appeal filed on the third day after entry of the judgment nisi and one day before the entry of judgment absolute was premature and without effect, necessitating a dismissal of the appeal.

Upon a trial by a court, the Maryland Rules of Procedure direct that a judgment nisi is "to be entered upon the law and the evidence".[1]

8. See Medical Soc'y of Mobile County v. Walker, 245 Ala. 135, 16 So. 2d 321 (1944); Trautwein v. Harbourt, 40 N.J. Super. 247, 123 A.2d 30 (1956); Harris v. Thomas, 217 S.W. 1068 (Tex. Civ. App. 1920); State *ex rel,* Hartigan v. Monogalia County Medical Soc'y, 97 W. Va. 273, 124 S.E. 826 (1924); Ross v. Ebert, 275 Wis. 523, 82 N.W.2d 315 (1957); Note, 75 HARV. L. REV. 1186 (1962).

9. Falcone v. Middlesex County Medical Soc'y, 62 N.J. Super. 184, 162 A.2d 324 (1960), *aff'd,* 34 N.J. 682, 170 A.2d 791 (1961). But see Matter of Salter v. New York State Psychological Ass'n, 14 N.Y.2d 100, 248 N.Y.S.2d 867, 198 N.E.2d 250 (1964).

10. See Annot., 89 A.L.R.2d 964, 978 (1963).

11. See Reddick v. State, 213 Md. 18, 130 A.2d 762, *cert. denied,* 355 U.S. 832 (1957).

12. See Smith v. Merriott, 130 Md. 447, 100 Atl. 731 (1917) (relating to membership in the Grand Lodge of a fraternal society).

13. Niner v. Hanson, 217 Md. 298, 308, 142 A.2d 798, 802 (1958).

14. The bylaws of the Maryland state medical society provide, "Component societies shall be the judges of the qualifications of their own members, provided that they may admit to membership every reputable and legally registered doctor of medicine *who does not practice, claim to practice or support any exclusive system of medicine. . . .*" (emphasis added.) Bylaws, Medical and Chirurgical Faculty of the State of Maryland, art. 1, § 4 (1964). See generally Note, 63 YALE L.J. 937, 966–67 (1954), for a brief analysis of the relationship between the profession of osteopathy and the American Medical Association.

1. MD. R.P. 564(b)(1).

There follows a three-day period in which either party may file a motion for a new trial.[2] Failure to file such a new trial motion results in the entry of final judgment.[3] The Maryland Rules further provide that where a right of appeal exists, a motion for appeal must be filed "within thirty days from the date of the judgment appealed from,"[4] after which time any motion for appeal may be dismissed.[5] The courts of Maryland have consistently limited this "judgment" from which appeal may be taken to final judgments[6] and not verdicts.[7] The Maryland Court of Appeals, when faced with the problem of a motion for appeal filed prior to final judgment, with no extentuating circumstances, has, as in the present case, ruled the appeal premature and dismissed it.[8] However, the court has on occasion decided, upon certain extenuating factors, to allow an appeal taken before final judgment to prevent injustice.[9]

WORKMENS' COMPENSATION — Injured Employee's Right Of Action Against Employer's Insurance Carrier As Third Person. *Mager v. United Hospitals of Newark,* 88 N.J. Super. 421, 212 A.2d 664 (1965). The plaintiff, as administratrix, brought an action on behalf of the decedent employee against his employer's workmens' compensation carrier. The decedent was injured and, pursuant to his employer's instructions, was taken to the defendant insurer's clinic, maintained for the treatment of its insured's injured workmen. The plaintiff alleged that the defendant was liable for the decedent's death because of negligent treatment administered at the clinic. The defendant denied negligence and set up the separate defense that as workmens' compensation carrier for the decedent's employer, any services it had rendered to the decedent were pursuant to its compensation policy, and therefore its obligation was limited to payment of benefits under the policy. The trial judge granted the defendant's motion for summary judgment; however, the Superior Court of New Jersey, on appeal, held that the defendant was not immune to such an action.

The defendant argued that the New Jersey statute placed the insurance carrier in the shoes of the employer for the purposes of liability. The court, citing a section of the statute which expressly preserved an injured employee's common law action against a "third

2. MD. R.P. 567(a).
3. MD. R.P. 567(e).
4. MD. R.P. 812(a).
5. MD. R.P. 835(b)(3).
6. See, *e.g.,* Dermer v. Faunce, 187 Md. 610, 51 A.2d 76 (1947); Snyder v. Cearfoss, 186 Md. 360, 46 A.2d 607 (1946); Smithson v. U.S. Telegraph Co., 29 Md. 162 (1868).
7. See, *e.g.,* Montauk Corp. v. Seeds, 215 Md. 491, 138 A.2d 907 (1958); Elkton Supply Co. v. Stubbiles, 180 Md. 97, 23 A.2d 3 (1941).
8. Maryland, Del. & Va. Ry. Co. v. Johnson, 129 Md. 412, 99 Atl. 600 (1916); Keirle v. Shriver, 11 G.&J. (Md.) 405 (1841).
9. See, *e.g.,* Keystone Engineering v. Sutter, 196 Md. 620, 78 A.2d 191 (1951) (appellant appealed, but upon realizing that there was no final judgment, applied to judge who granted judgment nunc pro tunc; appellee had made no motion for dismissal); Kendall v. State, 132 Md. 93, 103 Atl. 141 (1918) (where both appellant and appellee considered the appeal valid and so treated it, held, motion to dismiss denied).

party",[1] pointed out that the legislature, when defining the term "third party",[2] did not exclude an employer's compensation carrier. The court concluded that when the legislature intended the insurer to be considered as possessing the same rights and duties as the employer, it did so specifically.[3]

In *Flood v. Merchants Mutual Insurance Co.*,[4] the Maryland Court of Appeals was confronted with the same question posed in the *Mager* case. The Court of Appeals held that under the Maryland statute, which provided that the insurance company could enforce for its own benefit the liability of a "third party",[5] such an action against the insurance company as a "third party" could not be maintained.[6] The court reasoned that the insurance company could not be liable as a "third party" as contemplated under the statute because the insurance company could not be subrogated to a right of action against itself.

The New Jersey statute relating to third party actions[7] is strikingly similar to the Maryland statute,[8] and the fact situations of the two cases are very close. The principal question has been litigated in a number of states, and there are cases which support both the New Jersey and the Maryland views.[9]

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1. N.J. STAT. ANN. 34:15–40 (1959).

2. N.J. STAT. ANN. 34:15–40(g): "The words 'third party' as used in this section include corporations, companies, associations, societies, firms, partnerships, and joint stock companies as well as individuals."

3. The defendant, attempting to distinguish the cases holding an insurance carrier liable in similar cases, took the position that in those cases the insurance company was not carrying out an operation imposed upon it by statute, as the defendant was allegedly doing in the instant case. The court rejected this argument, saying there was nothing in the New Jersey statute which required the defendant to maintain a clinic, and as it was ultimately bound to pay medical expenses, its clinic was merely a means of reducing cost.

4. 230 Md. 373, 187 A.2d 320 (1963).

5. MD. CODE ANN. art. 101, § 58 (1957).

6. For a general discussion of third party liability under workmens' compensation statutes see McCoid, *The Third Person in the Compensation Picture: A Study of the Liabilities and Rights of Non-Employers,* 37 TEXAS L. REV. 389 (1959).

7. N.J. STAT. ANN. 34:15–40:

> Where a third person is liable to the employee or his dependents for an injury or death, the existence of a right of compensation from the employer or insurance carrier under this statute shall not operate as a bar to the action of the employee or his dependents, nor be regarded as establishing a measure of damages therein. . . .

8. MD. CODE ANN. art. 101, § 58 (1957):

> Where injury or death for which compensation is payable under this article was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the employee, or in the case of death, his personal representative or dependents . . . , may proceed either by law against that other person to recover damages or against the employer for compensation under this article, or in the case of joint tortfeasors against both; . . .

9. For cases reaching the New Jersey result, see: Mays v. Liberty Mutual Ins. Co., 323 F.2d 174 (3d Cir. 1963); Nelson v. Union Wire Rope Corp., 31 Ill. 2d 69, 199 N.E.2d 769 (1964); Fabricius v. Montgomery Elevator Co., 254 Iowa 1319, 121 N.W.2d 361 (1963); Smith v. American Employers' Ins. Co., 102 N.H. 530, 163 A.2d 564 (1960). For cases reaching the Maryland result, see: Sarber v. Aetna Life Ins. Co., 23 F.2d 434 (9th Cir. 1928); Schulz v. Standard Accident Ins. Co., 125 F. Supp. 411 (E.D. Wash. 1954); Noe v. Travelers Ins. Co., 172 Cal. App. 2d 731, 342 P.2d 976 (1959); Aetna Life Ins. Co. v. Watts, 148 Okla. 28, 296 Pac. 977 (1931); Baur v. Mesta-Machine Co., 393 Pa. 360, 143 A.2d 12 (1958); Raines v. Pennsylvania Threshermen & F.M.C. Ins. Co., 391 Pa. 175, 137 A.2d 257 (1958). For cases with Maryland result under Federal Employee's Compensation Act or the Longshoreman's Act, see: Lindsay v. George Washington University, 279 F.2d 819 (D.C. Cir. 1960); Balancio v. United States, 174 F. Supp. 636 (S.D. N.Y. 1958); Fernandez v. Ganty, 113 F. Supp. 763 (D.D.C. 1953).